

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 40023/21

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
Date: 11 May 2022

In the matter between:

G[...], K[....] R[....]

APPLICANT

and

MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

SECOND RESPONDENT

G[...], B[....] P[....]

THIRD RESPONDENT

and

PRETORIA ATTORNEYS ASSOCIATION

AMICUS CURIAE

JUDGMENT

Van der Schyff J

Introduction

[1] Section 7(3) of the Divorce Act 70 of 1979 ("the Divorce Act") provides the court granting a decree of divorce in respect of a marriage out of community of property concluded before 1 November 1984, with a discretion to make a redistribution order to the effect that any asset, or sum of money, may be transferred from one spouse to another, subject to the provisions of s 7(4), (5) and (6). This application concerns the constitutional validity of s 7(3)(a) and the restriction of the remedy provided for in s 7(3) to marriages out of community of property that were entered into before 1 November 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.¹ As the law currently stands, the court has no power to exercise the discretion provided in s 7(3), where marriages were concluded out of community of property with the exclusion of the accrual system after 1 November 1984.

[2] The applicant, Mrs. G[....], and her husband were married out of community of property, excluding the accrual system, in March 1988. Mrs. G[....] submits that unless this application is successful, neither she nor other spouses in a similar position are entitled to apply for a redistribution order on divorce, irrespective of their particular circumstances and no matter how stark the injustices they face are. She accordingly seeks an order declaring s 7(3)(a) of the Divorce Act unconstitutional and invalid to the extent that it limits the operation of s 7(3) to marriages out of community of property by which community of property, and community of profit and loss and accrual sharing are excluded that were '*entered into before the commencement of the Matrimonial Property Act, 1984*'.

[3] The court is not called upon to determine whether Mrs. G[....] should be

¹ 1 November 1984 is the date of commencement of the Matrimonial Property Act 88 of 1984.

granted a redistribution order in her particular divorce but to decide whether it is constitutional for spouses married out of community of property with the exclusion of the accrual system after 1 November 1984 to be deprived of the relief provided for in s 7(3) of the Divorce Act.

Structure of the judgment

[4] The application is not opposed. The second respondent, the Minister of Justice and Constitutional Development ("the Minister"), initially filed a notice to oppose the application, but later indicated that it abides the court's decision. The Minister subsequently filed an affidavit setting out its stance regarding the issue at hand. The first and third respondents abide the court's decision. Shortly before the hearing, the Pretoria Attorney's Association ("the PAA") applied to be admitted as *amicus curiae*. Based on the preliminary submissions made, and because of the lack of opposition, I was of the view that the PAA's contribution would be invaluable. The PAA was admitted as *amicus curiae*.

[5] In this judgment, I set out the parties' and the *amicus*'s respective contentions before engaging with the legal issues raised. The submissions collectively establish the context within which the constitutional validity of s 7(3)(a) of the Divorce Act is to be determined. I am indebted to all counsel concerned for the thorough exposition of applicable legal principles and law. I must extend my appreciation to the academic scholars whose works are referred to in this judgment. A constitutional challenge, long foreseen by academic scholars, was raised only in 2021.

The applicant's case

i. Arbitrary and irrational differentiation infringes s 9(1) of the Constitution²

[6] The applicant, Mrs. G[...], submits that s 7(3)(a) arbitrarily and irrationally differentiates between people married before and after 1 November 1984, being the date on which the Matrimonial Property Act 88 of 1984 ("the MPA") commenced.

² Section 9(1): Everyone is equal before the law and has the right to equal protection and benefit of

Counsel for the applicant contends that it is irrational that the applicant:

'would be protected by section 7(3) if she had married four years earlier. This is particularly so when the law still enforced a man's headship of the family until 1993, long after the blanket, guillotine deadline of 1984.'

[7] Expert reports, confirmed under oath by two expert witnesses, were submitted in support of Mrs. G[...]'s case. The Ancer report was compiled by a clinical psychologist, Ms. Judith Ancer. Ms. Ancer explains:

'Before the Matrimonial Property Act came into effect, the law entrenched a patriarchal system in which a man was legally entitled to control his wife and where women had a weak bargaining position. On the assumption that the husband's headship of the family was only removed in 1993 it means that the patriarchal system persisted for 9 years after the Matrimonial Property Act came into force, but a woman lost the ability to make an application under section 7(3) of the Divorce Act when the accrual system was introduced.'

[8] According to Ms. Ancer, there is a lag in time between something becoming law on paper, and the entrenched systems of romantic and marital relationships adjusting to a new legal position.

[9] Mrs. G[...] contends that no legitimate government purpose justifies the differentiation that denies persons married out of community of property with the exclusion of the accrual system after 1 November 1984 of the potential protection of a just and equitable remedial judicial order. Counsel for the applicant addressed the assumption that the purpose of limiting the benefit of s 7(3)(a) of the Divorce Act to marriages concluded before 1 November 1984, was to give effect to the choice of the parties to get married out of community of property without the accrual system, and that s 7(3)(a) holds them to that choice. He submitted that the choice-argument is illusory for the following reasons:

the law.

i. Experts whose reports were submitted into evidence hold that it does not necessarily mean that if a person is over 18-years old and legally able to get married, the person is mature and competent enough to consider the consequences of an antenuptial contract logically. It is necessary to mention at this point that in light of the entrenched position regarding a party's legal capacity to enter into a contract in South African Law, and the ensuing legal consequences when a contract is entered by a person who lacks the capacity to contract, I am of the view that this aspect is not relevant to the issue regarding the constitutional validity of s 7(3)(a) of the Divorce Act. A party who concluded an antenuptial agreement while lacking the required legal capacity to contract has appropriate remedies to pursue. The same can be said in relation to antenuptial agreements entered into because of coercion, *justus error*, and fraud – appropriate legal remedies exist in this regard.

ii. The Constitutional Court recently rejected the choice argument in the context of life partnerships in *Bwanya v Master of the High Court, Cape Town*.³ The Constitutional Court held that the question is not whether there absolutely is a choice, but whether, realistically, in the particular circumstances, a choice may be exercised. The question as to whether choice can realistically be exercised is to be differentiated from the question as to a party's capacity to contract.

iii. It is already accepted in our legislative scheme that courts can interfere with the choices expressed by spouses in their antenuptial contracts, section 7(3)(a) is a prime example. Other statutory provisions similarly empower a court to alter arrangements that parties to a marriage have made to avoid unfairness. Section 9 of the Divorce Act empowers a court to make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of another, having regard to the duration of the marriage, the circumstances that gave rise to the break-down of the marriage and any substantial

³ [2021] ZACC 51 (31 December 2021) para [62].

misconduct on the part of either of the parties. Section 8(2) of the MPA empowers a court to replace the accrual system applicable to the marriage with a matrimonial property system in terms of which accrual sharing, as well as community of property and community of profit and loss, are excluded. Sections 9 and 10 of the MPA respectively empower a court to declare the right to share in the accrual forfeit or to order that satisfaction of an accrual claim be deferred on conditions that the court deems just. Section 16 of the MPA empowers a court to step in where a party married in community of property withholds his or her consent required in terms of ss 15 and 17 of the Act. The judicial discretion granted in the abovementioned instances allows courts to deviate from the strict application of the property regime chosen by the parties concerned in circumstances where it would be inequitable to hold the parties to their original antenuptial contract.

[10] Counsel submits that it is irrational that s 7(3)(a) permits courts to interfere in cases where the parties contracted out of the default rule of community of property, but withholds it from cases involving parties who also contracted out of the second default rule of accrual.

ii. Violation of s 9(3) of the Constitution⁴

[11] Mrs. G[....] further contends that the cut-off date in s 7(3)(a) disproportionately impacts women. The blanket deprivation of excluding spouses from the potential benefits of a just and equitable redistribution order constitutes unfair discrimination based on sex, gender, marital status, culture, race, and religion. As a result, it operates to trap predominantly women in harmful, and toxic relationships when they lack the financial means to survive outside of the marriage.

