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August 2023 | Issue 92

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Community Service/ Pro bono regulations released

Justice & Correctional Services Minister Ronald Lamola, by notice in the Government Gazette on 11 August, has published new regulations in terms of the Legal Practice Act governing the rendering of community service by legal practitioners, both candidate and practising.

Legal practitioners will be obliged to perform 40 hours of community service per year, and candidate attorneys 8 hours.

We would like to invite legal practitioners to sign up to staff our legal clinics and help desks, take on cases and present workshops and webinars. There is a sign-up form on the home page of our website at www.probono.org.za

Write for us

We would like to invite legal practitioners to contribute to our bi-monthly newsletters by writing an article of up to 400 words (one page) on a topical issue of law. Please indicate your interest to the editor at **margaret@probono.org.za**

The deadline for articles for the next issue will be: **1 October 2023**

The end of the Zimbabwean Exemption Permit?

By Pearl Khumalo, Staff Attorney, Durban

In 2009, the Minister of Home Affairs introduced the Zimbabwean Dispensation Permit (now the Zimbabwean Exemption Permit, "ZEP") in terms of section 31(2) (b) of the Immigration Act. The purpose of the permit was to deal with the influx of economic migrants coming from Zimbabwe and to exercise control over the number of illegal immigrants in the country. For over 14 years, the ZEP has been renewed several times, in 2014 (Zimbabwean Special Permit) and finally Zimbabwean Exemption Permit in 2017. Over 178,000 Zimbabweans have applied through this process.

On 24 November 2021, The Department of Home Affairs issued a gazette notice that the ZEP would come to an end on 30 June 2023 and that all holders are to apply to be documented under the Immigration Act or Refugee Act 130 of 1998 or face deportation. In the recent case of *Helen Suzman Foundation v Minister of Home Affairs* (32323/2022), the Helen Suzman Foundation challenged the Minister's decision to terminate the ZEP.

In terms of the Promotion and Access to Justice Act 3 of 2000 ("PAJA"), "administrative action" is defined in section 1.

"administrative action" means any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

- exercising a power in terms of the Constitution or a provincial constitution; or

- exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.

In *Minister of Defence and Military Veterans v Motau* and Other (2014) ZACC 18, the Court set out the seven elements of administrative action as follows:

"there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions."

The Court further explained that in terms of the Act, the administrative action must be procedurally fair. Section 3 of the PAJA sets the criteria:

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

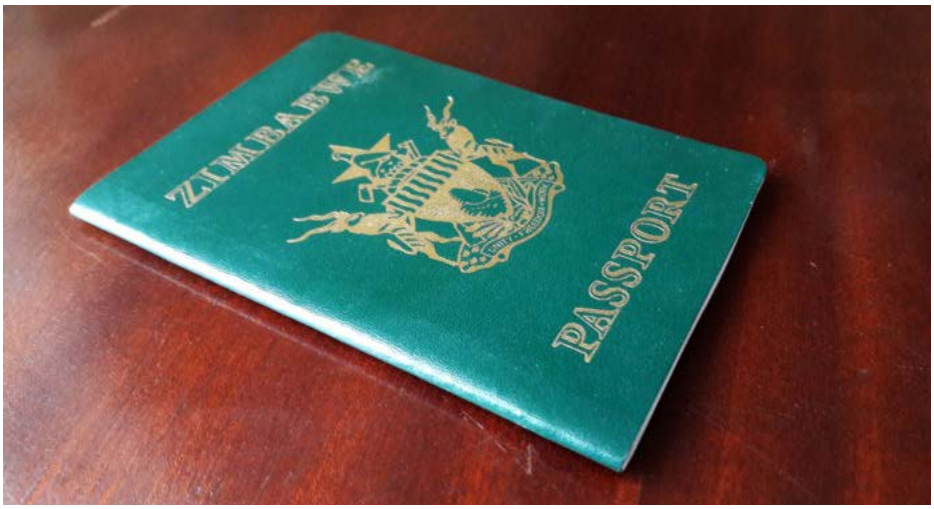
(iii) a clear statement of the administrative action;

(iv) adequate notice of any right

of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

The Court found that the Minister had taken administrative action in that he, a natural person, with authority over the immigration and asylum systems, had taken a decision to terminate the ZEP (which had been authorised by section 31(2) (b) and (d) of the Immigration Act) and that such decision would directly affect ZEP-holders. The Court found that the Minister had not followed the process set out in terms of section 3 of PAJA in that he failed to give adequate notice of the proposed administrative action but published gazette notices after the decision had already been taken. Evidence showed that the Minister had internal discussions and engagements but never with the public or those directly affected. The Minister further failed to allow those affected by the decision an



opportunity to make representations or meaningfully engage on the proposed action. The Court held that the Minister failed to consider the rights of the ZEP-holders and the effect the decision would have on them, their children and their livelihoods.

