

NEW MARRIAGE LAWS envisaged for South Africa

HOW WILL IT AFFECT YOU?

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INTRODUCTION

Marriage is a momentous life changing event for most of us! However, the concept of marriage is never fully appreciated in light of the various consequences thereof during the live thereof and especially at divorce. It is well known that parties intending marriage, are often ignorant or deprived of their rights, or do not focus on, obtain or take into consideration legal advice pertaining to the solemnization of their union and the consequences at the division or dissolution thereof. In our current marriage regime, the law is also not always on the side of the parties!

Such was the case in the matter of **A S and Another v G S and Another**¹ the first Applicant was a seventy-two (72) year old housewife of Pinetown, KwaZulu-Natal. She is one of approximately 400 000 black women whose marriages are out of community of property due to s 22(6) of the BAA. She contributed to the household, raised the children and had small business, yet when her husband wanted to sell the communal property, she realised that he did not need her consent to do so, mainly due to the effect of the MPA! The applicants applied for a declarator that sections 21 (1) and 21 (2)(a) of the Matrimonial Property Act 88 of 1984 (MPA) are invalid to the extent that it maintains the default of marriage out of community of property, established by section 22 (6) of the Black



Administration Act 38 of 1927 (BAA), in respect of marriages entered into, before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. In essence, the applicants contended that s 22(6) of the BAA denied hundreds of thousands of black women the protection that is afforded by a marriage in community of property. By doing so, it exacerbated their vulnerability and rendered them entirely dependent on the goodwill of their husbands, who generally control the bulk of the family's wealth. These women have largely contributed to the joint household and raising of children, yet they cannot enjoy the fruit of their labour. According to the applicants, s 22(6) was discriminatory in two respects. Firstly, it discriminated against black women by disadvantaging them relative to their husbands. Secondly,

the BAA unfairly discriminated against black women, as by contrast, the laws regulating civil marriages between couples of all other races set the default position as marriage in community of property. The law had resulted in black women who were married before 1988, being afforded less protection than all other women in the country. The court found that the discrimination the impugned provisions perpetuate is so egregious, that it should not be permitted to remain on our statute books by limiting the retrospective operation of the order or by suspending the order of invalidity to allow Parliament to rectify the error. The effect of the order of the court

1 (D12515/2018) [2020] ZAKZDHC 1; [2020] 2 All SA 65 (KZD); 2020 (3) SA 365 (KZD) (24 January 2020)

is that all civil marriages are in community of property. The recognition of the equal worth and dignity of all black couples of a civil marriage is well overdue and no case has been made out as to why it should be delayed any further.

Although our Constitutional values are set at protecting all unions, South African law clearly sometimes fall foul of the progression of time and rights. For purposes of understanding South African Marriage Laws, one should understand that there are three types of “unions” that are recognised. These marriages are inclusive of civil marriages, customary marriages, and civil unions. The aforementioned however pends possible amendment under intended new marriage laws, for South Africa. In its 2021- 2022 annual performance plan, Government made it clear that current legislation regulating marriages in South Africa has fallen short of necessary policy that is based on Constitutional values and, “Instead of creating a harmonised system of marriage in South Africa, the State has sought to give recognition to different marriage rituals through passing a range of different marriage laws”².

CURRENT MARRIAGE LEGISLATION AND ITS SHORTCOMINGS³

In our country, all marriages and civil unions, are currently regulated through three different pieces of legislation:

(i) **The Marriage Act 25 of 1961**, provides specifically for monogamous marriages in case of opposite-sex couples. The Act is lacking as other religious marriages which are monogamous and heterosexual are excluded on religious grounds. This includes Hindu and Muslim marriages which are concluded in accordance with their religious rites. Furthermore, Monogamous marriages of heterosexual black persons are governed by the partly repealed Black Administration Act 38 of 1927. The existing legislation does not provide a transitional mechanism for persons who initially married under the provisions of the Marriage Act, but who subsequently undergo a sex change.