[12] Counsel submits that in considering this aspect, the court should adopt a generous approach to interpreting the scope of the constitutional right protected by s

⁴ Section 9(3) – The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

9(3). Relying on *City Council of Pretoria v Walker*,⁵ counsel stressed that the court must recognise that conduct that appears to be neutral and non-discriminatory may result in discrimination. In anticipation of an argument that the exclusionary scope of s 7(3)(a) is gender-neutral, counsel submitted that such an argument relies on the premise that husbands and wives are similarly affected by the lack of a discretion where marriages out of community of property without the accrual are concluded after 1 November 1984. This premise, in turn, relies on the assumption that husbands and wives in heterosexual relationships are in the same financial positions at the time of the marriage; that heterosexual relationships have the same financial consequences for men and women, and that men and women who are parties to a heterosexual marriage are therefore similarly situated when marriages end. Expert evidence in the joint report by Professor Elsje Bonthuys and Dr. Anzille Coetzee ("the Bonthuys & Coetzee report") demonstrates that these assumptions are flawed.

[13] The Bonthuys & Coetzee report sketches the context of gender inequality in South Africa. Bonthuys and Coetzee opine that even today, twenty-five years after the transition to democracy, the intersecting inequalities of gender, race, and class still render many women unable to access and realise their rights. They refer to a 2016 study wherein it was found that South African women and women-headed households are significantly more likely to be 'multidimensionally poor' than males or male-headed households. Black women remain the poorest group in South Africa. As a result of their disproportionate poverty, women depend economically on male family members, husbands, and intimate partners for their survival and that of their children. The cumulative effect of a number of inequalities, e.g., gender income gap, unequal access to land and education, and women being disproportionately situated outside the formal economy, is that women often enter into marriage on a weaker footing than men, with high levels of economic precarity and financial dependence. They contend that:

'The decision to get married is there for one that many women make with less autonomy than men, and with less agency to insist on terms that would be advantageous to them.'

⁵ 1998 (2) SA 363 (CC) para [31].

In addition, cultural understanding and practices associated with heterosexual marriages often exploit and deepen these inequalities by supporting an unequal division of care and household labour between men and women in families. South African cultures share the assumption that women are responsible for or naturally predisposed towards child-rearing and household work. This often confines women in heterosexual relationships at home, where they perform unpaid care and household labour, while at the same time freeing up their husbands to develop professionally and increase their wealth. This affects women's ability to participate in paid labour on an equal footing with men in several respects. Bonthuys and Coetzee express the view that given that women's ability to generate an income is reduced by marriage, as statistically proven, and that women bear more responsibility for housework and caring labour, a marriage out of community of property with the exclusion of the accrual system would generally favour men. The effects of gender equality are exacerbated by high levels of physical, sexual, and other forms of violence which characterise intimate relationships. When courts do not have the discretion to affect adjustments to a matrimonial property regime when it is just and equitable to do so, it is typically the women who are unfairly disadvantaged.

[14] Bonthuys and Coetzee opine that s 7(3) simultaneously discriminate on several grounds and affect different groups of people differently. They refer to the Constitutional Court's decision in *Gumede v President of the Republic of South Africa*,⁶ where the court held that customary marriages concluded before the *Recognition of Customary Marriages Act* 120 of 1998, came into operation would effectively be marriages in community of property. They contend that the court effectively created a judicial discretion in all customary divorces and state that:

'[E]very divorce court granting a divorce decree relating to a customary marriage has the power to order how the assets of the customary marriage should be divided between the parties, regard being had to what is just and equitable in relation to the facts of each particular case. This would require that a court should carefully examine all the circumstances relevant to the

⁶ 2009 (3) SA 152 (CC) para [44].

customary marriage and in particular the manner in which the property of the marriage has been acquired, controlled and used by the parties concerned, in order to determine, in the final instance, what would be a just and equitable order on the proprietary consequences of the divorce.'

In the experts' view, the judicial discretion created in *Gumede* is broader than the discretion created in s 7(3)(a) and does not limit the discretion to marriages concluded before or after a specific date.

[15] Mrs. G[....]'s counsel submits that the time-bar, or cut-off date, in s 7(3)(a) constitutes a blanket bar that permits no exception. The subsequent limitations of rights are extensive. If the time-bar is removed, the discretion built into s 7(3)(a) will provide a less restrictive means of achieving the purpose of the statute while allowing the court to craft a just and equitable remedy in deserving cases.

[16] Mrs. G[....] contends that the limited and exclusionary application of s 7(3)(a) of the Divorce Act constitutes unfair discrimination as prohibited by s 9(3) of the Constitution and a limitation of the right to equality. He submits that once a limitation of any right in the Constitution is shown to exist, the onus shifts to the state respondents to justify the limitation.⁷ In this matter, neither of the respondents opposes the relief sought. The Minister and the applicant part ways as far as the remedy is concerned, but the deponent to the Minister's affidavit referred to the 'overwhelming need to amend section 7(3) of the Divorce Act'.

The Minister's submissions

[17] Although the Minister initially filed a notice of intention to oppose the application, he had a change of heart and abides the court's decision. The Minister indicates that the reason underlying the decision to file an answering affidavit is to supplement the arguments raised by Mrs. G[....] in her founding affidavit and assist the court in establishing the views of the Department on the relief sought by Mrs. G[....] and the proposed remedy.

⁷ *S v Makwanyane* 1995 (3) SA 391 (CC) para [102]; *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para [44].

[18] The Minister explains that the relief sought by Mrs. G[...] has been the subject of consideration by the South African Law Research Commission ("the SALRC").⁸ As a result it formed part of matters that the Minister approved for an investigation which could lead to a possible legislative amendment. The SALRC is still investigating and could not yet finalise an opinion.

[19] Based on the comments received subsequent to the publication of Issue Paper 34, the Minister states that parties opposing the extension of the judicial discretion contained in s 7(3)(a) past the time-bar of 1 November 1984, do so on the following grounds:

- i. It does not respect parties' freedom to contract;
- ii. Normal contractual remedies apply to antenuptial contracts entered into under coercion, *justus error* or fraud;
- iii. There would be little chance of ignorance between contracting parties as the notary would have explained alternatives to the parties, and even if the notary failed to do so, "it has never been the object of the law to protect the foolish";
- iv. A marital property system excluding any sharing is chosen deliberately, for clear and well-considered reasons, and such decisions should be respected;
- v. The judicial discretion applicable to marriages out of community of property pre- the commencement of the MPA is a temporary emergency measure, applicable to those who, for whatever reason, did not opt for the conversion possibilities under s 21 of the Divorce Act;
- vi. The extension of the judicial discretion would encourage litigation, increase costs and extend the time of litigation;
- vii. The extension of the judicial discretion would encourage cohabitation;

⁸ Issue Paper 34 dealt with Review of Aspects of Matrimonial Property Law. It was replaced by Issue paper 41. Before its revision Issue Paper 34, among others, considered whether s 7(3) of the Divorce Act should be amended to extend the judicial discretion of the court provided for in the said section, to marriages out of community of property with the exclusion of the accrual system. On 6 September 2021 the SALRC requested the respondents to submit comments on the matter raised in Issue Paper 41 dealing with the Review of Aspects of Matrimonial Property Law, the closing date for the submissions was 14 January 2022.

- viii. Judicial discretion creates uncertainty;
- ix. The extension of the judicial discretion would ignore the interests of creditors.

[20] The Minister points out that parties in favour of extending the judicial discretion to marriages out of community of property with the exclusion of the accrual system post the commencement date of the MPA, advanced the following arguments:

- i. Women cannot be allowed to contract themselves and their children into poverty;
- ii. Women entering into an antenuptial contract with an express exclusion of the accrual system are seldom making an "informed choice";
- iii. There is a power imbalance between the parties;
- iv. Our law recognises the imbalance between other contracting parties, such as employer and employee and has legislated to protect the weaker party.

Amicus curiae's submissions

[21] The PAA sought to be admitted as *amicus curiae* because-

'The PAA is concerned that the court may be faced with an issue that not only involves weighing up potential competing fundamental rights (equality, dignity and freedom of belief and opinion) within the context of s 36 of the Constitution, but also has the potential to not only affect the rights of prospective and divorcing spouses but also third parties and creditors.'

