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KANTOOR VAN DIE STAATSPRESIDENT

STATE PRESIDENT'S OFFICE

No. 414.

4 Maart 1988

Hierby word bekend gemaak dat die Staatspresident sy goedkeuring gegee het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 3 van 1988: Wysigingswet op Huweliks- en Huweliksgoederereg, 1988.

No. 414.

4 March 1988

It is hereby notified that the State President has assented to the following Act which is hereby published for general information:—

No. 3 of 1988: Marriage and Matrimonial Property Law Amendment Act, 1988.

MARRIAGE AND MATRIMONIAL PROPERTY LAW AMENDMENT
ACT, 1988

Act No. 3, 1988

GENERAL EXPLANATORY NOTE:

- [** **]** Words in bold type in square brackets indicate omissions from existing enactments.
- _____ Words underlined with solid line indicate insertions in existing enactments.

ACT

To amend the marriage and matrimonial property law with regard to certain marriages; and to provide for matters connected therewith.

*(Afrikaans text signed by the State President.)
(Assented to 25 February 1988.)*

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:—

1. Section 22 of the Black Administration Act, 1927, is hereby amended—
- 5 (a) by the substitution for subsection (1) of the following subsection:
- “(1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman.”;
- 10 (b) by the substitution for subsection (2) of the following subsection:
- “(2) Subject to subsection (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union.”;
- 15 (c) by the substitution for subsection (3) of the following subsection:
- “(3) No marriage officer shall solemnize the marriage of a Black man unless he has first taken from him a declaration to the effect that he is not a partner in a customary union with any woman other than the one he intends marrying.”;
- 20 (d) by the substitution for subsection (5) of the following subsection:
- “(5) A Black man who wilfully makes a false declaration to a marriage officer with regard to the existence or not of a customary union between him and any woman, shall be guilty of an offence and liable on conviction to the penalties which may by law be imposed for perjury.”;
- 25 (e) by the deletion of subsection (6); and
- (f) by the substitution for subsection (7) of the following subsection:
- 30 “(7) No marriage contracted after the commencement of this Act but before the commencement of the Marriage and Matrimonial Property Law Amendment
- 35

Amendment of
section 22 of
Act 38 of 1927.

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Act, 1988, during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and **[any]** the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.”

2. Section 7 of the Divorce Act, 1979, is hereby amended—

Amendment of section 7 of Act 70 of 1979, as amended by section 36 of Act 88 of 1984.

(a) 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,

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.”; and

(b) by the substitution for subsection (5) of the following subsection:

“(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3), the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account—

(a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3) (b) of this section may have in terms of section 22 (7) of the Black Administration Act, 1927 (Act No. 38 of 1927);

(b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;

(c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and

(d) any other factor which should in the opinion of the court be taken into account.”

3. Section 21 of the Matrimonial Property Act, 1984, is hereby amended by the substitution for paragraph (a) of subsection (2) of the following paragraph:

Amendment of section 21 of Act 88 of 1984, as amended by section 1 of Act 91 of 1986.

“(a) Notwithstanding anything to the contrary in any law or the common law contained, but subject to the provisions of paragraphs (b) and (c), the spouses to a marriage out of community of property—

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(i) entered into before the commencement of this Act in terms of an antenuptial contract by which community of property and community of profit and loss are excluded; or

5 (ii) 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 was in force immediately before its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

10 may cause the provisions of Chapter I of this Act to apply in respect of their marriage by the execution and registration in a registry within two years after [that] the commencement of this Act or, in the case of a marriage contemplated in subparagraph (ii) of this paragraph, within two years after the commencement of the said Marriage and Matrimonial Property Law Amendment Act, 1988, as the case may be, or such longer

15 period, but not less than six months, determined by the Minister by notice in the *Gazette*, of a notarial contract to that effect.”.

4. Section 25 of the Matrimonial Property Act, 1984, is hereby amended—

Amendment of section 25 of Act 88 of 1984, as amended by section 2 of Act 91 of 1986.

- 25 (a) by the deletion of subsection (1);
 (b) by the substitution for subsection (2) of the following subsection:

“(2) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage [other than a marriage contemplated in subsection (1)] entered into before the commencement of this Act and in respect of which the matrimonial property system was not governed by section 22 of the Black Administration Act, 1927 (Act No. 38 of 1927),

30 may—

- 35 (a) if they are married in community of property, cause the provisions of Chapters II and III of this Act to apply to their marriage; or
 40 (b) if they are married out of community of property and the wife is subject to the marital power of the husband [was not excluded in terms of the antenuptial contract concerned], cause the provisions of Chapter II of this Act to apply to their marriage,
- 45 by the execution and registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by the Minister by notice in the *Gazette*, of a notarial contract to that effect, and in such a case those provisions apply from the date on which the contract concerned was so
- 50 registered.”; and

