

THE MARRIAGE CONTRACT

When entering into a contract of marriage, spouses are advised to have an understanding of the consequences related to type of marital regime they are entering into. In the South African Matrimonial Property Act we have two types of marital regimes namely, in community of property, and out of community of property with the inclusion or the exclusion of the accrual system. There however seems to be more and more interference by the courts in the division of assets at the dissolution of marriages despite parties having reached a consensus of how they would want their estate to be divided. This happens mostly when there is an outdated law that courts have to align with the Constitutional values. The recent Constitutional Court's judgement of *KG v Minister of Home Affairs and Others* sets a clear precedence of how courts interfere when division of assets is seen to be unfair. The interference by courts makes a change to the consequences of the spouses' intended regime. This leaves spouses questioning if they should still have a preferred regime if the courts will ultimately make a decision over their preferred choice.

Proprietary consequences of each marital regime in terms of the Act

The old saying 'joint by the hip' is illustrated in marriages in community of property as it limits the spouses' freedom to contract as stated in section 15 of the Matrimonial Property Act. "Spouses in a marriage in community of property may not perform certain juristic acts without regard to the joint estate and without the consent of the other spouse." Spouses in a marriage in community of property are further responsible for each other's liabilities which form part of the joint estate. Section 17(5) of the Matrimonial Property Act states, "When a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessities for the joint household, the spouses may be sued jointly or severally therefor."

Marriages out of community of property "exclude the community of profit and loss" (Le Roux 2018) this enables the spouses to contract freely, to acquire assets separately and be able to enter into debt without the consent of the other spouse or making them liable for it. Section 2 of the Matrimonial Property Act mentions that marriage out of community of property gives spouses the ability to choose to include or exclude the accrual system. If spouses opt to include the accrual system a "the net value of the estate the spouses at the commencement of their marriage will be mentioned or deemed to be nil if the liabilities of those spouse exceed his assets at such commencement; that value was not declared in his ante nuptial contract", as stated in section 4 of the Matrimonial Property Act. This net value will be excluded from the accrual and spouses can individually deal as they wish with the assets from that net value. When the accrual system is excluded in an ante nuptial contract, spouses have two separate estates which they can also deal with as individuals.

Procedure when signing an ante nuptial contract

Elliot mentions that spouses intending to enter into a marriage out of community of property must approach a notary prior to entering into their marriage. Should spouses decide to enter into the out of community regime after conclusion of their marriage which is already deemed to be in community of property, an application must be made with the High Courts to change their marital regime and a post-nuptial contract will be entered into as stated in section 21 of the Matrimonial Property Act. It is therefore advised that should the spouses foresee that the preferred marital regime will be one out of community of property, a consultation with a notary must be done prior to a customary marriage or a civil marriage being concluded.

Dissolution of marriage by death or divorce

Ultimately when a marriage in community of property dissolves either by death or divorce the joint estate shall be divided in to two (2) to be shared by both spouses. The above-mentioned consequence is slightly similar to one of a marriage out of community of property with the inclusion of the accrual system. Wherein “the net value of the spouses gained after conclusion of their marriage will be calculated and be shared by the spouses according to the share indicated in the ante-nuptial contract or claims which spouses can have against each other’s estates” (Elliot 1987). On dissolution of a marriage out of community of property with the exclusion of the accrual system, each spouse is sole recipient of their assets and further not liable for the other spouse’s liabilities.

The executor dealing with the estate in the instance of death, or the attorneys dealing with the divorce in wherein the dissolution is as a result of the irretrievable breakdown of the marriage, must calculate the total accrued gain of both spouses. Section 3(1) of the Matrimonial Property Act states that “the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, acquires a claim against the other spouse for an amount equal to half of the difference between the accrual of the respective estates of the spouses.” Whilst there is no need for a division of the estate in the event where a marriage out of community of property with the exclusion of the accrual system dissolves, the courts could however order a redistribution of the assets where a marriage out of community of property was entered into prior to the commencement of the Matrimonial Property Act in terms of section 7(3) of the Divorce Act. The Constitutional Courts on 10 October 2023 declared paragraph (a) of section 7(3) of the Divorce Act “inconsistent with the Constitution and invalid to the extent that it fails to include marriages concluded on or after the commencement of the Matrimonial Property Act”

G v Minister of Home Affairs and Others

On dissolution of a marriage out of community of property with the exclusion of the accrual system, the spouse who is seen to not contribute financially to the matrimonial home does not secure assets gained during subsistence of the marriage. In most cases those types of spouses are women who take care of the children, upkeep the home and contribute towards the success of the spouse who contributes financially. This result became unfair to those women as redistribution of the assets could not be used a remedy before the recent Constitutional Court's decision.