[22] The *amicus* is concerned that the court is requested to consider a complex and multi-layered legal aspect without the benefit and availability of statistics and broad-based or other empirical research such as research by the SALRC. The *amicus* recognises the invaluable contribution of the academic input provided by the applicant's expert witnesses but endeavours to provide a 'practical perspective and approach from practitioners who deal with the pre-and post-divorce financial consequences as part of their practices on a grassroots level.'

[23] The *amicus* sheds light on the history of the debate regarding the extension of the redistribution discretion of s 7(3). The *amicus* highlights that the South African Law Commission ("the SALC") published *Project 12: Review of the Law of Divorce: Amendment of Section 7(3) of the Divorce Act, 1979 Report* ("Project 12") in July 1990. The SALC concluded that s 7(3) –

'... was only meant to be an outlet valve to alleviate the unfairness in existing marriages that had been made subject to the rigid predetermined matrimonial property systems" and that the English system allowing for a judicial redistribution discretion was, with the said exception of section 7(3), never part of our law and "... was never intended to be a matrimonial property system, alongside any other system.'

After considering the comments and concerns that are incidentally similar to those being raised by the *amicus* in this application, the SALC indicated that it was against the extension of the court's discretion to distribute assets of spouses married after 1 November 1984 with the exclusion of community of property and community of profit and loss and the accrual.

[24] The *amicus*, correctly in my view, states that s 7(3)(a) reflects the intention of the legislature to grant the court a discretionary power to order a redistribution of assets, even if such redistribution was to differ radically from the content of the antenuptial agreement entered into between the parties. The *amicus* opines that by setting the cut-off date of 1 November 1984, it appears that the legislature intended to address the plight of women who suffered under the yolk of marital power until its abolishment, by providing for a 'type of accrual sharing' to marriages out of community of property that was entered into prior to 1 November 1984.

[25] The concerns raised by the *amicus* are the following:

- i. The potential opening of floodgates and longer trial duration and higher litigation costs that might be caused by the extension of s 7(3);
- ii. The impact of an extension of s 7(3) on the individual's right to freedom of contract and the principle of *pacta sunt servanda* versus judicial

interference in respect thereof, and the potential of ensuing legal uncertainty;

iii. No concrete evidence or statistics are provided that women in general are in a weaker bargaining position than men, or in support of the notion that people (and especially women) do not really understand the consequences when entering into an antenuptial contract;

iv. The court should exercise caution in allowing for behaviour and the broad concept of 'behavioural law' to be incorporated into the law of contract, thereby potentially creating a different and uncertain set of principles against which antenuptial agreements should be evaluated;

v. An antenuptial agreement might be described as a contract *sui generis*, but it remains a contract and public policy demands that contracts be honoured;

vi. The principle laid down in *AB v Pridwin Preparatory School*⁹ will apply if in specific circumstances, the antenuptial agreement has an extremely inequitable effect;

vii. Potential implication for creditors and other parties where reliance is placed by such parties on the marriage contract and the consequences thereof;

viii. Horizontal v vertical impact of the Constitution in matters where two private parties contract.

[26] The *amicus* refers to comparative law and the different approaches in other jurisdictions and states:

'Other legal systems which provide for a judicial discretion regarding the division of assets experience problems due to lack of predictability, consistency and fairness.'

[27] In the final instance, the *amicus* submits that the retrospective working of the relief sought, if granted, is unclear and that the question whether or not the applicant has an interest in the relief sought depends on the interpretation and clarification of the legal position on this issue. This issue is relevant to the applicant's *locus standi* in

⁹ 2019 (1) SA 327 (SCA).

the current application and needs to be addressed before the constitutional validity of the cut-off date incorporated in s 7(3)(a) of the Divorce Act is considered.

Locus standi

[28] The *amicus* submits that specific rights vested in Mrs. G[...] and her husband at the time of their marriage and the registration of their antenuptial contract. As a result, the exercising of the parties' rights pertaining to the division of their assets is deferred until the dissolution of the marriage. Thus, the *amicus* argues, because the matrimonial property regime and its consequences upon divorce were established at the time that the parties got married, the applicable Act that governs the dissolution of the marriage was the Divorce Act as it then read. The *amicus* asks the following question:

'[D]oes a party upon registration of the antenuptial contract obtain a vested right to enforce the patrimonial consequences of the contract in accordance with the law as it was at the time of entering into the contract, in this case the Divorce Act in its unamended form? If so, can an order of constitutional invalidity of [a] part of section 7(3) (prospectively or retrospectively to the date that the Constitution came into effect) change the position that was established at the time of concluding the antenuptial contract?'

The *amicus* submits that the right to have the dissolution of the marriage determined in accordance with the antenuptial agreement, vested at the time of entering into the agreement. The law applicable at the time was the Divorce Act. As there was no Constitution when the applicant and the third respondent married, there could be no constitutional inconsistency. The applicant can also not be provided with more rights at divorce than she had at the conclusion of the marriage, and a declaration of constitutional invalidity cannot expand the applicant's rights.

[29] Based on the judgment of the Supreme Court of Appeal in *Four Wheel Drive Accessory Distributors CC v Rattan NO*¹⁰ the *amicus* submits that if the court applies

¹⁰ 2019 (3) SA 451 (SCA).

the legislation that was applicable at the date of the entering into the antenuptial agreement, when the contractual rights vested, a declaration of constitutional invalidity will not hold any benefit for the applicant and will be merely academic. In that event, the applicant does not have *locus standi* to bring these proceedings.

[30] Counsel for the applicant submits that s 7(3) is a power exercised by the court at the time of divorce, not at the time any antenuptial contract was concluded. As Mrs. G[....]'s divorce proceedings are pending and were instituted after the commencement of the final Constitution, no questions of constitutional retrospectivity arise at all. Counsel highlights that the *amicus* raised the issue of standing in the course of its heads of argument a week before the hearing after the applicant has filed all of its affidavits. Standing is indeed an issue of law, but it is determined on the basis of the pleadings, in this case, the affidavits. In addition, the applicant made it clear that the challenge is not only brought in her own interests. It is evident from the founding affidavit that the application falls within the ambit of both sections 38(a) and (c) of the Constitution.

[31] I am of the view that s 7(3) of the Divorce Act provides a power to be exercised by the court at the time of divorce. It is only at the time of the divorce that s 7(3) of the Divorce Act is triggered. Even in its current form, the section provides relief to spouses that meet the jurisdictional requirements at the time of divorce, irrespective of what the parties agreed to in the antenuptial agreement. I agree with Mahlantla J, who recently held in the context of the enforcement of rights under a will that public policy must be determined and measured at the time at which rights are enforced rather than at the time the will was executed.¹¹ The contention that the Divorce Act applies as it read at the time of the conclusion of the marriage is unsustainable.

[32] As is indicated herein below, s 7(3)(a) is not aimed at changing the matrimonial property regime agreed to by the parties, but to provide relief in certain carefully circumscribed instances to spouses who contributed directly or indirectly to the maintenance or increase of the estate of their spouses whilst married

¹¹ *King N.O v De Jager* 2021 (4) SA 1 (CC) at para 73.

out of community of property with the exclusion of the accrual system on the date when the marriage is terminated by divorce. The applicant has the necessary standing to bring this application.

Discussion

(i) The tests to be applied in evaluating the constitutional attack

[33] Mrs. G[...] claims that the constitutional validity of s7(3)(a) needs to be determined with reference to s 9(1) and s 9(3) of the Constitution. A distinction is drawn between the test for constitutional validity in terms of these two subsections of s 9 of the Constitution. Section 9(1) requires that all persons in similar positions must be afforded the same rights.¹²

[34] For purposes of this application, the Constitutional Court's approach as set out in *Harksen v Lane N.O.*¹³ is instructive. A court needs to answer the following question:

'Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 8(1) [the equivalent of s 9(1) of the 1996 Constitution]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.'

