

(9 August 2010 – to date)

[This is the current version and applies as from 9 August 2010 - to date, i.e. the date of commencement of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, Gazette No. 31579 dated 5 November 2008. Commencement date: 9 August 2010 from Proc. No. 41, Gazette No. 33448 – to date]

## **DIVORCE ACT 70 OF 1979**

*(Gazette No. 6508, Notice No. 1291, dated 15 June 1979. Commencement date: 1 July 1979)*

### **As amended by**

Matrimonial Property Act 88 of 1984 – Gazette No. 9322, No. 1517 dated 25 July 1984. Commencement date: 1 November 1984 [Proc. No. 158, Gazette No. 9413]

Transfer of Powers and Duties of the State President Act 97 of 1986 – Gazette No.10438, No. 1909 dated 12 September 1986. Commencement date: 3 October 1986 [Proc. No. 185, Gazette No. 10475]

Mediation in Certain Divorce Matters Act 24 of 1987 – Gazette No.10795, No. 1393 dated 24 June 1987. Commencement date: 1 October 1990 [Proc. No. 181, Gazette No. 12778]

Marriage and Matrimonial Property Law Amendment Act 3 of 1988 – Gazette No.11171, No. 414 dated 4 March 1988. Commencement date: 2 December 1988 [Proc. No. 203, Gazette No. 11596]

Divorce Amendment Act 7 of 1989 – Gazette No. 11741, No. 426 dated 15 March 1989. Commencement date: 1 August 1989 [Proc. No. 141, Gazette No. 12030]

Domicile Act 3 of 1992 – Gazette No. 13817, No. 769 dated 11 March 1992. Commencement date: 1 August 1992 [Proc. No. 76, Gazette No. 14166]

Divorce Amendment Act 44 of 1992 – Gazette No. 13921, No. 1072. Commencement date: 15 April 1992

Justice Laws Rationalisation Act 18 of 1996 – Gazette No. 17129; No. 632 dated 19 April 1996  
Commencement date: 1 April 1997 [Proc. No. 23, Gazette No. 17849]

Films and Publications Act 65 of 1996 – Gazette No.17560, No. 1811 dated 8 November 1996.  
Commencement date: 16 January 1998 [Proc. No. 3, Gazette No. 18633]

Divorce Amendment Act 95 of 1996 – Gazette No. 17605, No. 1894. Commencement date: 22 November 1996

Divorce Courts Amendment Act 65 of 1997 – Gazette No. 18451, No. 1562 dated 21 November 1997.  
Commencement date: 6 April 1998 [Proc. No. 39, Gazette No. 18824]

Judicial Matters Second Amendment Act 55 of 2003 - Gazette No. 26206, No. 428 dated 31 March 2004  
Commencement date: 31 March 2005 [Proc. No.13, Gazette No. 27406]

Jurisdiction of Regional Courts Amendment Act 31 of 2008 – Gazette No. 31579, No. 1201 dated 5  
November 2008. Commencement date: 9 August 2010 [Proc. No. 41, Gazette No. 33448]

## ACT

### To amend the law relating to divorce and to provide for incidental matters.

#### 1. Definitions

(1) In this Act, unless inconsistent with the context-

**“court”** means any High Court as contemplated in section 166 of the Constitution of the Republic of South Africa, 1996, or a court for a regional division contemplated in section 29(1B) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), which has jurisdiction with respect to a divorce action;

*(Definition of “court” substituted by section 4 of Act 65 of 1997)*

*(Definition of “court” amended by section 10(2) (Schedule) of Act 31 of 2008)*

**“divorce action”** means an action by which a decree of divorce or other relief in connection therewith is applied for, and includes –

- (a) An action *pendente lite* for an interdict or the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
- (b) An application for a contribution for the costs of such action or to institute such action, or make such application, *informa pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application;

**“pension fund”** means a pension fund as defined in section 1(1) of the Pensions Fund Act, 1956 (Act 24 of 1956) irrespective of whether or not the provisions of that Act apply to the pension fund or not;

*(Definition of “pension fund” added by section 1 of Act 7 of 1989)*

**“pension interest”** in relation to a party to a divorce action who –

- (a) Is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have terminated on the date of the divorce on account of his resignation from his office;
- (b) Is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1 (2) of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), for the purposes of that Act.

*(Definition of "pension interest" added by section 1 of Act 7 of 1989)*

"**rules**" in relation to a pension fund, means rules as defined in section 1(1) of the Pensions Fund Act, 1956.

*(Definition of "rules" added by section 1 of Act 7 of 1989)*

- (2) For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of the court, as the case may be.

## **2. Jurisdiction**

- (1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is –
  - (a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
  - (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.

