POST-DIVORCE RIGHTS OF THE SOUTH AFRICAN WOMEN TO THE ACCRUED ESTATE

by

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PROPOSAL ON HOW TO SOLVE THE PROBLEM

To integrate the property rights of women married either civil or customarily into workable system acceptable to the South Africans.

Synopsis

Equality is the cornerstone of every democratic society, which applies to social justice and human rights. In virtually all societies and spheres of activities women are subject to inequalities in law and in fact. This situation is caused by discrimination in the family, in community and in the courts of law.

South African law history as far as the property accumulated during marriage had unpleasant consequences towards women. Prior to 1984 women married out of community of property were basically denied the right to property during the marriage and after divorce. This was caused by the husband's marital powers as well as the separation of goods established by antenuptial contract.

South Africa saw the first change in the family law in 1984. The introduction of the Matrimonial property Act enacted only for Whites, Asians and Coloured as well as some amendments to the Deeds Registries Act of 1937 and the Divorce Act of 1979 brought some relief to women.

During 1984 South Africa was still clouded with racism. The Matrimonial property Act was only meant for Whites, Asians and Coloured as already mentioned. It was only in 1988 that Blacks married by civil rites enjoy the changed matrimonial affairs. The Marriage and Matrimonial Property Law Amendment Act were enacted mainly for Blacks married by civil rites.

In 1990 South Africa experiences some steps towards Democracy. In 1993 the Interim Constitution was enacted. In terms of this Act South Africa was declared a Democratic Country. The discriminatory Acts were amended and some repealed to align with the socio-economic, political and constitutional changes. Women gradually started to have rights that were denied to them before. Finally in 1996, the final Constitution was enacted as a supreme law of the Country.

It was as a result of the enactment of the final Constitution that the customary law, for the first in the history of South Africa, started to be given the attention it needed long time ago. This resulted in the enactment of the Recognition of Customary Marriage Act of 1998. The aim of the Act is amongst other things to integrate the property rights of women.

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CHAPTER ONE

HISTORICAL BACKGROUND OF THE SOUTH AFRICAN MATRIMONIAL LAW

1.1_ PRIOR TO 1984

Marriage has traditionally been defined as the legally recognized voluntary union for life between one man and woman to the exclusion of all others while it lasts[1]. This definition excludes marriage as defined in terms of customary law. The customary law marriage is a relationship between a man and one or more women hence referred to as a customary union[2]. Prior to 1998[3] this union was not recognized in South Africa as a marriage, with the same consequences as a civil law marriage because it was potentially polygamous and not solemnized by authorized marriage officers in compliance with the provisions of the Marriage Act 25 of 1962. The same applied to Muslim and Hindu marriages.

Whether the proprietary consequences of a marriage by Muslim rites were enforceable by South African Courts was also an issue. It was held on appeal by Trengrove J in the case of Ismael[4] that the Marriage was not valid in law because it was *de jure* polygamous although *de facto* monogamous and was not celebrated in accordance with the formalities prescribed in the Marriage Act 25 of 1961. The marriage between the parties was monogamous but the judge in his decision declined to view the proprietary consequences of the marriage separately from the marriage itself. His view was that they were inextricably linked to the underlying conjugal union. Until the commencement of the Matrimonial Property Act 88 of 1984, two main matrimonial property systems existed, that is marriage in community of property, profit and loss and marriage out of community of property, profit and loss. The primary matrimonial property system of South Africa has been and was the system of universal community of property.

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1 Lawsa Vol 16, Marriage p 12; The South African Law of Husband and Wife 5th ed (1985) p 21; Butterworths Forms and Procedure; Law of Persons and Family, Service Issue 1; Marriage and Settlement Contracts p 609

2 JC Bekker.; Seymour's Customary Law in South Africa 4th ed (1989) Juta: Cape Town

3 The Recognition of Customary Law Marriage Act 1998 (Act 120 of 1998)

4 Ismael vs Ismael 1983 (1) SA 1006 (A)

There was a rebuttable presumption that a marriage entered into without an antenuptial contract was in community of property with retention of the husband's marital powers except in the case of a civil marriage entered into by Blacks. The marriage entered into Blacks was automatically out of community of property with retention of the husband's marital powers[5] unless parties entered into an antenuptial contract in terms of which the marriage in community was concluded.