Accordingly, the Court found the Minister's decision to terminate the ZEP to be unlawful, unconstitutional and invalid and ruled that that decision was set aside and sent back to the Minister to reconsider, allowing the ZEP-holders, civil society organisations and the public to make representations. The Court further extended the ZEP for an additional twelve months. This court case is significant in reminding administrative bodies and authorities of their constitutional duty to ensure fairness in their exercise of public power as envisaged in section 33 of the Constitution.

Wills Week – Durban help desks

This year, Wills Week will run from 11 to 15 September 2023. During this time, the Legal Practice Council encourages legal practitioners to consult and draft wills for the public free of charge.

ProBono.Org Durban will be engaging in several events to participate in this special initiative. We have partnered with the Master of the High Court to host wills help desks at their office throughout Wills Week. In addition, we will be hosting special wills help desks in the communities listed below to ensure access to our services.

- 6 September 2023 - Chatsworth Court
- 20 September 2023 - Umlazi M Community Hall
- 27 September 2023 - Blue Roof Life Spaces in Wentworth

We will also be presenting radio interviews and community talks focusing on uplifting and educating the public about estate planning.

Was the Pretoria High Court judgment correct in declaring section 7(3)(a) of the Divorce Act 70 of 1979 unconstitutional?

By Nomvula Sibeko, Johannesburg Intern

On 11 May 2022 the High Court ruled section 7(3)(a) of the Divorce Act of 1979 unconstitutional in the case of *Greyling v Minister of Home Affairs and four others*, 40023/21, causing a series of legal opinions. The judgment was referred to the Constitutional Court to confirm its correctness in terms of section 167(5) of the Constitution. The judgment is still pending. This article discusses the main aim of section 7(3)(a) and the validity of the High Court judgment.

The Matrimonial Regimes

In South Africa prior to 1984 only two marital regimes were available, namely:

1. **In Community of Property** which allows parties to share equally their profits and losses. Upon divorce the assets are equally divided unless forfeiture is claimed.
2. **Out of Community of Property** (complete separation) where parties' assets are not included in the marriage. This means that each spouse has their own separate assets and they don't share profits or losses. This is made certain by an Antenuptial Contract that is signed by the spouses before marriage.

In 1984 a new matrimonial regime, the Accrual system was introduced by the Matrimonial Property Act 88 of 1984 (MPA) . The Accrual system enables spouses to either include or exclude the accrual system.

3. **The Accrual system** allows parties to share in the profits/ growth of the estate while keeping their own assets.

The accrual system came with a new judicial discretion, section 7 (3) (a) of the Divorce Act 70 of 1979 to give judges in divorce matters the power to distribute the assets of spouses in marriages out of community of property entered into before 1 November 1984 .

Section 7 (3) (a) dictates that 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 MPA, 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, may, subject to the provisions of subsection (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 .

The aim of section 7 (3) (a) was to cater for spouses who did not previously have the option of accrual. This provision was intended to address the unfairness in the existing marital regimes that were too rigid. The discretion was for that reason only available for those spouses married out of community of property prior to the commencement date of the legislation, on 1 November 1984.

A case of interest, Karen Rita Greyling v Minister of Home Affairs and others, suggests that a redistribution discretion should be available in all marriages out of community of property without the accrual system, irrespective of the dates on which these marriages were concluded. The court was called upon to determine the constitutionality of section 7 (3) in excluding spouses married out of community of property without the

accrual system after 1984 .

The applicant, Mrs Greyling, was married in 1988, four years after the commencement of the MPA. She married a wealthy farmer out of community of property excluding the accrual system. Mrs Greyling was a housewife who took care of their children and household chores. However, as a result of abuse, the couple separated.

The court was not called upon to decide whether Mrs Greyling was entitled to a redistribution order but to determine whether section 7 (3) (a) of the Divorce Act, which deprived her of such relief, was constitutional.

Mrs Greyling's attack was twofold.

1. The section arbitrarily and irrationally differentiated between spouses married before and after 1 November 1984 when the MPA commenced.
2. The cut-off date has disproportionate discriminatory consequences for women.

Mrs Greyling's argument was that in the context of gender inequality in South Africa, women tend to enter marriages in a weaker bargaining position than men and as a result have less autonomy to contract on terms that would be favourable to them. This results in exploitation during the marriage by heteronormative standards which reinforce an unequal adjustment to matrimonial property regimes and women are disproportionately disadvantaged.

