

DISSERTATION

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The constitutionality of section 7(3)
of the
Divorce Act 70 of 1979, with specific
reference to the date of conclusion of
the marriage and the matrimonial
property system as limitations to the
application of section 7(3).

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A. INTRODUCTION

1. Background

Amidst an era during which women in particular were economically discriminated against and subjected to the oft draconian effects of the marital powers of their husbands, they usually got the short end of the stick when their marriages were terminated. The legislature made an attempt to come to the aide of the hardship that the then marriage regime flogged upon the economically weaker spouse.

The legislature toiled to wedge statutory authority for judicial intervention for what otherwise may have been left to spouses to be agreed upon; it sought to achieve equality and save the feebler partner from destitution post-divorce by introducing section 7(3) of the Divorce Act¹. It undoubtedly recognised the unequal bargaining powers between spouses when negotiating their marital property regime. This legislative intervention has been hailed, in the context of its time, as a radical reform².

However, this reform was enacted at least a decade prior to the dawn of the Interim Constitution³. The Bill of Rights has, as legal supremacy, subjected all law to this new Constitutional dispensation. By virtue of the qualifying prerequisites of section 7(3) of the Divorce Act⁴, especially if weighed against the equality principle in the Constitution, this provision has been exposed as segregating a secluded group of marriages to the exclusion and detriment of others who may equally be in need of analogous fortification.

2. Purpose

In this paper, the constitutionality of section 7(3) of the Divorce Act⁵ will be considered, specifically with reference to the date of the conclusion of the marriage and the matrimonial property system as limitations to the application thereof. Contractual freedom will also be deliberated. The right to equality, as a

¹ 70 of 1979

² Heaton 2005 SAJHR 547

³ Act 200 of 1993

⁴ Act 70 of 1979

⁵ Act 70 of 1979

specific constitutional right, and the imbalances brought about by the differentiation of this provision will be considered as well.

3. Methodology

The following literature will be consulted:

- (i) The Bill of Rights, as the omnipotent fulcrum of South African Law, will of necessity be the focal, yet underlying, thread throughout the discussion;
- (ii) section 7(3) of the Divorce Act⁶, as read with subsections 7 (4), (5) and (6) thereof;
- (iii) decided cases from the various High Courts; and
- (iv) journals and academic commentaries on this point.

4. Proposed structure

The discussion will commence with a brief overview of the marital property regimes, followed by the content and the context⁷ of section 7(3) of the Divorce Act⁸. A consideration of the qualifying prerequisites for the application of this subsection including the limited application thereof with specific reference to the date of the conclusion of the marriage as well as the matrimonial property regime will follow.

A reflection on the constitutionality of the provision under consideration will follow, which will entail the following:

- It will firstly be determined whether there is differentiation between marital regimes and, if so, whether it constitutes a breach of section 9(1) of the Constitution. It will be shown that, although there is differentiation, it is justifiable having regard to the principle of contractual freedom. Hence section 9(1) of the Constitution is not breached.
- The differentiation based on the date of commencement of marriages will be considered to determine if it constitutes unfair discrimination in terms of section 9(3) of the Constitution. With reference to the *Gumede*⁹ case, it will be demonstrated that, although there is no breach of the grounds listed in section

⁶ Act 70 of 1979.

⁷ I.e. a brief description of the history leading up to the enactment of section 7(3) of the Divorce Act 70 of 1979.

⁸ Act 70 of 1979.

⁹ *Gumede v President of the Republic of South Africa and Others* 2009 3 SA 152 (CC).

9(3) of the Constitution, section 7(3) of the Divorce Act¹⁰ nonetheless constitutes unfair discrimination which is not justifiable in terms of section 36 of the Constitution.

➤ In conclusion, a proposal for broader judicial discretion would be advocated. The court should be empowered to deviate from the ordinary consequences of the matrimonial property system, if equity and justice demand this. This proposal will include the argument that, in the event of such broader judicial intervention being introduced, the necessity for forfeiture orders will dissipate.

B. DISCUSSION PAPER

1. Brief history of patrimonial regimes of marriages

The concept of a marriage has been known to civilisations from the creation of mankind in biblical times¹¹. Womanhood has, for millennia, been a martyrdom, at least from a patrimonial viewpoint, where women have entered into a marriage¹². With the formation of civilisations and consequent development of jurisprudence varying attempts, mostly inept, have been made to formalise, explain and categorise the concept of marriages.

In early Roman law times, a woman obtained the status of her husband's daughter upon entering into marriage.¹³ All the property she acquired became the property of her husband.¹⁴ Later, as the Roman law was advanced, a wife retained her capacity to act and to litigate.¹⁵ The man, however, retained marital

¹⁰ Act 70 of 1979.

¹¹ Genesis 2:24.

¹² Deuteronomy 24:1; Genesis 3:16 (King James Version); Genesis 4:19, Number 27:8-11.

¹³ Cronjé & Heaton, *South African Family Law*, 2nd Edition 4.

¹⁴ Cronjé & Heaton, *South African Family Law*, 2nd Edition 4.

¹⁵ Cronjé & Heaton, *South African Family Law*, 2nd Edition 4.

power.¹⁶ Under Roman and Roman–Dutch Law, the marriage created a community of property, unless specifically excluded by antenuptial agreement.¹⁷ Since 1875, the registration of an antenuptial contract was set as a requirement for it to be enforceable against creditors of the spouses in South African Law.¹⁸ In its original form, a marriage in terms of indigenous law did not know the concepts of community of property.¹⁹ From 1 September 1927, a civil marriage concluded between Blacks was regarded as a marriage out of community of property, unless the intended spouses declared, at least a month prior to the conclusion of the marriage before a magistrate, that they intended for the marriage to be in community of property.²⁰ This provision was deleted effective from 2 December 1988²¹ and hence forth a civil marriage between Blacks was treated on common law principles.²²

Significant and progressive inroads were made in eroding the supremacy of the traditionally patriarchal marital regimes with the introduction of the Matrimonial Property Act²³ which came into operation on 1 November 1984. The accrual system was introduced, subjecting marriages out of community of property concluded on or after 1 November 1984 automatically to the accrual system, unless the accrual system was expressly excluded by antenuptial contract.²⁴ A further momentous provision was the amendment of section 7 of the Divorce Act,²⁵ ²⁶ which introduced a claim for an order for the redistribution of assets. This provision has, however, limited application, *inter alia* in that it only applies to marriages out of community of property with the exclusion of profit and loss

¹⁶ Cronjé & Heaton, *South African Family Law*, 2nd Edition 4.

¹⁷ *Edelstein v Edelstein NO and Others* 1952 3 SA 1 (A) 10.

¹⁸ Cronjé & Heaton, *South African Family Law*, 2nd Edition at 4.

¹⁹ *Gumede v President of the Republic of South Africa and Others* 2009 3 SA 152 paragraph [43].

²⁰ Section 22(6) of the Black Administration Act 38 of 1927.

²¹ Section 1(e) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

²² Van Niekerk, *A Practical Guide to Patrimonial Litigation in Divorce Actions* 1-2.

²³ 88 of 1984.

²⁴ Section 2 of Matrimonial Property Act 88 of 1984.

²⁵ 70 of 1979.