The rebuttable presumption that all marriages were in community of property was rebutted by the existence of a valid antenuptial contract in terms of which community of property and/ or community of profit and loss was excluded.

The purpose of the antenuptial contract was to exclude either all or some of common law or statutory consequences of marriage. After the conclusion of the marriage, the matrimonial property system chosen by the spouses remained fixed and could not be changed during the subsistence of the marriage. The principle of immutability applied in our matrimonial property law. This was a serious defect because it often happened that the financial position of spouses changed to an extent, during the subsistence of their marriage, that the system chosen by them at the beginning of the marriage becomes totally inadequate.

The main purpose of these antenuptial contracts was to provide a matrimonial property system alternative to the usual community of property. Most of the marriages entered into by antenuptial contract prior 1984 were entered into by excluding community of property, community of profit and loss and the husband's marital powers. Contract with these provisions were subsequently referred to as standard form antenuptial contracts[6].

The effect of these standard form contracts was that the parties remained in the same patrimonial position as that in which they were before the marriage. Each spouse retained his or her separate estate, which he or she possessed before the marriage and retained everything he or she acquired after conclusion of that marriage. This standard form contract was often very prejudicial to the

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5 Sec 22 (1) Black Administration Act 38 of 1927

6 The South African Law of Husband and Wife by HR Hahlo p 260- 261

wife. In cases where she was fully occupied at home as housewife and thus not able to accumulate an estate of her own, the financial position in which she could be left on at the eventual dissolution of a marriage governed by a standard form contract, could be most unfavourable.

The disadvantage of this matrimonial property regime was that the wife, while she enjoyed an independent legal and contractual capacity, could not expect to receive any share in her husband's estate on the termination of marriage by divorce. The situation was worse because the woman was the most likely disadvantaged spouse who might not have worked during the marriage and could therefore not gather assets of her own.

In this instance a woman was "tied to a shoe string" in the sense that her role is confined to the household functions. She stayed at home and took care of the family and household and this was important because some of these functions cannot ordinarily be performed by the husband. The husband on the other hand has in some cases started married life with little or no property, but in the long run acquired vast assets by virtue of their efforts in the business world, with a substantial has amassed a fortune, the wife would surely make a contribution by assisting in the running of the business whilst at the same time maintaining the family and household.

What was surprising was that the services she rendered and the supportive role she played by looking after children and the performing her role as a housekeeper were not taken into account[7]. It followed therefore that even if she has put substantial efforts by maintaining and taking care of the family and the household, taking the children to school, assisting in the running of her husband's business, that would not be considered as a contribution to her husband's estate. Therefore, her role was relegated to that of a "slave" who must serve his master without any form of remuneration.

On dissolution of the marriage, her assets would consist of little more than personal effects such as clothing, jewellery, and a few items of furniture that she acquired through the assistance of her husband. The dissolution of the marriage constitutes a serious blow for the wife because she

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7 Schafer; Family Law Services

would be left poor and destitute while her husband would emerge with vast assets most of which were brought about by the joint efforts of the parties' *stante matrimonio*. It was this imbalance in the respective assets of the spouses at the end of the marriage, which promoted some legislative redress.

The system of community of property, community of profit and loss on the other hand had got some advantages. It terms of this system, the spouses shared equally in the profits, and the joint estate was liable for all the debts of the parties. At the time of divorce, each party was entitled to a half share of the joint estate[8]. Thus the wife's position was secured because she was entitled to a share in the estate, though it was the husband alone who exercised full control over the joint estate *stante matrimonio through* the exercise of matrimonial powers.

Under customary law all meaningful property was owned and controlled by the husband. Women were often, if not always, reduced to propertyless dependents who were required to submit to the will of their husbands in order to survive. The customary law on matrimonial property perceived a married woman as unpaid servant of her husband. She worked for him, looked after his family, acquired and preserved property for him. At the end of the marriage she left the home propertyless and destitute like a sacked employee. The position of women was however different in Natal and Kwa-Zulu. In terms of section 13 of the Code of Zulu Law any Black person, including women, may acquire immovable property in his or her own right.

