



## **ANTENUPTIAL AGREEMENT EXCLUDING THE ACCRUAL SYSTEM - UNCONSTITUTIONAL SECTION OF DIVORCE ACT**

### **1. Introduction**

The Pretoria High Court recently delivered a judgment on the Constitutionality of section 7(3)(a) of the *Divorce Act* 70 of 1979.<sup>1</sup> The *Matrimonial Property Act* 88 of 1984, which only commenced in November 1984, makes provision for three different marriage regimes which are namely, 1) marriage in a community of property, 2) marriage out of a community of property including the accrual system and 3) marriage out of a community of property excluding the accrual system.<sup>2</sup> The judgement focused on the marriage regime of marriage out of community of property excluding the accrual system, more specifically with regards to spouses married according to this system before November 1984.<sup>3</sup>

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<sup>1</sup> *Greyling v Minister of Home Affairs and others* (unreported) case number: 40023/21 of 11 May 2022.

<sup>2</sup> Section 3 and 14 of the *Matrimonial Property Act* 88 of 1984.

<sup>3</sup> *Greyling v Minister of Home Affairs and others* (unreported) case number: 40023/21 of 11 May 2022 par 1.

## 2. Application

The Applicant argued that section 7(3)(a) of the *Divorce Act* is unconstitutional on the grounds that when getting divorced it barred those parties married according to this property regime from benefiting from what they contributed to the marriage.<sup>4</sup> This section reads as follows:

"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."<sup>5</sup>

The court declared this section as inconsistent with section 9(3) of the *Constitution of the Republic of South Africa, 1996*, in that this section limits parties married in terms of the above-mentioned regime.<sup>6</sup> The discrimination is caused by the time-bar, referring to the wording of "*before the commencement of the Matrimonial Property Act*" - that is

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<sup>4</sup> *Greyling v Minister of Home Affairs and others* (unreported) case number: 40023/21 of 11 May 2022 par 6.

<sup>5</sup> Section 7(3)(a) of the *Divorce Act* 70 of 1979.

<sup>6</sup> *Greyling v Minister of Home Affairs and others* (unreported) case number: 40023/21 of 11 May 2022 par 6 and 63.

read in this section. The court concluded that the discrimination can be corrected by eliminating the "time-bar".<sup>7</sup>

### **3. Conclusion**

The effect hereof means that any person who entered into an antenuptial contract without accrual, after the commencement of the Act may now ask a court for a redistribution of assets, which will then override the content of their signed antenuptial contract. This will however only be done if the court deems it appropriate and just.<sup>8</sup>

When determining the re-distribution of assets, the court would have to consider many factors, including, firstly, any direct or indirect contributions made by the party concerned, to the maintenance or increase of the estate of the other party, secondly, the existing means and obligations of the parties, thirdly, any donations made by one party to the other party during the subsistence of the marriage, and lastly, any other factor which should in the opinion of the court be taken into account.<sup>9</sup> Parties who were previously limited, especially those who have been previously disadvantaged, are now free to apply for re-distribution due to this landmark case.

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<sup>7</sup> *Greyling v Minister of Home Affairs and others* (unreported) case number: 40023/21 of 11 May 2022 par 66.

<sup>8</sup> *Greyling v Minister of Home Affairs and others* (unreported) case number: 40023/21 of 11 May 2022 para 64.

<sup>9</sup> *Greyling v Minister of Home Affairs and others* (unreported) case number: 40023/21 of 11 May 2022 para 65.

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