²⁶ This amendment was effected by section 36 of The Matrimonial Property Act 88 of 1984.

and accrual which were concluded prior to 1 November 1984²⁷ for whites and prior to 2 December 1988 for blacks.

Only as late as 1 November 1984 was the marital power of a husband abolished.²⁸ Several patrimonial benefits for a spouse, who traditionally was in the position of the wife of a marriage, was introduced, e.g. the introduction of the accrual system, the sharing of pension interest and the power of a court to order a redistribution of assets.

2. Overview of section 7(3) – (6) of the Divorce Act, 1979²⁹

2.1.1 Provisions of Section 7(3)

Section 7(3) of the Divorce Act³⁰ provides as follows:

“(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; or
- (b) Entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

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

²⁷ Section 7(3)(a) and (b) of the Divorce Act 70 of 1979.

²⁸ Section 11 of the Matrimonial Property Act 88 of 1984.

²⁹ The particular difficulties of each part of this subsection, insofar as it may be relevant to the present discussion, will be delved into below.

³⁰ Hereinafter referred to as section 7(3).

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.”

Section 7(3) has limited application. It is important to fully comprehend the realm of this subsection to properly consider its constitutionality.

The intention of the legislature was 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 an antenuptial agreement entered into between the parties. The aim of this provision was to redress the inequities that naturally flow from a marriage out of community of property.³¹

Its enactment was

“...conceived out of a desire of the legislature to redress economic inequalities between spouses, to take cognizance of changed socio-economic developments as well as the changed status of married women – in short to do justice between husband and wife. The thinking was reformative, equitable and laudable...”³²

The Appellate Division³³, as it then was, described the nature and purpose of section 7(3) as follows:

“Subsection (3) introduced an entirely novel concept into this branch of our law: the power of a Court under certain circumstances to order the transfer of assets of the one spouse to the other. An order in terms of subsection (3) may conveniently be referred to as a redistribution order. The creation of a power enabling a Court to make a redistribution order was obviously a reforming and remedial measure...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

³¹ Robinson & Horsten, 2010 *Speculum Juris* 98.

³² Costa, 1990 *De Rebus*, December 916.

³³ *Beaumont v Beaumont* 1987 1 SA 967 (A) 987H-I.

spouse upon divorce to claim an adjustment of a discrepancy between the respective assets of the spouses which is incommensurate with their respective contributions during the substance of the marriage to the maintenance or increase of the estate of the one spouse or the other.”

Various academics have, however, been vociferous in criticising not only the manner in which section 7(3) was framed, but also its interpretation and application by the courts.³⁴ A drastic reform has been called for.

2.1.2 The jurisdictional requirements of section 7(3)

- (a) It can only be applied when the court grants a decree of divorce. The present continuous tense employed by the legislature makes this plain.³⁵ It can neither be resorted to during the subsistence of the marriage nor when the marriage is dissolved by the death of a spouse. The position of an extant marriage as well as that of a surviving spouse does not fall within the ambit of the present discussion, hence a consideration and comparison of those difficulties, albeit also revealing substantial inequities, must be left for another day. This discussion focuses on the constitutionality of section 7(3) of the Divorce Act³⁶; an Act which seeks to regulate the event of divorce and nothing else.
- (b) It only applies to marriages that were out of community of property.
- (c) Two further sets of limitations or conditions, each with its own further limitations, set in the alternative, apply:

³⁴ See, for example, Zaal, 1986 *TSAR* 57-69; *Gumede v President of the Republic of South Africa and Others* 2009 3 SA 152 paragraph [43]; Heaton, 2005 *SAJHR* 547-574; Van Schalkwyk, 2006 *De Jure* 632.

³⁵ *Beaumont v Beaumont* 1987 1 SA 967 (A) 988D-E and *Kritzinger v Kritzinger* 1989 1 SA 67 (A) 78H-I.

³⁶ Act 70 of 1979

- (1) The marriage must have been entered into prior to the commencement of the Matrimonial Property Act³⁷, i.e. prior to 1 November 1984.³⁸ Further, the marriage must have been entered into in terms of an antenuptial contract which excluded community of property, community of profit and loss and accrual sharing, in any form. The antenuptial contract needed not to have been formally registered or even be in writing for it to be effective as between parties to the marriage.³⁹ A verbal agreement to this end suffices.^{40 41}
- (2) The alternative condition⁴² is that the marriage must have been entered into before the commencement of the Marriage and Matrimonial Property Amendment Act⁴³, i.e. 2 December 1988⁴⁴ in terms of section 22(6) of the Black Administration Act, as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act. This condition relates to marriages between blacks. Prior to its amendment, section 22(6) of the Black Administration Act⁴⁵ provided as follows:

“A marriage between Blacks, contracted after the commencement of this Act, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other

³⁷ 88 of 1984.

³⁸ Proclamation R158 published in Government Gazette 9413 dated 7 September 1984.

³⁹ *Ex parte Spinazze* 1985 3 SA 650 (A) 658 A-B. For such antenuptial contract to be enforceable as against third parties, it remains to be duly noted under the Deeds Registries Act, 1937. See *Ex parte Spinazze* 1985 3 SA 650 (A) 658D.

⁴⁰ *Ex parte Spinazze* 1985 3 SA 650 (A) 658C.

⁴¹ This first set of conditions is set in section 7(3)(a) of the Divorce Act 70 of 1979.

⁴² Section 7(3)(b) of the Divorce Act 70 of 1979.

⁴³ 3 of 1988.

⁴⁴ GG 11595 Notice No. 203 dated 25 November 1988.

⁴⁵ 38 of 1927.

than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, Commissioner or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage except as regards any land in a location held under quitrent tenure such land shall be excluded from such community.”

Thus, prior to its amendment, section 22(6) determined that a marriage between blacks was, save for when they indicated a contrary intention at least a month prior to the marriage, out of community of property. Due to this default position with regard to a marriage between blacks, it was not necessary for the legislature to make further dictates, as was done under section 7(3)(a), since the default position between non-blacks were quite the opposite.

- (d) A further prerequisite for the operation of section 7(3) is that it must be applied for. Logically this application will be brought simultaneously or during the proceedings in which a decree of divorce is sought.
- (e) Lastly, there may not be any agreement between the parties regarding the division of their assets.

2.1.3 Sections 7 (4), (5) and (6)

Whether subsection (a) or (b) of section 7(3) applies, the court's powers are specifically subjected to sections 7(4), 7(5) and 7(6). These subsections provide as follows:

- “(4) An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services or the saving of expenses which would otherwise have been incurred, or in any other manner.
- (5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3), the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account–
- (a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3)(b) of this section may have in terms of section 22(7) of the Black Administration Act, 1927 (Act No. 38 of 1927);
 - (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;
 - (c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and
 - (d) any other factor which should in the opinion of the court be taken into account.
- (6) A court granting an order under subsection (3) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.”

These subsections, as can be seen, set further limitations or conditions on the application of section 7(3).

Under subsection (4), the court must be satisfied that it would be just and equitable by reason of the fact that the party in whose favour the order is granted has contributed, either directly or indirectly, to the maintenance or increase of the estate of the other party during the subsistence of the marriage. Where such a contribution is lacking, or, where such a contribution is present but an order favouring the applicant will not be equitable in relation to the contribution, an order in terms of section 7(3) cannot follow.