It is almost unprecedented for an African wife having divorced her husband to run around and seek maintenance from the same husband. The very idea of maintaining a wife after divorce appeared to be foreign to the African conception of marriage and divorce. During divorce the wife returned back to her maternal relatives either to her father or brother's home. It was the duty of her male relative to take care of her and maintain her and not her husband. Under customary law there was no statutory provision for maintenance of divorced wives. In 1965, however, in Nigeria an attempt was made by a female member of the then Eastern House of Assembly to introduce legislation dealing with maintenance of married women under customary law but the

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[8] Ibid

proposal did not proceed beyond the Bill stage due to the dissolution of the legislative body[9].

[9] Simon Roberts; Law and Family in Africa; Economic consequences of divorce; A case study of some judicial decisions in Lagos

CHAPTER TWO

LEGISLATIVE DEVELOPMENT OF THE SOUTH AFRICAN MATRIMONIAL LAW

2.1 AFTER 1984

The Matrimonial property was promulgated on the 1st November 1984[10]. This piece of legislation raised some hopes in this area of the law because it aimed at removing a number of problems that pertained to the property rights of women who are married out of community of property, profit and loss.

It was also aimed at combining the advantages of both matrimonial property systems whilst excluding their disadvantages[11]. However it remains a moot question whether the above objectives were indeed achieved after the promulgation of the Act. An attempt to resolve the above inquiry would clearly assist in elucidating a number of problems which militate against some of the provisions of the Act. Once such a step has been taken, it would be fairly easy for one to isolate the advantages from the disadvantages in the application of the Act.

Section 7 of the Divorce Act 70 of 1979 was amended by section 36 of the Act[12]. Section 36 inserted subsections 3 to 6 to section 7 of the Divorce Act to bring a measure of relief to marriages entered into before the commencement of the Matrimonial Property Act. In terms of these subsections, the courts are empowered in specific circumstances to make an order that the assets or such parts of the assets belonging to one of the spouses be transferred to the other spouse.

Section 7(3) introduces the creation of a power enabling the courts to make a redistribution order and that is a reforming and remedial measure to remedy inequity which could flow from the law

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[10] The Matrimonial Property Act No 88 of 1984. See also C Nathan; How the New Marital Law Helps (1986) 15 Businessman's Law p 122

[11] Butterworths Forms and Precedents; The Law of Persons and Family p 6.11

[12] Act 88 of 1984

to recognize a right of a spouse upon divorce to claim on adjustment to a disparity between the respective contributions during subsistence of the marriage to the maintenance or increase of the estate of the one or the other.

The courts may, however, only have this power if the parties concern:

(1) were married prior to the commencement of the Matrimonial Property Act;

(2) concluded an antenuptial contract excluding community of property, profit and loss;

(3) were married before the commencement of the Marriage and Matrimonial Property Law Amendment Act in terms of section 22(1) of Black Administration Act[13]; and

(4) had not entered into an agreement concerning the division of their estates.

When all the mentioned circumstances are present one of the spouses may apply to the court for an order to be incorporated in the decree of the divorce to the effect that the assets or such part of the assets as the court may deem fit, be transferred from spouse to the other[14]. 1989 saw a plethora of cases reported on the judicial discretion, contained in section 7(3) of the Divorce Act, to redistribute property on divorce.

The two jurisdictional grounds to be satisfied before the court may exercise the discretion are contained in section 7(4) of the Act. In the first instance, the spouse in whose favour the order is granted must have made either a direct or indirect contribution to the maintenance or increase of the estate of the other spouse. The contribution may be 'by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any manner.' Secondly, by reason of the contribution, the court must be satisfied that it is 'equitable and just' to order the redistribution of assets.

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[13] Act 38 of 1927

[14] Section 7(3) of Act 27 of 1990

The decision of Kritzinger[15] invited considerable academic comments. The parties in this case were married out of community of property in 1967. In 1985 the Plaintiff instituted divorce proceedings and claimed a sum of money in terms of section 7(3), from her husband's estates. He counterclaimed for divorce, and similarly asked for redistribution in his favour. The wife alleged that she had made a direct contribution to her husband's estate in the form of an amount spend on the family home registered in his name. The husband's claim was based on an indirect contribution made to her estate. He alleged that, by not taking up the transfers necessary for him to make progress in his career, and by allowing the matrimonial home to remain in Cape Town, he had enabled his wife to advance her career and consequently build up her estate.

