

**CRITICAL OVERVIEW OF THE APPLICATION OF  
THE DEFAULT SYSTEM IN SOUTH AFRICA'S  
MATRIMONIAL PROPERTY REGIMES**

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A research paper submitted in partial fulfillment of the requirement for the degree of  
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## **KEY WORDS**

In Community of Property

Out of Community of Property

Matrimonial Property Act

Divorce Act

Antenuptial Contract

Joint Estate

Accrual

Divorce

Default System

Notary Public



## DECLARATION

I declare that '*Critical overview of the application of the default system in South Africa's matrimonial property regimes*' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete reference.

Full name: Mogammad Shamiel Jassiem

Signed: \_\_\_\_\_

November 2010



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## **LIST OF ABBREVIATIONS**

Department of Justice and Constitutional Development

National Director of Public Prosecutions (NDPP)

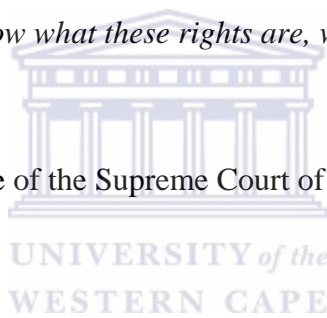
Directors of Public Prosecutions (DPP)



## CHAPTER ONE: INTRODUCTION

*Equality, human dignity and freedom are the bedrock on which the South African democracy stands firm. The Constitution outlaws unfair discrimination and guarantees every person in this country equality before the law and the right to the equal protection and benefit of the law. But equality cannot, and does not, mean only equality on paper or in theory. That is simply not good enough. Promoting and achieving equality- and, indeed, the other human rights protected in the Bill of Rights- requires an acute awareness of the lived realities of people's lives. One of these realities is that many people in South Africa are unable to enforce their legal rights because they do not know what these rights are, what they mean in practice and how to protect them.*

- BJ van Heerden, Judge of the Supreme Court of Appeal, November 2008.<sup>1</sup>



### **1.1 Background to the study**

The South African Constitution<sup>2</sup> provides that everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>3</sup> Section 9(3) provides that everyone has the right not to be unfairly discriminated against on the grounds of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age disability, religion, conscience belief, culture, language and birth.<sup>4</sup> Statutes have been adopted, limited and extended to ensure that the laws align with the rights entrenched in the Bill of Rights of the Constitution.<sup>5</sup> In some cases, statutes or sections thereof have been repealed as a result of being in conflict with the Bill of

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<sup>1</sup> Foreword in Monareng KN, *A simple guide to South African Family Law* (2008) v.

<sup>2</sup> Act 108 of 1996.

<sup>3</sup> S 9.

<sup>4</sup> S 9(3).

<sup>5</sup> S 9(4) provides that national legislation must be enacted to prevent or prohibit unfair discrimination.



Rights. With the need to respect the right of equality and dignity and the prohibition of discrimination on the grounds listed above ringing loudly in the ears of the legislature and family law practitioners, family law and the institution of the legally recognised marriage was bound to undergo radical changes and developments.

South Africa is a cosmopolitan country, rich with different ethnic, cultural, traditional and religious heritages and groups. Against the backdrop of the Bill of Rights, and having regard to the diversity of our country's make-up, and the unfortunate history of South Africa's apartheid regime, family law in relation to marriages and unions was in dire need of an overhaul. A need to give legal recognition to marriages or unions concluded in terms of the tenets of religious laws, cultural rituals or traditions and unions between same-sex couples arose. With the recognition of all unions, regardless of whether it was concluded in terms of civil, customary or religious laws, the ideal is for all unions to be governed by the same rules and laws applicable in respect of the proprietary, maintenance and child-parent consequences.<sup>6</sup> This leads to an assessment of the civil law matrimonial property systems available in South Africa and the statutes governing this aspect.

In modern times, the matrimonial property system applicable to a particular marriage will be determined by the terms of a notarial contract concluded between the parties to the marriage or in the absence of such contract, by operation of the law. In South Africa, if the parties have not concluded a notarial contract, the default matrimonial

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<sup>6</sup> This has proven to be a more challenging process than initially believed as marriages in terms of Islamic and Hindu religious laws are yet to gain legal recognition in South Africa.

property system of the country where the husband is domiciled will regulate the proprietary consequences of such marriage.<sup>7</sup>

The default matrimonial property system of a country is the law that will govern the proprietary consequences of the marriage should the parties neglect to or elect not to conclude a contract specifying that a specific matrimonial property system, other than the default matrimonial property system of the country, will apply to their marriage.

In South Africa, the Matrimonial Property Act<sup>8</sup> regulates the matrimonial property systems of the conventional civil marriage.<sup>9</sup> The Matrimonial Property Act distinguishes between two types of systems:

- (i) a marriage in community of property;<sup>10</sup>
- (ii) a marriage out of community of property with the incorporation or exclusion of the accrual system.<sup>11</sup>

Some religious and customary marriages<sup>12</sup> are not concluded in terms of the requirements set out in the Marriages Act<sup>13</sup> and are therefore not granted the status of a civil or legally recognised marriage. As a result, the Matrimonial Property Act does not apply to these marriages and no proprietary consequences between spouses flow from such marriages. There are no laws governing the proprietary consequences of

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<sup>7</sup> S 2 of the Divorce Act 70 of 1979.

<sup>8</sup> Act 88 of 1984.

<sup>9</sup> These are marriages concluded in terms of the provisions of the Marriages Act 25 of 1961, S 29 sets out the requirements for a valid marriage.

<sup>10</sup> Chapter iii of the Matrimonial Property Act 88 of 1984.

<sup>11</sup> *Ibid*, Chapter iii.

<sup>12</sup> Unless the customary marriage is recognised as a civil marriage in terms of the Recognition of Customary Marriages Act 120 of 1998.

<sup>13</sup> Act 25 of 1961.

these marriages and the spouses are viewed as unmarried in terms of civil law. The Matrimonial Property Act does not apply to domestic partnerships between same-sex or heterosexual couples who have not concluded a marriage or registered partnership in terms of the Civil Unions Act.<sup>14</sup> There are currently no statutes specifically governing the proprietary consequences of domestic partnerships.<sup>15</sup>

Prior to the introduction of legislation, which gave recognition to certain customary marriages and civil unions, as will be dealt with more fully in the paragraph hereafter, no legal recognition was afforded to marriages not concluded in terms of the Marriages Act.<sup>16</sup> Having regard to the cosmopolitan make up of South Africa, the liberal Bill of Rights entrenched in the Constitution of South Africa, and to remedy the inequities of the non-recognition of customary or religious marriages or same-sex partnership in South Africa, many steps have been taken to offer protection, provide clarity and create guidelines to marriages, unions or partnerships that fell outside the ambit of the Matrimonial Property Act.

These steps include the enactment of the Recognition of Customary Marriages Act<sup>17</sup> and the Civil Union Act.<sup>18</sup> Further steps include the introduction of the Domestic Partnership Bill and the Issue Paper 15 (Project 59) on Islamic Marriages and Related Matters<sup>19</sup> (hereafter referred to as “the Issue Paper”). The Issue Paper sets out the

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<sup>14</sup> Act 17 of 2006.

<sup>15</sup> The non-recognition of spouses to religious and customary marriages or partners in a domestic partnership is specifically discussed here in the context of proprietary consequences from their religious or customary marriage or domestic partnership. For purposes of certain legislation for example the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990, spouses to religious or customary marriages have been included in the definition of spouses and are afforded equal rights as that of spouses to a civil marriage.

<sup>16</sup> Act 25 of 1961.

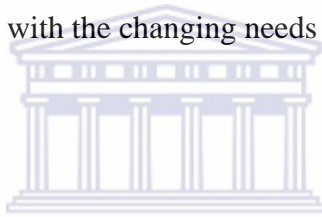
<sup>17</sup> Act 120 of 1998.

<sup>18</sup> Act 17 of 2006.

<sup>19</sup> Released by The South African Law Reform Commission in May 2000.

investigations regarding the legal recognition of Islamic marriages and other aspects of Islamic Personal Law within South Africa. In the Issue Paper attention is drawn to the more compelling issues arising out of the potential recognition of Muslim Personal Law in South Africa. It is meant to stimulate debate on how Muslim Personal Law should coexist with current legislation and with the Constitution.<sup>20</sup>

The primary purpose of these acts, bills and issue papers is directed at regulating the proprietary consequences of all unions be it civil, religious, customary or domestic in order for there to be uniformity amongst the various types of unions. The introduction of these statutes, bills and discussion papers verify the continuous development and progress of the law in keeping with the changing needs of society.



## **1.2 The Research Questions**

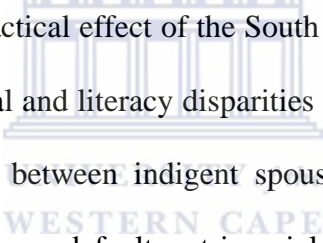
- (i) Whether the default matrimonial property system of South Africa caters for the needs of the large majority of indigent or sub-economic groups of South Africa, who have little or no resources to access information about the proprietary consequences of their marriage.
- (ii) Whether the default matrimonial property system infringes on the indigent persons constitutional right to equality.

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<sup>20</sup> Stats SA Library Cataloguing-in-Publication (CIP) Data Marriages and divorces, 2004 / Statistics South Africa. Pretoria: Statistics South Africa, 2006 xxvi, 157p. [Report No. 03-07-01(2004)] xxvi.

### **1.3 Objectives of the study**

The aim of this thesis is to explore the three types of matrimonial property systems available in South Africa with the primary focus being on critically analyzing whether the South African matrimonial property default system of a marriage in community of property, is a suitable default system having regard to the needs of the indigent and uneducated majority of South Africans. In the context of the marked variances in the socio-economic and literacy make up of South African's population, this thesis aims to assess the practical effects of the default system and, more importantly, to consider whether it creates inequality and what steps are recommended to redress such inequities.



This thesis will explore the practical effect of the South African default system having regard to the economic, cultural and literacy disparities in this country by using a case study of the average divorce between indigent spouses. The feasibility of an in community of property system as a default matrimonial property system which will be applicable in the majority of marriages between indigent or even lower earning spouses, will be examined and possible reform recommendations and alternatives presented.

### **1.4 Significance of the study**

The unfortunate reality is that a large portion of South Africans do not have proper education, the means to access information or the knowledge that marriage is a contract with far reaching proprietary consequences.<sup>21</sup> For many of these people, marriage is simply a symbol of their love for each other. They are not aware that they

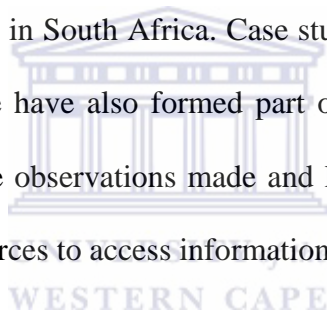
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<sup>21</sup> Proprietary consequences refer to the division of the property upon dissolution of the marriage.

have different options available to them in order to protect assets that they may already own upon entering the marriage or that they may acquire during the marriage. If they are aware of the options when concluding a marriage, they often do not have the resources to conclude and register a notarial agreement.<sup>22</sup>

## **1.5 Research Methods**

Various legal journals, articles, academic papers, legislation, South African case law, discussion papers, projects and text books were consulted to obtain information relating to the history, development and current legal principles and positions of the law of marriage, unions and the proprietary consequences of various systems of matrimonial property systems in South Africa. Case studies incorporating the facts of cases encountered in practice have also formed part of the research with a specific emphasis being placed on the observations made and limitations encountered due to indigent parties' lack of resources to access information and education.



## **1.6 Literature**

A wide array of literature is available on the history and development of South African law on matrimonial property. The most comprehensive having been found in *The South African Law of Husband and Wife*, Hahlo HR, 5<sup>th</sup> Edition, 1985. This book was the primary source of information relating to the history and development of matrimonial property law in South Africa. Other sources for information included books such as *South African Family Law*, Cronje DSP and Heaton J, 2004, *Introduction to South African Family Law*, Robinson JA, Human S and Boshoff A, 4<sup>th</sup>

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<sup>22</sup> S 21 of the Matrimonial Property Act 88 of 1984.

Edition, 2009. These books were also a good source of information and commentary on the current matrimonial property law.

Due to the topic under review, a lot of reference is made to legislation, the most prevalent in this thesis being the Matrimonial Property Act<sup>23</sup>, the Marriages Act<sup>24</sup>, the Marriages and Matrimonial Property Law Amendment Act<sup>25</sup>, the Divorce Act<sup>26</sup>, the Recognition of Customary Marriages Act<sup>27</sup> and the Civil Union Act<sup>28</sup>.

Certain discussion papers, presented by the South African Law Reform Commission (SALRC) which resulted in amendments to or the enactment of statutes have also been used to evaluate the development of law. These discussion papers include Discussion Paper on Customary Law of Succession, Project 90, September 2000, Discussion Paper, on the Review of the Law of Divorce: Amendment of Section 7(3) of the Divorce Act 1979, Project 12, July 1990. Other discussion papers presented by the SALRC relied on for this study includes Discussion Paper on Domestic Partnerships, Project 118, September 2003 and Discussion Paper on Islamic Marriages and Related Matters, Project 59, September 2003.

As a result of the South African law being influenced and developed by case law, the interpretation, adaptation and extension of the law have also been explained by referring to the applicable case law dealing with specific issues. Various cases have been consulted and referred to as a result.

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<sup>23</sup> Act 88 of 1984.

<sup>24</sup> Act 25 of 1961.

<sup>25</sup> Act 3 of 1988.

<sup>26</sup> Act 70 of 1979.

<sup>27</sup> Act 120 of 1998.

<sup>28</sup> Act 17 of 2006.

## **1.7 Outline of Chapters**

Chapter 1 sets out background information about this thesis and sets the tone for the research questions, the objectives, significance and the methodology of this thesis and literature relied on to compile it.

In chapter 2, the history of marriage and matrimonial property systems in terms of uncodified, South African common law, which formed the basis for statutory law, will be examined. Focus is placed on the development of the law to the current legislation which codify the three matrimonial systems that exist in South Africa.

Chapter 3 sets out a detailed analysis of the matrimonial property systems available to South Africans in terms of legislation.

In Chapter 4, the disadvantages and advantages of the South African matrimonial systems from an indigent person's perspective will be examined with specific reference to the facts of the case study.

Chapter 5 concludes this thesis with recommendations on the matrimonial property system best suited to the needs of the indigent majority of South Africa and remedies on educating this class in order for informed decisions to be made when concluding a marriage contract.