Subsection (5) does not set any limitations, but serves as a guide in relation to factors that a court may consider in quantifying the extent of an order contemplated in terms of section 7(3).

Subsection (6) appears to envisage a situation where, if the order in terms of section 7(3) is made, the party against whom the order is made may be given respite in executing compliance with the order.

3. Test for Constitutionality

The Bill of Rights finds direct application to the issues of matrimonial property law,⁴⁶ and also in particular the question of the constitutionality of section 7(3) of the Divorce Act.^{47 48}

It is contended that the only possible constitutional infringement that section 7(3) may bear, is a contravention of the right to equality. The right to equality is entrenched in section 9 of the Constitution.⁴⁹ It is one of the foundational

⁴⁶ *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC) 255C-D; *Gumede v President of the Republic of South Africa and Others* 2009 3 SA 152 (CC) 168E-F.

⁴⁷ Act 70 of 1979.

⁴⁸ Robinson & Horsten, 2010 *Speculum Juris*, Part 1 109.

⁴⁹ Constitution of the Republic of South Africa Act 108 of 1996. Section 9 of the Constitution reads as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination must be taken."

principles of the Constitution.⁵⁰ The right to equality is set in the Bill of Rights which is described as the cornerstone of democracy that affirms the democratic values of human dignity, equality and freedom.⁵¹

South Africa's past has been characterised by momentous inequalities which were procured at the hands of a small minority desperate to cling to the power of rule which they did not deserve. Under this draconian leadership, unequal power struggles permeated into just about all spheres of society resulting in even the smallest and most basic unit of society, the family, becoming enslaved under patriarchy, which rippled out to a concomitant economic muscling out of the vulnerable women. The systemic placement of women in the homestead and denying them the same easy road to employment as has been conferred upon men, have put women at a distinct disadvantage. Thus societal norms have, in general, not just diminished but mostly depleted women's fiscal prowess. It was only men who were permitted to advance their estates and, when separation befell a marriage, a woman's prospects of chiselling out a piece of the cake, commenced already depleted.

Robinson & Horsten⁵² describe how, not only in South Africa, but also internationally, in the majority of cases women still take on the lion's share of child care activities and responsibilities, choose jobs that are more tolerant of family responsibilities and thus have, in general, decreased financial earning capacity due to these circumstances.

(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.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

⁵⁰ Section 1(a) of the Constitution of the Republic of South Africa, 1996.

⁵¹ Section 7(1) of the Constitution of the Republic of South Africa, 1996.

⁵² 2010 *Speculum Juris*, Part 1 110-1.

The meaning of equality in the present context must be understood against the history outlined above.⁵³ Equality, as a right, has been described as the most difficult of rights.⁵⁴ Couched in its prominence of South Africa's highest ethos, the Constitution, it would be overly simplistic to accord the dictionary meaning of the word 'equality' any significance. It provides nonetheless, albeit naïvely, a sound starting point. It defines 'equality' as 'the equal treatment of people irrespective of social or cultural differences'⁵⁵. In our complex and diverse society, given its inegalitarian past, what may appear to be equal treatment of people, may in fact be a pervasive invasion of a right to equality.

Former Chief Justice Langa, in an address at the University of Stellenbosch in 2006, identified the legal idea of substantive equality as pivotal to a reformation of society. He championed the aspirational value of substantive equality: a social and economic revolution in which all enjoy equal access to the resources and amenities of life and are able to develop to their full human potential⁵⁶.

But what is the legal idea of substantive equality? Formal equality is premised on the idea that inequality is irrational and arbitrary. It presumes that all persons are equal and that any differential treatment, based on arbitrary grounds, is intolerable. It ignores social and economic differences between individuals and groups. Formal equality, thus defined, might be applied fruitfully where there have not been inequalities in the past. But applied in the South African context, it will simply disguise the reality of existing inequalities and perpetuate its practices. A legal commitment to substantive equality entails attention to context; it must be assessed in relation to the lived inequalities. Substantive equality recognises that it is not the fact of difference that is the problem, but rather the harm that may flow from this. The focus of the legal enquiry is

⁵³ Woolman et al, *Constitutional Law of South Africa*, 2nd Edition, Volume 3 35-3

⁵⁴ McLachlin, 2000 (14) *The Supreme Court Law Review* 17.

⁵⁵ www.dictionary.com

⁵⁶ P Langa *Transformative constitutionalism* (2006) 3 Stellenbosch Law Review 351.

therefore on the impact of the act and on the nature of the harm that the act creates⁵⁷.

In the very first case which called upon the Constitutional Court to decide a matter based on equality,⁵⁸ the foundation was laid in these words:

“[40] As in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in chapter 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.

[41] Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting section 8, the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and may continue to cause, considerable harm. For this reason, section 8(2)

⁵⁷ P Langa *Transformative constitutionalism* (2006) 3 Stellenbosch Law Review 351.

⁵⁸ *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC). This case was decided under the Interim Constitution. The reference in the quoted passage to section 8 was the section for equality under the Interim Constitution. In the final Constitution, section 9 sets the equality provision.

lists a wide, and not exhaustive, list of prohibited grounds of discrimination.

[42] Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of section 8 and, in particular, subsections (2), (3) and (4).

[43] Sections 44 (1) and (2) of the Act treat married women and married men differently. This difference in treatment disadvantages married women and not married men. The discrimination in sections 44(1) and (2) is therefore based on two grounds: sex and marital status. Section 8(2) does not require that the discrimination be based on one ground only; it specifically states that it may be based on 'one or more' grounds. Nor is it a difficulty for the applicant that section 8(2) mentions only one of the grounds, sex. The list provided in section 8(2) is not exhaustive. The subsection states expressly that the list provided should not be used to derogate from the generality of the prohibition on discrimination. It is not necessary to consider whether the other ground of discrimination, marital status, would be a ground which would constitute unfair discrimination for the purposes of section 8. It is sufficient that the disadvantageous treatment is substantially based on one of the listed prohibited grounds, namely, sex.

[44] Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute

in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution. The preamble states the need to create a new order in 'which there is equality between men and women' as well as equality between 'people of all races'. The Constitution proposes the establishment of a Commission on Gender Equality which shall 'promote gender equality'. It is clear, therefore, that legal rules which discriminate against women, as do sections 44(1) and (2), are in breach of section 8(2), unless it can be shown that they fall within the terms of section 8(3).”

The best articulation, in my view, of the proper test in considering whether legislation complies with the equality guarantee, has been given by Moseneke DJP in *Minister of Finance and Others v Van Heerden*⁵⁹ thus:

“[22] The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.

[23] For good reason, the achievement of equality preoccupies our constitutional thinking. When our Constitution took root a decade ago our society was deeply divided, vastly unequal and uncaring of human worth. Many of these stark social and economic disparities will persist for long to come. In effect the commitment of the Preamble is to restore and protect the equal worth of everyone; to heal the divisions of the past and to establish a caring and socially

⁵⁹ 2004 6 SA 121 (CC). Footnotes contained in the quoted passage have been omitted.

just society. In explicit terms, the Constitution commits our society to “improve the quality of life of all citizens and free the potential of each person”.

[24] Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality — a duty which binds the judiciary too.

[25] Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.