The trial court (per Berman) dismissed the wife's claim for a redistribution order, and awarded the husband the full amount of his counterclaim out of her estate[16]. The net result was that the plaintiff left the marriage with approximately R490 000-00, while her former husband ended up with approximately R475 000-00 a roughly equal sharing of the assets[17].

Berman J in his judgment, adopted an overall and global approach to the claim and counterclaim and concluded that each party had contributed to the increase of the other's estate as contemplated in section 7(4). The Court *a quo* correctly interpreted the word "contribution" as used in section 7(4) very widely, refusing to confine it exclusively to "money provided or property delivered or service rendered". The court *a quo* also attached more weight to the wife's adulterous activities as a significant factor in the assessment of the redistribution orders claimed.

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[15] Kritzinger v Kritzinger 1989 (1) SA 67 (A). See also, C Lind; Divorce and Property Sharing (1989) 18 Businessman's Law p 231

[16] Kritzinger v Kritzinger 1987 (4) SA 85 (C)

[17] See 1987 Annual Survey p 104-6

On Appeal, Milne, JA (with Corbett JA and Nicholas AJA concurring) criticized the overall and global approach adopted by the court *a quo* in its assessment of the claim. The claims were dealt with separately by the court. As regards the Appellant's claim in reconvention , his Lordship refused to accept the trial court's findings that the Appellant had to be solely to blame for the breakdown of the marriage. Milne JA held that the trial court had erred in regarding fault as a significant factor and thus failed to exercise its judicial discretion properly. The court relied approvingly on the decision of **Beaumont**[18] in which Botha JA, referring to English legislation, held that the conduct of each of the spouses should be a relevant factor if "that conduct is such that it would be in the opinion of the court inequitable to disregard it"

As to the Respondent's claim in reconvention, Milne JA was not satisfied on the facts that the Respondent had given up anything, except to sacrifice his career[19]. What the Respondent was really seeking to do, in his Lordship's opinion, was to claim damages of his wife's contribution to their combined earning power and there was no warrant for such claim. The court held that in any event, even if the Respondent's sacrifice of his career had been established, such conduct was not to be regarded as a contribution within the meaning of section 7(4). The court further held that what was clearly envisaged was some positive act by means of which one spouse puts something into the maintenance or increase of the estate of the other spouse, whether by way of money or property, labour or skill. It does not envisage a mere refraining from a particular activity or cause of conduct.

On the application of this test, the Respondent had contributed nothing whatsoever to the increase of the Appellant's estate. The Appeal succeeded and the Respondent's counterclaim was dismissed. The decision of the Appeal Court in the Kritzinger[20] case did not go unchallenged. The court's approach in this decision is unacceptable. First, the question to be considered by the court

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[18] Beaumont v Beaumont 1987(1) SA 67 (A) See also: B Clark & BJ van Heerden "Assets redistribution on divorce- The exercise of judicial discretion" SALJ (1989) 106

[19] Kritzinger (supra): Holding that the conduct relied on as a contribution must be the causa causans, and not only the causa sine qua non of the alleged maintenance or increase, his Lordship found that the Appellant would in all probability have accumulated exactly the same estate if she married some other man or not married at all. (88 G-H)

[20] Supra

is surely what the financial position of the Appellant would have been at the time divorce if the parties had, in 1976, relocated overseas, and not what it would have been had she married somebody else or remained unmarried[21].

In my view, the above submission is relevant because it tends to establish whether the choice by the parties to remain in the country or to relocate overseas would have enhanced the Appellant's financial position or not. This is important because the change of environment also plays a role in the financial position of an individual regard being to certain economic factors such as the currency and viability of a business venture.

Having considered the above factors, it would not be justifiable to confine our inquiry on the possibility of "being married to somebody else or to remain unmarried" as this line of reasoning would tend to be too far fetched. One would safely state that the latter argument would not be of assistance in determining the issues at stake and if it were to be considered, it would to some extent lead to a different finding.