(ii) **The Recognition of Customary Marriages Act, 120 of 1998 (RCMA)**; providing for polygamous marriages for opposite-sex couples. This Act regulates polygamous marriages for indigenous Black South



Africans however does not regulate other polygamous marriages such as Islamic, Jewish, Shembe or KhoiSan marriages and customary marriages concluded with non-citizens. Furthermore, the current marriage statute doesn't recognise certain customary marriages that are concluded in some African communities, including royal families. This includes the practice of marriages that are concluded for the purpose of giving birth to a future king or heir. The RCMA also provides for the conclusion of polygamous marriages between on man and more than one women (polygyny), whereas the South African law does not recognise the right of a woman to take more than one husband (polyandry).

(iii) **The Civil Union Act, 17 of 2006** that includes monogamous partnerships for both same and opposite-sex couples. The CUA makes provisions for the designation of marriage officers, who in the past, could refuse to solemnize a union. However, since the introduction of the Civil Union Amendment Act in 2020, government officials may no longer refuse to solemnise civil unions for same sex couples. Other social groups including Traditional Leaders and LGBTIQ+ are not eligible to be designated as marriage officers.

(iv) **Consent to marry by minors:** Currently the existing legislation makes provision for the marriage of minors provided that consent which is legally required, has been granted and submitted to the marriage officer in writing. However, the presence of both spouses is not required for some religious marriages, such as Hindu and Muslim marriages. Under the proposal, no marriage shall be legally entered into without the full and free consent of the intending spouses and no person under the age of 18 years will be permitted to marry. This provision will give protection to minors under the age of 18 and women in religious marriages. It remains to be seen whether the forced marriage of a minor will be prevented by this and how the new proposed legislation will sanction the contravention thereof.

It is now envisaged that the Legislator will, through the intended amendments, bring all the above-mentioned legislation under a single new Act, addressing shortcomings, while it also intends closing gaps that exist in current regulations. The new legislation will also now align and encompass different sexual orientation,

² www.businessstech.co.za "South Africa is changing its marriage laws next year" [dated 31 March 2022]

³ <http://www.dha.gov.za/index.php/notices/1449-know-your-green-paper-on-marriages-in-south-africa>

religious and cultural persuasions, by amassing legal marriages that will accord with the doctrine of equality, non-discrimination and human dignity, as encapsulated in the Constitution of the Republic of South Africa.

(v) **Different marriage regimes:** There are three marriage regimes applicable in South Africa in terms of the Matrimonial Property Act 88 of 1984. That is, marriage in community of property, marriage out of community of property with accrual and marriage out of community of property without accrual. Marriage in community of property is the default marriage regime in South Africa, therefore, if the parties do not decide and elect how to regulate their marriage, they are married in community of property, by default as the intending spouses marry without an ante nuptial contract, their marriage will be automatically in community of property. This is contra to some religious marriages that are automatically out of community of property.



The new legislation aims to exclude the default situation and proposes to allow for all intending spouses to be given an opportunity to make an informed decision on their preferred marriage regime during pre-marital counseling.

PROPOSED AND PENDING AMENDMENTS

As the proposal currently stands, the new Act, inter alia, will cover the following aspects:

- (i) Strict rules with regards to the age of marriage, taking into consideration the Children's Act;
- (ii) Configuration of marriage legislation to include marriages, property in respect of marriages, and the law of divorces;
- (iii) To make provision for intestate succession upon divorce;
- (iv) To align marriage laws with Section 15 of the Constitution, allowing for equitable treatment in respect of religion and customary beliefs;
- (v) To govern solemnisation and registration of marriages of foreign nationals; and
- (vi) To include solemnisation and registration of customary marriages in respect of non-citizens, cross border communities or citizens of neighbouring countries.

CONCLUSION

Overall, it will be a welcome addition to the marriages and divorce - legislation - family, underwriting the Constitution and necessary principles such as equality, non-discrimination, and human dignity, which is currently disregarded in respect of the existing marriage and divorce legislation.