[35] In *Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye Intervening)*¹⁴ the Constitutional Court reiterated that it is a well-established principle in our law that where an impugned provision differentiates between categories of people, it must bear a rational connection to a legitimate government purpose, otherwise the differentiation is in violation of s 9(1) of the Constitution. Rationality operates as a minimum standard, a constitutional baseline, that applies even in circumstances where no fundamental right or other constitutional

¹² *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at para [24].

¹³ 1998 (1) SA 300 (CC) 324H-I.

¹⁴ 2019 (2) ZACR 88 (CC) at para [46].

standard is directly applicable.¹⁵

[36] In *New National Party v Government of South Africa*,¹⁶ Yacoob J drew a distinction between rationality and reasonableness as standards of review of legislative schemes. He held that the former was the appropriate standard in light of the separation of powers. Section 9(1) thus presents a very low threshold to meet, with the Constitutional Court in *New National Party of South Africa and United Democratic Movement v President of the Republic of South Africa*¹⁷ invoking a narrow notion of 'rationality' as mere connection between a legitimate state purpose and the means chosen, when it held the legislative scheme to be rational and thus constitutional.

[37] Section 9(3) of the Constitution provides a more rigorous prohibition on unfair discrimination. Where there is an allegation that a particular legislative rule violates s 9(3) of the Constitution, a two-stage analysis is followed. In the first stage it must be determined whether the impugned rule differentiates between people or groups and whether the differentiation amounts to discrimination. Once it has been determined that the differentiation amounts to discrimination, it must be determined whether or not the discrimination is unfair.¹⁸

(ii) Marriage and matrimonial property regimes

[38] A civil marriage is traditionally defined as 'the legally recognised life-long voluntary union between one man and one woman to the exclusion of all other persons'.¹⁹ Despite the prevalence of divorce in modern days, it can still be assumed that parties conclude a marriage with some sense of permanency, and at minimum, a long-term commitment in mind. Hahlo,²⁰ stated that although marriage is a contract in that it is based on the consent of the parties, it is not an ordinary private contract. He

¹⁵ Price, A. The content and justification of rationality review. (2010) 25 *SAPL* 346-381, 346.

¹⁶ 1999 (3) SA 191 (CC) para [24].

¹⁷ 2003 (1) SA 495 (CC).

¹⁸ *Harksen No. O. v Lane* 1998 (1) SA 300 (CC).

¹⁹ Heaton, J., Kruger, H. *South African Family Law*. 4th ed. LexisNexis, 13. This definition highlights one of the differences between customary, Muslim and Hindu marriages that permit polygamy, and civil unions between parties of the same sex under the Civil Unions Act 17 of 2007.

²⁰ Hahlo, HR. *The South African Law of Husband and Wife*. 5th ed. JUTA, 22.

explained – '... the act of marriage is a juristic act *sui generis*, and the relationship which it creates is not an ordinary contractual relationship but involves a status of a public character.' Heaton and Kruger²¹ argue that there are so many differences between a contract and a civil marriage as a type of agreement, that it is undesirable to describe a civil marriage as a type of contract. For current purposes, it is relevant to take note of the fact that one of the key differences between marriage and a contract is that a marriage cannot be dissolved by consent – only the death of a spouse or a decree by a competent court can bring an end to it.²²

[39] The consequences of a marriage can be categorised as personal or proprietary consequences. The duties of cohabitation, conjugal fidelity and reciprocal support are personal consequences of a marriage. These consequences are 'of the essence' of the matrimonial relationship and cannot be excluded by agreement.²³ Community of property and profit and loss is a proprietary consequence of marriage and can be excluded or modified by antenuptial contract, or changed by postnuptial contract.²⁴

[40] Two main matrimonial property regimes existed in South Africa prior to the commencement of the MPA on 1 November 1984. These were (i) marriages in community of property with the marital power, and (ii) marriages out of community of property with the exclusion of both community of profit and loss and the marital power.²⁵ Marriage in community of property is characterised by the joint nature of ownership of assets by the spouses. In marriages out of community of property both spouses retained their separate estates.²⁶ The MPA brought about major changes. The marital power was abolished in respect of marriages in community of property, which resulted in a total abolishment of the notion of marital power, and the Act introduced the accrual system as a second category of marriages out of community of property.

²¹ Heaton and Kruger note 19, above.

²² Hahlo note 20, above.

²³ Ibid. See also Heaton and Kruger note 19, above, chapter 5.

²⁴ Hahlo, note 20, above, 282, 258. Heaton and Kruger note 19, above, chapter 6. Sections 21 and 25 of the MPA.

²⁵ See, *inter alia*, Heaton and Kruger note 19, above, 61.

²⁶ See *inter alia* Robinson, J. A., Human, S., Boshoff, A. and Smith, B. Introduction to South African Family Law. LexisNexis, 132.

[41] For all practical purposes,²⁷ intending spouses can now choose between three matrimonial property systems: (i) community of property, (ii) marriage out of community of property with the exclusion of the accrual system, and (iii) marriage out of community of property with the accrual system. Each of these matrimonial property regimes has its advantages and disadvantages. Since this application deals exclusively with marriages out of community of property with the exclusion of the accrual system, it is not necessary to consider the advantages and disadvantages of all three standard regimes.

[42] Where both parties to a marriage out of community of property with the exclusion of the accrual system are economically active and support each other to more or less the same degree to be economically successful in their respective endeavours, it is difficult to identify any real disadvantages that this matrimonial property regime has for the parties. Often, however, one party becomes economically inactive, or less active than the other after the conclusion of the marriage. While it was historically the wife who sacrificed her career and exited the labour market, or took up employment with family-compatible hours at a lower salary to run the joint household and take care of the children, occurrences of men fulfilling the traditional role of homemaker while their professional wives pursue their careers are increasing. Both scenarios provide for an economic inactive or less active party ("the economically disadvantaged party"). The main disadvantage of a marriage out of community of property with the exclusion of the accrual system and thus a system of complete separation, in these circumstances, is that no matter how long the marriage has endured and how much the economically disadvantaged party has contributed to the other party's economic and financial success, the economically disadvantaged party does not as a right share in the latter's gains. The advantage of a system of complete separation for the economically active party, is that at the dissolution of the marriage through divorce, he or she reaps the fruits of both spouses' contribution, because only one estate increased during the duration of the marriage. Women are, however, still predominantly found in the position of the economically disadvantaged party. This is an international phenomenon and not

²⁷ Hahlo, note 20 above, 311 explains that nothing prevents parties from constructing their own made-to-measure system.

unique to the South African context.²⁸ The wide manifestation of women as economically disadvantaged as indicated in the experts' reports, belies the *amicus*' submission that recent changes in women's circumstances render the relief provided in s 7(3)(a) of little consequence.

[43] I pause to note that although emphasis is placed on the position where one party is rendered an economically disadvantaged party because of the interaction between the provisions of the parties' antenuptial agreement and the parties' post-marital realities, it is likewise possible for both spouses to remain economically active but for one party to directly or indirectly contribute to the maintenance or the growth of the other's estate ("the contributing spouse"). A similar inequality will arise, although the consequences on divorce are not so pronounced or dire for the contributing spouse as for an economically disadvantaged party.

[44] The legislature, in an effort to address the obvious disadvantage suffered by economically disadvantaged parties in marriages out of community of property concluded before the commencement of the MPA, introduced s 7(3)(a). Botha JA explained in *Beaumont v Beaumont*²⁹ that s 7(3) was introduced as –

'an entirely novel concept into this branch of our law: the power of the Court under certain circumstances to order the transfer of assets of the one spouse to the other.'

[45] Botha JA coined an order made in terms of s 7(3) for convenience sake 'a redistribution order', and agreed with Kriegler J, as he then was, who held in the court a quo that the creation of the power enabling a court to make such a redistribution order was 'obviously a reforming and remedial measure'. He continued:

'What the measure was designed to remedy is trenchantly demonstrated by the facts of the present case: the inequity which could flow from the failure of the law to recognise a right of a spouse upon divorce to claim an adjustment

²⁸ Sinclair, J. 'Family Rights' in Van Wyk, D., *et al* (eds) Rights and Constitutionalism – The New South Africa Legal Order 1994 JUTA 502-572, 548.