(Mrs G) in the case of G v Minister of Home Affairs and Others she called on the High Court "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 section 7(3) of the Divorce Act". Mrs G submitted that: "Section 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 commenced". Mrs G further contended that "the cut-off date in section 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 and religion".

The High Courts declared section 7(3) (a) of the Divorce Act to be unconstitutional in that it limits its operation only to marriages entered into before 1 November 1984. This leaves spouses with adverse repercussions as a result of the out of community marital regime, with the alternative to approach the courts to consider redistribution of the assets even when the accrual system was excluded. In that way spouses who could not contribute financially in a marriage can also benefit from the asset value of the financially contributing spouse. The High Court agreed with Mrs G that "marriage out of community with the exclusion of the accrual does not take into account how long the marriage has endured and how much economically disadvantaged spouse has contributed to the other spouses' economic financial success. The economically disadvantaged does not have a right share in the latter's' gains."

The decision of the High Court was referred to the Constitutional Court for confirmation. The Constitutional Court confirmed this judgement and declared it to be "inconsistent with the Constitution and invalid to the extent that it fails to include marriages concluded on or after the commencement of the Matrimonial Property Act". The Court concluded that "the differentiation between old and new marriages constitutes unjustifiable indirect discrimination on the grounds of gender." The Court confirmed that the discrimination is based on gender because "in other classes of marriage women have the benefit of the redistribution remedy whereas women who concluded an ante nuptial contract with the exclusion of the accrual system after 1 November 1984 are disproportionately prejudiced as against men by the absence of the same remedy."

The Constitutional Court decided Mrs G's matter together with E B v E R and Others where in the constitutionality of section 7(3) of the Divorce Act was brought before it based on that "it fails to include

redistribution of assets on dissolution a marriage out of community of property by death.” The Courts decided that this exclusion is also inconsistent with the Constitution, and that the limitation in terms of section 36 of the Constitution on both matters is not justified. The court’s decision does not invalidate the consequences of the marriage out of community of property without accrual. It tries to limit the negative effects that it may have on the spouse who was seen not be financially contributing to the marriage, which in majority is women who take care of the household. Thus spouses need to treat each other with fairness bearing in mind the court’s decision.

Concluding remarks

Prospective spouses are left to decide if it is still important to conclude an ante nuptial contract for a marriage out of community of property with the inclusion or exclusion of the accrual system. If it is beneficial for spouses who would like to exercise the freedom to contract, and to have their estates dealt with separately even though the courts can interfere with their intended conclusion. Another question is if this interference by courts is justifiable.

It remains fundamental to ensure that spouses guard their patrimonial interests with a conclusion of an ante nuptial contract. On the dissolution of the marriage by divorce, the estate of each spouse must be dealt with in accordance with that contract in a division that is fair. Spouses must ensure through their attorneys that their assets are thoroughly dealt with and that there is clarity in the division of their estates if they are divided. If there is a settlement order, it must indicate how the assets will be allotted, and also dispense their properties in accordance with section 45(bis) of the Deeds Registries Act. The same thoroughness must appear where a marriage dissolves by death. The deceased’s estate must be dealt with in accordance with the ante nuptial contract, the Will if applicable or Intestate Succession Act.

The advent of the G v Minister of Home Affairs and others does not abolish the necessity to enter into an out of community contract with the exclusion of the accrual system. It cautions prospective spouses to consider the contribution that they collectively make to have an economic success. That on dissolution of their marriage the spouse who achieved the financial success must not disregard the one who indirectly contributed towards that achieved success, and somehow must rewarded for that. If spouses do not want to consider the redistribution they may then opt for the inclusion of accrual system. Both the systems are crucial in protecting one from being liable for the other’s liabilities, which protection is not afforded in a marriage in community of property. The court’s decision promotes reasonableness and equity which at times may be absent in out of community of property contracts with the exclusion of the accrual system.

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SOURCES

1. Legislation

- 1.1 Matrimonial Property Act 88 of 1984;
- 1.2 Divorce Act 70 of 1979;
- 1.3 Deeds Registries Act 47 of 1937;
- 1.4 Wills Act 7 of 1953;
- 1.5 Intestate Succession Act 81 of 1987.

2. Case Law

- 2.1 G v Minister of Home Affairs and Others (40023/21) [2022] ZAGPPHC 311; [2022] 3 All SA 58 (GP).
- 2.2 EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others (CCT 364/21; CCT 158/22) [2023] ZACC 32.

3. Books

- 2.1 Elliot, *The South African Notary*, sixth edition (adapted by Lowe MJ, Dale, De Kock, Froneman and Lang), Juta, 1987.
- 3.2 Le Roux, Frantzen, Pretorius, *Course in Notarial Practice*, fifteenth edition, Centre for Conveyancing Practice, 2018.