[26] The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution. As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact. Of this Ngcobo J, concurring with a unanimous Court, in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* observed that:

‘In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution

recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.’

- [27] This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but “situation-sensitive” approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society. The unfair discrimination enquiry requires several stages. These are set out by this Court in *Harksen v Lane NO and Others*.

...

- [33] It seems to me plain that if restitutionary measures, even based on any of the grounds of discrimination listed in section 9(3), pass muster under section 9(2), they cannot be presumed to be unfairly discriminatory. To hold otherwise would mean that the scheme of section 9 is internally inconsistent or that the provisions of section 9(2) are a mere interpretative aid or even surplusage. I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as

presumptively unfair. Such an approach, at the outset, tags section 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly. Secondly, such presumptive unfairness would unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination.

...

[37] When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.

[38] The first question is whether the programme of redress is designed to protect and advance a disadvantaged class. The measures of redress chosen must favour a group or category designated in section 9(2). The beneficiaries must be shown to be disadvantaged by unfair discrimination. In the present matter, the Minister and the Fund submitted that the differentiated contribution scheme was set up to promote the attainment of equality between members of the CPF and new members who were in the past excluded on account of race and or political affiliation. This objective they would advance by identifying three separate indicators of need for increased pensions for new parliamentarians. On the facts, however, it is clear that not all new parliamentarians of 1994 belong to the class of

persons prejudiced by past disadvantage and unfair exclusion. An overwhelming majority of the new members of Parliament were excluded from parliamentary participation by past apartheid laws on account of race, political affiliation or belief.

[39] The starting point of equality analysis is almost always a comparison between affected classes. However, often it is difficult, impractical or undesirable to devise a legislative scheme with “pure” differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or “hard cases” or windfall beneficiaries. That however is not sufficient to undermine the legal efficacy of the scheme. The distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies. In this regard I am in respectful agreement, with the following observation of Gonthier J, in *Thibaudeau v Canada*:

‘The fact that it may create a disadvantage in certain exceptional cases while benefitting a legitimate group as a whole does not justify the conclusion that it is prejudicial.’

...

[41] The second question is whether the measure is “designed to protect or advance” those disadvantaged by unfair discrimination. In essence, the remedial measures are directed at an envisaged future outcome. The future is hard to predict. However, they must be reasonably capable of attaining the desired outcome. If the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorised end. Moreover, if it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by section 9(2).

[42] In *Public Servants Association*, Swart J, in interpreting section 8(3)(a) of the interim Constitution, held that:

‘The measures must be designed to *achieve* something. This denotes . . . a causal connection between the designed measures and the objectives.’

[43] In the present matter Thring J followed this approach and held that no such causal nexus is present because the sponsor of the differentiated employer contribution scheme does not say that less had to be paid for the disfavoured category in order to give more to the favoured group. I cannot support this approach. Section 9(2) of the Constitution does not postulate a standard of necessity between the legislative choice and the governmental objective. The text requires only that the means should be designed to protect or advance. It is sufficient if the measure carries a reasonable likelihood of meeting the end. To require a sponsor of a remedial measure to establish a precise prediction of a future outcome is to set a standard not required by section 9(2). Such a test would render the remedial measure stillborn, and defeat the objective of section 9(2).

...

[44] The third and last requirement is that the measure “promotes the achievement of equality”. Determining whether a measure will in the long run promote the achievement of equality requires an appreciation of the effect of the measure in the context of our broader society. It must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged. Action needs to be taken to advance the position of those who have suffered unfair discrimination in the past. As Ngcobo J observed in *Bato Star*:

‘The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities.’

[45] However, it is also clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. In assessing therefore whether a measure will in the long-term promote equality, we must bear in mind this constitutional vision. In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.”

Section 9(3) of the Constitution lists the grounds upon which the state may not unfairly discriminate in these words:

“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.”

It must be noted that this list is not a closed list.⁶⁰ The use of the word “including” signifies this. The significance of the grounds listed in section 9(3) of the Constitution becomes apparent in subsections (4) and (5) of section 9 of the Constitution. Whereas subsection (3) of section 9 prohibits the state from discriminating on any ground, including the listed grounds, subsection (4) extends the prohibition to persons, but only on the listed grounds. Subsection

⁶⁰ *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC) paragraph [41].

(5) directs that discrimination on one or more of the listed grounds is unfair unless it is established that the discrimination is fair.

In several of the reported cases in which section 7(3) was applied, including those cases which considered the Constitutional right to equality, gender was the implicated ground for equality considerations, despite the gender neutral wording of section 7(3). As set out above, substantive equality does not accept that all are equal. Section 7(3), although set as gender neutral, had as its primary desire a redress for the plight of women who found themselves married out of community of property⁶¹. The context and history of this provision shows its specific gender discriminatory origin and orientation. All the academic articles on this topic likewise singled out gender as the focal point for equality concerns. Looking at specific factual instances⁶² it would not be difficult to agree to the premise of singling out gender as the ground on which section 7(3) could possibly unfairly discriminate against.

However, the South African law has developed. Same sex marriages are also recognised.⁶³ If such a marriage is considered in the context of section 7(3), the issue of gender inequality wanes. This will be so, despite the fact that same sex marriages can equally be characterised by the same inequalities that traditional, gender opposite, marriages have suffered. To find and/or identify a possible listed ground of discrimination that can possibly apply to a same sex marriage, in the context of the present discussion, would require some adventurous and creative, perhaps even absurd, thinking. Contrariwise, should section 7(3) be found constitutionally wanting, premised on gender inequality, such finding could offend against discrimination based on sexual orientation as against an

⁶¹Costa, 1990 *De Rebus*, December 916.

⁶²E.g. *Gumede v President of the Republic of South Africa and Others* 2009 3 SA 152 (CC).

⁶³Civil Union Act 17 of 2006 which came into operation on 30 November 2006. In terms of section 13 of this Act, a civil union under this Act can be equated, for all legal purposes, to a marriage in terms of the Marriage Act 25 of 1961. While I appreciate the fact that section 7(3) applies to marriages entered into prior to 1 November 1984 or 2 December 1988 and as such same sex marriages cannot enter the fray of a discussion on section 7(3), it is being contended that the date by which a marriage had to be concluded for the purposes of section 7(3) should be erased. See below for a discussion on this contention.

individual from a same sex marriage. It is submitted that, although women have been economically at the short end of marriages, it is more apt to describe the economically weaker spouse as the one who is discriminated against when it comes to the financial considerations of divorce. Of course, in preferring the reference to the economically weaker spouse, as opposed to a wife, sight cannot be lost of the fact that in the vast majority of cases, it is the wife that is the economically weaker spouse.

I appreciate that, applying the facts of individual cases, the gender problem may not arise. This discussion is, however, directed at section 7(3) in general and not limited to specific factual scenarios. A holistic approach should thus be adopted. In line with this, it cannot be said that section 7(3) can possibly be attacked on any of the grounds listed in section 9(3) of the Constitution.⁶⁴ Lest this discussion suffers a fatal blow in the starting blocks, for lack of appearing on the listed grounds, it was pointed out above that the listed grounds are not a closed group insofar as section 9(3) of the Constitution prohibits the state from unfair discrimination. The state, which is responsible for enacting and keeping section 7(3) in force, is precluded from discrimination on any ground, even those outside the list contained in section 9(3) of the Constitution.