## CHAPTER TWO: THE HISTORY OF MATRIMONIAL PROPERTY LAW IN SOUTH AFRICA

### 2.1 Roman law

In terms of Roman law an engagement preceded a marriage.<sup>29</sup> This was an informal contract to enter into a marriage and did not give rise to any enforceable obligations.<sup>30</sup> No damages could be claimed as a result of a breach of promise.<sup>31</sup> Later the parties gave each other gifts to prove that their intention to marry was serious.<sup>32</sup> If the marriage did not take place due to a breach of promise, the guilty party forfeited the gifts and had to pay the other party double the value of the gifts.<sup>33</sup> A marriage concluded in terms of Roman law was the only legally recognised marriage in Roman law.<sup>34</sup> In order for the marriage to be recognised, both parties had to be Roman citizens, unmarried, over the age of puberty (14 years for boys and 12 years for girls) and competent to marry one another.<sup>35</sup>

The head of the family had to consent to the marriage of a party under parental authority.<sup>36</sup> In early Roman law the marriage was concluded *cum manu*.<sup>37</sup> Upon marriage, the wife became the subject of the husband's power and had limited status,

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<sup>29</sup> Hahlo HR, *The South African law of husband and wife*, 5<sup>th</sup> edition, 1985, 1. See also Sinclair J and Heaton J, *The law of husband and wife*, 1996, 183; Van der Vyver JD and Joubert DJ, *Persone- en familiereg*, 3<sup>rd</sup> edition, 1990, 457; Visser PJ and Potgieter JM, *Introduction to family law*, 2<sup>nd</sup> edition, 1998, 20; Robinson JA, Human S and Boshoff A, *Introduction to South African family law*, 4<sup>th</sup> edition, 2009, 20.

<sup>30</sup> *Ibid.*

<sup>31</sup> Hahlo HR, 1.

<sup>32</sup> Robinson JA, Human S and Boshoff A, 21.

<sup>33</sup> Van Zyl DH, *History and principles of Roman private law*, 1983, 102. See also Robinson JA, Human S and Boshoff A, 21.

<sup>34</sup> Van der Vyver and Joubert, 458. See also Robinson JA, Human S and Boshoff A, 21.

<sup>35</sup> Hahlo HR, 7. See also Van Zyl DH, 99; Robinson JA, Human S and Boshoff A, 21.

<sup>36</sup> Van der Vyver JD and Joubert DJ, 458. Also see Robinson JA, Human S and Boshoff A, 21.

<sup>37</sup> The power that the head of the family had over his wife. Van Zyl DH, 102; Hahlo HR, 1. See also Robinson JA, Human S and Boshoff A, 21.

similar to that of a minor child.<sup>38</sup> The husband gained marital power over the wife in all matters concerning the residence, house matters, maintenance, children, expenditure and property.<sup>39</sup> The husband became the owner of all property, regardless of whether it belonged to the wife upon her entering the marriage. The wife only had “*a tacit hypothec*” over the property of the husband.<sup>40</sup> This ultimately resulted in the wife not being able to build up a separate estate as everything that she owned was legally owned by her husband.

During the later stages of Roman law, marriage was concluded without *manu*.<sup>41</sup> This meant that the wife was no longer subjected to her husband’s authority.<sup>42</sup> The husband only acquired the authority to administer the joint household.<sup>43</sup>

The marriage terminated when one of the parties died, became enslaved or lost his or her citizenship.<sup>44</sup> The marriage could also be terminated by divorce, which was a unilateral act<sup>45</sup> and there was no need to indicate specific reasons for the divorce.<sup>46</sup>

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<sup>38</sup> Van Zyl DH, 103. See also Robinson JA, Human S and Boshoff A, 21.

<sup>39</sup> Sinclair J and Heaton J, 184. See also Cronje DSP and Heaton J, *South African Family Law*, 2<sup>nd</sup> edition, 2004, 4; Robinson JA, Human S and Boshoff A, 21.

<sup>40</sup> Hahlo HR, 3.

<sup>41</sup> Hahlo HR, 2. See also Van der Vyver JD and Joubert DJ, 458; Robinson JA, Human S and Boshoff A, 21.

<sup>42</sup> Van der Vyver JD and Joubert DJ, 458. See also Robinson JA, Human S and Boshoff A, 21, 22; Hahlo HR, 2.

<sup>43</sup> Robinson JA, Human S and Boshoff A, 22.

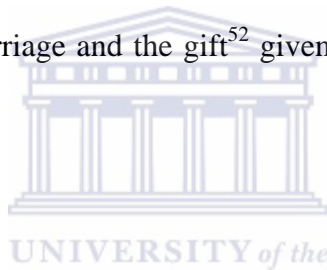
<sup>44</sup> Van Zyl DH, 110; Robinson JA, Human S and Boshoff A, 22.

<sup>45</sup> *Ibid.*

<sup>46</sup> Van der Vyver JD and Joubert DJ, 457. See also Robinson JA, Human S and Boshoff A, 22.

## 2.2 Continental law

In early Germanic law, a marriage was considered a legal relationship between two individuals to create a community life and to procreate.<sup>47</sup> The marriage closely resembled the *lobolo* marriage in terms of the customary law of South African indigenous people.<sup>48</sup> The prospective families of the parties were required to give their consent to the marriage.<sup>49</sup> A bride price (or bride wealth) was negotiated between the prospective husband and bride's father, which was usually cattle, and once paid, the bride was handed to the husband in the presence of representatives of both families.<sup>50</sup> The husband acquired guardianship over his wife<sup>51</sup> and was regarded as the owner of all the matrimonial assets, except for the clothing and jewellery that the wife brought into the marriage and the gift<sup>52</sup> given to her by her husband on the morning after the wedding.<sup>53</sup>



It was later accepted that the wife could have her own patrimony,<sup>54</sup> which included gifts from her husband, bequests from her family and the morgengawe.<sup>55</sup> If the wife did not have her own assets or morgengawe at the death of her husband, some tribes granted her a share of her husband's estate.<sup>56</sup> During the marriage, the husband administered both his and the wife's assets and he was entitled to the income generated from the wife's assets as her contribution to the expenses of the joint

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<sup>47</sup> *Ibid.*

<sup>48</sup> Hahlo HR, 4. See also Robinson JA, Human S and Boshoff A, 22.

<sup>49</sup> Robinson JA, Human S and Boshoff A, 22.

<sup>50</sup> Van der Vyver JD and Joubert DJ, 457. Also see Robinson JA, Human S and Boshoff A, 22.

<sup>51</sup> Hahlo HR, 4. See also Robinson JA, Human S and Boshoff A, 22.

<sup>52</sup> This gift was referred to as the morgengawe and was intended to provide for the wife's maintenance in the event of her husband predeceasing her.

<sup>53</sup> Van der Vyver JD and Joubert DJ, 457. See also Robinson JA, Human S and Boshoff A, 22.

<sup>54</sup> Hahlo HR, 5. See also Robinson JA, Human S and Boshoff A, 22.

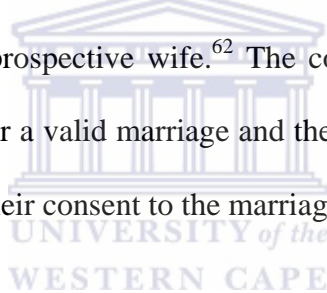
<sup>55</sup> Robinson JA, Human S and Boshoff A, 22.

<sup>56</sup> Van der Vyver JD and Joubert DJ, 459. See also Robinson JA, Human S and Boshoff A, 23.

household.<sup>57</sup> If the husband had good reason to terminate the marriage, all he had to do was send his wife back to her family with no financial penalty.<sup>58</sup> Later the wife obtained right to divorce her husband.<sup>59</sup>

### **2.3 The late Middle Ages (Canon law)**

During this period, marriage was governed by the Roman Catholic Church and some consequences still apply in modern South African law.<sup>60</sup> A divorce could only be granted by a Papal decree and not a human agency as a marriage was regarded as a sacrament.<sup>61</sup> The old tribunal customs gave place to a new order in that polygamy was abolished and marriage was considered a contract between the two parties which required the consent of the prospective wife.<sup>62</sup> The consent of the parties to marry became a vital requirement for a valid marriage and the marriage could be annulled if either party had not granted their consent to the marriage.<sup>63</sup>



According to Cronje and Heaton<sup>64</sup> further developments in this period included that:

- (i) persons within certain degrees of affinity were forbidden to marry one another;
- (ii) banns had to be published prior to the marriage;
- (iii) a minor who wanted to enter into a marriage needed the consent of his or

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<sup>57</sup> Van der Vyver JD and Joubert DJ, 458. See also Robinson JA, Human S and Boshoff A, 23.

<sup>58</sup> Hahlo HR, 6. See also Robinson JA, Human S and Boshoff A, 23.

<sup>59</sup> *Ibid.*

<sup>60</sup> Cronje DSP and Heaton J, 4. See also Robinson JA, Human S and Boshoff A, 23.

<sup>61</sup> Robinson JA, Human S and Boshoff A, 23.

<sup>62</sup> Hahlo HR, 5; Cronje DSP and Heaton J, 4; Robinson JA, Human S and Boshoff A, 23.

<sup>63</sup> *Ibid.*

<sup>64</sup> 4. See also Robinson JA, Human S and Boshoff A, 23, 24.

her guardian;

- (iv) the marriage had to be consecrated by a priest;
- (v) divorce was prohibited (save by a Papal decree).

The wife remained under the guardianship of her husband and as a result, the wife had no separate estate.<sup>65</sup> As the wife had limited legal status, she could not contract freely and required her husband to represent her and conclude legal transactions on her behalf and he was further required to represent her in any legal proceedings.<sup>66</sup> Although divorce was prohibited, a decree of separation from bed and table could be applied for which allowed husband and wife to live apart.<sup>67</sup>

The law later developed a new marriage dispensation in terms of which all the assets which the husband and wife accumulated during the course of the marriage were divided equally between them at the dissolution of their marriage.<sup>68</sup>

## **2.4 Roman-Dutch law**

During this period, marriage law became secularised as a result of the reformation.<sup>69</sup> The rigid Catholic viewpoints on marriage lost influence and the Reformed Church, due to the sacramental nature of marriage, continued to influence the law of

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<sup>65</sup> Van der Vyver JD and Joubert DJ, 460. See also Robinson JA, Human S and Boshoff A, 24.

<sup>66</sup> Robinson JA, Human S and Boshoff A, 24.

<sup>67</sup> Hahlo HR, 8. See also Robinson JA, Human S and Boshoff A, 24.

<sup>68</sup> Van der Vyver JD and Joubert DJ, 460. See also Robinson JA, Human S and Boshoff A, 24.

<sup>69</sup> Robinson JA, Human S and Boshoff A, 24.

marriage.<sup>70</sup> Holland was the first European jurisdiction to permit civil marriages.<sup>71</sup>

The state prescribed the requirements for the conclusion of a marriage and the courts gained authority over marriage law.<sup>72</sup>

The marriage law was codified in the Political Ordinance of the States of Holland (1580) and the following requirements had to be complied with at the conclusion of a marriage:<sup>73</sup>

- (i) the parties had to voluntarily consent to the marriage;
- (ii) minors (men under 25 and woman under 20) had to obtain the consent of their guardians;
- (iii) the minimum age for the bridegroom was 14 years and 12 years for the bride;
- (iv) in the case of a widow, she could not be pregnant from her previous marriage;
- (v) the parties could not be related within the prohibited degrees of affinity;
- (vi) banns had to be published in the church , town hall or in front of the council chamber on three successive Sundays or market days;<sup>74</sup>
- (vii) the marriage had to be solemnised by a minister of the church or a magistrate and at least two witnesses had to be present.

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<sup>70</sup> Sinclair J and Heaton J, 191. See also Robinson JA, Human S and Boshoff A, 24; Cronje DSP and Heaton J, 4.

<sup>71</sup> *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA) par 73. See also Robinson JA, Human S and Boshoff A, 24.

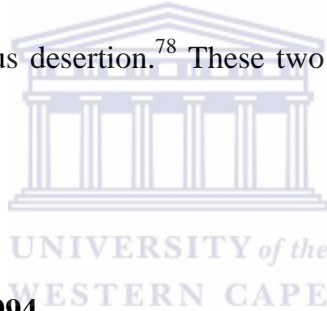
<sup>72</sup> Van der Vyver JD and Joubert DJ, 461. See also Robinson JA, Human S and Boshoff A, 25.

<sup>73</sup> Cronje DSP and Heaton J, 4, 5. See also Robinson JA, Human S and Boshoff A, 25.

<sup>74</sup> *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA) par 71.

By the 13<sup>th</sup> century all the assets of the wife and the husband acquired before marriage or during the marriage were merged to form a joint estate (in community of property of profit and loss) and the parties had the right to exclude community of property by entering into an antenuptial contract.<sup>75</sup>

The husband retained marital power over his wife and the joint estate was solely administered by him.<sup>76</sup> If the wife believed that the husband acted fraudulently in the administration of the joint estate or threatened to dissipate the assets of the joint estate, the wife had the right to apply to a court of law for an order claiming division of the joint estate.<sup>77</sup> Two grounds for divorce were recognised based on Bible texts, namely adultery and malicious desertion.<sup>78</sup> These two grounds became the common law grounds of divorce.<sup>79</sup>



## 2.5 South African law pre 1994

Many of the basic premises of the Political Ordinance of 1580 were retained in South African law and form the basis for the contemporary South African law of marriage.<sup>80</sup>

Banns were required to be published and permission from the Council of Policy to publish the banns had to be obtained.<sup>81</sup> Marriages were solemnized by the Secretary

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<sup>75</sup> Sinclair J and Heaton J, 193. See also Robinson JA, Human S and Boshoff A, 25.

<sup>76</sup> Hahlo HR, 13. See also Robinson JA, Human S and Boshoff A, 25.

<sup>77</sup> Hahlo HR, 11. See also Voet 23.2.54 quoted in *Laws v Laws* 1972 1 SA 321 (W); *Reyneke v Reyneke* 1990 3 SA 927 (EC); Sinclair J and Heaton J, 192; Robinson JA, Human S and Boshoff A, 25.

<sup>78</sup> Hahlo HR, 13. See also Robinson JA, Human S and Boshoff A, 25; Cronje DSP and Heaton J, 5.

<sup>79</sup> Hahlo HR and Sinclair J, *The reform of the South African law of divorce*, 1980, 2. See also Robinson JA, Human S and Boshoff A, 26.

<sup>80</sup> Cronje DSP and Heaton J, 5. See also Robinson JA, Human S and Boshoff A, 26.

<sup>81</sup> Hahlo HR, 15. See also Van der Vyver JD and Joubert DJ, 461; Robinson JA, Human S and Boshoff A, 27.

of the Council of Policy until 1665 when the first clergyman was appointed.<sup>82</sup> Marriages were then solemnized by the clergyman.<sup>83</sup>

Community of property and of profit and loss was the primary marriage dispensation and the consequences of marriage were the same as those in Holland.<sup>84</sup> In 1804 a civil marriages solemnized by magistrates were prohibited until 1838 when secular marriages were again allowed.<sup>85</sup> In 1875 in the Cape, the Ante-nuptial Contracts Law Amendment Act<sup>86</sup> required that antenuptial contracts had to be registered in order for it to be enforceable against the creditors of either husband or wife.<sup>87</sup>

In 1935, with the enactment of the Marriage Law Amendment Act,<sup>88</sup> the minimum age for the conclusion of a marriage was set at 18 years for boys and 16 years for girls provided that the parent's permission was obtained.<sup>89</sup> In addition to the civil grounds for divorce (adultery and malicious desertion), two further grounds for divorce were recognised in 1935, namely:

- (i) imprisonment for five years after being declared a habitual criminal; and
- (ii) incurable insanity for a period of seven years.<sup>90</sup>

The Matrimonial Affairs Act<sup>91</sup> empowered the courts to grant an order in respect of maintenance against the party at fault upon divorce.<sup>92</sup> In 1961 the formal

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<sup>82</sup> *Ibid.*

<sup>83</sup> Sinclair J and Heaton J, 194. See also Robinson JA, Human S and Boshoff A, 27; *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA) par 72.