²⁹ 1987 (1) SA 967 (A) 987G.

of a disparity between the respective assets of the spouses which is incommensurate with their respective contributions during the subsistence of the marriage to the maintenance or increase of the estate of the one or the other.'

[46] A few years later, in *Beira v Beira*³⁰ the court explained that s 7(3):

'[w]as enacted to redress a deficiency, namely to enable both spouses to enjoy their rightful shares in the accumulated wealth residing in the one which their joint endeavours during the subsistence of the marriage had brought them.'

[47] Although Botha JA coined an order granted under s 7(3) 'conveniently as a redistribution order', a s 7(3) order does not bring about a change regarding the agreed-to matrimonial property regime that determines and regulates the proprietary consequences of a particular marriage. Robinson and Horsten³¹ emphasise that s 7(3) does not grant the court a judicial discretion to create a system of accrual that the parties themselves did not create or to redistribute the spouses' assets in a way that seems fair. In *Beira, supra*, Leveson J expressly stated that it was not the aim of the legislature for a s 7(3) order to put the parties in equal financial positions. The aim of s 7(3) is to redress the unfair financial imbalance flowing from the very nature of a marriage being out of community of property in circumstances where one party contributed to the other's maintenance or the increase of the other's estate during the existence of the marriage.³² A spouse does not qualify as having made a contribution as a matter of course by virtue of being married,³³ the jurisdictional requirements of s 7(3) read with ss 7(4), (5) and (6) need to be met. The practical effect of a s 7(3) order is that the party who contributed to the other's gain is compensated for its contribution to the extent that a court finds just and equitable. To this end, the court is cloaked with a wide discretion taking into account an infinite

³⁰ 1990 (3) SA 802 (W).

³¹ Robinson, R. and Horsten, D. *The Quantification of "Labour of Love": reflections on the Constitutionality of the Discretion of a Court to Redistribute Capital Assets in terms of Section 7(3)-(6) of the South African Divorce Act.* (2010) *Speculum Iuris* 96-117, 115.

³² Robinson and Horsten note 31 above, 97-98.

³³ Sonnekus, note 37 below, 763.

variety of factors.³⁴

[48] The legislature prescribed a number of prerequisites that must be satisfied before an order can be granted in terms of s 7(3)(a). The first requirement, coincidentally the requirement that underpins this application, is that the marriage must have been entered into before the coming into operation of the MPA. It is, however, not open to all parties married out of community of property before the commencement of the MPA to approach the court for a redistribution in the nature as provided for by s 7(3)(a), a fact attested to by the reality that the courts were not flooded by applications for redistribution when the MPA commenced, as was predicted by some. The remaining requirements act as the proverbial gatekeepers, in that the remedy is only available in (i) the absence of any agreement between the parties regarding the division of their estates, where an applicant (ii) contributed directly or indirectly to the maintenance or increase of the estate of his or her spouse during the subsistence of the marriage, either by the rendering of services or the saving of expenses which would otherwise have been incurred.

(iii) Enquiry into the constitutional validity of s 7(3)(a)

[49] To determine whether or not the Bill of Rights, and thus section 9 of the Constitution, applies to matrimonial property law, one need only to turn to the decision of the Constitutional Court in *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre as Amicus Curiae)* ("*Van der Merwe*").³⁵ The facts in *Van der Merwe* are distinguishable, however, in *Van der Merwe* the plaintiff's claim was met by a submission that:

'[M]arriage is a matter of choice and so too are the proprietary consequences of marriage. The applicant chose marriage in community of property and ... it is fair and reasonable that she be kept to the immutable consequences of her choice. It is not now open to her to challenge the constitutional validity of

³⁴ Apart from the direct and indirect contributions made by the applicant, factors are listed in s 7(5). See also Robinson and Horsten, note 31 above, 109.

³⁵ 2006 (4) SA 230 (CC).

the law she opted to marry under'.³⁶

[50] Moseneke DCJ responded as follows:

[61] This line of reasoning falters on two grounds. First, the constitutional validity or otherwise of legislation does not derive from the personal choice, preference, subjective consideration or other conduct of the person affected by the law. The objective validity of a law stems from the Constitution itself, which in s 2, proclaims that the Constitution is the supreme law and that law inconsistent with it is invalid. Several other provisions of the Constitution buttress this foundational injunction in a democratic constitutional State. A few should suffice. Section 8(1) affirms that the Bill of Rights applies to all law and binds all organs of State including the Judiciary. Section 39(2) obliges courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. And importantly, s 172(1) makes plain that, when deciding a constitutional matter within its power, a court must declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Thus the constitutional obligation of a competent court to test the objective consistency or otherwise of a law against the Constitution does not depend on and cannot be frustrated by the conduct of litigants or holders of the rights in issue. Consequently, the submission that a waiver would, in the context of this case, confer validity on a law that otherwise lacks a legitimate purpose has no merit.

[62] Second, ordinarily the starting point of a justification enquiry would be to examine the purpose the government articulates in support of the legislation under challenge. In this case the government did not proffer a purpose to validate the impugned provision. If anything, the government contends that the provision is inconsistent with the Constitution because it is irrational or unfairly discriminatory. It correctly, in my view, disavowed the existence of a legitimate purpose for withholding a right of recourse for patrimonial loss from physically brutalised spouses in marriages in

³⁶ Par [59].

community of property whilst granting the protection to spouses in other forms of marriages or indeed to parties in other domestic partnerships.

[63] Of course, the pursuit of a legitimate government purpose is central to a limitation analysis. The Court is required to assess the importance of the purpose of a law, the relationship between a limitation and its purpose and the existence of less restricted means to achieve the purpose. However, in this case there is no legitimate purpose to validate the impugned law. The absence of a legitimate purpose means that there is nothing to assess. The lack of a legitimate purpose renders, at the outset, the limitation unjustifiable. I am satisfied that s 18(b) of the Act is inconsistent with the Constitution because it limits the equality provision of s 9(1) without any justification.'

[51] As in *Van der Merwe*, the Minister did not proffer a purpose to validate the impugned cut-off date incorporated in s 7(3)(a). In fact, the Minister filed its answering affidavit with the aim of supplementing the arguments raised by the applicant. The *amicus*, however, highlighted the legislative purpose of s 7(3) and I am bound to consider it.

Section 9(1) rationality enquiry

[52] The legislature crafted a reforming and remedial measure but limited its application to marriages out of community of property concluded before the MPA commenced. Since the possibility of granting a redistribution order was created concomitantly with the introduction of the system of accrual sharing, it can arguably be assumed that s 7(3) was intended to be a transitional measure,³⁷ as submitted by the *amicus*. The legislature arguably did not extend the relief to marriages out of community of property excluding the accrual system because the MPA provided the option of choosing between a system that includes accrual sharing and a system that excludes accrual sharing.³⁸ Parties seemingly exercise a deliberate choice when they exclude the accrual system and incorporate that choice in a written antenuptial

³⁷ Sonnekus, J. *Herverdelingsdiskresie by egskeiding, 'n deugsame vrou en pacta sunt servanda*. 2003 SALJ 761.

³⁸ Hahlo, note 20 above, 384; Van Schalkwyk L. N., *Gumede v President of the Republic of South*

agreement executed before a notary. The question is whether in this context it can be said that legislative innovation that brought into force s 7(3) of the Divorce Act to address the plight of economically disadvantaged parties who did not have the opportunity to choose a more beneficial marital regime in the form of the accrual system, is irrational. By restricting the operation of s 7(3) to marriages concluded before 1 November 1984 the legislature honoured the principle of freedom of contract and *pacta sunt servanda*, and that is not without merit. It cannot be held that the inclusion of the time-bar was irrational. This is, however, not the end of the matter.