- (c) by the addition of the following subsection:

“(3) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, and in respect of which the matrimonial property system was governed by section 22 of the Black Administration Act, 1927 (Act No. 38 of 1927),

55 may—

- 60 (a) if they are married in community of property, cause the provisions of Chapters II and III of this Act to apply to their marriage; or
 (b) if they are married out of community of property and the wife is subject to the marital power of the

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husband, cause the provisions of Chapter II of this Act to apply to their marriage,
by the execution and registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by the Minister by notice in the *Gazette*, of a notarial contract to that effect, and in such a case those provisions apply from the date on which the contract was so registered.”

5. The following section is hereby substituted for section 26 of the Matrimonial Property Act, 1984:

Substitution of section 26 of Act 88 of 1984.

“Application of sections 1 and 2 of Act 37 of 1953.” 26. Sections 1 and 2 of the Matrimonial Affairs Act, 1953 (Act No. 37 of 1953), do not apply to marriages in respect of which the provisions of section 25 (2) or (3) of this Act have been applied or to marriages concluded after the commencement of this Act, other than marriages in respect of which the matrimonial property system [is] was governed by section 22 (6) of the Black Administration Act, 1927 (Act No. 38 of 1927), before the deletion thereof by the Marriage and Matrimonial Property Law Amendment Act, 1988.”

6. The following section is hereby substituted for section 89 of the Deeds Registries Act, 1937:

Substitution of section 89 of Act 47 of 1937, as inserted by section 32 of Act 88 of 1984.

“Registration of postnuptial contracts.” 89. (1) The provisions of sections 86 and 87 shall *mutatis mutandis* apply in respect of—
(a) an order under section 20 of the Matrimonial Property Act, 1984, as if that order were a notarial deed; and
(b) a contract in terms of section 21 or 25 (2) or (3) of the Matrimonial Property Act, 1984.
(2) Where a contract in terms of section 21 or 25 (2) (b) or (3) (b) of the Matrimonial Property Act, 1984, replaces or amends an existing antenuptial contract, the contract to be registered shall be accompanied by the existing contract or a certified copy thereof.
(3) Upon the registration of a contract contemplated in section 21 or 25 (2) (b) or (3) (b) of the Matrimonial Property Act, 1984, the existing antenuptial contract, if any, shall be cancelled or endorsed appropriately, as the case may be, and for that purpose the registrar shall notify the registrar of the registry where the existing contract is registered and every registrar in whose registry a copy thereof is filed in terms of section 87 (3).”

7. Section 102 of the Deeds Registries Act, 1937, is hereby amended by the substitution in subsection (1) for paragraphs (b) and (c) of the definition of “owner” of the following paragraphs:

Amendment of section 102 of Act 47 of 1937, as amended by section 12 of Act 3 of 1972, section 22 of Act 27 of 1982, section 9 of Act 62 of 1984 and section 4 of Act 75 of 1987.

“(b) immovable property, where a right of leasehold in respect of such property has been granted to any person and registered in his name, such person, and where such a right of leasehold has been registered in the name of both spouses in a marriage in community of property—

- (i) to which the provisions of Chapter III of the Matrimonial Property Act, 1984, (Act No. 88 of 1984), are not applicable, the husband; and
(ii) to which the provisions of Chapter III of the Matrimonial Property Act, 1984, are applicable,

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either one of the spouses acting with the written consent, attested by two competent witnesses, of the other spouse; and

- 5 (c) immovable property, real rights in immovable property and notarial bonds—
- 10 (i) which are registered under section 17 (1) in the name of both spouses in a marriage in community of property [entered into before 1 November 1984 and] to which the provisions of Chapter III of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), are not applicable, the husband;
- 15 (ii) which are registered under section 17 (1) in the name of both spouses in a marriage in community of property [entered into after 31 October 1984, or in such a marriage entered into before 1 November 1984 and in respect of] to which the provisions of Chapter III of the Matrimonial Property Act, 1984, [applies] are applicable, either one of the spouses acting with the written consent, attested by two competent witnesses, of the other spouse; and
- 20 (iii) which are registered in the name of only one spouse and which form part of the joint estate of both spouses in a marriage in community of property [entered into after 31 October 1984, or in such a marriage entered into before 1 November 1984 and in respect of] to which the provisions of Chapter III of the Matrimonial Property Act, 1984, [applies] are applicable, either one of the spouses acting with the written consent, attested by two competent witnesses, of the other spouse;”.
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- 30

8. This Act shall be called the Marriage and Matrimonial Property Law Amendment Act, 1988, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

Short title and commencement.