<sup>84</sup> *Ibid.*

<sup>85</sup> Robinson JA, Human S and Boshoff A, 27. See also Van der Vyver JD and Joubert DJ, 461.

<sup>86</sup> Act 21 of 1875.

<sup>87</sup> Sinclair J and Heaton J, 195. Robinson JA, Human S and Boshoff A, 27. See also Van der Vyver JD and Joubert DJ, 461. Robinson JA, Human S and Boshoff A, 27; Cronje DSP and Heaton J, 5.

<sup>88</sup> 8 of 1935.

<sup>89</sup> Robinson JA, Human S and Boshoff A, 27.

<sup>90</sup> Hahlo HR, 17. Robinson JA, Human S and Boshoff A, 27. See also Van der Vyver JD and Joubert DJ, 461. Robinson JA, Human S and Boshoff A, 27.



requirements for a marriage and an amendment to the prohibited degrees of relationship by affinity was revised and incorporated in the Marriages Act<sup>93</sup>.<sup>94</sup> The Marriage Law Amendment Act<sup>95</sup> amended the Marriages Act<sup>96</sup> and abolished the requirement that the banns had to be published. The minimum age for girls to marry was lowered to 15.<sup>97</sup>

The common law grounds for divorce were repealed with the enactment of the Divorce Act.<sup>98</sup> The Divorce Act replaced the previous grounds for divorce by introducing irretrievable breakdown of the marriage as the main ground of divorce.<sup>99</sup>

The Matrimonial Property Act,<sup>100</sup> which commenced on 1 November 1984, abolished the marital power of a husband in marriages with regard to all marriages entered into after the commencement date of the Act.<sup>101</sup> A system of equal, concurrent administration of the joint estate for spouse who married in community of property was created.<sup>102</sup> This Act introduced a statutory alternative to a complete separation of property (marriage out of community of property) by introducing the accrual system.<sup>103</sup> This system and the operation of the Matrimonial Property Act were

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<sup>91</sup> 37 of 1953.

<sup>92</sup> Cronje DSP and Heaton J, 5.

<sup>93</sup> Act 25 of 1961.

<sup>94</sup> *Ibid.*

<sup>95</sup> Act 51 of 1970.

<sup>96</sup> Act 25 of 1961.

<sup>97</sup> Op cit note 92.

<sup>98</sup> Act 70 of 1979.

<sup>99</sup> S 4.

<sup>100</sup> Act 88 of 1984.

<sup>101</sup> S 11.

<sup>102</sup> Op cit note 92.

<sup>103</sup> Cronje DSP and Heaton J, 5. See also Robinson JA, Human S and Boshoff A, 28.

neither applicable nor available to black person marriages until the enactment of the Marriages and Matrimonial Property Law Amendment Act.<sup>104</sup>

The Act<sup>105</sup> remedied the potential disadvantages of economic inequality in marriages out of community by inserting certain subsections<sup>106</sup> into the Divorce Act.<sup>107</sup> These subsections allow for judicial discretion with regard to the redistribution of assets where marriages have been concluded with complete separation of property before the commencement date of the Matrimonial Property Act<sup>108, 109</sup>. Prior to the enactment of the Marriages and Matrimonial Property Law Amendment<sup>110</sup>, black marriages were governed by the Black Administrations Act.<sup>111</sup>

The default marriage system in respect of marriages concluded between black parties were distinguished from marriages concluded in South Africa between members of other ethnic groups, including European, Coloured and Indian persons. In terms of the Black Administrations Act<sup>112</sup> black persons who concluded a civil marriage were automatically married out of community of property.<sup>113</sup> In terms of South African law, if black parties to a marriage do not sign an ante-nuptial contract prior to their marriage or a post-nuptial contract during their marriage, they are regarded as being married in community of property.<sup>114</sup>

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<sup>104</sup> Act 3 of 1988.

<sup>105</sup> S 36.

<sup>106</sup> Ss 7(3) – (6).

<sup>107</sup> Act 70 of 1979.

<sup>108</sup> Act 88 of 1984.

<sup>109</sup> Robinson JA, Human S and Boshoff A, 28.

<sup>110</sup> Act 3 of 1988.

<sup>111</sup> Act 38 of 1927.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ex parte the Minister of Native Affairs: In re Molefe v Molefe* 1946 AD 315.

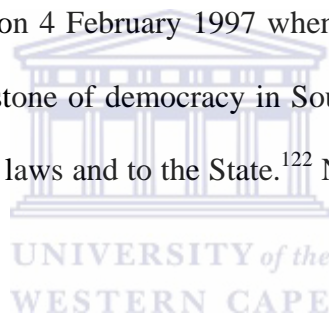
<sup>114</sup> *Edelstein v Edelstein NO and Others* 1952 (3) SA 1(A) at 10- when two persons marry, a rebuttable presumption exist that they are married in community of property. See also chapter 3 below.

In 1993 the General Law Fourth Amendment Act,<sup>115</sup> which had retrospective effect, abolished marital power in all marriages.<sup>116</sup>

## 2.6 South African law post 1994

### 2.6.1 Introduction

On 27 April 1994 a new legal order was created in South Africa when the interim Constitution<sup>117</sup> came into operation.<sup>118</sup> The preamble to the interim Constitution<sup>119</sup> guaranteed equality between men and women and people of all races so that all citizens can enjoy and exercise their fundamental rights and freedoms. The interim Constitution<sup>120</sup> was repealed on 4 February 1997 when the ‘final’ Constitution came into operation.<sup>121</sup> The cornerstone of democracy in South Africa is based on the Bill of Rights which applies to all laws and to the State.<sup>122</sup> No law may be in conflict with it.<sup>123</sup>



By exercising their powers of judicial review,<sup>124</sup> the courts have the power to declare existing law to be unconstitutional and invalid if found to violate the Bill of Rights.<sup>125</sup> Examples of how the courts exercised their power of review will be highlighted in 2.6.3. hereunder. This chapter will illustrate how South Africa’s marriage law has

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<sup>115</sup> Act 132 of 1993.

<sup>116</sup> Robinson JA, Human S and Boshoff A, 28.

<sup>117</sup> Act 200 of 1993.

<sup>118</sup> Robinson JA, Human S and Boshoff A, 29.

<sup>119</sup> *Op cit* note 117.

<sup>120</sup> *Op cit* note 117.

<sup>121</sup> *Op cit* note 118.

<sup>122</sup> Chapter 2 of the Constitution.

<sup>123</sup> S 7 read with S 8(3). See also Robinson JA, Human S and Boshoff A, 30.

<sup>124</sup> Hosten WJ *et al*, *Introduction to South African law and legal theory*, 2<sup>nd</sup> edition, 1995, 1013.

<sup>125</sup> Robinson JA, Human S and Boshoff A, 32.

developed in keeping with the rights enshrined in the Bill of Rights based on the right of equality<sup>126</sup> and the right not to be unfairly discriminated against.<sup>127</sup>

### **2.6.2 Customary (indigenous) law marriages**

A customary law marriage can be defined as a union formed according to the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.<sup>128</sup> Civil marriages in terms of the Marriages Act<sup>129</sup> were the only form of family relationship recognised by South African family law.<sup>130</sup> It is for this reason that a marriage concluded according to customary law was not regarded as a valid or recognised marriage in South Africa.<sup>131</sup>

The Constitution has altered this position significantly by allowing for legislation that recognises marriages concluded under a tradition or a system of religious law.<sup>132</sup> In order to give effect to the foregoing, the Recognition of Customary Marriages Act<sup>133</sup> came into operation on 15 November 2000.<sup>134</sup> The Act gives validity to all customary marriages provided that the marriage complies with the provisions of the Act.<sup>135</sup>

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<sup>126</sup> S 9(1) of the Constitution.

<sup>127</sup> On the grounds as set out in S 9(3) of the Constitution.

<sup>128</sup> S 1 of the Recognition of Customary Marriages Act 120 of 1998.

<sup>129</sup> Act 25 of 1961.

<sup>130</sup> Robinson JA, Human S and Boshoff A, 33.

<sup>131</sup> Bekker JC *et al*, *Introduction to legal pluralism in South Africa*, 2<sup>nd</sup> edition, 29.

<sup>132</sup> S 15(3).

<sup>133</sup> Act 120 of 1998.

<sup>134</sup> Robinson JA, Human S and Boshoff A, 44.

<sup>135</sup> S 2.

## 2.6.3 How the courts changed the face of marriage by giving effect to the Bill of Rights

### 2.6.3.1 Same sex marriages

As stated above, civil marriages concluded in terms of the Marriages Act<sup>136</sup> were the only form of family relationship which was recognized by South African family law.<sup>137</sup> This Act does not contain a definition for marriage. In *Ismail v Ismail*<sup>138</sup> the court defined a marriage in terms of the common law as the legally recognized unions for life of one man with one woman to the exclusion of all others while it last. This definition clearly excludes couples in a same sex relationship. A couple in a same sex relationship could not register a marriage in terms of the Marriages Act.<sup>139</sup>

On 1 December 2005, the Constitutional Court found that the failure of both the common law and section 30(1)<sup>140</sup> of the Marriages Act<sup>141</sup> to provide a mechanism whereby same sex couples could marry constituted unfair discrimination and violated their rights to equality and dignity under the Constitution.<sup>142</sup> The Constitutional Court gave Parliament one year from the date of the judgment to pass legislation that would allow persons of the same sex to marry.<sup>143</sup>

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<sup>136</sup> Act 25 of 1961.

<sup>137</sup> Robinson JA, Human S and Boshoff A, 33.

<sup>138</sup> 1983 1 SA 1006 (A) 1019 (H). See also *Seedat's Executors v The Master (Natal)* 1917 AD 302, 309.

<sup>139</sup> *Fourie and Another v Minister of Home Affairs and Another (The Lesbian and Gay Equality Project Intervening as amicus curiae)*: Unreported judgment of the Pretoria High Court (Transvaal Provincial Division) [case number 17280/2002] delivered on 18 October 2002.

<sup>140</sup> S 30(1) sets out the requirements for a valid marriage.

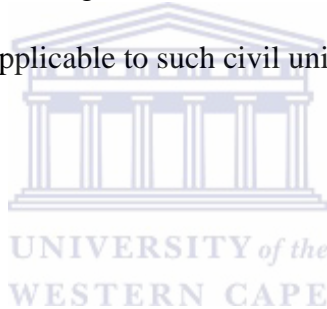
<sup>141</sup> Act 25 of 1961.

<sup>142</sup> *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC), 114. See also Robinson JA, Human S and Boshoff A, 37.

<sup>143</sup> *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC), 162.

In 2006 Parliament responded to the Constitutional Court's judgment by promulgating the Civil Union Act.<sup>144</sup> This Act came into operation on 30 November 2006.<sup>145</sup> This Act gave legal recognition to unions between same sex partners,<sup>146</sup> and extended the application of the Matrimonial Property Act<sup>147</sup> to such unions. Formalities, such as, the solemnisation and registration of civil unions are set out in section 8 of the Act.

The Civil Union Act has legalised civil unions concluded in terms of section 13, and has placed these unions on a par with all marriage entered into in terms of the Marriage Act.<sup>148</sup> The consequences of a civil union concluded in terms of the Civil Union Act are analogous to a marriage concluded in terms of the Marriage Act<sup>149</sup>. The Matrimonial Property Act is applicable to such civil unions.<sup>150</sup>



### 2.6.3.2 Religious marriages

The current legal position in South African law is that if the parties conclude a marriage in terms of the tenets of Islam, their marriage is void regardless of whether or not it is monogamous in nature.<sup>151</sup> The only instance when a marriage between Islamic couples will be valid in South African law is when the couple concludes both an Islamic marriage as well as a civil marriage (a marriage that is solemnised in accordance to either the Marriage Act<sup>152</sup> or the Civil Union Act<sup>153</sup>).<sup>154</sup> Despite the

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<sup>144</sup> Act 17 of 2006.

<sup>145</sup> Robinson JA, Human S and Boshoff A, 37.

<sup>146</sup> The Act also applies to opposite sex partners who conclude a union in terms of the Civil Unions Act as opposed to the Marriage Act 25 of 1961, provided that neither of the parties has concluded a marriage in terms of the Marriages Act.

<sup>147</sup> Act 88 of 1984.

<sup>148</sup> Act 25 of 1961.

<sup>149</sup> *Ibid.*

<sup>150</sup> S 2(a) of the Civil Union Act.

<sup>151</sup> Robinson JA, Human S and Boshoff A, 46.

<sup>152</sup> Act 25 of 1961.

above, the South African courts have allowed Islamic marriages to be recognised for certain limited purposes.<sup>155</sup>

According to Robinson JA, Human S and Boshoff A<sup>156</sup> these instances are:

- (a) that the contractual obligations that flow from an Islamic marriage can be enforced between the parties provided that the marriage is monogamous in nature;<sup>157</sup>
- (b) that a spouse in a *de facto* monogamous Islamic marriage may institute an action for loss of support;<sup>158</sup>
- (c) that a spouse to a purely religious Islamic marriage will be able to claim maintenance and to inherit intestate from the deceased spouse's estate;<sup>159</sup>
- (d) that a spouse to a polygynous Islamic marriage will be able to claim maintenance and to inherit intestate from the deceased spouse's estate;<sup>160</sup>

The above does not mean that Islamic marriages are valid according to South African Law; however it simply means that certain limited legal consequences are attached to them.<sup>161</sup>

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<sup>153</sup> Act 17 of 2006.

<sup>154</sup> In *Singh v Ramparsad* 2007 3 SA 445 (D & CLD) the court held that a marriage concluded in accordance with Hindu rites that has not in addition been solemnised as a civil marriage in terms of South African law is void and of no legal effect.

<sup>155</sup> Robinson JA, Human S and Boshoff A, 47.

<sup>156</sup> 47.

<sup>157</sup> *Ryland v Edros* 1997 2 SA 690 (C) as noted in Robinson JA, Human S and Boshoff A, 47.

<sup>158</sup> *Amod v Multilateral Motor Vehicle Accident Fund* 1999 4 SA 1319 (SCA) as noted in Robinson JA, Human S and Boshoff A, 47.

<sup>159</sup> *Daniels v Campbell* 2004 7 BCLR 735 (CC) as noted in Robinson JA, Human S and Boshoff A, 47.

<sup>160</sup> *Hassam v Jacobs NO and Others* 2008 4 ALL SA350 (C) as noted in Robinson JA, Human S and Boshoff A, 47.

<sup>161</sup> Robinson JA, Human S and Boshoff A, 47.