*(Section 2(1) amended by section 6(a) of Act 3 of 1992)*

- (2) A court which has jurisdiction in terms of subsection (1) shall also have jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned.

*(Section 2(2) amended by section 6(b) of Act 3 of 1992)*

- (3) A court which has jurisdiction in terms of this section in a case where the parties are or either of the parties is not domiciled in the Republic shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted.

*(Section 2(3) amended by section 6(c) of Act 3 of 1992)*

- (4) The provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law.

### **3. Dissolution of marriage and grounds of divorce**

A marriage may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are –

- (a) the irretrievable break-down of the marriage as contemplated in section 4;
- (b) the mental illness or the continuous unconsciousness, as contemplated in section 5, of a party to the marriage.

### **4. Irretrievable break-down of marriage as ground for divorce**

- (1) A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.
- (2) Subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence-
- (a) that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;
  - (b) that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship; or
  - (c) that the defendant has in terms of a sentence of a court been declared an habitual criminal and is undergoing imprisonment as a result of such sentence,

as proof of the irretrievable break-down of a marriage.

- (3) If it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings in order that the parties may attempt a reconciliation.
- (4) Where a divorce action which is not defended is postponed in terms of subsection (3), the court may direct that the action be tried *de novo*, on the date of resumption thereof, by any other judge of the court concerned.

## **5. Mental illness or continuous unconsciousness as grounds of divorce**

- (1) A court may grant a decree of divorce on the ground of the mental illness of the defendant if it is satisfied-

(a) that the defendant in terms of the Mental Health Act, 1973 (Act No. 18 of 1973)--

- (i) has been admitted as a patient to an institution in terms of a reception order;
- (ii) is being detained as a State patient at an institution or other place specified by the Minister of Correctional Services; or
- (iii) is being detained as a mentally ill convicted prisoner at an institution;

and that he has, for a continuous period of at least two years immediately prior to the institution of the divorce action, not been discharged unconditionally as such a patient, State patient or mentally ill prisoner; and

- (b) after having heard the evidence of at least two psychiatrists, of whom one shall have been appointed by the court, that the defendant is mentally ill and that there is no reasonable prospect that he will be cured of his mental illness.

*(Section 5(1)(a)(ii) and (iii) amended by section 4 (Schedule III) of Act 18 of 1996)*

- (2) A court may grant a decree of divorce on the ground that the defendant is by reason of a physical disorder in a state of continuous unconsciousness, if it is satisfied-

(a) that the defendant's unconsciousness has lasted for a continuous period of at least six months immediately prior to the institution of the divorce action; and

- (b) after having heard the evidence of at least two medical practitioners, of whom one shall be a neurologist or a neurosurgeon appointed by the court, that there is no reasonable prospect that the defendant will regain consciousness.
- (3) The court may appoint a legal practitioner to represent the defendant at proceedings under this section and order the plaintiff to pay the costs of such representation.
- (4) The court may make any order it may deem fit with regard to the furnishing of security by the plaintiff in respect of any patrimonial benefits to which the defendant may be entitled by reason of the dissolution of the marriage.
- (5) For the purposes of this section the expressions "institution", "mental illness", "patient", "State patient" and "reception order" shall bear the meaning assigned to them in the Mental Health Act, 1973.

*(Section 5(5) amended by section 4 (Schedule III) of Act 18 of 1996)*

#### **5A. Refusal to grant divorce**

If it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the precepts of their religion or the religion of either one of the, not be free to remarry unless the marriage is also dissolved in accordance with such precepts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just.

*(Section 5A added by section 1 of Act 95 of 1996)*

#### **6. Safeguarding of interests of dependent and minor children**

- (1) A decree of divorce shall not be granted until the court –
  - (a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances; and
  - (b) if and enquiry is instituted by the Family Advocate in terms of section 4(1)(a) or (2)(a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations referred to in the said section 4(1).

*(Section 6(1) substituted by section 6 of Act 24 of 1987)*

- (2) For the purposes of subsection (1) the court may cause any investigation which it may deem necessary, to be carried out and may order any person to appear before it and may order the parties or anyone of them to pay the costs of the investigation and appearance.
- (3) A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may in particular, if in its opinion it would be in the interests of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent.
- (4) For the purposes of this section the court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or anyone of them to pay the costs of the representation.

**7. Division of assets and maintenance of parties**

- (1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.
- (2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

*(Section 7(2) substituted by section 36(a) of Act 88 of 1984)*

- (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 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.

*(Section 7(3) added by section 36(b) of Act 88 of 1984, and substituted by section 2(a) of Act 3 of 1988)*

- (4) An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.

