



COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE JUDICIAL MATTERS AMENDMENT BILL [B7-2023]

The Law Society of South Africa (LSSA) constitutes the collective voice of the approximately 30 000 attorneys within the Republic. It brings together the Black Lawyers Association, the National Association of Democratic Lawyers and the Independent attorneys, in representing the attorneys' profession.

The LSSA has considered the Judicial Matters Amendment Bill [B7 of 2023], and hereby submits the following comments:

PROPOSED AMENDMENT TO THE MAGISTRATES' COURTS ACT

1. Clause 1 (Section 51 of the Act)

The proposed addition of subsection 51(4) to the Magistrates' Courts Act is concerning, as it allows for a magistrate to step into the adversarial fray. However, it can enable the truth to come out if correctly used by the magistrate.

The practicality of the calling of such witnesses could create problems - who leads the witness and who cross examines him/her? Can a party ask a magistrate to exercise the right to call such a witness?

It is also uncertain who issues the subpoena and pays the sheriff's fees, travel and witness fees, especially if the witness has to travel from out of town and stay over.

PROPOSED AMENDMENTS TO THE ADMINISTRATION OF ESTATES ACT, 1965

2. **Clause 3 (Section 28 of the Act)**

A “current account” is a “transactional account”. A “transactional account” includes a “current account”. It is therefore submitted that only the words “transactional account” should be referred to.

The Chief Master should not be permitted to issue a directive with regard to the establishment of an account. It would serve no purpose whatsoever.

An electronic payment may indicate the identity of the payee and the amount paid but will not facilitate details of the cause of payment. Furthermore, an electronic payment advice will not necessarily indicate the account number of the payee. These proposals pertaining to the identity of the payee appear, at this stage, impractical because when an EFT is executed, not all banks print such information on the bank statement. It appears that in order to comply with the provisions of the Protection of Personal Information Act, financial institutions are only reflecting the last 4 digits of the account number.

The requirement of “such additional information as directed by the Master” is not supported and will lead to confusion. The requirements must be clearly set out in the Act.

3. **Clause 4 (Section 34 of the Act)**

The word “may” in the second last line of clause 4 should be replaced by the word “must” or “shall” to indicate that it is not discretionary but peremptory to accept an affidavit.

4. **Clause 5 (Section 35 of the Act)**

The word “may” in the last line of clause 5 should be replaced by the word “must” or “shall” to indicate that it is not discretionary but peremptory to accept an affidavit.

5. **Clause 8 (Insertion of Section 96A)**

The Chief Master’s authority should be made “subject to directions from the Minister”. It is suggested that this be inserted immediately after the word “shall” in line 2, to read:

96A. *The Chief Master, as the head of the Offices of the Master of the High Court, shall, **subject to directions from the Minister**, have authority over the exercise of all powers, and the performance of all the duties and functions conferred or imposed on or assigned to any Master by this Act or any other law.*

6. **Clause 9 (Section 103 of the Act)**

Regulations made under the Administration of Estates Act should be made by the Minister in consultation with the recognised bodies and associations representing legal practitioners.

PROPOSED AMENDMENTS TO THE MATRIMONIAL PROPERTY ACT, 1984

7. **Clause 12 (Section 21 of the Act)**

It appears evident that the draft amendment references an incomplete section number. Clause 12 proposes the repeal of “Section 21(2)(a) of the Matrimonial Property Act.” It is our submission that it in fact should be referring to **Section 21(2)(a)(ii)**.

It is only Section 21(2)(a)(ii) which has been rendered unconstitutional, rather than the entire sub-section (a).

The deletion of the entire sub-section (a) would create great uncertainty to those parties who were married out of community of property prior to the commencement of the Matrimonial Property Act and thereafter caused the provisions of Chapter 1 of the Act to apply by executing and registering an antenuptial contract within the two-year period after the commencement of the Act.

The amendment, as proposed, would mean that there is no provision in the Act which would have allowed those parties (who married before the Act, out of community of property) to have executed antenuptial contracts in accordance with the Act after its commencement.

This would therefore create a lacuna in the law.

The Constitutional Court order in *Sithole and Another v Sithole and Another* [2021] ZACC 7 specifically stated:

Order

[59] The following order is made:

1. The provisions of section 21(2)(a) of the Matrimonial Property Act 88 of 1984 ('the MPA') are hereby declared unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by section 22(6) of the Black Administration Act 38 of 1927 ('the BAA'), and thereby maintain the default position of marriages of black couples, entered into under the Black Administration Act before the 1988 amendment, that such marriages are automatically out of community of property.

MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS AMENDMENT BILL, 2023

5. Memorandum

The invitation by the Portfolio Committee to submit written submissions would, on the surface, appear to be somewhat strange in the light of Section 3 (CONSULTATION) of the Memorandum, reading:

"The amendments are technical in nature and no public consultation is needed."

The LSSA considers some of the amendments as more than just "technical". For instance, however it may be justified, the abolition of the common law crime of defamation is hardly technical. On the contrary, it is a radical departure from the current position. The same applies to giving effect to some of the judgments dealt with in this Amendment Bill.