## 2.7 Conclusion

In conclusion, civil marriages in South Africa are a secular institution which was strongly influenced by the Christian faith and legal principles which originated from Canon law.<sup>162</sup> According to case law, civil marriage legislation is applied in the same manner to all couples who conclude a civil marriage regardless of their religious belief.<sup>163</sup> The Bill of Rights contained in the South African Constitution has greatly changed some areas of the South African family law and will continue to shape South African family law in future.<sup>164</sup>

The institution of marriage has since the enactment of the Constitution changed radically from the previously widely applied definition of a marriage as the legally recognized voluntary union for life of one man and one woman to the exclusion of all others while it lasts to marriages between same sex couples being recognized and extending legal recognition to marriages concluded in terms of customary law. Further advances are expected as progress is made to giving recognition to marriages concluded in terms of Islamic law.

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<sup>162</sup> Robinson JA, Human S and Boshoff A, 29.

<sup>163</sup> *Singh v Ramparsad* 2007 3 SA 445 (D & CLD) par 45.

<sup>164</sup> *Ryland v Edros* 1997 2 SA 690 (C); *Amod v Multilateral Motor Vehicle Accident Fund* 1999 4 SA 1319 (SCA); *Daniels v Campbell* 2004 7 BCLR 735 (CC); *Hassam v Jacobs NO and Others* 2008 4 ALL SA350 (C).



**CHAPTER THREE: OVERVIEW OF THE MATRIMONIAL PROPERTY  
SYSTEMS AVAILABLE IN SOUTH AFRICA**

**3.1 Introduction**

South African matrimonial property law is primarily regulated by way of statutory law.<sup>165</sup> These statutes do not codify all the rules and certain areas are still regulated by the rules of the common law.<sup>166</sup> Parties to a marriage may elect which matrimonial property system will apply to their marriage before they get married.<sup>167</sup> The choice is limited and the parties can only choose between the possibilities available in law.<sup>168</sup> This chapter aims to assess the matrimonial property systems available to South Africans in terms of legislation. The discussion will consist of an examination of legislation, jurisprudence and case study.

**3.2 Marriages in community of property**

As stated in chapter two, if the parties fail to elect their matrimonial property system before they enter into a marriage, the default matrimonial property system applicable to their marriage is in community of property.<sup>169</sup> A marriage concluded between two parties, where community of property and profit and loss is not expressly excluded in a notarial contract, will be regarded as a marriage “in community of property and in community of profit and loss” in terms of the South African common law and the

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<sup>165</sup> The Matrimonial Property Act 88 of 1984 and the Divorce Act 70 of 1979 are currently the most primary statutes regulating matrimonial property law in South Africa.

<sup>166</sup> See chapter 4 below. See also Robinson JA, Human S and Boshoff A, 126.

<sup>167</sup> Parties may vary their matrimonial property system with leave of the court: Matrimonial Property Act 88 of 1984, s 21.

<sup>168</sup> See Sonnekus JC, 1993 *De Jure* 363 for the discussion on how to extent the available options by way of contractual freedom to regulate one’s own relationship.

<sup>169</sup> Cronje DSP et al in *LAWSA vol 16 Marriage First Reissue* (1998) para 63. See also Cronje DSP & J Heaton *South African Family Law* 2 ed (2004) 70-71; Visser PJ & Potgieter JM *Introduction to Family Law* 2 ed (1998) 94-95 on the exceptions to the rule that all marriages are in community of property.

Matrimonial Property Act.<sup>170</sup> This matrimonial property system brings about the joining of the estates of both parties to the marriage, including the profits and losses of their respective estates.<sup>171</sup>

### 3.2.1 The joint estate

Where parties conclude a marriage 'in community of property', the spouses' assets<sup>172</sup> acquired and liabilities incurred before their marriage form part of their joint estate.<sup>173</sup>

All assets acquired and debts incurred by the parties jointly or individually during the marriage will form part of their joint estate.<sup>174</sup> In short, there is no legal distinction between the parties' individual assets and liabilities, regardless of whether they were acquired or incurred prior to or during the marriage.<sup>175</sup>

The parties to a marriage in community of property are equal and joint owners of all the assets in the joint estate irrespective of which party purchased the individual assets.<sup>176</sup> They are joint debtors in respect of debts of the joint estate, regardless of which party incurred the debt.<sup>177</sup> Creditors may claim against the parties jointly and

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<sup>170</sup> Act 88 of 1984; According to Cronje DSP and Heaton J, 85 a complete system of community of property was unknown to the Roman and early Germanic legal system, but only came into existence at the end of the 13<sup>th</sup> century in Holland and Zeeland.

<sup>171</sup> S 17(1) of the Deeds Registries Act 47 of 1937.

<sup>172</sup> *Blatchford v Blatchford's Estate (1861) 1 EDC 365 367*- In common law the rule has long existed that a third party can make a donation or bequest to a husband or a wife, subject to the condition that such assets must not become part of the joint estate.

<sup>173</sup> There are certain exceptions to this rule which will be discussed below. See *In Estate Sayle v Commissioner of Inland Revenue 1945 AD 388* where the court pointed out that the old Dutch writers unanimously stated that the husband and wife were co-owners of the joint estate in equal undivided portions for the duration of the marriage, and that this opinion is also that of our courts.

<sup>174</sup> S 17 (5) of the Matrimonial Property Act 88 of 1984.

<sup>175</sup> *In Estate Sayle v Commissioner of Inland Revenue 1945 AD 388*.

<sup>176</sup> Robinson JA, Human S and Boshoff A, 129.

<sup>177</sup> Hahlo HR, 169. See also Cronje DSP and Heaton J, 90; Robinson JA, Human S and Boshoff A, 144.

severally as joint owners of the assets and co-debtors of the liabilities of the joint estate.<sup>178</sup>

Upon dissolution of the marriage, through death or divorce, each party is entitled to a half share of the joint estate.<sup>179</sup> The assets excluded from a joint estate according to Robinson JA, Human S and Boshoff A<sup>180</sup> are the following:

- (i) assets specified in an antenuptial contract;<sup>181</sup>
- (ii) assets excluded in a will or donation agreement (unless otherwise agreed to by the parties);<sup>182</sup>
- (iii) assets subject to a fideicommissum or usufruct;<sup>183</sup>
- (iv) small gifts between spouses;<sup>184</sup>
- (v) any benefit granted to a wife in terms of the Friendly Society Act 25 of 1956;<sup>185</sup>
- (vi) costs of matrimonial litigation;<sup>186</sup>
- (vii) monies received in respect of personal injury claims.<sup>187</sup>

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<sup>178</sup> Sonnekus JC, 1986 *TSAR* 92 97 is of the opinion that a creditor can claim any assets belonging to a spouse, irrespective of whether such asset falls inside or outside the joint estate.

<sup>179</sup> Robinson JA, Human S and Boshoff A, 234.

<sup>180</sup> 141, 142.

<sup>181</sup> Hahlo HR, 165.

<sup>182</sup> Yeats JP, 1944 *THRHR* 159-162. See also *Ex parte Lelie* 1945 WLD 167.

<sup>183</sup> *Van der Merwe v Van Wyk* 1921 EDL 298. See also *Ex parte Van der Watt* 1924 OPD9, 12; *Ex parte Malan* 1951 3 SA 715 (O); *Van Wyk v Groch* 1968 3 SA 240 (EC); Hahlo HR, 167, Cronje DSP and Heaton J, 90.

<sup>184</sup> Yeast JP, 1944 *THRHR* 159. See also *Reddy v Chinasamy* 1932 NPD 461; Cronje DSP and Heaton J, 90.

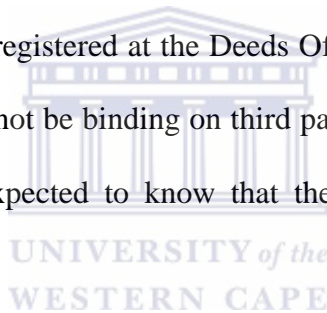
<sup>185</sup> S 17.

<sup>186</sup> Visser PJ & Potgieter JM, 100. See also *Comerma v Comerma* 1938 TPD 220; *Paarl Wine and Brandy Co Ltd v Van As* 1955 3 SA 558 (O).

<sup>187</sup> S 18 of the Matrimonial Property Act 88 of 1984.

- (viii) if the assets that form part of the separate estate of one of the spouse are replaced by other assets.<sup>188</sup>

In the absence of an antenuptial or postnuptial<sup>189</sup> contract (herein after referred jointly as the notarial contract), a marriage is contracted in community of property.<sup>190</sup> A notarial contract concluded between the parties and registered at the Deeds Office will serve as *prima facie* proof that the parties are married out of community of property.<sup>191</sup> In terms of South African law the notarial contract must be attested by a notary and it must be registered at the Deeds Office in order for the marriage to be recognised as one out of community of property.<sup>192</sup> If the parties concluded a notarial contract but failed to have it registered at the Deeds Office,<sup>193</sup> such contract could be binding *inter partes* but may not be binding on third parties or creditors as they could not have been reasonably expected to know that the parties were not married in community of property.<sup>194</sup>



The only way that a party is able to avoid a strict adherence to the precept of an equal division of the joint estate is if he or she makes a claim, in terms of Section 9 of the

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<sup>188</sup> *Ex parte Lelie* 1945 WLD 167. See also Cronje DSP and Heaton J, 91; Lee RW and Honore T, *The South African law of obligations*, 1978, par 81 (x).

<sup>189</sup> S 21 of the Matrimonial Property Act 88 of 1984. See also Cronje DSP and Heaton J, 131-135; Visser PJ and Potgieter JM, 90- 92; Labuschagne S, 1991 *TSAR* 516; Van Schalkwyk LN, 1991 *De Jure* 351; Sonnekus JC, 1991 *THRHR* 133; Van Schalkwyk LN, 1995 *De Jure* 443; Heaton J and Jacobs S, 1995 *THRHR* 133.

<sup>190</sup> This means that there is a rebuttable presumption that the parties are married in community of property. See also *Brummand v Brummund's Estate* 1993 2 SA 494 NmHc.

<sup>191</sup> *Odendaal v Odendaal* (2002) All SA 94 (W), 2002 (1) SA 763 (W).

<sup>192</sup> S 86 of the Deeds Registries Act 47 of 1937.

<sup>193</sup> *Ex parte Spinazze* 1983 4 SA 751 (T), confirmed on appeal 1985 3 SA 650 (A); Cronje DSP and Heaton J *Casebook on the Law of Persons and Family Law* 1990.

<sup>194</sup> S 89 of the Deeds Registries Act 47 of 1937; See also Cronje DSP and Heaton J, 131-135; Visser PJ and Potgieter JM, 90- 92; Labuschagne E, 1991 *TSAR* 516; Van Schalkwyk LN, 1991 *De Jure* 351; Sonnekus JC, 1991 *THRHR* 133; Van Schalkwyk LN, 1995 *De Jure* 443; Heaton J and Jacobs 1995 *THRHR* 133.

Divorce Act<sup>195</sup>, for the other party to forfeit his or her patrimonial benefit to all the assets of the joint estate (a total forfeiture claim), part thereof or specific assets of the joint estate (a partial forfeiture claim). The underlying principle of forfeiture is that a spouse should not benefit financially from a marriage that he or she has caused to fail.<sup>196</sup> This remedy is onerous and places a heavy burden of proof on the party making the claim.<sup>197</sup>

The factors that a court has to take into account in considering a claim for the forfeiture of benefits are

- i) the duration of the marriage;<sup>198</sup>
- ii) the circumstances leading to the breakdown of the marriage; and
- iii) any substantial misconduct by either of the parties.<sup>199</sup>

A party claiming a forfeiture of benefits against his or her spouse must satisfy all three requirements before a court can make a forfeiture of benefits order.<sup>200</sup> In addition hereto, the court must be satisfied that the claimant will be unduly prejudiced if a forfeiture order is not made.

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<sup>195</sup> Act 70 of 1979.

<sup>196</sup> Cronje DSP and Heaton J, 326.

<sup>197</sup> Legal Aid South Africa will only provide legal representations in divorce matters if there minor children are involved. See Legal Aid Guide, 11<sup>th</sup> Edition, Juta, 2009.

<sup>198</sup> *Matyila v Matyila* 1987 3 SA 230 (W) 235-236.

<sup>199</sup> “Substantial misconduct” for purposes of a forfeiture claim may be different to misconduct resulting in the breakdown of a marriage. Adultery for example can be sufficient misconduct for a breakdown in the marriage but may not be the sole reason to satisfy the requirement of “substantial misconduct” for the forfeiture of benefits claim - *Matyila v Matyila* 1987 3 SA 230 (W) 234I. In *Singh v Singh* 1983 1 SA 781 (C), the court found that the misconduct required to fulfill the requirement of “substantial misconduct”, must have caused or contributed to the breakdown of the marriage.

<sup>200</sup> *Matyila v Matyila* 1987 3 SA 230 (W) 235 E.

### 3.2.2 Administration of the joint estate

The parties are the joint administrators of the joint estate<sup>201</sup> with equal control over the management of the joint estate.<sup>202</sup> Each party retains full capacity to act and independently manage their own assets and liabilities which fall in the joint estate.<sup>203</sup>

Both spouses have the capacity to perform juristic acts that are binding on the joint estate, without the consent or knowledge of the other spouse. This freedom to contract is limited in certain instances as set out in section 15 of the Matrimonial Property Act.<sup>204</sup> The joint estate is jointly managed by the spouses and the consent of the other spouse is required for a juristic act which binds the joint estate.<sup>205</sup>

In some instances, mainly where furniture or household effects are alienated or pledged, monies due to one spouse are received by the other spouse or donations which unreasonably prejudices the other spouse, the informal consent of the other spouse must be obtained.<sup>206</sup>

Written consent of the other spouse is required for the alienation, cession and encumbrance of shares, stocks, bonds or investments,<sup>207</sup> assets retained in the joint

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<sup>201</sup> S 14 of the Matrimonial Property Act 88 of 1984.

<sup>202</sup> White, coloured and Asian spouses to a marriage in community of property concluded after 1 November 1984 had equal power to administer the joint estate. The wife in a marriage in community of property concluded prior to this date was subject to the marital power of the husband, who as a result had sole and exclusive control over the administration of the joint estate. Marital power was abolished by S 12 of the Matrimonial Property Act 88 of 1984. The abolishment of marital power extended to black in community of property marriages in 1988, by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. In 1993, the General Law Fourth Amendment Act abolished marital power retrospectively in respect of all marriages (concluded prior to 1984).

<sup>203</sup> S 14 of the Matrimonial Property Act 88 of 1984.

<sup>204</sup> S 15(1) of Act 88 of 1984 stipulates that the spouse may perform juristic acts without the consent of the other spouse, save for the juristic acts excluded in terms of S 15(2) and S 15(3) of the Act.

<sup>205</sup> Robinson JA, Human S, Boshoff A, 153.

<sup>206</sup> *Ibid*, 154 – 155.