The test that was applied by the Appeal Court in this case which is to the effect that "what was clearly envisaged was some positive act by means of which one spouse puts something into maintenance or increase of the estate of the other spouse, whether by way of money or property, labour or skill" is also crucial[22]. A critical analysis of this test clearly indicates some flaws in so far as the interpretation of the provisions of section 7(4) is concerned. It is quite logical to argue that the Respondent, by sacrificing his career and forfeiting his promotion, had intended not to disrupt the Appellant's career and prospects and that in itself had the advantage of enhancing her financial position.

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[21] See (1989) 106 SALJ 243. Supra

[22] Supra. See paragraph 88 C-D

Consideration must be given to the fact that the viability of the market economy in New York is not the same as in South Africa. Thus a particular business venture which is viable in one country could certainly not flourish in the same manner in another country. This is so because, if the Appellant's career and prospects had not been favourable or good, surely the spouses would have opted to relocate overseas and the respondent would have sacrificed his promotion. In the light of the aforegoing, a mere refraining from a particular activity or cause of conduct could also be regarded as a relevant factor in determining whether one spouse has made a contribution to the maintenance or increase of the assets of another spouse as contemplated in section 7(4). The subparagraph (d) of subsection 5[23] refers to the phrase "any other factor which in the opinion of the court should be taken into account". This clause bears an ordinary grammatical meaning and could also be interpreted to include the above situation.

As regards the interpretation of the wording of section 7(4), Clarke's argument seems to hold water especially when he started that "Milne JA placed undue emphasis on the financial nature of the contribution required"[24]. It is therefore clear that Milne JA in his interpretation of the wording of that provision, placed undue emphasis on the financial nature of the contribution required[25]. One would submit that this interpretation is incorrect as it tends to narrow the scope of the definition of the word "contribution" because the phrase "any other manner" could be widely interpreted any form of contribution.

This line of approach was also adopted by the court *a quo* where Berman J held the view that the contribution contemplated herein was not limited by the Legislature to any particular form. Indeed the contribution to the increase of the other spouse's estate may be made "in any other manner" besides those mentioned in section 7(4) and the word "any" is of the widest connotation[26]. Having regard to the above, one is left without doubt that the interpretation adopted by the court *a quo* carries much weight and it could assist in arriving at an equitable

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[23] Sec 7(5)(d) Divorce Act

[24] Ibid

[25] Ibid

[26] Supra (See page 95 F-G)

division of assets between spouses at the time of divorce.

Of equally importance to note is the fact that a narrow interpretation of the phrase "in any other manner" would certainly limit the scope of the required contribution and this would have adverse consequences on the transfer of property from spouse to the other. In this respect, one agrees with the argument by Clarke stated that;

> The decision by Milne to restrict the nature of the required contribution to some "positive act" may well have the effect of preventing the exercise of the judicial discretion in future cases in which redistribution order is necessary to ensure that the assets of the spouses are shared equitably between them[27].

It is also important to note that there has to be a certain degree of flexibility which is necessary to enable the court to deal with infinite variety of permutations of relevant circumstances and this could be achieved by wider approach to the requirement of a contribution as a condition precedent to the granting of a redistribution order[28].

Professor Sinclair correctly cited an example of an unemployed woman who refrains from employing a domestic servant. She argued that this would satisfy the requirement because her decision results in a positive behaviour on her part in performing the domestic tasks; it saves the expenses that would otherwise have been incurred[29]. In my view, the above argument appears to be a sound one because when a woman gets married, she is expected to perform her Common Law duties of taking care of the family and household. These duties involve a wide range of household responsibilities which includes cooking for the husband and children, maintaining and cleaning of the household, taking children to school, etc.

Therefore when she does that she is certainly making an indirect contribution to the maintenance or increase of her husband's estate which in my view should be taken into account. On the contrary, if a narrow interpretation were adopted, it would certainly exclude contribution made by an unemployed woman which sounds to be unfair.