The court declared that section 7 (3) (a) was unconstitutional due to its wording, "entered into before 1984". In deciding the validity the court analysed firstly whether the section differentiates between people on grounds that amount to discrimination, and secondly whether the discrimination was unfair. The court ruled that there is no legitimate reason justifying the differentiation between spouses married before and after 1 November 1984, further stating that the section operates to trap predominantly women in harmful and toxic relationships when they lack the financial resources to survive outside the marriage.

The main purpose of secion 7(3) is to redress a deficiency of financial imbalance to allow spouses who were affected by marital power to acquire their rightful shares in the accumulated wealth of their joint endeavours. South Africa's history of patriarchal marital power was the factor for this judicial discretion.

I support the Pretoria Attorneys' Association's contention, who were admitted as amicus curiae on the Greyling case, that there is no evidential basis to prove that women are generally in a weaker bargaining position than men or that women lack an understanding of the consequences of entering into an antenuptial contract. Choosing a marital regime affords spouses the freedom to contract so as to protect their interests. Judicial discretion would promote legal uncertainty. Parties would not be able to protect their interests in marriages, resulting in a lacuna in our law.

The MPA provided the option of choosing between a system that includes accrual sharing and a system that excludes accrual sharing and parties seemingly exercise a deliberate choice.

Conclusion

The High Court erred in declaring section 7 (3) (a) of the Divorce Act 70 of 1979 unconstitutional as this will cause discrimination for spouses in that it overlooks the freedom to contract and the reason behind marital regimes in protecting assets. The Greyling approach should only be considered as a guide to provide a remedial section empowering courts to interfere where spouses stand to be economically impacted by virtue of their marital regime. This proposed section would not be alien to South African law as courts continue to deviate from the strict application of property regimes as seen in both section 9 of the Divorce Act which deals with forfeiture of patrimonial benefits of a marriage and section 8 (2) of the MPA which gives a court power to order division of accrual. In order to consider the High Court judgment the Constitutional Court will need to conduct thorough research on the consequences of the High Court's judgment on marriages in South Africa.

Guest slot

Lungelo Mkhize, Fasken Attorneys

Higher duty of care when acting pro bono

Pro bono legal services are aimed at making justice more accessible to the most impoverished members of our society. When providing legal services to pro bono clients, it is important for legal practitioners to exercise a higher duty of care. In exercising such a higher duty of care, legal practitioners may be required to look for solutions to problems that are not necessarily the problems identified by the pro bono client.

On or about April 2018, the following matter was taken on by Fasken from the NISAA clinic it runs with ProBono.Org. The firm was approached for legal assistance by the mother of a child born with a permanent disability known as chronic subdural hematoma, which rendered him severely disabled and in need of special health care. The mother requested Fasken to assist with an application for the child's maintenance against his father, and an application for the child's birth certificate.

A maintenance order was accordingly obtained against the father of the child. Notwithstanding various obstacles encountered in respect of the registration of the child's birth, the child was eventually issued with a South African birth certificate in March 2022.

In the process of assisting this client, Fasken identified a number of further issues that the client required assistance with, including the following:

- The mother, who is a citizen of Lesotho, required assistance with regularising her status in South Africa;
- As a result of the child's severe disability, he required assistance with applying for a care-dependency grant from the South African Social Security Agency ("SASSA");
- The mother needed further assistance with the enforcement of the maintenance order against the father pursuant to numerous instances of non-compliance.

Having identified the abovementioned issues, Fasken assisted the client with preparing and lodging an application for:

- South African permanent residence in terms of the Immigration Act 13 of 2002;
- the child's care dependency grant with the SASSA; and
- the enforcement of the maintenance order against the father's employer, and subsequently his pension fund.

With the assistance from Fasken, the mother is now a permanent resident of South Africa and the child is receiving a care dependency grant. Fasken is also in the process of obtaining a maintenance enforcement order to attach the father's pension benefits to satisfy his maintenance obligations.

In many instances, pro bono clients do not have the necessary knowledge to properly identify all the legal issues they face and the remedies they need. It is therefore important for the legal representatives to exercise a higher duty of care when advising these clients. Legal representatives should strive to provide sustainable solutions for clients and properly interrogate instructions.

Fasken's journey with this client is not over yet as the firm seeks to raise funds to purchase a wheelchair for her child, which would empower the child with mobility and the ability to undertake certain tasks independently.

We encourage any person who is able to assist to donate towards the purchase of a wheelchair for the child.

To donate, kindly contact Sushila Dhever on (011) 586 6029 for further information.