<sup>207</sup> S 15(2)(c) of the Matrimonial Property Act 88 of 1984.

estate for investment purposes<sup>208</sup> and withdrawal of monies held in the name of the other spouse at a bank or other institution account.<sup>209</sup>

Written consent attested before two witnesses are required for:

- (i) the alienation or encumbrance of immovable property which belong to the joint estate;<sup>210</sup>
- (ii) the conclusion of a contract for the alienation or encumbrance of an immovable property which belongs to the joint estate or the granting of a real right over the property to a third party;<sup>211</sup>
- (iii) entering a contract of surety which binds the joint estate;<sup>212</sup>
- (iv) the conclusion of credit agreements or instalment agreements to receive credit;<sup>213</sup> and
- (v) the acquisition of immovable property in terms of the Alienation of Land Act 68 of 1981 which covers the acquisition of immovable property where the purchase price is payable in more than two instalments over a period exceeding one year.<sup>214</sup>

The requirement of consent by both parties encourages the assurance that neither spouse is able to operate to the financial detriment of the joint estate nor to the

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<sup>208</sup> *Ibid*, S 15(2)(d).

<sup>209</sup> *Ibid*, S 15(2)(e).

<sup>210</sup> *Ibid*, S 15(2)(a).

<sup>211</sup> *Ibid*, S 15(2)(b).

<sup>212</sup> If the conclusion of the surety agreement forms part of the normal business, trade or occupation of the spouse, the other spouses consent is not required.

<sup>213</sup> *Op cit* note 207, S 15(2)(h); the other spouses consent is not required if the agreement forms part of the normal business, trade or occupation of the spouse.

<sup>214</sup> *Op cit* note 207, S 15(2)(g) ; the other spouses consent is not required if the agreement forms part of the normal business, trade or occupation of the spouse.

financial detriment of the other spouse without the latter's knowledge,<sup>215</sup> save in instances of transacting in the normal course of his/her business, trade or occupation or where the juristic act will not unreasonably prejudice the other party.<sup>216</sup>

This matrimonial property system promotes and creates a sense of legal and economic equality between the spouses.

### **3.2.3 In community of property matrimonial system and black marriages**

Civil marriages concluded between black parties prior to the 1988,<sup>217</sup> were automatically out of community of property,<sup>218</sup> in terms of the Black Administration Act.<sup>219</sup> Section 22(6)<sup>220</sup> of the Act provided that black persons had to show at the conclusion of the marriage, or within one month of concluding a marriage, and in the presence of a Magistrate, Commissioner or the marriage officer who solemnised their marriage, that their intention was to be married “in community of property and community of profit and loss”.<sup>221</sup> Their choice of the matrimonial property system was reflected on their marriage certificate.

If the marriage was recorded as, or converted to, a marriage “in community of property and community of profit and loss”, any immovable property owned by either of the parties situated in a location or black township designated as tribal land,

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<sup>215</sup> *Kotzé v Oosthuizen* 1988 3 SA 578 (C).

<sup>216</sup> *Amalgamated Banks of South Africa Bpk v De Goede* 1997 4 SA 66 (SCA). Cronje DSP and Heaton J, 161 – 165.

<sup>217</sup> On 25 February 1988, the Marriages and Matrimonial Property Law Amendment Act 3 of 1988 was enacted which gave civil marriages between black persons the same status as any other civil marriage, with the Matrimonial Property Act being made applicable to such marriages.

<sup>218</sup> Unless the parties agreed differently.

<sup>219</sup> Act 38 of 1926.

<sup>220</sup> S 22(6) of the Black Administrations Act. 38 of 1927 (deleted by S 1 (e) of The Marriage and Property Law Amendment Act).

<sup>221</sup> Cronje DSP and Heaton J, 85.



including a leasehold, was excluded from the joint estate.<sup>222</sup> This provision was in direct conflict with the community of property concept applied in the South African civil law. In order to address this conflict, section 1(e) of The Marriage and Matrimonial Property Law Amendment Act<sup>223</sup> repealed Section 22(6) of the Black Administration Act. The Marriage and Matrimonial Property Law Amendment Act also extended the application of the Matrimonial Property Act to black marriages.<sup>224</sup> This resulted in no distinctions being drawn between civil marriages of the various ethnic groups in South Africa since 1988.

A black marriage concluded after 2 December 1988<sup>225</sup> has the same proprietary consequences as any other civil marriage and is largely governed by the matrimonial property system chosen by the parties to the marriage.<sup>226</sup> A black marriage concluded before 2 December 1988, where the parties have not entered into an agreement to change the matrimonial property system to an in community one is deemed to be a marriage out of community of property despite the absence of a notarial contract and such a marriage is governed by the Matrimonial Property Act.<sup>227</sup>

The Matrimonial Property Act may apply to a black marriage solemnised prior to 1 November 1984, the date of enactment of the Matrimonial Property Act, by the execution and registration of a postnuptial contract.<sup>228</sup>

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<sup>222</sup> *Ibid*, 86.

<sup>223</sup> Act 3 of 1988.

<sup>224</sup> S 1 (e) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

<sup>225</sup> Date of Act 3 of 1988 coming in to operation.

<sup>226</sup> *Op cit* note 224.

<sup>227</sup> Cronje DSP and Heaton J, 85.

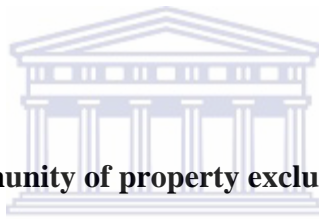
<sup>228</sup> Barnard AH, Cronje DSP and Olivier PJJ, 240.

### **3.3 Marriages out of community of property**

Prior to the enactment of the Matrimonial Property Act two matrimonial property systems existed in South Africa; namely, marriages in community of property and profit and loss, and marriages out of community of property and profit and loss.<sup>229</sup>

The enactment of the Matrimonial Property Act in 1984 retained the two matrimonial property systems mentioned above, however the Act introduced the accrual system.<sup>230</sup>

The difference between the marriages out of community of property excluding the accrual system and marriages out of community of property including the accrual system is dealt with below



#### **3.3.1 Marriages out of community of property excluding the accrual system**

Where parties to a marriage elect to marry out of community of property, excluding the accrual system, they will conclude a notarial contract usually before the marriage which is called the antenuptial contract. A notarial contract concluded after the date of marriage is called a postnuptial contract.<sup>231</sup>

The parties must expressly agree to exclude the application of community of property and community of profit and loss in the notarial contract.<sup>232</sup> The effect of excluding community of property and community of profit and loss is that each party will retain the assets acquired by him or her prior to and during the

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<sup>229</sup> Robinson JA, Human S and Boshoff A, 128.

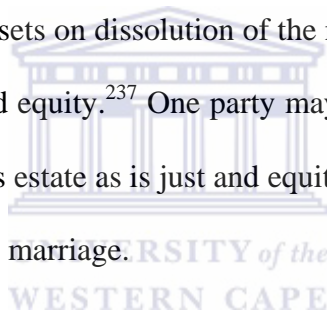
<sup>230</sup> Robinson JA, Human S and Boshoff A, 129. See also Cronje DSP and Heaton J, 121 which deem the marriage out of community of property including the accrual system to be the secondary marriage system under South African family law.

<sup>231</sup> For a detailed discussion on the procedure to register a postnuptial contract see Cronje DSP and Heaton J, 131- 135; Robinson JA, Human S and Boshoff A, 132- 133.

<sup>232</sup> S 2 of the Matrimonial Property Act 88 Of 1984.

marriage. Each party will be responsible for his or her debts incurred in their respective names prior to and during the marriage. Neither party will have an automatic right to share in the other party's estate at the dissolution of the marriage through death or divorce.<sup>233</sup>

An exception to the automatic consequence of a marriage out of community of property is where a claim in terms of Section 7 (3) of the Divorce Act<sup>234</sup> for a redistribution of assets is made during divorce proceedings. This section allows for a party to a marriage out of community of property concluded prior to 1984,<sup>235</sup> when the Matrimonial Property Act<sup>236</sup> came into force, to apply to the court for a redistribution of assets on dissolution of the marriage through divorce on the grounds of fairness and equity.<sup>237</sup> One party may claim such a portion or percentage of the other party's estate as is just and equitable having regard to the facts and circumstances of the marriage.



The main objective for the introduction of this section was to address the inequity which existed in the patriarchal society of South Africa where the husband was the main breadwinner and the economically secure party to a marriage with a better opportunity to build up an estate.<sup>238</sup> The wife was the homemaker with limited or no economic security and negligible resources to

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<sup>233</sup> Robinson JA, Human S and Boshoff A, 144.

<sup>234</sup> Act 70 of 1979.

<sup>235</sup> Currently there is uncertainty between some writers as to whether the restricted application of section 7(3), by only including marriages prior to certain date, does not infringe on the constitutional right of parties to equal protection and benefit of the law. See Heaton J, *Bill of Rights Compendium*, 1998, par 3C25.

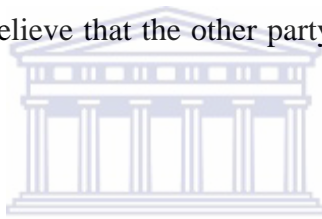
<sup>236</sup> Act 88 of 1984.

<sup>237</sup> S 7(3). See also Zaal N, 1986 *TSAR* 64; Sonnekus JC, 1985 *TSAR* 346.

<sup>238</sup> In *Jordaan v Jordaan* 2001 3 SA 288 (C) at par 23 the court noted that the housewife made it possible for her husband to fully develop his business.

build up an estate.<sup>239</sup> The reality in South Africa is that most women relied on their husbands for financial security. As a result of their generally lower economic and occupational status and because of cultural and social norms, women are therefore usually in a weaker bargaining position than men when it comes to negotiations regarding economic assets.<sup>240</sup>

Research shows that parties who enter into a contract about their relationship often do so while suffering from cognitive distortion.<sup>241</sup> The distortion lies in the fact that, despite the enormous number of divorces, one of the future spouse or both of them do not really think that their relationship will end in divorce and/or he or she or they genuinely believe that the other party will behave honourable should the relationship end.<sup>242</sup>



Many women contribute directly or indirectly to the increase of their husband's estates as his estate were regarded as their joint retirement security.<sup>243</sup> The direct contributions of wives could include contributions made to their husband's employment by being actively involved in his business, for example attending to

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<sup>239</sup> *Ibid.*

<sup>240</sup> Bonthuys E, *Family Contracts* (2004) 121 *SALJ* 879, 896-897. South African notaries recognize that there seldom is true informed choice when future spouses enter into an antenuptial contract. As a notary commented to the South African Law Commission when the commission considered extending the current limited judicial discretion to redistribute property upon divorce (which is contained in S 7(3) of the Divorce Act): '[I]t is quite often found that one of the parties...is more dominant than the other and the other will fall in line with what the first party says': SA Law Commission Report *Project 12: Review of the Law of Divorce: Amendment of Section 7(3) of the Divorce Act, 1979* (July 1990) 11. See also Heaton J, 'Striving for substantive gender equality in family law: selected issues.' (2005) 21 *SALJ* 547, 554.

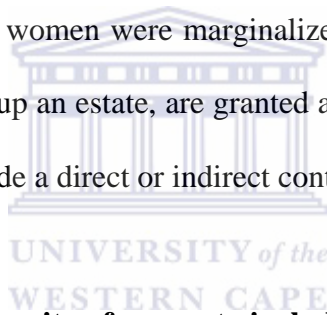
<sup>241</sup> Heaton J, 550.

<sup>242</sup> See Bonthuys E, 895 and the research she refers to at 896 fn 117. On temporary cognitive distortion within the context of financial agreements between family members see further Trebilcock MJ & Elliott S, 'The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements' in Benson P, (ed) *The Theory of Contract Law* (2001) 45, 57.

<sup>243</sup> In *Beaumont v Beaumont* 1987 1 SA 967 (A) 997G the court held that the view of Sonnekus JC, 1987 *THRHR* 332 that a wife merely fulfils her common law duties by managing the husband's estate is not correct.

manage the company books, entertaining clients, or fulfilling a managerial or administrative role in the business. Others contributed indirectly by being homemakers and child minders for the parties' children. They sacrificed their own careers to fulfil the role as wife and mother. Misconduct by one of the parties which caused the breakdown in a marriage and other factors are also considered by the court.<sup>244</sup> The court enjoys a wide discretion in making a redistribution of assets order which the court may consider to be just and equitable.<sup>245</sup>

In this way, women who have concluded a marriage out of community of property, during a time when women were marginalized, accepting of what the man said and unable to build up an estate, are granted an opportunity to share in an estate to which she had made a direct or indirect contribution.



### **3.3.2 Marriages out of community of property including the accrual system**

A traditional marriage out of community of property has various benefits as well as disadvantages.<sup>246</sup> One major disadvantage is that a spouse, upon dissolution of the marriage, could be left without any claim against the estate of the other spouse because of the fact that spouses were unable to share in each other's financial gain during the subsistence of the marriage.<sup>247</sup> As a direct consequence

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<sup>244</sup> Visser PJ and Potgieter JM, 187. See also *Buttner v Buttner* 2006 3 SA 23 (SCA) par 31 where the court noted that the misconduct of a party should only influence the outcome in instances where it would be unfair to ignore such misconduct.

<sup>245</sup> S 7(3) of the Divorce Act.

<sup>246</sup> See chapter 4 below.

<sup>247</sup> Robinson JA, Human S and Boshoff A, 177.

of this, Parliament enacted the Matrimonial Property Act<sup>248</sup> and introduced the accrual system.

Marriages out of community of property and profit and loss concluded after 1 November 1984 are subject to the “accrual system”, unless the “accrual system” is expressly excluded in the antenuptial contract.<sup>249</sup> The accrual system is a form of sharing of assets that are acquired during the marriage.<sup>250</sup> There are two separate estates that are administered independently and the accrual system only comes into operation upon the dissolution of the marriage.<sup>251</sup>

The consequences of this matrimonial property system are that both parties will retain ownership of their assets and liability for their debts, but the party whose estate has shown a lesser accrual or profit will have a right to share in 50% of the difference between the net values of the two individual estates.<sup>252</sup>

The parties may declare the value of their estates at date of marriage in the notarial contract.<sup>253</sup> This amount is then appreciated in accordance with inflation and is deducted from the value of the parties’ estate on dissolution of the marriage in order to determine the growth in his or her estate.<sup>254</sup>

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<sup>248</sup> Act 88 of 1984.

<sup>249</sup> Robinson JA, Human S and Boshoff A, 130.

<sup>250</sup> Hahlo HR, 304.

<sup>251</sup> *Op cit* note 249.

<sup>252</sup> S 4(1)(a) of the Matrimonial Property Act 88 of 1984.

<sup>253</sup> S 6(4)(b) of the Matrimonial Property Act 88 of 1984.

<sup>254</sup> S 4(1)(b)(iii) of the Matrimonial Property Act 88 of 1984.