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[27] Clarke B "Assets distribution on Divorce: the exercise of judicial discretion" SALJ vol 106 (1989) 243

[28] See page 247

[29] Sinclair J: Divorce and Judicial Discretion- In search of the middle ground: (1989) 106 SALJ 252

The above argument is in line with the view held by Botha JA in the **Beaumont[30]'s decision**. In this case, the Plaintiff sued the Defendant for divorce and also claimed forfeiture of certain benefits conferred by him on the Defendant under an antenuptial contract. The Defendant made a counterclaim for the transfer to her assets by the Plaintiff. The Defendant was unemployed and her assets comprised the former household furniture and a motor car. The Plaintiff on the other hand was a successful businessman whose business activities flourish to a very large extent.

Botha JA in this instant case held that the wife contributed directly and indirectly, continuously and capably to the maintenance or increase of her husband's estate. She gave him her wages, she rendered services in his business and in his home, she made do with far less than she was entitled to by way of domestic help, the creature of comforts, entertainment, social contact and all the elements necessary to live reasonable human dignity. In his pursuit of money, he totally ignored her right to pursue happiness.

The court held further that it was not dealing with the assessment of partnership shares or the rightful expectations of a career employee; as to the former, it had to exercise a judicial discretion in terms of section 7(3), considering not only what the Defendant had contributed but also what she had to a forebear and suffers; as to the latter, Act 88 of 1984 was clearly a reforming statute, designed to remedy what is perceived to be a social evil-it would therefore be wrong to try to give effect to its provisions while dragging the shackles of inappropriate analogies from the Law of Contract. The court awarded an amount of R150 000-00 as an appropriate amount in satisfaction of the Defendant's claim for a redistribution order.

However in Kretschmer[31], Flemming J held the view that neither party can claim, unless further facts are proved, that, because they drove the children to school, it represented a contribution to the maintenance or to the increase of the party's estate. The point is that not every activity which can notionally be obtained as a paid-in-service can be claimed to represent something by which a party contributed to the maintenance or to an increase in the net estate.

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[30] Supra. See also PQR Boberg: Divorce in haste, repent at leisure (1986) Businessman's Law 145

[31] 1989 (1) SA 566 (W)

In the decision of Katz[32], Milne JA held that before a court could make an order in terms of section 7(3), it must be established that;

(1) the party seeking such an order has made a contribution;

(2) such a contribution has increased or maintained the other party's estate; and

(3) that it would be just and equitable to make such an order because of (a) and (b).

It does not follow that the manner in which the court is to arrive at what is just and equitable is limited to what has been contributed. Factors other than purely monetary ones may properly be taken into account. Therefore, in this instant case, the court has moved away from restrictive approach and adopted a wider interpretation of the word contribution. In Muhlmann[33], the court was called upon to determine whether a tacit agreement was reached between the spouses who married each other out of community of property, out of community of profit and loss during 1967. The court as per Hoexter JA held that it was well known that many wives worked in the business of their husbands without expecting or receiving any remuneration for their services. From this it follows that, unless a wife has rendered services manifestly surpassing those ordinarily expected of a wife in her situation, a court will not be easily persuaded to infer a tacit agreement of a partnership between the spouses.

However in Nilsson[34], the court as per Van den Heever J held that where an order of divorce was now obtainable without regard to fault, the courts could and should use section 7 of the Divorce Act 70 of 1979 (which governs the award of maintenance) to ensure that, where there can be no equitable division of capital assets because there was no community or sufficient antenuptial settlement to ensure fairness, the parties are treated fairly vis a vis one another.

In **Van Geysen**[35] both parties had been married for ten years out of community of property, and

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[32] Katz v Katz (1989) (3) SA 1 (A)

[33] Muhlmann v Muhlmann 1984 (3) SA 102 (A)

[34] Nilsson v Nilsson 1984 (2) SA 294 (C)

[35] Van Geysen v Van Geysen 1986 (1) SA 56 (C)

out of community of profit and loss. They were childless and both had worked during the course of their marriage. The wife in her divorce papers averred that in the light of the existing means and obligations of the parties and the conduct of the Plaintiff in relation to the cause of the breakdown of the marriage relationship, it was equitable that a portion of Plaintiff's assets should be distributed and transferred to her. It was argued on her behalf that she could get half of the assets as a universal partnership had existed. Tebbut J held that it was clear that both parties had made a contribution to the maintenance or increase of the parties' assets, directly in the form of savings and indirectly in the form of rendering services and the saving expenses, and it was thus fair to distribute those assets.