Section 9(3) enquiry

[53] For the purpose of a rationality enquiry in terms of s 9(1) of the Constitution, the fact that s 21 of the MPA provides parties with the opportunity to jointly apply for leave to change their matrimonial property system, is of no-consequence. As is the fact that the interaction between the Divorce Act and the MPA affords the relief provided for in s 7(3)(a) of the Divorce Act to spouses married out of community of property before 1 November 1984, despite them not having utilised the option in s 21 of the MPA to cause the provisions of Chapter 1 of the MPA to apply in respect of their marriages. These factors are, however, relevant in the s 9(3) enquiry, because, parties married out of community of property with the exclusion of the accrual after 1 November 1984 and parties married out of community of property before 1 November 1984 who refrained from or neglected to cause the provisions of Chapter 1 of the MPA to apply in respect of their marriages, find themselves in similar positions. No basis exists to exclude the view that parties made a deliberate choice in both scenarios. And yet economically disadvantaged parties from the former group cannot approach a court for the relief provided for in s 7(3)(a), but economically disadvantaged parties from the latter group can, solely based on the date of the marriage.

[54] It cannot be gainsaid that s 7(3)(a) of the Divorce Act differentiates between spouses married out of community of property who were married before the MPA

commenced, and spouses married out of community of property with the exclusion of the accrual system after the MPA commenced. The obvious disparity and inequity that ensues when parties who are married out of community of property and where one party contributed to the maintenance or increase of the estate of the other party, file for divorce, moved the legislature to enact s 7(3)(a) of the Divorce Act. By incorporating a cut-off date for the application of s 7(3), economically disadvantaged parties who were married after 1 November 1984 cannot approach a court to make an order that is just and equitable if they meet the remaining jurisdictional requirements of s7(3). Thus, the inequity which is caused because the economically disadvantaged spouse nevertheless made a direct or indirect contribution towards the other spouse's estate, persists.

[55] It is, in my view, not necessary to determine whether the cut-off date affects black women to a greater extent than other women in the country, or whether it is indeed an illusion to accept that women, in general, have a choice to agree to the inclusion or exclusion of the accrual system. Aspects like the now abolished marital power and the man's headship of the family are factors that contributed, and continues to play a significant role in the way some men, and even women themselves, regard the roles, and stature of women in society. Only those who go blindfolded through life can deny that gender equality has not yet been achieved in South Africa. In fact, the South African society still has a long way to go. However, the equality issue brought to the fore by this application is not solely attributable to race or gender or religion, but also to economic inequity. The grounds listed in s 9(3) of the Constitution are non-exhaustive and discrimination need not be embedded in the grounds listed in s 9(3) before constitutional protection can be claimed.

[56] Bonthuys³⁹ points out:

'[A]s a general proposition, antenuptial contracts usually favour wealthier spouses by excluding the common-law system of property sharing with poorer spouses.'⁴⁰

³⁹ Bonthuys, E, Public Policy and the Enforcement of Antenuptial Contracts: *W v H*. (2018) 135 SALJ 237-248, 241.

⁴⁰ See also Mosey, B. How Ante-Nuptial Agreements Perpetuate Male Dominance: A Critical Feminist

The contributory role of gender and race in the equation is found therein that:

'As a consequence of gender discrimination, women tend to be poorer than men and to earn less in the marketplace. Stereotypical roles also entail that women tend to devote more time and effort to childcare and housework which further impacts on their earning capacity.'

Within this context black women are regarded as the 'marginalised of the marginalised'.⁴¹ The constitutional validity of s 7(3)(a) should, however, in my view, not solely be considered from the perspective of the parties' position as it is when an antenuptial agreement is concluded, because there can be a plethora of legitimate reasons as to why parties would agree to conclude a marriage out of community of property with the exclusion of the accrual system, e.g., a proud less affluent party who is intending to marry the love of their life who happens to be wealthy, may wish to demonstrate that the marriage is concluded solely for the reason of love, and not to gain any future patrimonial benefits.

[57] The inequality at hand is caused when, after the conclusion of the marriage, a distortion is caused by the fact that one spouse contributes directly or indirectly to the other's maintenance or the increase of the other's estate without any *quid pro quo*. In ideal circumstances where parties commit 'for better and worse, until death do us part' the economic inequality that follows when one spouse contributes to the other's maintenance or estate growth while its own estate decreases or remains stagnant, may not even be noticed. The unity of marriage conceals economic disparity because it is, for the most part, during the subsistence of the marriage of no consequence. However, where it becomes apparent on divorce that one spouse's estate increased because of the other spouse's contribution while the latter spouse's estate decreased, the party who received maintenance from the other or whose estate increased because of a direct or indirect contribution by the other, have received what can be described as an unfair economic advantage on the basis of the marriage. This is the inequality that can be addressed by an order in terms of s

Analyses of *Radmacher v Granatino* [2010] UKSC 42. *De Lege Ferenda* (2021) Vol IV, Issue ii, 50-65.
⁴¹ N Masiko City Press 17 August 2018.

7(3)(a), irrespective of the race or gender of the economically disadvantaged party. This remedy is currently available only to spouses married before 1 November 1984.

[58] Section 7(3)(a) differentiates between parties solely based on the date of commencement of the MPA in circumstances where parties could either (i) apply to incorporate the accrual system into their existing marriage property regime and for one or other reason, failed, or refrained from doing so, and (ii) where parties decided to exclude the accrual system. 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 MPA, 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 s 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 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.

[59] Section 7(3) is subject to subsections (4), (5) and (6). It is evident from a reading of these provisions that any party approaching the court for the relief provided for in s 7(3) must make out a case that it contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage. It is patently unfair that an economically disadvantaged party who can make out a case for relief in terms of s 7(3), whose contribution is not recognised and adequately compensated by the spouse who benefitted from such contribution, is metaphorically left out in the cold at the mercy of the spouse whose estate increased, without any recourse to the court to address the injustice.

[60] Section 7(3) of the Divorce Act was recently amended by s 1 of Act 12 of 2020 with effect from 22 October 2020, to include marriages out of community of property

—

'entered into in terms of any law applicable in a former homeland, without entering into an antenuptial contract or agreement in terms of such law.'

Section 7(3)(c) does not contain a cut-off date as ss 7(3)(a) and (b) do. This fact, in itself raises questions regarding the equal treatment of spouses married out of community of property with the exclusion of the accrual system in South Africa.

[61] The adjustive judicial power provided by section 7(3) of the Divorce Act is aimed at avoiding grossly inequitable discrepancies in the financial position of spouses on divorce. Irrespective of whether the section was initially intended as a transitional provision, the innate restriction in s 7(3)(a) based solely on the date on which a marriage was concluded, does not in 2022, muster constitutional scrutiny. The limitation of the relief provided for in s 7(3)(a) of the Divorce Act to marriages concluded prior to the commencement of the MPA violates s 9(3) of the Constitution. The cut-off date contained in s 7(3)(a) unfairly discriminates against people married according to a system of complete separation of property on the ground of the date of their marriage. I share the view expressed by Sinclair:⁴²

'The discrimination takes the form of denying to those people a remedy to relieve injustice that is granted to persons married with an identical system, but earlier.'

And:

'For couples who live on their salaries and do not have the opportunity to amass property the matrimonial property system that governs their marriage turns out to be the panacea for the poverty that will be experienced most acutely by the divorced women [or any economically disadvantaged party].

⁴² Sinclair, note 28 above, 552.

For the poor, matrimonial property law is as important as an elaborate estate planning exercise. But for many thousands of people the matrimonial home and a share in pension and other retirement benefits accumulated during marriage make the difference between forced reliance on exiguous welfare and some form of financial security. To these people the sharing of property acquired by joint efforts is crucial. To be denied an equitable remedy on the ground of the date of one's marriage is unacceptable'.