The parties may elect to declare a nil value to their pre-marriage assets.<sup>255</sup> All assets owned by the parties or registered in his or her name at date of dissolution will form part of their estate and will be taken into account when determining the growth of their respective estates.<sup>256</sup>

The parties may exclude certain assets from his or her estate when calculating the accrual or determining the growth in their estates.<sup>257</sup> The following assets are excluded:

- (i) any amount for non-patrimonial loss which a spouse receives during the subsistence of the marriage;<sup>258</sup>
- (ii) inheritance, legacy or donation which a spouse receives during the subsistence of the marriage;<sup>259</sup>
- (iii) assets which the spouses excluded in the antenuptial contract for the purposes of calculating the accrual;<sup>260</sup>
- (iv) donations made between the spouse during the subsistence of the marriage.<sup>261</sup>

The effect of this system is that each party will retain his or her assets and be responsible for his or her own debts, but the party whose estate has shown a lesser accrual will be entitled to half the difference in the growth or profit of the two estates.

In effect the parties will share the nett growth in their massed estates equally.<sup>262</sup>

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<sup>255</sup> S 6(4)(a).

<sup>256</sup> *Op cit* note 254.

<sup>257</sup> S 4(1)(b)(ii).

<sup>258</sup> S 4(1)(b)(i). See also Van der Vyver JD and Joubert DJ, 568.

<sup>259</sup> S 5(1). See also Cronje DSP and Heaton J, 125.

<sup>260</sup> *Op cit* note 239.

<sup>261</sup> Robinson JA, Human S and Boshoff A, 183.

<sup>262</sup> S 7 of the Matrimonial Property Act 88 Of 1984.

The underlying principle of the accrual system is that each party is entitled to take out the asset value that he or she brought into the marriage provided that they have declared their commencement values, and share the assets that they have built up together. The sharing of the profit is made in such a manner that each party will, save for their assets excluded from the application of the accrual, receive an equal value of the nett estate through the retention or transferring of assets between parties.<sup>263</sup> This system achieves a complete separation of the spouses' estates as each spouse will retain ownership of completely separate estates. Should they own assets jointly, the value of their portion of the asset will be included in their individual estate. Likewise, if they are joint debtors of a liability, their portion of the debt will be deducted from the value of their individual gross estates.<sup>264</sup>

The Matrimonial Property Act<sup>265</sup> sets out the formula to calculate the division of the accrual between the parties.<sup>266</sup> On dissolution of the marriage, either by death or divorce, the accrual or growth in each party's estate is calculated. The growth in the estate is calculated by subtracting the value of the estate at commencement of marriage (as declared in the notarial contract) from the nett value of the estate at date of dissolution.

If one of the estates has shown a higher growth, the party with the smaller growth in their estate will enjoy a claim against the party with the greater growth. Their claim will be limited to half the difference between the nett values of the two estates.<sup>267</sup>

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<sup>263</sup> Wille G, *Wille's Principles of South African Law*, 9<sup>th</sup> edition, 2007, 167. Also see Robinson JA, Human S and Boshoff A, 130.

<sup>264</sup> S 4 of the Matrimonial Property Act 88 Of 1984.

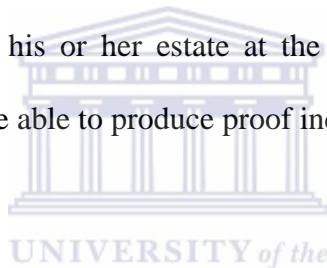
<sup>265</sup> Act 88 of 1984.

<sup>266</sup> *Op cit* note 264.

<sup>267</sup> *Ibid.*



The parties may, in their notarial contract, declare the nett value of their assets at the commencement of the marriage. Alternatively, a party to a marriage may, before the marriage or within six months from date of commencement thereof, declare his or her nett worth in a written statement.<sup>268</sup> The statement must be signed by the other party and be attested to by a notary (who will usually be the notary who attended to the attestation of the parties' notarial contract).<sup>269</sup> If either of the party's debts at the time of the marriage exceeds the value of his or her assets, the nett value of his or her estate at the commencement of the marriage is regarded as nil.<sup>270</sup> If the parties do not state the value of his or her estate in the notarial contract or in a separate statement, the commencement value of his or her estate at the time of the marriage will be regarded as nil, unless they are able to produce proof indicating the contrary.<sup>271</sup>



If the value of a party's estate at marriage is regarded as nil, everything he or she owns at the dissolution of the marriage will be treated as having accrued during the marriage, unless it can be proved that the assets belonged to him or her before the marriage took place.<sup>272</sup>

When calculating the values of the parties' estates at the dissolution of the marriage, allowance is made for any difference in the value of money at the commencement and

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<sup>268</sup> S 6(1) of the Matrimonial Property Act 88 Of 1984.

<sup>269</sup> S 18(1) of the Attorneys Act 53 of 1979 provides that the court may on application admit and enroll a person as a notary if the court is satisfied that he or she is an admitted attorney and that he or she has passed the practical examination in respect of the practice, functions and duties of a notary.

<sup>270</sup> S 7 of the Matrimonial Property Act 88 Of 1984.

<sup>271</sup> S 6(4)(b) of the Matrimonial Property Act 88 Of 1984.

<sup>272</sup> *Ibid.*

the dissolution of the marriage,<sup>273</sup> usually with reference to the consumer price index (i.e. the inflation rate).

In order for a marriage out of community of property to be effective between the parties, a notarial contract has to be concluded prior to the solemnization of their marriage or during the marriage. If an antenuptial contract is not concluded prior to the marriage being solemnized, the matrimonial property system applicable to the marriage may be varied on application to court to change the matrimonial property system.<sup>274</sup>

### **3.4 Conclusion**

Although the two matrimonial property systems are available to South Africans, they are often not accessible to indigent South Africans who have limited access to information or are simply not educated enough on the topic of marriage and its proprietary consequences.

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<sup>273</sup> S 4(1)(b)(iii) of the Matrimonial Property Act 88 of 1984.

<sup>274</sup> S 21 of the Matrimonial Property Act 88 of 1984.

**CHAPTER FOUR: ADVANTAGES AND DISADVANTAGES OF THE  
MATRIMONIAL PROPERTY SYSTEMS AVAILABLE IN SOUTH AFRICA**

**4.1 Introduction**

An analysis of the disadvantages and advantages of each available matrimonial property system will help gage a better understanding of the consequences and the practical effect thereof. For purposes of this study the analysis of the patrimonial consequences upon dissolution of a marriage, based on the spouse's matrimonial property system, will be limited to dissolution of a marriage by divorce.

An example of the problems created by the lack of resources and information is best illustrated having regard to the facts of the following case, which is unfortunately a prevalent reality for the majority of sub-economic families in South Africa. The names of the parties have been changed in order to safeguard the identity of the parties. The facts are as follows:

May Smith was a working mother of two minor children, aged 10 and 15 years old respectively. She was employed as a full time domestic worker and earned R2000-00 per month. In 1996 May received a housing subsidy from the government and she was allocated an immovable property in Delft. The immovable property was registered in May's name. She had one minor child born out of wedlock from a relationship with Ben Sack at the time of receiving the subsidy.

In 1998 she met Jack Smith and married him in community of property on 14 June 1999. Jack was unemployed for the duration of their marriage. Save for the income from odd handyman jobs that he did, John had no income. He had managed to secure

a loan with African Bank which monies he used to purchase furniture items and other household for the family.

May instituted an action for a decree of divorce on 23 January 2008. May claimed amongst other things an order whereby Jack's patrimonial benefits of the joint estate was to be forfeited in her favour, in terms of section 9 of the Divorce Act. The reasons advanced by May for her claim was that Jack made no financial contributions to the joint estate and the parties had never intended for the immovable property to be shared equally. Jack contested May's version and testified that he made a financial contribution by purchasing furniture and applying his sporadic income when he earned.

On 12 June 2008, the court granted a decree of divorce ordering that the joint estate between May and Jack be divided equally between them on the basis that they had elected to conclude a marriage in community of property and that the reasons advanced by May were not sufficient grounds to grant a forfeiture of benefits order in her favour. This meant that the property in Delft had to be sold and the net proceeds divided equally between May and Jack.

By the time of the divorce was finalized, John had an outstanding debt with African Bank in excess of R25 000.00. The property was sold for R35 000.00. After estate agents commission and costs associated with the sale of the property, including arrear municipality accounts, the nett proceeds were R27 500.00. The R25 000.00 debt was regarded as a debt of the joint estate. The nett proceeds were utilized to settle the debt with African Bank. After settlement of this debt, May and John each received R1 750.00. May lost her home and was left destitute without any recourse in law against John.

Using this case as a backdrop, the flaws and strengths of the South African matrimonial property default system will be analyzed from the perspective of indigent persons.

## **4.2 Marriages in community of property**

In terms of the marriage in community of property system there is a merging of the assets and liabilities of the two parties who conclude the marriage. A joint estate is created and the parties are the joint administrators of the joint estate<sup>275</sup> with equal control over the management of the joint estate.<sup>276</sup>

### **4.2.1 Advantages of marriages in community of property**

The main advantage of marriages in community of property is that spouses share in each other's financial prosperity including in cases where a spouse does not contribute to the increase in the joint estate or contributes indirectly to the growth of the joint estate.<sup>277</sup>

### **4.2.2 Disadvantages of marriages in community of property**

The disadvantages of this matrimonial system appear to outweigh the advantages. A disadvantage of marriages in community of property is that it does not afford a spouse

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<sup>275</sup> S 14 of the Matrimonial Property Act 88 of 1984.

<sup>276</sup> White, coloured and Asian spouses to a marriage in community of property concluded after 1 November 1984 had equal power to administer the joint estate. The wife in a marriage in community of property concluded prior to this date was subject to the marital power of the husband, who as a result had sole and exclusive control over the administration of the joint estate. Marital power was abolished by S 12 of the Matrimonial Property Act 88 of 1984. The abolishment of marital power extended to black in community of property marriages in 1988, by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. In 1993, the General Law Fourth Amendment Act abolished marital power retrospectively in respect of all marriages (concluded prior to 1984).

<sup>277</sup> Robinson JA, Human S, Boshoff A, 129.

protection of his or her 'individual' assets in the joint estate from the debts of the other spouse.<sup>278</sup>

Spouses to a marriage in community of property are equally liable for the other's debts regardless of whether they had knowledge of such debts. An exception to this principle would occur when both parties' written consent was required and one spouse failed to furnish such written consent.<sup>279</sup> In such a case, the spouse who is not a party to the agreement affecting the joint estate may not be liable for a debt so incurred<sup>280</sup> and they cannot be sued individually.<sup>281</sup>

The spouse who entered into the agreement or both parties will have to be sued.<sup>282</sup> If the debt was incurred for household necessities, the creditor is within his/her full right to institute a claim against either or both spouses. If it is a debt incurred where the consent of both parties were required, the contract may be declared void, on the basis that the one spouse did not have the contractual capacity to conclude the contract without the other spouse's consent, unless the creditor is able to prove that he was not aware that consent was necessary or not obtained.<sup>283</sup> If the creditor was not aware or could not have reasonably known that the consent of the spouse was required or not received, the contract would be valid and enforceable.

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<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

<sup>280</sup> S 15(9)(b) of the Matrimonial Property Act 88 of 1984 stipulates that if the joint estate suffers a loss as a result of such a transaction, an adjustment must be effected upon division of the joint estate. Sinclair JD, 85 accepts that the burden of proof rests on the innocent prejudiced spouse, who must show that the facts satisfy the requirements of s 15(9)(b).

<sup>281</sup> Robinson JA, Human S, Boshoff A, 162.

<sup>282</sup> S 17(5) of the Matrimonial Property Act 88 of 1984.

<sup>283</sup> This is a subjective test with an objective requirement of whether a reasonable person would have known that the consent of the other spouse was required. Each case will have to be determined on its facts. If the contract is voided and the creditor has performed in terms of the contract, he/she may reclaim the asset or money by way of *rei vindicatio* or *condictio* proceedings.

A serious prejudicial consequence of marrying in community of property is that assets in the joint estate are vulnerable to the claims of creditors of both spouses and very little remedies are available to the prejudiced spouse to protect the assets acquired by the individual against this vulnerability.

In the case of May and John for example, John became a co-owner of the property by virtue of his marriage to May. Although May had acquired the property prior to her marriage to John, at the dissolution of her marriage, she was forced to share the property with him. May was also jointly liable for his debt with African Bank which was paid from the assets of the joint estate before the nett assets were distributed between the parties. In this particular case a marriage in community of property operated to May's detriment and to John's advantage. John benefitted from an asset that he made minimal, if any, contribution towards. A further disadvantage by way of example is if John had defaulted on the repayment of the loan to African Bank, the immovable property would have been at risk of being attached in order to satisfy the outstanding debt with African Bank. African Bank would have been able to sue both May and John jointly for the debt as, based on the facts, the monies was used for household necessities.

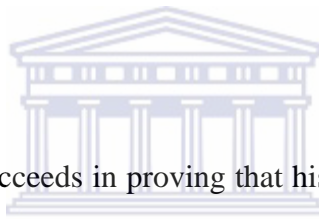
Where a spouse is declared insolvent, it will affect the communal property or joint estate of the parties and may lead to the sequestration of the joint estate.<sup>284</sup> Should one spouse be reckless with his or her financial affairs, it will adversely affect the other spouse, as they are liable for each other's debts.

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<sup>284</sup> S 17(4) of the Matrimonial Property Act 88 of 1984.

A further disadvantage of the marriage in community of property is that the insolvency of one of the spouses will affect the other spouse. When one of the parties become insolvent, all the assets of the joint estate may be sequestrated in order to make payment to the creditors of the insolvent spouse.

In terms of section 21 of the Insolvency Act,<sup>285</sup> the solvent spouse has to prove that the asset in his or her possession do not form part of the joint estate in order for it to be excluded from the assets of the joint estate, or it is not an asset of the insolvent spouse. When one spouse is sequestrated, the solvent spouse is temporarily divested of his / her estate and therefore cannot transfer, alienate or dispose of his / her assets.<sup>286</sup>



Even if the solvent spouse succeeds in proving that his or her assets do not form part of the joint estate, the appointed trustee may claim these assets and attach it. Should the trustee claim and attach such assets, then the solvent spouse has to show “good cause” why the assets should not be attached by proving that the asset does not form part of the joint estate or that it was not acquired with monies from the joint estate.

The insolvency of one of the spouses affects the business of the solvent spouse.<sup>287</sup> The solvent spouse may apply to court for their assets to be excluded from attachment or separated from the insolvent assets. A court may grant such relief if the solvent spouse is likely to suffer serious prejudice of vesting his or her asset with the Master.<sup>288</sup> The court must be satisfied before granting such relief that the solvent

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<sup>285</sup> Act 24 of 1936.

<sup>286</sup> S 21(2) of Act 24 1936.

<sup>287</sup> S 21(10) of Act 24 of 1936.

<sup>288</sup> *Ibid.*



spouse is willing to make arrangements to safeguard the interest of the creditors of the insolvent spouse. This section places an onerous burden on the solvent spouse to prove that his or her assets do not form part of the joint estate.