In main, as will be seen, the gripe that is taken with section 7(3) is not so much the inter spousal discrimination that exists, but more a disparity in treatment before the law of persons in comparable or substantially similar circumstances; i.e. spouses, who are not from the same marriages but who are in the same boat, are not enjoying the same benefits afforded by section 7(3).

I do not consider it necessary though to reach a definite conclusion as to on which of the listed grounds, if any, referred to in section 9(3) of the Constitution there might be discrimination. The reason for this is sourced from paragraph

⁶⁴ Robinson & Horsten, 2010 *Speculum Juris*, Part 1 114, argues that section 7(3) offends against the listed grounds of marital status, gender and, arguably against section 34 of the Constitution.

[33] of the *Van Heerden* case⁶⁵ quoted above. Section 9(2) of the Constitution obliges legislative and other measures to be taken to promote the achievement of equality. Moseneke DJP rejected the notion that legislation which was enacted with the view to promote the achievement of equality can be presumed to be unfair under section 9(5) of the Constitution. As is clear from the history preceding section 7(3), the purpose thereof was to bring about equality.

The legislation under investigation in the *Van Heerden* case⁶⁶ was enacted after the Constitution came into operation and thus clearly an attempt to give effect to section 9(2) of the Constitution. Section 7(3) was enacted well before the Constitution and accordingly it cannot be said that it was enacted to comply with an obligation that only came into being some 22 years later. In spite of this, I submit that section 7(3) cannot be held to be presumably unfairly discriminatory under section 9(5) of the Constitution, since its aim was to address the existing inequality and not to reinforce or compound it. This is not to say that the relevant provision may not be found to be unfairly discriminatory. It is merely the presumption of unfairness that cannot be agreed with.

4. Constitutional muster

4.1 Contractual freedom

The first ground upon which the constitutionality of section 7(3) may be attacked might cause uproar amongst the liberalists of women's rights: it is the question whether section 7(3) infringes upon contractual freedom of individuals. In a way, this consideration differs, in principle and in approach, from the other considerations discussed below.

When soon to be spouses enter into an antenuptial contract, it is with a view to regulate the economical side of their relationship. On the face of it, these

⁶⁵ *Minister of Finance and Others v Van Heerden* 2004 6 SA 121 (CC).

⁶⁶ *Minister of Finance and Others v Van Heerden* 2004 6 SA 121 (CC).

individuals negotiate the terms of their antenuptial contract at an arm's length. While it cannot be argued that a marriage out of community of property with no accrual is always beneficial for both parties, the converse also holds no water. In some instances, i.e. where the wealthier spouse whose estate has shown great growth during the subsistence of the marriage, such wealthier spouse may, for any one or more of a number of reasons, become insolvent. The marital regime of the parties, being out of community of property, will then act as a saving grace for the poorer spouse. From this viewpoint, section 7(3) allows a spouse to bear no risk, as against third parties, during the subsistence of the marriage, yet such spouse would still be entitled to claim a share of the profit of the marriage. The spouse who is to defend a claim in terms of section 7(3) may justly be disgruntled for having to solely bear the risk of loss yet at the termination of the marriage have to share the fruits of her/his toil.

Sonnekus⁶⁷ raises concern over the approach that the mere performance of common law duties by the respective spouses during the subsistence of the marriage entitles each such spouse to rely on section 7(3) for a redistribution of the estate. He advocates that only juridical relevant factors may entitle a claimant to relief under section 7(3), i.e. only where a spouse has performed functions and/or duties over and above the normal common law duties that are expected to be performed by each respective spouse. He finds it unacceptable that a claimant can be compensated, in spite of an antenuptial agreement to the contrary, by an after the fact change of the marital regime to one of in community of property, merely because each spouse did what they were supposed to do in any event, irrespective of their marital regime.

⁶⁷ 1986 *SALJ* 367 paragraph 10.

Contractual freedom must be respected. Cameron JA (as he then was) in the case of *Napier v Barkhuizen*⁶⁸ affirmed this principle of the common law. In paragraph [13] of his judgment, he stated:

“...the Constitution requires [the court]⁶⁹ to employ its values to achieve a balance that strikes down the unacceptable excesses of ‘freedom of contract’, while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates. It is also to recognise that intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties’ individual arrangements.”

Heaton⁷⁰ argues that in the majority of heterosexual marriages, there is no real equality between the parties in light of the oft stronger negotiating position of prospective husbands, due to their loftier financial position and prowess. That argument does hold water, but this general observation cannot be used to justify a complete ignorance of the content of an antenuptial contract. After all, the antenuptial contract is the footing upon which the parties thereto conducted their marriage and upon which third parties who wished to contract with these spouses had to abide by; and by entering into such agreement, the parties agreed that this be the basis of governing their economic affairs between each other even until death do them part.

A marriage is not a business enterprise. Agreements in respect of marriages, as between the parties to such agreements, should likewise not be placed on the same footing as commercial or other contracts where profit or services or the

⁶⁸ [2006] 2 All SA 469 (SCA). See also Louw, *Potchefstroom Electronic Law Journal* 68 where a call is made for greater understanding or investigation into the *bona fides* of contracting parties, i.e. for courts to empower themselves to void terms in a contract which is manifestly unfair and against public policy in light of the unequal bargaining power of the contracting parties.

⁶⁹ My addition.

⁷⁰ 2005 SAJHR 547.

like are the focal intention of the contracting parties. An antenuptial contract is made at a time when the parties probably have every intention to conduct themselves for the improvement of their joint station. Its intention is neither profit nor gain.⁷¹ For a marriage to reach divorce proceedings, there most likely would have been a drastic change in the economic circumstances of the parties, the manner in which their respective estates have evolved and, most acutely, a different view of the previous peaceful dual symbiosis. Due to antenuptial contracts being devoid of commercial interest, the quantification of the joint effort of the parties becomes nigh impossible. Judicial pronouncements have made simplistic attempts in addressing this vexed legal issue. By way of example, it has been held that the contribution of the homemaker spouse should not be discounted for lack of showing a direct improvement in the parties' estates.⁷²

It may legitimately be asked: Why is it so offensive against public policy that an antenuptial contract determining a complete exclusion of community of property may fall by the wayside where both parties performed accordingly? In my view, this question can be answered thus. As Sonnekus⁷³ correctly points out, marriage *per se* places duties on each respective spouse. The marital regime does not necessarily affect the existence of these duties. In a traditional marriage, where the husband is the breadwinner and the wife the homemaker, an antenuptial agreement would have the effect of the parties agreeing to only one of them enlarging her or his estate whereas the other acts as non-profit and non-compensated servant. The one's toil resulting in economic gain enhancing not only lifestyle, but also longevity; the other's drudgery resulting in no economic growth and facing the stark reality of destitution upon dissolution of

⁷¹ Although the marriage formula set out in section 30 of the Marriage Act, 1961 (Act No. 25 of 1961) requires no more than an affirmation before the marriage may be solemnised, marriages that are concluded under the auspice of religion, which most marriages are, includes an inter spousal vow to '*love and to hold, for richer or poorer, in sickness and in health*'. Clearly this marks an undertaking that is incompatible with economic or contractual principles.