[62] The *amicus curiae* drew attention to several objections to declaring the cut-off date in s 7(3) unconstitutional, and I find it apposite to briefly deal with these since I have considered the *amicus*'s submissions:

i. *Pacta sunt servanda*: The Constitutional Court has already pronounced on the applicability of the Constitution and the *pacta sunt servanda* argument in *Van der Merwe*, as indicated above. The fact that parties deliberately chose to exclude the accrual system after 1 November 1984 is one of the myriads of factors that a court will take into consideration when crafting an order that is just and equitable in appropriate cases where the jurisdictional requirements for an application in terms of s 7(3)(a) are met.

ii. Cognisance must be taken thereof that the legislature has already deemed it necessary to provide courts with the discretion to intervene and, in appropriate circumstances, craft orders that will bring about consequences that differ radically from the consequences that generally flow from a chosen matrimonial property regime, thereby overriding *pacta sunt servanda*:

a. When a decree of divorce is granted, a court, under s 9(1) of the Divorce Act, may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part. The factors that a court may consider in exercising its discretion under s 9 are limited. The section does not empower the court to award a portion of an errant party's separate estate to the other party. Forfeiture is also limited to the benefits of the marriage

and merely entails that that the spouse loses the claim he or she has to financial benefits generated by the other spouse;⁴³

b. Under s 8 of the MPA a court may grant the immediate division of the accrual *stante matrimonio* and under s 8(2) order that the accrual system applicable to the marriage be replaced by a matrimonial property system in terms of which accrual sharing, as well as community of property and community of profit and loss, are excluded;

c. Under s 20 of the MPA a court may, on application, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem just, and under s 20(2) order that the community of property be replaced by another matrimonial property system;

The power of the court under ss 8(2) and 20(2) is drastic and will, other than an order granted in terms of s 7(3)(a), result in substituting or replacing one matrimonial property regime for another.

iii. The *amicus* submitted that the existence of a maintenance claim negates the necessity of a remedy akin to what is currently afforded by s 7(3)(a) of the MPA. I disagree. The difference between the nature of a maintenance claim and an order granted in terms of s 7(3)(a) renders this submission nugatory. A party receiving maintenance remains dependant on the other. It is a well-known fact that post-divorce maintenance as a mechanism to alleviate the plight of women who are economically reliant on their spouses is often inadequate due to default.⁴⁴ It is unjustifiable that a party who contributed to the other's maintenance and estate growth during the subsistence of the marriage must rely on a remedy that signifies their continued dependence on the other. Over the years the understanding of a marital relationship shifted from being regarded as a protector-and-dependant relationship, to that of a partnership between equals. Section 7(3)(a), *inter alia*, recognises the economic value of services provided in the

⁴³. *Rousalis* 1980 (3) SA 446 (C) at 450D-E. See also Heaton and Kruger note 19 above 135-137.

⁴⁴ Sinclair, note 28, *supra*, 553

domestic sphere. Everyone has an inherent dignity and the right to have their dignity respected and protected. An economically disadvantaged party's dignity is implicitly impaired when that party's contribution made on the basis of the marriage is not recognised and he or she is left to claim maintenance alone.

iv. Whenever a court is provided with a discretion, uncertainty in the outcome of proceedings prevails. Neels⁴⁵ explains that the tension between legal certainty on the one hand and reasonableness and fairness in the particular circumstances of each case, is not novel. The overriding certainty that does prevail in light of s 7(3)(a) is that the court is bound to grant an order that is just and equitable. Undue harshness can flow from any unalterable matrimonial property regime due to the unique factual context within which spouses find themselves.⁴⁶ The legislature provided courts with a discretion to change the matrimonial property regime in relation to marriages in community of property and marriages out of community of property with the inclusion of the accrual system. The same discretion is not afforded in relation to marriages out of community of property with the exclusion of the accrual system. Any uncertainty regarding the outcome of a s7(3)(a) application is preferable to 'irremediable harshness' that might flow from circumstances where a spouse in a marriage out of community of property excluding the accrual system contributes directly or indirectly to his or her spouse's accumulation of wealth on the basis of the marriage, and is deprived of the benefits of his or her contribution, without being compensated therefor, on divorce. Given the Constitutional Court's recent decision in *Gumede, supra*,⁴⁷ which extended the judicial discretion to redistribute assets to spouses in all customary marriages, it can safely be said that legal uncertainty about the financial outcome of divorce does not carry excessive weight and certainty does not trump considerations of justice and equality.⁴⁸

⁴⁵ Neels, J. L. Substantiewe geregtigheid, herverdeling en begunstiging in die internasionale familiereg. 2001 4 TSAR 692- 709, 692.

⁴⁶ Sinclair, note 28, *supra*, 551 fn 189.

⁴⁷ *Gumede*, note 6 above.

⁴⁸ See also Heaton and Kruger, note 19 above, 142.

v. The cut-off date in s 7(3)(a) is in itself the cause of legal uncertainty and extensive legal costs. Economically disadvantaged spouses need to rely on ingenious manoeuvres by their legal representatives in an attempt to claim a share of the benefits acquired by their spouses due to their contributions made on the basis of the marriage when the marriage's future was rosy. If both spouses are aware that direct and indirect contributions by them to the other's maintenance and estate growth during the subsistence of the marriage may be accounted for at the dissolution of the marriage on divorce, there are no innate uncertainties that can prejudice any party. Such knowledge will provide a fair basis for the settlement of proprietary issues on divorce. A declaration of constitutional invalidity that will result in the amendment of the existing position by striking out the cut-off date contained in s 7(3)(a), will not in itself, leave legal representatives who provided advice relating to the consequences of concluding an antenuptial agreement liable to client's who might be confronted with s 7(3)(a) applications if their marriages were concluded after 1 November 1984.

vi. The *amicus* raised the issue that creditors of the advantaged spouse may be affected when a court grants an order in terms of s 7(3)(a). The position of creditors is not a novel issue as creditors' rights can theoretically be affected by s 7(3)(a) orders as the section currently reads, and by orders granted in terms of s 9, s 8 and 20 of the MPA. No novel position will be created if the application of s 7(3)(a) is extended to all marriages out of community of property with the exclusion of the accrual system.

vii. The *amicus* submits that other legal systems that provide for a judicial discretion regarding the division of assets experience problems due to a lack of predictability, consistency, and fairness. I did not undertake a comprehensive comparative study but mainly relied on academic publications when considering this submission. The article 'The financial consequences of divorce: s 7(3) of the Divorce Act 1979 – a comparative study' by Nicholas DC Dillon, published in XIX CILSA 1986, is instructive. Dillon states the following:

'In England the right of freedom to contract between spouses exists and the parties may order their property rights as they think fit. Nonetheless the court has a discretion to vary or even to extinguish any marital contract.

In New Zealand a similar view is taken and the parties are free to make marital contracts but the courts retain a discretion not to give effect to contracts that they consider unjust.⁴⁹

In Canada each province has its own rules in regard to the validity and effect of marriage contracts. All the provinces allow marriage contracts but each province provides varying degrees of restraint upon the parties.'

Dillon concludes that while most jurisdictions allow parties to conclude antenuptial contracts, most states complement this freedom of contract by certain control mechanisms, some by administrative requirements such as registration and/ or court approval, or by a judicial discretion that permits the court to vary or discard the contract. He held that in introducing the judicial discretion contained in s 7(3), the legislature is following developments which have taken place in many other jurisdictions:

'In something of a universal attempt to achieve an equitable distribution of the assets of the parties to a marital partnership on its dissolution, many legislatures have introduced a form of judicial discretion to complement their usual matrimonial proprietary regime(s).'

Prenuptial agreements are known in Australia as 'binding financial agreements'. It became enforceable with the enactment of the Family Law Amendment Act 2000. Part VIIIA of the Family Law Act sets forth particular provisions concerning the oversight to be given to such agreements by family solicitors. In *Chaffin v Chaffin*⁵⁰ the an agreement that was entered into ten days before the wedding was set aside when challenged. The court considered that the husband was 10 years older than the wife, in a

⁴⁹ From 2001 agreements cannot be set aside unless they cause 'serious injustices' - <https://www.international-divorce.com/prenuptial-agreements-in-new-zealand>.