If the solvent spouse can prove that his or her assets or estate do not fall within the ambit of section 21, then the solvent spouse's assets will not vest in the trustee. In the case of *Janit v Van Den Heever and another NNO*<sup>289</sup>, it was held that where one of the spouses has died and that spouse's estate is subsequently declared insolvent and sequestrated, then the solvent spouse's estate will not vest in the trustee.

In the case of John and May, if John were unable to service the repayment of the African Bank loan, African Bank would have been entitled to bring an application for the parties to be sequestrated. If this had happened, the immovable property, which was the most valuable asset of the joint estate, would have been sold in order to satisfy the debts of the creditors (African Bank) of the joint estate.

A marriage in community of property has far reaching effects on a spouse especially if one of the spouses administers their finances in a reckless manner. While it is the cheapest manner to conclude a marriage, it risks a spouse's assets for claims by creditors of the other spouse.

Indigent or low earning people conclude their marriage in community of property for the following reasons:

- (i) they are not aware of the practical effect of such a marital system;

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<sup>289</sup> 2001 (1) SA 731 (W).

- (ii) they are not aware that they have the option to conclude a contract whereby they have the option to conclude a contract where they are able to protect their assets;
- (iii) they do not have the finances to concluded a notarial contract.

On divorce of indigent or low earning persons, who are married in community of property, the little assets that the parties have managed to build up during their marriage are divided equally between the parties. The practical effect hereof is that both parties end up with very little assets and in some cases they end up in a far worse financial situation than when they entered the marriage.

### **4.3 Marriages out of community of property**

In order for community of property to be excluded from a marriage, the parties must in their notarial contract expressly exclude community of property.<sup>290</sup>

#### **4.3.1 Advantages of marriages out of community of property**

The main reason why parties prefer to enter into a marriage out of community of property is because they wish to retain their separate estates and independent control over their estate.<sup>291</sup>

Each spouse retains sole ownership of the assets he/she had prior to the marriage and the assets acquired after the conclusion of their marriage.<sup>292</sup> Spouses may be co-

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<sup>290</sup> Robinson JA, Human S, Boshoff A, 130.

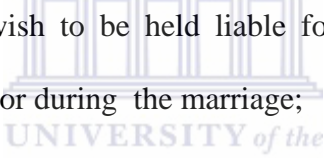
<sup>291</sup> The two main characteristics of a out of community of property system- Robinson JA, Human S, Boshoff A, 165.

<sup>292</sup> It is possible for the parties to agree in terms of their contract that they will be married out of community of property, with profit and loss. The practical effect hereof is that a joint estate is formed, which comprises of assets acquired and liabilities incurred during the marriage. Upon dissolution, the

owners of an asset, and their share will form part of their individual estate. Each party has full capacity to perform juristic acts and they do not require the consent of the other spouse to alienate, encumber or acquire assets in their individual names and estates.

They cannot be held liable for the debts of the other spouse, with the exception of debts incurred for household expenses,<sup>293</sup> unless they are co-debtors and equally and severally liable for the shared debt<sup>294</sup> or have stood surety for the debt of the other spouse.<sup>295</sup>

According to Robinson JA, Human S and Boshoff A,<sup>296</sup> parties may opt to conclude a marriage out of community of property for the following reasons:

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- (i) They do not wish to be held liable for the debts incurred by their spouse prior to or during the marriage;
  - (ii) They wish to protect their assets from creditors, particularly if one of the spouses has a business of his or her own which is not registered as a separate legal entity;
  - (iii) One or both spouses have assets at the time of the marriage that they wish to preserve for their own benefit;
  - (iv) They wish to retain their contractual ability to enter into transactions without having to obtain the consent of the other spouse;

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parties will share in the profits and losses of joint estate. This system is very rarely encountered in modern times. See Visser PJ and Potgieter JM 143 -144.

<sup>293</sup> Both parties will be liable for household necessities, regardless of which spouse incurred the debt. See S 23 of the Matrimonial Property Act.

<sup>294</sup> For example the school fees of a minor child are a shared debt and both parents (spouses in the current context) will be jointly liable for the debt.

<sup>295</sup> This aspect will be dealt with under the laws pertaining to suretyship.

<sup>296</sup> 130.

- (v) They wish to retain control of their own property, build up their own separate estate(s) and be responsible for their own debts.

These reasons also highlight the advantages of this matrimonial property system.

#### **4.3.2 Disadvantages of marriages out of community of property**

The disadvantage of this matrimonial property system is that spouses are unable to share in the financial gain of each other. This is particularly disadvantageous to a spouse who has not been able to build up an estate of their own due to them either primarily looking after the home and family or assisting the financially stronger spouse in their endeavours to earn an income and build up their estate.<sup>297</sup>

#### **4.4 Marriages out of community of property excluding accrual**

In order for the accrual system to be excluded from a marriage out of community of property and profit and loss, the parties must in their notarial contract expressly exclude the operation of the accrual system.<sup>298</sup>

The consequences, advantages and disadvantages of such marriages are as set out in paragraphs 4.3.1 and 4.3.2 above. Depending on the facts of a particular matter, the biggest potential disadvantage of this matrimonial property system is that neither spouse will have a claim to the other's estate, especially in instances where the estate of one spouse has either grown substantially or is greater than the other spouse's estate. This often has the potential of being prejudicial to the wife who often has not

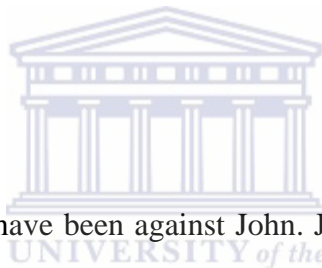
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<sup>297</sup> The financially disadvantaged spouse may in certain circumstances and as part of divorce proceedings claim that a universal partnership existed, but the burden of proof is rather onerous as an agreement (unless written) will have to be proved to show that the parties had agreed to enter in to a partnership agreement.

<sup>298</sup> S 2 of the Matrimonial Property Act.

built up a sufficient estate and who has during the marriage relied either solely or largely on the husband for financial support. As set out in chapter 3, a claim for a redistribution of assets<sup>299</sup> has been introduced in our law but such relief is only available to parties to a marriage out of community of property concluded prior to 1984.<sup>300</sup>

In the case study, if May and John had concluded an antenuptial contract prior to their marriage, as May contends the parties had intended to do but were unable to afford, her property would have been protected and John would have had no claims against the immovable property. May and the children's accommodation would have been protected.



African Bank's claim would have been against John. John would have ownership of the household furniture and effects purchased with the monies received through his loan with African Bank, but he would also be solely liable for the debt owed to African Bank.

On closer examination, it would have been a lot more cost effective for May to have concluded and registered a notarial contract with John. Unfortunately the reality for many persons in May and John's position is that legal advice and services are not freely accessible and are unaffordable. They live from hand to mouth and hardly earn sufficient income to put a plate of food on the table. Legal advice and legal protection

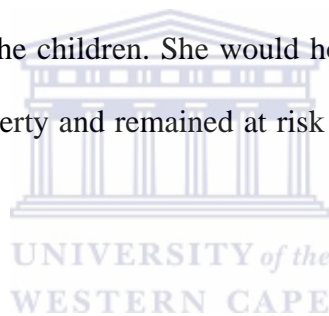
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<sup>299</sup> *Beaumont v Beaumont* 1987 1 SA 967 (A) 987 HI and *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA).

<sup>300</sup> S 7(3) of the Matrimonial Property Act 88 of 1984.

are not priorities in their lives as survival and basic necessities are given precedence over everything else.

If the roles were reversed and John was the sole bread winner and sole owner of the property while May remained at home rearing the children and maintaining the home, she would have no claim against the property upon divorce. John would however have an obligation to maintain the children and possibly May. Part of his maintenance obligation would have been to provide reasonable accommodation, within his means, for the children and May. This portion of his obligation could have been discharged by him transferring ownership of the property to May or granting her a right to remain in the property with the children. She would however not have an automatic real right to share in the property and remained at risk of being left destitute without an estate of her own.



#### **4.5 Marriage out of community of property including the accrual system**

Since the Matrimonial Property Act<sup>301</sup> came into effect, marriages out of community of property are deemed to include the accrual system,<sup>302</sup> unless the accrual system is expressly excluded from the marriage system in the notarial contract.

If the notarial contract does not expressly exclude the application of the accrual system, it will automatically be applied to the parties' marriage out of community of property. The accrual system only has a practical effect on the parties upon the dissolution of the marriage through death or divorce.

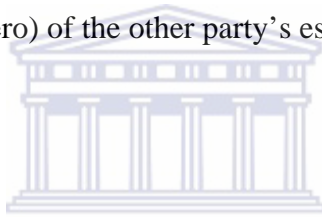
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<sup>301</sup> Act 88 of 1984.

<sup>302</sup> S 2 of the Matrimonial Property Act. See also Robinson JA, Human S, Boshoff A, 108.

The advantages of this marriage system are as set out in paragraph 4.3.2, the most important of which is that there is a complete separation of estates and spouses retain absolute control over their individual estates. The accrual system however allows for the sharing of profit accrued during the marriage.

In the case of May and John, this system is not likely to have been effective as neither May nor John would, as indigent parties, have built up an estate sufficient to show a profit during the marriage. May would have retained her property and John would have remained solely liable for his debt with African Bank. Neither would have built up an estate during the marriage and therefore neither party would have a right to share in the profit (which is zero) of the other party's estate.



#### **4.6 Conclusion**

It is difficult to assess which one of the available matrimonial property systems would be best suited for the indigent person. These parties have so little by way of material wealth. In most cases, spouses bind themselves to a marriage, blind to the far reaching proprietary consequences of their contract of marriage.

It may very well be that the very matrimonial property system which has been relegated to an almost extinct legal species of matrimonial property system by disuse could be the very answer to the difficulties faced by indigent parties to a marriage.<sup>303</sup>

This is a combination of the two basic matrimonial property systems- an out of community of property with the inclusion of profit and loss.

If such a matrimonial property system were implemented each party would retain legal autonomy to perform juristic acts in respect of their own estates, while at the same time protecting their own assets acquired solely by their own means before the marriage. It also ensures that neither party is placed at risk for the debts of the other spouse incurred prior to their marriage.

The sharing of profit and loss of the joint estate allows parties to equally share in the fruits of their joint efforts during their marriage. This will however only work effectively if the requirement for consent by spouses in the circumstances as set out in section 15 of the Matrimonial Property Act is applied to transactions relating to the joint estate. The parties should retain the right to claim forfeiture of benefits of the joint estate in terms of section 9 of the Divorce Act. This does appear to be a way to address the inequities and risks to both indigent parties to a marriage where their only option, due to lack of knowledge, resources and finances, forces them to enter a marriage in community of property.

Parties will still have the option of concluding a notarial contract wherein they could agree to have a matrimonial property system purely in community of property, out of community of property, without the accrual or with the accrual.



## **CHAPTER FIVE: THE SOUTH AFRICAN DEFAULT SYSTEM FROM A SOCIO-ECONOMIC PERSPECTIVE**

### **5.1 Introduction**

Parties who intend to conclude a marriage may select the type of matrimonial property system which would best suit their financial needs during the marriage and upon dissolution. This chapter attempts to explore how people select the type of matrimonial property system; what remedies are available during the marriage to change a matrimonial property system; and the effect of the matrimonial property system upon dissolution of a marriage by divorce. For purposes of this study the analysis will focus on indigent people.

### **5.2 Situation of parties before marriage**

In South Africa, the vast discrepancies in the socio-economic conditions of its population impact directly upon the type of matrimonial property system parties may elect. It is important to note that a large percentage of South Africa is lacking in education.<sup>304</sup> A lack of education amongst the majority results in high numbers of unemployment and in turn wide spread poverty.<sup>305</sup> For many, knowledge of and access to the law is limited. Not only would the majority not have the knowledge of the options available to them, but many cannot afford to utilise such options since they are not in a position to afford the services of an attorney.<sup>306</sup>

With many living below the bread line, paying for the services of an attorney or payment for other formal requirements, for example the registration of a notarial

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<sup>304</sup> Africa M, Budlender D and Mpetsheni Y, *Education in South Africa: Selected findings from Census'96 / Statistics South Africa. Pretoria: Statistics South Africa, 2001* 17.

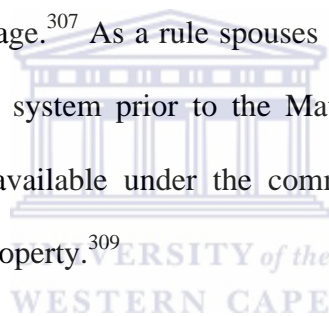
<sup>305</sup> *Ibid.*

<sup>306</sup> Legal Aid Guide, 2009.

contract at the deeds office, is not financially possible for these parties. Access to the choice of the matrimonial property systems is therefore limited and arguably denied. Without the knowledge of the available options or without the means to contract in a manner of their own choice, the parties usually marry in accordance with the default system of South Africa, namely in community of property and in community of profit and loss.

### 5.3 Situation of parties during marriage

The matrimonial property system which spouses elect has important patrimonial consequence between themselves as well as in respect of their legal relationship with third parties during the marriage.<sup>307</sup> As a rule spouses could not change or vary their chosen matrimonial property system prior to the Matrimonial Property Act.<sup>308</sup> An exception to this rule was available under the common law but only applied to marriages in community of property.<sup>309</sup>



In terms of the common law, a spouse married in community of property can make a unilateral application to court requesting for the immediate division of the joint estate on the basis that the other spouse will seriously harm his or her interest in the joint estate.<sup>310</sup> The Matrimonial Property Act<sup>311</sup> codified the above common law position.<sup>312</sup>

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<sup>307</sup> Robinson JA, Human S and Boshoff A, 131. Also see chapter 4 above.

<sup>308</sup> *Ibid.* This is referred to as the immutability principle.

<sup>309</sup> Cronje DSP and Heaton J, 104.

<sup>310</sup> Visser PJ and Potgieter JM, 93.

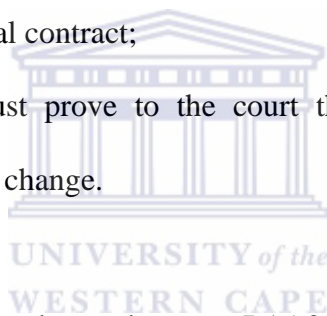
<sup>311</sup> Act 88 of 1984.

<sup>312</sup> S 20.

This Act also allows spouses to make an application to the High Court for leave to amend their matrimonial property system by registration of a postnuptial contract.<sup>313</sup>

In *Ex parte Lourens*<sup>314</sup> the court laid down the following guidelines:

- (i) the parties must give notice to all interested parties of the intended application at least two weeks prior to the application being heard by way of registered post;
- (ii) the notice must be published in the Government Gazette and in two local newspapers;
- (iii) the registrar of deeds must receive notice together with a copy of the draft postnuptial contract;
- (iv) the parties must prove to the court that the creditors will not be affected by the change.



This application is expensive and costs between R15 000 and R30 000.<sup>315</sup> The parties are usually not aware they may vary their matrimonial system and if they are aware hereof the option, they are not in a financial position to bring such an application to court.

