

REPUBLIC OF SOUTH AFRICA

JUDICIAL MATTERS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill and prior notice of its introduction published in Government Gazette No. 42712
of 20 September 2019)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 13—2019]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend—

- the Divorce Act, 1979, so as to further regulate the division of assets and maintenance of parties in divorce proceedings in accordance with a judgment of the Constitutional Court; and
 - the National Prosecuting Authority Act, 1998, so as to deal with aspects pertaining to the term of office of the National Director of Public Prosecutions and the Deputy National Directors of Public Prosecutions in accordance with a judgment of the Constitutional Court;
- and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:—

Amendment of section 7 of Act 70 of 1979, as amended by section 36 of Act 88 of 1984, section 2 of Act 3 of 1988, section 2 of Act 7 of 1989, section 1 of Act 44 of 1992 and section 11 of Act 55 of 2003

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1. Section 7 of the Divorce Act, 1979, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) A court granting a decree of divorce in respect of a marriage out of community of property—

(a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; **[or]**

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

(c) entered into in terms of any law applicable in the Republic, the impact of which excludes the benefits accruing to spouses in terms of this section, may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.”.

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Amendment of section 12 of Act 32 of 1998

2. Section 12 of the National Prosecuting Authority Act, 1998, is hereby amended—

- (a) by the deletion of subsection (4);
- (b) by the insertion in subsection (6) after paragraph (a) of the following paragraph: 5

“(aA) The period from the time the President suspends the National Director or a Deputy National Director to the time he or she decides whether or not to remove the National Director or Deputy National Director may not exceed twelve months.”; and

- (c) by the substitution in subsection (6) for paragraph (e) of the following paragraph: 10

“(e) The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, **[no salary or such salary as may be determined by the President]** his or her full salary.”. 15

Short title

3. This Act is called the Judicial Matters Amendment Act, 2019.

MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS AMENDMENT BILL, 2019

1. PURPOSE OF BILL

The primary aim of the Judicial Matters Amendment Bill, 2019 (the “Bill”), is to amend two Acts that are administered by the Department of Justice and Constitutional Development (the “Department”) and are intended to address practical and technical issues.

2. OBJECTS OF BILL

2.1 **Clause 1** of the Bill amends section 7 of the Divorce Act, 1979 (Act No. 70 of 1979). This amendment arises from the Constitutional Court judgment in *Bukelwa Nolizwe Holomisa v Sango Patekile Holomisa and Another* [2018] ZACC 40 (“*Holomisa v Holomisa*”) where the court declared section 7(3) of the Divorce Act, 1979, constitutionally invalid.

2.1.1 Section 7(3), read with section 7(4) and (5) of the Divorce Act, 1979, empowers a court granting a decree of divorce in respect of a marriage out of community of property to order a redistribution of assets where it considers it just and equitable to do so, taking into consideration the contribution, monetary and otherwise, of the parties to the marriage. The objective hereof was to make proprietary transfers possible that favoured women married out of community of property. The challenge is that this section only covers persons who were married, out of community of property before the commencement of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), in terms of an ante-nuptial contract, which excluded community of property, profit and loss and accrual, and out of community of property before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988), in terms of section 22(6) of the Black Administration Act, 1927 (Act No. 38 of 1927). This in effect excludes persons married out of community of property under the repealed Transkei Marriage Act, 1978 (Act No. 21 of 1978). Section 22(6) of the repealed Black Administration Act, 1927, provided for a proprietary regime in terms of which a civil marriage between Africans was not in community of property, as it was the case under the common law, unless the parties intending to get married declared before a competent official within a month before the marriage that they intend their marriage to be in community of property.

2.1.2 Section 22(6) of the Black Administration Act, 1927, was repealed in the former Transkei and re-enacted in section 39 of the Transkei Marriage Act, 1978. In the meantime, legislation was enacted in the pre-democracy South Africa, which ensured that the proprietary regime for all marriages in South Africa, regardless of race, would be in community of property. Furthermore, the severe consequences of a marriage out of community of property were then alleviated by section 7(3) of the Divorce Act, 1979. This development was not available to persons married in the former Transkei. While the Justice Laws Rationalisation Act, 1996 (Act No. 18 of 1996) extended the application of a number of laws, including the Divorce Act, 1979, and the Matrimonial Property Act, 1984, to areas which formed part of the former homelands, including the Transkei, and also repealed some sections of the Transkei Marriage Act, 1978, it did not repeal section 39. This section continued to operate until its repeal by the Recognition of Customary Marriages Act, 1998.

2.1.3 The Constitutional Court, in the case of *Holomisa v Holomisa*, found that section 7(3) of the Divorce Act, 1979, discriminates against women married out of community of property under the Transkei Marriage Act, 1978, in that it fails to extend to them the protection of