⁷² *Bezuidenhout v Bezuidenhout* 2003 6 SA 691 (C) 704G.

⁷³ 1986 SALJ 367.

such contract. Seen from an economic point of view, it is highly offensive against public policy that parties should come to an agreement that one will gain economically from their joint venture whereas the other, despite expending effort, will be left empty handed.

An analogous case, *Baart v Malan*⁷⁴ illustrates the point being made here. In the *Baart* case, a wife agreed to pay her entire gross salary to her husband, who had received custody of their children, as maintenance for the children. This meant that the wife had to pay over her entire salary plus an additional amount as tax was deducted from her salary prior to her receiving it. She applied for a downward variation of this order. The court granted her the relief sought as the agreement was found to be offending against public policy.

In all the reported cases in which the court had to consider a redistribution order in terms of section 7(3), the courts regarded the wives' contribution in being a homemaker as sufficient to qualify for invoking section 7(3). Sonnekus⁷⁵ disavowment of this approach has not, as yet, found favour with the judiciary. Sonnekus' approach is, in my respectful view, flawed from the outset if regard is had to the influence of public policy, as outlined above.⁷⁶ On the approach of Sonnekus, a spouse who has kept the home and nothing else (thus kept her end of the deal), should be left with nothing whereas the spouse who has received an income and done nothing else (thereby also keeping his end of the deal) should get everything. The public policy is offended by this state of affairs. Public policy demands that there should not be any need for requiring performance outside the scope of what is required *ex lege* in terms of common law to acquire compensation for the effort.

⁷⁴ 1990 2 SA 862 (E).

⁷⁵ 1986 SALJ 367

⁷⁶ Robinson & Horsten, 2010 *Speculum Juris*, Part 1 112, also expresses discourse with Sonnekus' approach, but for different reasons.

An examination of the legislature's stated intention leading up to the enactment of section 7(3)⁷⁷ clearly shows that there was a dire need to address the abuses that flowed from the situation where parties married out of community of property. Legislature's answer to this need was to interfere in these private treaties by permitting a judicial redistribution. Legislature's interference was founded on the demands of public policy – a just basis for not enforcing terms of a contract that are found to be contrary to public policy, as set out above – and the need to achieve substantial equality between spouses.

Thus, while profiteering spouses will advance a disgruntled argument praying for the upholding of their initial antenuptial agreement, they will not have any legitimate response to the manifest inequality to this type of agreement. Interference with freedom of contract thus cannot succeed as a ground for finding section 7(3) to breach the constitutionally entrenched equality clause. Upholding such a view would do nothing other than perpetuate inequality.

4.2 Marriage out of community of property

The first requirement, for consideration, set for section 7(3) to find application, is that the marriage must have been one that was out of community of property without any form of sharing. Zaal,⁷⁸ as far back as 1986, voiced his concerns over the ineffective way in which the legislature gave effect to what was obviously intended to be provisions to address the protracted inequality in marital property regimes. In the same article, Zaal further reveals the inadequacies of marital property regimes that are practiced in South Africa. He complained⁷⁹ that the property regimes are still rigidly contractual, unlike some

⁷⁷ See e.g. GG 8993 of 9 December 1983 Notice 930 page 30 *et seq*

⁷⁸ 1986 *TSAR* 57-69

⁷⁹ At 62.

intended amendments⁸⁰ which sought to introduce some familial concepts in this familial arrangement called marriage.

Likewise, Heaton⁸¹ demonstrated that the marital property regimes that are currently legislated, and the legislation which regulates its termination, fail to appropriately address the real difficulties when a marriage is terminated upon divorce: a forfeiture of benefits in terms of section 9 of the Divorce Act⁸², cannot be used as an effective equality tool⁸³ and is in reality only effective if it is made against the poorer spouse⁸⁴; a redistribution order only has the limited application that the present discussion sets out; and settlement agreements are, so Heaton argues,⁸⁵ often the result of draconian conduct by a wealthier spouse.

Heaton⁸⁶ advocates a legislative reform to import a very intense and extensive marital inquest by the judiciary. It is clear from Heaton's plea that what is lacking is a true discretionary power to be given to the court to make an equitable order pertaining to the patrimonial dissolution of the marriage, irrespective of what the actual property regime of such marriage is.

Section 7(3), but for its limitations, would go a long way to address this true need for a court to divest the consequences of an intended matrimonial regime of its inequity. If section 7(3) were to be applied to all types of marriages, and provided that the judiciary takes up the challenge to consider marriages outside the realm of the law of contract, i.e. to recognise it as a familial rather than legal or economic agreement, the risk of destituting the more vulnerable spouse would be substantially reduced.

⁸⁰ Which failed to survive parliamentary scrutiny.

⁸¹ 2005 SAJHR 547-574

⁸² 70 of 1979

⁸³ See *Wijker v Wijker* 1993 4 SA 720 (A).

⁸⁴ Heaton 2005 SAJHR 557-8.

⁸⁵ At 566-8.

⁸⁶ 2005 SAJHR 547-574

By limiting the application of section 7(3) to marriages out community of property, spouses to all other types of marriages are divested of the relief offered by section 7(3). That constitutes discrimination on the basis of the type of marital regimes applicable.

Justification might, arguably, be hinting at the other remedies available to marriages in community of property in all its formats. It might also be premised on the principle that marriages in community of property inherently involve a sharing in the joint estate.

As indicated above, Heaton's commanding outlay of the ineffectiveness of all marital property regimes renders all remedies available to a vulnerable spouse hapless when even-handedness is sought upon divorce. The conduct and contribution that each spouse has made during the subsistence of the marriage should have a decisive effect on the outcome of the termination of the marriage. This is what equality demands. The spouse married in community of property, whose relentless whims of infidelity and lavish socialising, at the expense of the diligent hardworking spouse, should certainly not have a better outcome from the termination of her/his marriage than the bedridden maiden who betrothed her compassionate lover out of community of property and is divorced now on the basis of perpetual illness. Based on the present outlook, the socialite would look forward to a continuation of her/his grandiose lifestyle and the maiden would face death.

*Van Schalkwyk*⁸⁷, after considering the differences between the proprietary consequences between marriages in and out of community of property, concludes that the differentiation is not an impeachment of section 9(2) nor does it constitute discrimination or, even if discrimination is found, unfair discrimination.

⁸⁷ 2010 *De Jure* 188–190.

The discrimination as between marital property regimes could be advanced as being fair, seeing the fact that the individual couples specifically and consciously chose the relevant property system. Such an argument would hold water if the agreements were to be interpreted on a purely economic or contractual basis. But these agreements are not. They are made on a premise that defies economic or contractual logic and common sense; they are made on the trust and hope of defeating the odds of termination other than through death. Its roots are love – an indefinable term insofar as the law of contract is concerned.

4.3 Date of the marriage

4.3.1 Section 7(3)(a)

Section 7(3)(a) limits its application to civil marriages entered into before the commencement of the Matrimonial Property Act⁸⁸, which occurred on 1 November 1984⁸⁹. The Matrimonial Property Act⁹⁰ was quite drastic in the measures it enacted. Not only did it substantially turn the law of marriage on its head, but it did so even with retrospective effect in some regards. Amongst other things, it introduced an automatic accrual system to certain types of marriages,⁹¹ it abolished the marital power of a husband⁹² and it granted women equal powers to men in marriages in community of property.⁹³ Section 7(3) was introduced into the Divorce Act⁹⁴ by the Matrimonial Property Act.⁹⁵ It altered the position of women in marriages substantially, for the better.