⁵⁰ [2019] FamCA 260.

significantly superior financial position to the wife while the wife was financially dependent on the husband, and pregnant, when the agreement was signed. The court held that the wife was at a 'special disadvantage' due to a combination of the mentioned factors and the husband acted unconscientiously when he took advantage of thereof. The difference in the 'bargaining power' between the parties was one of the factors the court considered when setting aside the agreement.

As far as the position in Canada is concerned, an analyses of the applicable legislation indicates that a Canadian court may modify or even ignore a prenuptial agreement in some circumstances.⁵¹ Most Canadian provinces provide for judicial oversight of prenuptial agreements but the standard of judicial review varies from province to province.⁵²

It is evident that other legal jurisdictions recognised the necessity to blend predictability and certainty with fairness and justice based on the unique facts of each individual matter at hand.

The way forward

[63] Mrs. G[....]'s counsel submits that section 172(1)(a) of the Constitution enjoins this Court to declare a law that is inconsistent with the Constitution invalid to the extent of its inconsistency. The applicant seeks an order to the effect that s 7(3)(a) of the Divorce Act is unconstitutional and invalid to the extent that it limits the operation of s 7(3)(a) to marriages out of community of property 'entered into before the commencement of the Matrimonial Property Act, 1984.' Counsel contends that it is critical that any order made by the court provides for the order to apply to the applicant's divorce action as well as other similarly placed spouses where divorce proceedings are still pending. It is trite that parties must be granted effective relief.⁵³

[64] The state respondents' representative stated that if the court was to issue an order with full retrospective force, considerable uncertainty would be created in

⁵¹ <https://www.international-divorce.com/prenuptial-agreements-in-canada>

⁵² See also, amongst others, Ontario's Family Law Act, R.S.O. 1990, Ch.F.3., Sec. 56(4); Nova Scotia's Matrimonial Property Act, R.N.S. 1989, Ch. 275, Sec. 29; Saskatchewan's Family Property Act, S.S. 1997, Ch. F-6.3, Sec. 24(2); New Brunswick's Marital Property Act, S.N.B. 1980, Ch. M- 11, Sec.41; British Columbia's Family Relations Act, R.S.B.C. 1996, Ch. 128, Sec. 65(1).

respect of divorce orders that have already been granted. In reply hereto, Mrs. G[...]'s counsel submitted that due to the broad discretionary power afforded by s 172(1)(b)(i) of the Constitution the court can limit the retrospectivity of a declaration of invalidity provided that it is just and equitable to do so. Counsel submitted that it is just and equitable in these circumstances to limit the retrospectivity of the declaration of invalidity, so that it does not affect divorce proceedings that have already been finalised.

[65] Mrs. G[...]'s counsel, in my view correctly, submits that s 7(3)(a) allows a court to interfere in a private relationship to avoid injustice. It is axiomatic that no injustice could be done if that power was also available to courts relating to marriages out of community of property with the exclusion of the accrual system. The court's s 7(3)- discretion is wide in the sense that it is to be exercised in a manner that will bring about a just and equitable outcome in the factual context concerned, but the power to exercise the discretion is circumscribed and limited to the two scenarios prescribed in s 7(4) to wit - the party in whose favour the order is granted must have contributed directly or indirectly to the (i) maintenance, or (ii) increase of the estate of the other party, during the subsistence of the marriage. The laudable aim of the section has been dealt with above. The unfair discrimination that is caused by the exclusionary time-bar in s 7(3)(a) can be corrected by removing the time-bar according to the Constitutional Court's guidance in *Coetzee v Government of the Republic of South Africa*,⁵⁴ where the court held:

'[I]f the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute.'

[66] Mrs. G[...]'s counsel submits that the severance of the time-bar from the remainder of s 7(3)(a) will not cause any difficulty to the manner in which s 7 of the Divorce Act operates, and it would provide an appropriate remedy. An order to this effect by this court will not prevent the legislature from amending the Divorce Act if it

⁵³ *Fose v Minister of Safety and Security* 1997 (3) SA 788 (CC) at para [69].

⁵⁴ *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (4) SA 631 (CC) at para [16].

is inclined to address the various problems associated with the said Act, including the constitutional violations demonstrated in this application.

[67] In the alternative, the applicant seeks an order to the effect that the court suspends the constitutional invalidity of the time bar contained in s 7(3)(a) to afford the legislature sufficient time to amend s 7 of the Divorce Act to remedy its unconstitutional defects demonstrated in this application, coupled with the suspension order grant an interim remedy to cure the constitutional defects contained in s 7(3)(a) of the Divorce Act during the period of suspension. Counsel submits that a failure to grant such an interim remedy would unnecessarily prolong divorce proceedings that are dependent on the curing of the constitutional defects in s 7(3)(a) of the Divorce Act and would inhibit spouses from being able to escape abusive marriages. Pending the remedying by Parliament of the constitutional defects in the impugned section, the court is requested to issue an interim order that s 7(3)(a) of the Divorce Act is read without the time bar, and that Parliament is ordered to remedy the constitutional defects within 18 months from the date of the order, failing which the alternative relief shall continue to apply.

[68] Counsel for the Minister submits that the Minister saw no reason why the court's discretion to grant redistribution in the circumstances provided for in s 7(3) of the Divorce Act cannot be extended to individuals in the position of the applicant and other individuals in her class. After considering all parties' submissions in this regard, I am of the view that it is just to follow the precedent set in *Gumede*. No reason exists that justifies a suspension of the declaration of invalidity. The striking down of the impugned portion of s 7(3)(a), namely the time-bar, will not leave a *lacuna* that renders the suspension of the order appropriate.⁵⁵ As in *Gumede* it is necessary to emphasise that nothing in the order this court is intent on making, will affect marriages out of community of property with the exclusion of the accrual system concluded after 1 November 1984, that have been terminated either by death or by divorce before the date of this order.

Costs

⁵⁵ *J J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC) at para [21].

[69] The first and third respondents abided the court's decision from the onset, and there should not be an order of costs against them. Mrs. G[....]'s counsel seeks a costs order against the Minister. The relief claimed by the applicant in her notice of motion, as far as costs are concerned, encompasses the following:

'The costs of the applicant, including the costs of two counsel, shall be paid jointly and severally by any respondent opposing the application.'

[70] As previously stated, the Minister did not in the final instance oppose the application, an approach that Mrs. G[....]'s counsel submits to be laudable. After initially filing a notice of intention to oppose, the Minister withdrew the opposition. It is difficult to understand why Mrs. G[....] in these circumstances seeks a costs order against the Minister where she indicated in the notice of motion that a costs order is only sought against respondents that oppose the application.

ORDER

In the result, the following order is granted:

1. Section 7(3)(a) of the Divorce Act, 70 of 1979, is declared 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;

2. The inclusion of the words '*entered into before the commencement of the Matrimonial Property Act, 1984*' in section 7(3)(a) of the Divorce Act, 70 of 1979, is declared inconsistent with the Constitution and invalid. These words are notionally severed from section 7(3)(a) of the Divorce Act, 70 of 1979, and section 7(3)(a) of the Divorce Act, 70 of 1979, is to be read as though the words '*entered into before the commencement of the Matrimonial Property Act, 1984*' do not appear in the section.

3. In terms of section 172(1)(b) of the Constitution, the orders in paragraphs (1) and (2) of this order shall not affect the legal consequences

of any act done or omission or fact existing in relation to a marriage out of community of property with the exclusion of the accrual system concluded after 1 November 1984, before this order was made;

4. The aforementioned orders, in so far as they declare provisions of an Act of Parliament invalid, are referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution, 1996, and the Registrar of this Court is directed to comply with Rule 16(1) of the Rules of the Constitutional Court in this regard.

5. Each party is to pay its own costs.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Adv. S. Scott
Instructed by:	CLARKS ATTORNEYS
For the second respondent:	Adv. Mphaga SC
With:	Adv. MD Sekwakweng
Instructed by:	The State Attorney
For the <i>amicus curiae</i> :	Adv. LC Haupt SC
With:	Adv. S Mentz,
And with:	Adv. B Stadler
And with:	Adv. B Nchabeleng
Date of the hearing:	11 March 2022
Date of judgment:	11 May 2022