In **MacGregor**[36] where Plaintiff sought an order for a decree of divorce and a redistribution order in terms of section 7(3) of the Divorce Act 70 of 1979, Nel J granted the order as prayed for by the Plaintiff. The court was mindful of the fact that evidence did not point to either party as responsible for the breakdown of the marriage and that the future earning capacity of the Defendant was vastly superior to that of the Plaintiff.

Ludorf J in **Archer**[37] adopted a different attitude by preferring "a clean break" approach with a view to rendering the wife financially independent. He held that if the court were to order the transfer of assets in terms of section 7(3), such an order should be for the transfer of a sum of money in lieu of assets rather than the assets themselves which would entail administrative and other practical difficulties. The husband was ordered to pay the wife R300 000-00 in terms of section 7(3) in three installments at six-monthly intervals of R100 000-00 each.

In **Redgard**[38] the court refused to make an order for payment of a specific sum of money in lieu of a transfer of assets. Zietsman J held that since the Defendant's liabilities exceeded his assets, he had no assets which could be subject of a redistribution order. The Plaintiff's action was accordingly dismissed.

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[36] MacGregor v MacGregor 1986 (3) SA 644 (C)

[37] Archer v Archer 1989 (2) SA 885 (E)

[38] Redgard v Redgard 1989 (1) SA 566 (E)

In the case of **Beira**[39], the court was called upon to decide whether the property which accrued to the estate of one of the spouses by way of inheritance, legacy and donation from a third party could be shared between the spouses under a redistribution order. The Defendant in this case launched an application for a postponement of the trial in a divorce suit in which Plaintiff had claimed a redistribution order under section 7(3) of the Act, to enable him to examine certain documents and financial statements relating to a trust of which the Plaintiff was the beneficiary. The Plaintiff had opposed the application on the grounds that the trust assets, which had been donated to the trust by her father, were irrelevant to the question of redistribution because they would vest in her only upon the death of both parents.

The Defendant, relying on the provisions of section 7(5)(d) argued that the value of the assets was relevant for purposes of determining the wealth of the Plaintiff in his own right, which might have the effect of causing the amount to be redistributed to be lower than might otherwise have been the case. Leveson J held that in view of the fact that the accrual system had been introduced in terms of marriages solemnized after the commencement of the Act for the same reasons that section 7(3) of the Act had been enacted, that if legacies, donations and inheritances from third parties had been specifically excluded by subsection 5 of the Act from the assets to be shared by the spouses under the accrual system, then in the absence of express language in the Divorce Act providing for their exclusion, they should similarly be excluded for the purposes of a redistribution order under section 7(3) of the Act.

The court further held that since the trust assets had not yet vested in the Plaintiff, they did not form part of the "existing means" and for that reason too, should not be brought into consideration for the purposes of determining the extent of a redistribution order. One would submit that the above approach is correct because the transfer of trust assets to Plaintiff was made conditional upon the occurrence of a certain future event and such property could not be classified as property which already vests in her.

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[39] Beira v Beira 1990 (3) SA 802 (WLD)

In **Webster**[40] the parties were first married in 1960. That marriage was terminated by divorce in1981. Three months later, the parties married. It was common cause that the latter marriage had irretrievably broken down by 1989. The Plaintiff instituted divorce proceedings and the Defendant filed a counterclaim asking the court for an order compelling the Plaintiff to transfer to her one half of the assets from his estate. The Defendant made a series of allegations in support of her claim, some of which related to the parties first marriage.

It was argued on behalf of the Plaintiff that in as much as the proprietary rights arising out of the first marriage had been finally settled by the order of divorce of that marriage, these allegations were not factors on which the court could rely in determining whether or not there had to be a redistribution of assets as provided for in section 7(3) of the Divorce Act 70 of 1979. This issue was decided by the court *in limine*.