By setting the date of 1 November 1984 as the cut-off date for marriages ending up in the divorce court to have the benefit of section 7(3)(a), it appears

⁸⁸ 88 of 1984.

⁸⁹ Proclamation R158, Gazette No. 9413 dated 7 September 1984.

⁹⁰ 88 of 1984.

⁹¹ Sections 2-10 of the Matrimonial Property Act 88 of 1984.

⁹² Section 11 of the Matrimonial Property Act 88 of 1984.

⁹³ Sections 14-17 of the Matrimonial Property Act 88 of 1984.

⁹⁴ Act 70 of 1979.

⁹⁵ Section 36 of the Matrimonial Property Act 88 of 1984. Section 7(3)(b) of the Divorce Act 70 of 1979 was added only later.

that the legislature wished to address the plight of women who suffered under the yolk of the marital power of men until date of its abolishment. Because the legislature introduced the more equitable accrual system, which automatically applied to marriages out of community of property, it appears that the legislature wanted to add a type of accrual to marriages out of community of property that were entered into prior to 1 November 1984. Hence the introduction of section 7(3)(a) to place the marriages out of community of property on some sort of equal footing. If the question is posed as to why the legislature then simply did not make the accrual system applicable on marriages out of community of property entered into prior to 1 November 1984, it probably is so because the legislature, by creating section 7(3)(a), did not wish to tamper, legislatively, with the parties' freedom of contract, but rather empowered judicial interference with such freedom, based on justness. This intention would have permitted a much more elastic approach, which could address the peculiar merits on a case by case basis, rather than to enforce the rigidity of legislative intervention.

The introduction of the accrual system was not an inviolable attribute introduced into the matrimonial property system of marriages out of community of property. Section 2 of the Matrimonial Property Act⁹⁶ specifically permits the exclusion of the accrual system by antenuptial contract.

The abolition of marital power, with retrospective effect, had the result that the position of spouses, concerning proprietary interests, save for one exception, entering a marriage out of community of property prior to 1 November 1984 were exactly the same as spouses entering a marriage out of community of property and excluding the accrual system, after 1 November 1984. The one exception is that spouses of such marriages entered into prior to 1 November 1984 may have resort to section 7(3)(a), whereas spouses marrying after 1 November 1984 may not. There is, in fact, no other provision anywhere that

⁹⁶ 88 of 1984.

could possibly provide a similar or comparable remedy for spouses marrying post 1 November 1984. This is where the discrimination is. The discrimination is set by a date for entering into a marriage out of community of property.

Is the discrimination unfair, or is it justifiable?

The South African Law Commission⁹⁷ considered calls for the revision of the limitation by way of date of a marriage. In upholding the discrimination, the Law Commission cited a reluctance to interfere with contractual freedom, based on an assumption that parties to a marriage are financially better informed, and that judicial interference in marriages out of community of property would lead to great uncertainty in the outcome of divorces.

Sinclair, assisted by Heaton, stated herein that it "...has not produced the flood of litigation that the critics have predicted"⁹⁸ and that uncertainty is preferable to "...the rigid, irremediable harshness acknowledged to derive from complete separation of property."⁹⁹

The South African Law Commission perhaps also closed its eyes on the reality of the level of education when it deemed that spouses, post 1984, are financially and legally better informed. In 1996, 19.3% of South Africa's population had no education and only 6.2% of the population had tertiary education.¹⁰⁰ In 2012, the population with no education decreased to 14.3% whereas the population with tertiary education dropped to 0.7%.¹⁰¹ This trend is damning evidence of what could only have been unfounded assumptions by the South African law Commission.

Another possibility that can be conjured up as just cause for this discrimination is the economic hardship and the subjection of women to patriarchal marital

⁹⁷ Chapter 3, *Report on the Review of the Law of Divorce: Amendment of section 7(3) of the Divorce Act, 1979*.

⁹⁸ *The Law of Marriage* 147.

⁹⁹ *The Law of Marriage* 145.

¹⁰⁰ Census in Brief, 1999 Statistics South Africa (1996 census data).

¹⁰¹ Statistics South Africa, 2012.

power of men that befell the poorer spouses prior to 1 November 1984. But those same economic hardships are still being endured today¹⁰² and the subjection of women to the power of men can hardly be a just cause for depriving spouses, post 1 November 1984, of an equitable remedy.

The effect of limiting the remedy under section 7(3)(a) to pre 1 November 1984 marriages, is to permeate the very same atrocities that drove the legislature to bring about the kind of reform set in the Matrimonial Property Act¹⁰³. We are back at square one and the wheel needs to be re-invented. There is no inkling of justification for limiting the remedy to marriages pre 1 November 1984.

4.3.2 Section 7(3)(b)

This subsection deals with marriages between blacks that were entered into in terms of section 22(6) of the Black Administration Act¹⁰⁴ before the commencement of the Matrimonial Property Amendment Act.¹⁰⁵ The Matrimonial Property Amendment Act commenced on 2 December 1988. These marriages were, by default, out of community of property.

The obvious intention with enacting this subsection was to align all types of marriages that were effectively out of community of property to be able to claim the benefit introduced by section 7(3). Again, the underlying principle here was equality, i.e. to provide equal treatment to persons in similar circumstances.

By setting a cut-off date by when the marriages must have been entered into and closing the door for marriages of the exact same circumstance thereafter to be excluded from the section 7(3) benefit, the same unequal consequences follow as was set out under section 7(3)(a) above.

¹⁰² Some might argue that, because of the economic emancipation of women, the prevalence of women succumbing to this situation is on the decline. Heaton, 2005 *SAJHR* 557-8 argues convincingly the converse.

¹⁰³ 88 of 1984.

¹⁰⁴ 38 of 1927.

¹⁰⁵ 91 of 1986.

Although section 7(2) the Recognition of Customary Marriages Act¹⁰⁶ makes all customary marriages entered into after the commencement of that Act in community of property, unless specifically excluded by antenuptial contract, DJP Moseneke in *Gumede*¹⁰⁷ declared that customary marriages should not be viewed through the prism of being a marriage in or out community of property, but through its own substantive prism. Customary marriages thus, it appears, even though it may be out of community of property, would not be able to resort to section 7(3) upon dissolution of the marriage. DJP Moseneke said, in this regard¹⁰⁸

“This means that every 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.”

DJP Moseneke has thereby created, for customary marriages, a regime that is elevated above the limitations set in section 7(3). Irrespective of the statutorily imposed regime of a customary marriage, the above quoted passage removed the limitations set in section 7(3) and allowed for an equitable distribution of assets of a marriage terminated in divorce, irrespective of its agreed regime. This was based on the court’s interpretation of section 8(4) of the Recognition of Customary Marriages Act.¹⁰⁹ While this is a positive step towards the call for reform to empower courts with the power to redistribute assets upon divorce, irrespective of the property regime, in itself, this approach created further discrimination between customary and common law marriages: monogamous customary marriages have been freed of all limitations set in section 7(3) whereas civil marriages are still tied by the very same provision.

