

REPUBLIC OF SOUTH AFRICA

JUDICIAL MATTERS AMENDMENT BILL

*(As amended by the Portfolio Committee on Justice and Correctional Services
(National Assembly))*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 13B—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 5

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; 10
[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 15

(c) entered into in terms of any law applicable in a former homeland, without entering into an antenuptial contract or agreement in terms of such law, 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.”. 20
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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

a just and equitable redistribution of property on divorce and as such fails the test of rationality in terms of section 9(1) of the Constitution, which affords everyone the right to equal protection and benefit of the law.

2.1.4 In order to ensure that no other law that may be applicable in the Republic, of similar purport to the former Transkei Marriage Act, 1979, including any law that may still be in operation in a former homeland, has the effect of excluding spouses married out of community of property from the benefits of section 7(3) of the Divorce Act, 1979, **clause 1** amends section 7(3) by inserting a new paragraph (c), which, in effect, provides that a marriage out of community of property entered into in terms of any law applicable in a former homeland, falls within the scope of section 7.

2.2 **Clause 2** of the Bill amends section 12 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), which deals with the term of office of the National Director of Public Prosecutions (the “National Director”) and Deputy National Directors of Public Prosecutions (“Deputy National Directors”).

2.2.1 Section 12(4) of the National Prosecuting Authority Act, 1998, deals with the extension of the term of office of the National Director and Deputy National Directors who are otherwise due to retire from office due to age. In terms of section 12(1) of the National Prosecuting Authority Act, 1998, the National Director and Deputy National Directors hold office for a non-renewable term of 10 years but must vacate office at the age of 65 years. Section 12(4) of the National Prosecuting Authority Act, 1998, currently empowers the President to extend the term of office of a National Director or a Deputy National Director beyond the age of 65 years if the President is of the opinion that it is in the public interest to do so, but not for longer than two years. Section 12(6) of the National Prosecuting Authority Act, 1998, currently provides that the President may provisionally suspend the National Director or a Deputy National Director for misconduct, among others, pending an inquiry into his or her fitness to hold office. There is no limit placed on such suspension. In terms of section 12(6)(e), a National Director or Deputy National Director who is suspended provisionally will receive either no salary or such salary as may be determined by the President for the duration of the suspension.

2.2.2 In *Corruption Watch NPC and Others v The President of South Africa and Others* [2018] ZACC 23, the Constitutional Court declared that the provisions of section 12(4) and (6) of the National Prosecuting Authority Act, 1998, are constitutionally invalid. Regarding section 12(4) of the National Prosecuting Authority Act, 1998, the Court held that the President’s power to extend the term of office of a National Director undermines the independence of the office of the National Director. Section 12(4) of the National Prosecuting Authority Act, 1998, is consequently being deleted. The Court also found that section 12(6) of the National Prosecuting Authority Act, 1998, is constitutionally invalid to the extent that it permits the suspension of a National Director or a Deputy National Director by the President for an indefinite period and without pay, compromising the independence of those offices. Section 12(6) of the National Prosecuting Authority Act, 1998, is therefore being amended to provide that the period of suspension of a National Director or a Deputy National Director by the President may not exceed 12 months. A new subsection 16(6)(aA) is proposed to give effect to this proposal. While the Constitutional Court judgment ordered that the period of suspension may not exceed six months, it is proposed that the period should be 12 months. In practice it will be virtually impossible to complete an investigation within six months. Section 12(6)(e) of the National Prosecuting Authority Act,

1998, is being amended to provide that a National Director or a Deputy National Director who is on suspension is entitled to his or her full salary.

2.3 **Clause 3** contains the short title of the Bill.

3. CONSULTATION

The provisions of the Bill arise from the Constitutional Court judgments of *Holomisa v Holomisa* and *Corruption Watch NPC and Others v The President of South Africa and Others*. The National Prosecuting Authority was consulted on the amendments to the National Prosecuting Authority Act, 1998.

4. IMPLICATIONS FOR PROVINCES

There are no implications for the provinces.

5. FINANCIAL IMPLICATIONS FOR STATE

There are no financial implications for the State.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department are of the opinion that the Bill should be dealt with in accordance with the procedure set out in section 75 of the Constitution, since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 The Constitution distinguishes between four categories of Bills as follows: Bills amending the Constitution (section 74); Ordinary Bills not affecting provinces (section 75); Ordinary Bills affecting provinces (section 76); and Money Bills (section 77). A Bill must be correctly classified or tagged, otherwise it would be constitutionally invalid.

6.3 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4¹ to the Constitution.

6.4 The crux of tagging has been explained by the courts, especially the Constitutional Court in the case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC). The Court, in its judgment, stated as follows:

“[58] What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill “in substantial measure fall within a functional area listed in schedule 4”. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This “involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about”. (footnote omitted)

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The

¹ Functional areas of concurrent national and provincial legislative competence

process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.”

- 6.5 In light of what the Constitutional Court stated in the abovementioned case, the test essentially entails that “any Bill whose provisions in substantial measure” affects the provinces must be classified to follow the section 76 procedure.
- 6.6 The Bill seeks to amend two Acts in order to give effect to judgments of the Constitutional Court. The amendments are technical in nature. In the final analysis, it is our view that the subject matter of the Bill does not fall within any of the functional areas listed in Schedule 4 or Schedule 5 to the Constitution. Consequently, we are of the opinion that this Bill is an ordinary Bill not affecting provinces and that it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

7. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL LEADERS

The opinion is held that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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