*(Section 7(4) added by section 36(b) of Act 88 of 1984)*

- (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 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 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.

*(Section 7(5) added by section 36(b) of Act 88 of 1984 and substituted by section 2(b) of Act 3 of 1988)*

- (6) A court granting an order under subsection (3) may on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including



conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.

*(Section 7(6) added by section 36(b) of Act 88 of 1984)*

- (7) (a) In the determination of the matrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.
- (b) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce-
- (i) was paid over or awarded to another party; or
- (ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.
- (c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

*(Section 7(7) added by section 2 of Act 7 of 1989)*

- (8) Notwithstanding the provisions of any other law or of the rules of any pension fund-
- (a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that-
- (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;
- (ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;

*(Section 7(8)(a)(ii) amended by section 11 of Act 55 of 2003)*

- (b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned.

*(Section 7(8) added by section 2 of Act 7 of 1989)*

- (9) When a court grants a decree of divorce in respect of a marriage the patrimonial consequences of which are according to the rules of the South African private international law governed by the law of a foreign state, the court shall have the same power as a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other spouse.

*(Section 7(9) added by section 1 of Act 44 of 1992)*

## **8. Rescission, suspension or variation of orders.**

- (1) A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor. Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) or 2(b) of the Mediation in Certain Divorce Matters Act, 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4(1) have been considered by the court.

*(Section 8(1) substituted by section 7 of Act 24 of 1987)*

- (2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.
- (3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to any order referred to in subsection (1) given by a court in a divorce action before the commencement of this Act.

## **9. Forfeiture of patrimonial benefits of marriage.**

- (1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the

marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

- (2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.

#### **10. Costs**

In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in, so far as it may be relevant, make such order as it considers just and the court may order that the costs of the proceedings be apportioned between the parties.

#### **11. Procedure**

The procedure applicable with reference to a divorce action shall be the procedure prescribed from time to time by rules of court.

#### **12. Limitation of publication of particulars of divorce action.**

- (1) Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgement or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce- action or any information which comes to light in the course of such an action.
- (2) The provisions of subsection (1) shall not apply with reference to the publication of particulars or information-
  - (a) for the purposes of the administration of justice;
  - (b) in a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or
  - (c) for the advancement of or use in a particular profession or science.
- (3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by a Family Advocate in terms of the Mediation in Certain Divorce Matters Act, 1987.

*(Section 12(3) substituted by section 8 of Act 24 of 1987)*

- (4) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

**13. Recognition of certain foreign divorce orders**

The validity of a divorce order or an order for the annulment of a marriage or for judicial separation granted in a court of a foreign country or territory shall be recognized by a court in the Republic if, on the date on which the order was granted, either party to the marriage-

- (a) was domiciled in the country or territory concerned, whether according to South African law or according to the law of that country or territory;
- (b) was ordinarily resident in that country or territory; or
- (c) was a national of that country or territory.

*(Section 13(1)(2) and (3) amended by section 46 and 47 (First and Second Schedule) of Act 97 of 1986)*

*(Section 13 substituted by Section 7 of Act 3 of 1992)*

**14. Abolition of orders for restitution of conjugal rights and judicial separation**

It shall not be competent for a court to issue an order for the restitution of conjugal rights or for judicial separation.

**15. Application of Act.**

This Act shall not apply with reference to a divorce action or proceedings for the restitution of conjugal rights or for judicial separation instituted before the commencement of this Act.

**16. Amendment of section 5 of Act 37 of 1953, as amended by section 2 of Act 13 of 1966.**

**17. Amendment of Section 72 of Act 66 of 1965, as amended by section 7 of Act 54 of 1970.**

**18. Repeal of laws.**

The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule

**19. Short title and commencement.**

This Act shall be called the Divorce Act, 1979, and shall come into operation on 1 July 1979.

**Schedule**

No. and year of law	Short title	Extent of repeal
Act No. 32 of 1935	Divorce Laws Amendment Act, 1935	The whole
Act No. 22 of 1939	Matrimonial Causes Jurisdiction Act, 1939	The whole
Act No. 17 of 1943	Matrimonial Causes Jurisdiction Amendment Act. 1943	The whole
Act No. 35 of 1945	Matrimonial Causes Jurisdiction Act, 1945	The whole
Act No. 37 of 1953	Matrimonial Affairs Act, 1953	Sections 6, 7, 8, 9 and 10
Act No. 70 of 1968	General Law Amendment Act. 1968	Sections 21, 22 and 23
Act No. 42 of 1974	Amended by Schedule 12 of Act 65 of 1996	

(Schedule amended by section 33 of Act 65 of 1996)