¹⁰⁶ 120 of 1998

¹⁰⁷ *Gumede v President of the Republic of South Africa and Others* 2009 3 SA 152 (CC).

¹⁰⁸ At paragraph [44]

¹⁰⁹ 120 of 1998.

*Van Schalkwyk*¹¹⁰ refers to DJP Moseneke's finding in the *Gumede* case¹¹¹ that the cut-off date for marriages concluded before and after the enactment of the Recognition of Customary Marriages Act¹¹² respectively amounted to unfair discrimination between those sets of marriages. Inevitably, *Van Schalkwyk* convincingly argues, the same must hold true for the cut-off date set in section 7(3).

4.4 Upon divorce only

Section 7(3) only operates upon divorce of the parties. Although the Maintenance of Surviving Spouses Act¹¹³ allows for a surviving spouse to claim maintenance from the deceased spouse's estate insofar as the surviving spouse cannot provide for him/herself, there is no provision available to a surviving spouse whereby her/his fair and equitable contribution may be reclaimed upon death. It is quite thinkable that a surviving spouse may very well be able to maintain her/himself, but that such surviving spouse has made a contribution to the deceased spouse's estate which cannot, in fairness, be said to be just and equitable.

5. Conclusion and recommendations

What is needed in order to rectify the present state of affairs is a combination of legislative and judicial reform. If section 7(3) is left unaltered, its life expectancy is probably at its end. Having regard to the extreme high rate of divorces and the fact that people die, marriages entered into prior to 1 November 1984 or 2 December 1988, i.e. 30 and 26 years ago respectively, would be a rare find.

¹¹⁰ 2010 *De Jure* 176 – 191.

¹¹¹ *Gumede v President of the Republic of South Africa and Others* 2009 3 SA 152.

¹¹² 120 of 1998.

¹¹³ 27 of 1990.

To hold, as the legislature presently does, that the initial agreed marital regime must be enforced, irrespective of the vast injustices that has been shown to have been inflicted, is incompatible with a democratic society based on equality and dignity. The only effective way in which equality of a failed marriage can be attained, is by permitting the court that is endowed to decree the end of such marriage, to be empowered to intervene and balance the scales. Without such powers, the divorce courts can do no more than endorse the atrocities that play out before it.

I am in absolute agreement with Heaton¹¹⁴ that legislative intervention is required in the form of, at the very least, doing away with the limitations of setting a date for the entering into of a marriage and of limiting its application to marriages out of community of property. Judicial reform is required for the courts to desist in approaching marriage as a commercial enterprise and to give it the familial approach that it truly is. To aide and direct the judicial reform, legislative amendment to the current position should ideally list some factors that may be considered in determining or evaluating what is just and equitable as between the parties. At its core, these factors should include a consideration of:

- (i) The duration of the marriage;
- (ii) the roles played by each party to the marriage;
- (iii) the benefits accrued during the marriage;
- (iv) the conduct of the parties towards each other and their dependants or other members of their household;
- (v) the contribution made by each party to the other and to the marriage;
- (vi) the extent to which each party would be able to fend for her/himself post divorce;
- (vii) any other order regarding forfeiture and/or maintenance that the court will make; and
- (viii) any other relevant factor that the court may deem relevant.

¹¹⁴ 2005 SAJHR 547.

In addressing economic inequality upon the termination of a marriage, the courts will be able to empower the more vulnerable and combat impoverishment of spouses who gave their all to a marriage.

BIBLIOGRAPHY

Articles, Books and Reports

- Costa A “A plea for the reform of s 7(3) of the Divorce Act 70 of 1979 as amended” 1990 *De Rebus* 916
- Cronjé DSP & Heaton J *South African Family Law*, 2nd Edition, LexisNexis Durban 2007
- Heaton J “Striving for substantive gender equality in family law: Selected issues” 2005 *SAJHR* 547
- Langa P “Transformative constitutionalism” (2006) 3 *Stellenbosch Law Review* 351
- Louw AM “Yet Another Call for a greater Role of Good Faith in the South African Law of Contract: Can we banish the Law of the Jungle while avoiding the Elephant in the Room?” 2013 *Potchefstroom Electronic Law Journal* 68
- McLachlin B “Equality: The most Difficult Right” 2001 *The Supreme Court Law Review* 17
- Report on the Review of the Law of Divorce: Amendment of section 7(3) of the Divorce Act, 1979*
- Robinson R & Horsten D “The Quantification of “Labour of Love”: Reflections on the Discretion of a Court to Redistribute Capital Assets in terms of Section 7(3)–(6) of the South African Divorce Act” 2010 *Speculum Juris* 96
- Sinclair JD (assisted by Heaton J) *The Law of Marriage*, Volume 1, Juta Cape Town 1996

- Sonnekus JC “Egskeiding en Kwantifisering van die Bydrae tot die Ander Gade se Boedel – Artikel 7(3) van die Wet op Egskeiding 70 van 1979” 1986 *SALJ* 367
- Van Niekerk PA *Practical Guide to Patrimonial Litigation in Divorce Actions*, LexisNexis Durban 2013
- Van Schalkwyk LN “Gumede v President of the Republic of South Africa and Others 2009 (3) SA 152 (KH)” 2010 *De Jure* 176
- Van Schalkwyk LN “Herverdeling van Bates ingevolge Artikel 7(3) van die Wet op Egskeiding 70 van 1979: Het ons ‘n Nuwe Uitgangspunt?” 2006 *De Jure* 632
- Woolman S, Bishop M *Constitutional Law of South Africa*, 2nd Edition, Volume 3, Juta Cape Town 2014
- Zaal N “Marital Milestone or gravestone? The Matrimonial Property Act 88 of 1984 as a reformative halfway mark for the eighties” 1986 *TSAR* 57

Cases

Baart v Malan 1990 2 SA 862 (E)

Beaumont v Beaumont 1987 1 SA 967 (A)

Bezuidenhout v Bezuidenhout 2003 6 SA 691 (C)

Brink v Kitshoff NO 1996 6 BCLR 752 (CC)

Edelstein v Edelstein NO and Others 1952 3 SA 1 (A)

Ex parte Spinazze 1985 3 SA 650 (A)

Gumede v President of the Republic of South Africa and Others 2009 3 SA 152 (CC)

Kritzinger v Kritzinger 1989 1 SA 67 (A)

Minister of Finance and Others v Van Heerden 2004 6 SA 121 (CC)

Napier v Barkhuizen [2006] 2 All SA 469 (SCA)

Van der Merwe v Road Accident Fund 2006 4 SA 230 (CC)

Wijker v Wijker 1993 4 SA 720 (A)

Statutes

Black Administration Act 38 of 1927

Civil Union Act 17 of 2006

Constitution of the Republic of South Africa Act 108 of 1996

Divorce Act 70 of 1979

Interim Constitution of the Republic of South Africa Act 200 of 1993

Maintenance of Surviving Spouses Act 27 of 1990

Marriage Act 25 of 1961

Marriage and Matrimonial Property Amendment Act 3 of 1988

Matrimonial Property Act 88 of 1984

Matrimonial Property Amendment Act 91 of 1986

Recognition of Customary Marriages Act 120 of 1998