#### **5.4 Situation of parties upon dissolution of marriage by divorce**

Even divorce seemed inaccessible to indigent parties as the High Court of South Africa was the only court in South Africa with the jurisdiction to dispense of matters pertaining to the status of parties, which included divorce.<sup>316</sup> Proceedings in the High

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<sup>313</sup> S 21.

<sup>314</sup> 1986 2 SA 291 (C) as noted in Robinson JA, Human S and Boshoff A, 133.

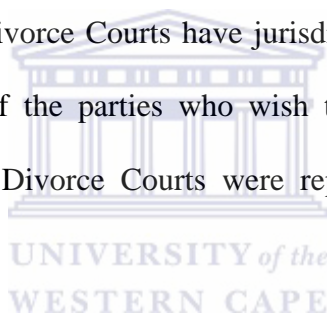
<sup>315</sup> Monareng KN, 21.

<sup>316</sup> Supreme Court Act 59 of 1959.

Court of South Africa may be an expensive exercise as parties without legal knowledge would have to employ the services of legal representatives, which most indigent parties can not afford.<sup>317</sup>

Specialised Divorce Courts were established in terms of section 10 of the Black Administration Amendment Act,<sup>318</sup> in 1929. These courts were empowered to hear divorce matters, including the annulment of marriages of “black” parties.

With the move towards a new democratic dispensation in South Africa in the early 1990’s<sup>319</sup>, the legislature was forced to reconsider the role and purpose of the Specialised Divorce Courts.<sup>320</sup> The jurisdiction of the Divorce Courts<sup>321</sup> was changed in 1997.<sup>322</sup> Since then, the Divorce Courts have jurisdiction over all divorce matters regardless of the ethnicity of the parties who wish to institute or defend divorce proceedings.<sup>323</sup> In 2010 the Divorce Courts were replaced by the Regional Civil Magistrates Court.<sup>324</sup>



Most of the parties to divorce proceedings instituted in the Divorce Courts<sup>325</sup> are low to middle income earners. Their estates are small and often only comprise of a few movable assets such as basic furniture. They are usually married in community of property by default because they are/were not aware of the different types of

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<sup>317</sup> Legal Aid Guide, 2009.

<sup>318</sup> Act 9 of 1929.

<sup>319</sup> Mr. Nelson Mandela was released from prison on the 11 February 1990 after serving 27 years in prison. All political parties who were banned in 1960 in the wake of Sharpsville were unbanned on 2 April 1990.

<sup>320</sup> *Hoexter Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court Third and final Report of 1997*, Chapter 3.

<sup>321</sup> Divorce Courts were established in terms of the Administration Amendment Act

<sup>322</sup> Divorce Courts Amendment Act 65 of 1997.

<sup>323</sup> S 3 of the Divorce Courts Amendment Act 65 of 1997.

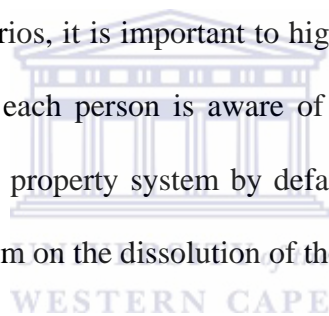
<sup>324</sup> Jurisdiction of Regional Courts Amendment Act 31 of 2008.

<sup>325</sup> Note that the court is no longer referred to as the Divorce Court; it is now known as the Regional Civil Courts. However for the purpose of this paper, the court shall be referred to as the Divorce Court.

matrimonial property systems and/or lack the financial means to conclude and register a notarial contract. In many instances these parties are not aware that due to their marriage in community of property, the joint estate is shared equally. They are /were further not aware that they are the joint owners of each other's assets and are jointly liable for each other's debts.

The best way to illustrate the possibly inequitable proprietary consequences of a marriage concluded by indigent parties in community of property upon divorce is to consider the three common scenarios encountered in practise.

Before we consider the scenarios, it is important to highlight the following: there is a presumption in our law that each person is aware of what the law is.<sup>326</sup> Generally ignorance of the matrimonial property system by default cannot be evoked to avoid the consequences of this system on the dissolution of the marriage.<sup>327</sup>



The only way that a party is able to avoid a strict adherence to the precept of an equal division of the joint estate is if he or she makes a claim, in terms of Section 9 of the Divorce Act<sup>328</sup>, for the other party to forfeit his or her patrimonial benefit to the assets of the joint estate in full or partially.

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<sup>326</sup> *Union Government v National Bank of South Africa Ltd* 1921 AD 121 at 126.

<sup>327</sup> For an exception to this rule see *S v De Blom* 1977 4 ALL SA 70 (A) at 529 H: "At this stage of our legal development it must be accepted that the cliché that 'every person is presumed to know the law' has no ground for existence and that the view that 'ignorance of the law is no excuse' cannot be applied in the light of the current concept of guilt in our law" (translation). See also *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) at 224 F where the following caution by Hefer JA must be borne in mind, namely 'It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances where it is not'. In my experience as an attorney for the past eight years in the family law arena, courts are reluctant to accept ignorance of the available matrimonial property systems as a defence.

<sup>328</sup> Act 70 of 1979.

Based on the presumption that each person is aware of the law, and therefore that parties are aware that they have contracted to a marriage in community of property and are aware of the legal consequences thereof, the court will not make an order for the forfeiture of patrimonial benefits easily. It appears that the court is reluctant to interfere with the parties' right to contract and enter into a marriage in terms of a particular property system. The court is also reluctant to remedy the failure by a party to the marriage not to properly regulate the terms of the matrimonial property system applicable to his or her marriage.<sup>329</sup>

### **Scenarios of problems encountered in practice**

#### **SCENARIO 1**

Parties are married for a relatively short period.<sup>330</sup> One of the spouses may have a sizeable estate to which the other spouse has not contributed in any manner. The estate will form part of the joint estate and both spouses are the co-owners of this estate. On divorce and despite the party not having contributed to the estate of the other party, he or she will be entitled to half of the joint estate which will include half of the individual estate which falls in the joint estate by virtue of the marriage in community of property.

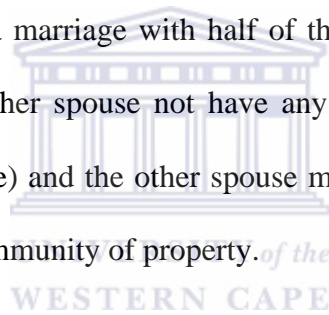
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<sup>329</sup> *Soupiouas v Soupiouos* 1983 3 SA 757 (T) at 759 B “if people... decide to marry, the legal consequences of the marriage must be an important motivating factor for the contract of marriage and, consequently, all the material consequences of that marriage must have been thoroughly contemplated between the parties and it would be sound public policy to enforce such contractual views of the parties against each other.” While the court specifically dealt with parties who entered in to a marriage after a long term relationship of 9 years in this case, the attitude of the court not to interfere in parties duty to investigate the available options available to them and their ‘choice’ to marry under a certain system must first and foremost be given preference.

<sup>330</sup> In practise a rule of thumb has developed where a short marriage is usually defined as one of fewer than 8 years.

Bearing in mind that most parties who are married in community of property are low to middle income groups, their assets regardless of the comparatively low value thereof, may be the only source of financial security that they have.

Unless the party with the bigger estate is able to satisfy the requirements for a forfeiture of patrimonial benefits claim he or she will have to transfer half of the assets to the other spouse in such a manner that each party receives an equal value of the assets. Alternatively the joint assets have to be sold and the proceeds of the sale have to be divided equally between the parties. Unless the parties are able to agree on the distribution of assets, the latter will take place. In effect a situation may arise where one party may leave a marriage with half of the assets he or she entered the marriage with (should the other spouse not have any assets or minimal assets that formed part of the joint estate) and the other spouse may have gained assets only by virtue of their marriage in community of property.



In many cases the party with the bigger estate may lose half of his or her retirement security including half of their pension fund (which for purposes of divorce is deemed to be an asset included in the joint estate),<sup>331</sup> life savings or even the home which they have built up through careful and prudent planning considering their limited resources.

## SCENARIO 2

The parties purchase an immovable property during their marriage. The wife pays the bond while the husband contributed sporadically to the household expenses for

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<sup>331</sup> S 7(8) (a) (i) of the Divorce Act 70 of 1997.

example by paying a contribution towards the mortgage bond repayments, rates, electricity etc. The parties may have been married for a long period. The husband has numerous extra marital affairs, drinks excessively and is abusive to the wife.

Because the house was not the asset of the wife, it having been acquired by the parties during the marriage, and because of the financial contributions made by the husband towards maintaining the property of the joint estate, all the requirements to satisfy a forfeiture of benefits claim cannot be satisfied. Nor is the underlying principle for the forfeiture claim observed as the husband will not be benefiting from an asset that he would not otherwise, but by virtue of the marriage, be entitled to.

Unless the parties agree otherwise, the house will likely be sold and the proceeds divided. The wife will not have the means to pay to the husband the value of his portion of the house which would be an option available to her in order for the house to be transferred in to her sole name. Even if she were able to do so, without the joint income of the parties, she may not be able to maintain the home. The practical effect hereof is that the wife and possibly the children born of the marriage will often be left without accommodation.

### SCENARIO 3

At divorce one of the spouses find out that the joint estate is so heavily indebted that the joint estate is worth nothing or has a negative value. This may be caused by one of the spouses recklessly incurring debt without the knowledge of the other spouse. In these cases, a spouse who had assets on entering the marriage or who acquired assets during the marriage may find themselves in a situation where their debts (half of the debts of the joint estate) exceed their assets. At dissolution of the marriage, because



spouses are entitled to half of the net value of the joint estate, the ‘innocent’ spouse receives no or minimal assets, as the debts of the joint estate will first be settled before the division takes place. If the assets are sold to settle the debts of the joint estate, and the debts exceed the proceeds of the sale, an ‘innocent’ spouse will be responsible for half of the liabilities of the joint estate

The three scenarios are a mere excerpt of a few of the problems encountered in situations where the parties have married in community of property and profit and loss. While the literate and advantaged community may view the failure to properly consider and contract to a marriage property system as the fault of the parties, it has to be borne in mind that what the former take for granted is not common knowledge for all communities.



## **5.5 Conclusion**

The reality in South Africa is that people in economically disadvantaged communities do not have the knowledge or access to the knowledge that may be taken for granted amongst the more affluent communities. They get married without knowing that such marriage is actually a contract that has consequences on their legal rights as a person and on their property. They marry without the knowledge that their marriage is a contract with legal ramifications that has the potential to operate to their detriment.

In the Southern Divorce court<sup>332</sup> alone the statistics reveal that in 2009, 11075 divorce summons were issued. 9850 divorce matters were set down for hearing in the same year. Of this, 6291 were finalised on an undefended basis and 1041 on a defended

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<sup>332</sup> The divorce court as established in terms of the Divorce Courts Amendment Act 65 of 1997 for Cape Town. This court has concurrent jurisdiction with the High Court of South Africa (Cape Provincial Division) to hear divorce matters.

basis.<sup>333</sup> Not only do these statistics indicate the high divorce rate in South Africa, it can also serve as an indication of how many divorces are finalised amongst indigent parties married in terms of the default system of South Africa, in community of property.

**5.5.1 Research Question 1- Does the default matrimonial property system of South Africa cater for the needs of the large majority of indigent or sub-economic groups of South Africa, who have little or no resources to access information about the proprietary consequences of their marriage.**

The archaic South African common law default system was simply codified and extended to apply to all marriages where the parties have not contracted differently without regard to the needs of the people, the inaccessibility to legal knowledge and limited resources of the vast majority of South Africans. The default system does not suit South Africans. This can clearly be seen through the problems encountered in practice, the preference of people who have the knowledge and means to enter in to a notarial contract to marry out of community of property. People in South Africa generally do not marry in community of property if they have the knowledge and resources to contract their marriage differently.

South Africa is one of the few countries who have a default system of ‘in community of property’. The system is outdated and no longer caters for the needs of the country. It is the default system which applied to ‘white’ marriages through the common law and was only extended to include ‘black’ marriages in 2 December 1988. Prior to this

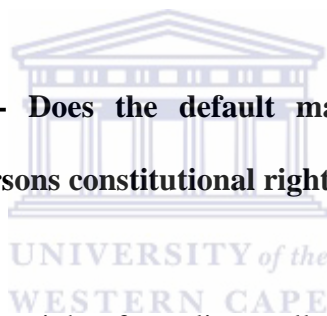
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<sup>333</sup> These statistics do not include divorce proceedings instituted or finalized on a defended or undefended basis in the High Court of South Africa (Cape Provincial Division).

extension, 'black' marriages concluded in terms of the civil laws of the country were automatically out of community of property. While the default system may have suited the 'white' community at the time of its introduction, it no longer caters for the needs of the country.

A point to reflect on is that most of the affluent communities in South Africa are from the 'white' race, the race for whose benefit the community of property default system was introduced. Of these 'white' parties, a miniscule percentage opts to get married in community of property. This in itself is indicative that the default system no longer caters for the needs of South Africans.

**5.5.2 Research Question 2- Does the default matrimonial property system infringe on the indigent persons constitutional rights to equality.**



The Constitution guarantees the right of equality to all. It also provides that no person shall be unfairly discriminated against on various grounds of differentiation.

The right to equality provides all persons with the right to equal protection and benefit of the law. The sad reality is that a real problem of poverty and illiteracy exists in South Africa. Due to the previous apartheid dispensation, these problems are most prevalent in the black and coloured communities.

Having assessed the available matrimonial property systems, it appears safe to draw the conclusion that the uneducated and economically disadvantaged groups conclude marriages in community of property and are the most affected by the default system.

By analogy, this system is more prevalent amongst the black and coloured communities. Although equal protection of the law is observed, it may be argued that due to their lack of education and financial resources, black and coloured (and indigent whites) are not afforded equal benefits of the law.

The only conclusion that can be drawn is that although the default system itself does not infringe on an indigent party's right to equality, indigent parties are not granted equal benefits of the law as that of their more affluent counterparts, who have the education and resources to conclude a marriage of their choice after making an informed decision.

### **5.5.3 Recommendation**

In order to address this inequity and the view that the default system does not cater for the needs of the indigent or sub-economic groups, a review of the default system is required. The priority would be for the assets brought in to the marriage by a spouse, to be protected against all risks of claims by their spouse or a creditor of the spouse. In recognition of their joint efforts, direct or indirect, to build up their estates during the marriage, the profits and losses during the marriage are to be shared equally upon dissolution of the marriage.

The marriage system is to be reviewed with these two factors in mind. It is submitted that a default system which is out of community of property, where there is a total separation of assets and debts of the individual parties in respect of their individual estates as at date of marriage and for the profits and losses enjoyed or suffered during

the marriage to be shared equally (the marital estate). This would be a marriage out of community of property with community of profit and loss.

Provided that the marital estate is administered on a similar basis as a joint estate as found in the in community of property marriage system, with the requirement of consent of both parties in certain instances where the joint estate is affected and that the right to claim forfeiture of benefits as provided for in section 9 of the Divorce Act, this system appears to be a workable solution to the problems encountered by indigent parties. The main purpose is to protect the individual party's assets which they have brought in to a marriage.



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