Mullins J referred to section 7(5) (d) of the Act and held that in determining the redistribution of assets as contemplated by section 7(3), a trial court should not be deprived of the opportunity of hearing such evidence as the parties may wish to place before it; it was for the trial court to sift out of such evidence that which was relevant and material. The court further held that it could not as question of law hold that any evidence relating to the first marriage should be excluded.

Thus far the attitude of the South African courts has been quite positive in that the courts took into account the need to fill the gap in their interpretation of the provision of the Act and to adopt a flexible approach in resolving the issues at stake.

2.2 AFTER 1988

Before 1984 marriages were either in community or out of community included marital power. In the case of out of community of property marital power was excluded through an antenuptial

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[40] Webster v Webster 1992 (3) SA 729 (E)

contract. This only applied to Whites because Blacks civil marriages were automatically out of community including marital power. An antenuptial contract was entered into if the marriage is to be in community of property. In 1984 the legislature abolish marital power in regard to all marriages contracted before 1st November 1984. At first the abolition of marital power only applied to marriages of Whites, Coloured and Asians. Then these provisions were also extended to marriages of Blacks concluded on or after 2nd December 1988. In order to bring uniformity and end all unfair discrimination against women, the General Law Fourth Amendment Act 132 of 1993 was passed to abolish marital power in all old marriages as well.

After the commencement of Marriage and Matrimonial Law Amendment Act[41] all civil marriages entered in to by Blacks were also automatically in community of property. Every marriage out of community of property in terms of an antenuptial contract by which community of profit and loss are excluded, which is entered into after the commencement of these Acts[42] is subjected to the accrual system, except in so far as that system is expressly excluded by an antenuptial contract.

The husband's marital power is no longer expressly excluded in the contract because it is statutorily excluded. The accrual system as contained in the Act is an attempt on the part of the legislature to resolve the disadvantages of the standard form antenuptial contract, namely that a wife has no legal claim to the growth of her husband's estate despite the fact that she contributed either directly or indirectly to its increase and even when she was unable to accumulate an estate of her own because all her time and energy were devoted exclusively to the increase of her husband's estate. Secondly, the judicial discretion to redistribute the spouses' assets in terms of section 7(3) of Divorce Act was sometimes dissatisfactory[43].

This objection remains applicable to marriages contracted out of community of property and excluding accrual system prior to Matrimonial Property Act entered into in terms of section 22(1) of Black Administration Act before commencement of Marriage and Matrimonial Property law

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[41] Act 3 of 1988

[42] Act 88 of 1984 and 3 of 1988 supra

[43] See Kritzinger's case

Amendment Act.

It is common cause that spouses' estate shows some growth (accrual) from the time of marriage. The accrual system implies that upon the dissolution of a marriage the spouse whose estate shows accrual, or a smaller accrual that the estate of the other spouse, acquires a claim against the other spouse for an amount equal to half of the difference between the accrual of the respective estate of the spouse.

Finally the South African Government had brought a step forward by repealing section 22(1) to (5) and 22 of the Black Administration Act. Section 7(2) of the Recognition of customary Marriage Act 120 of 1998[44] provides that:-

> "A customary marriage entered into after the commencement of the Act in which a spouse is not a partner in any other existing customary, is a marriage in community of property and of profit and loss between the spouse, unless such consequences are specifically excluded, by the spouse in an antenuptial contract which regulates the matrimonial property system their marriage"[45].

Section 4 makes provision for the registration of customary marriages. However, in terms of section 4(9) there is no penalty for non-registration of customary marriages. Section 6 provides that:-

"A wife in customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have a customary law". This means that customary marriages are fully recognized just like the civil marriages. Gone are the days where a married woman is regarded as a perpetual minor under the guardianship of her husband.

However, irrespective of the socio-economic and political changes and against the HIV/ AIDS. Awareness Campaigns of one partner, the Act still allows polygamous marriages but on condition of cause that the customary law husband makes an application to the court to approve a written

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[44] Government Gazette No: 19539, 29th December 1998

[45] Read with Section 10(2) Act 120 of 1998; Chapter III and Sections; 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act

contract which will regulate the future matrimonial property system of his marriages[46]. It is my submission that the legislature has still failed women because their say in this matter was not considered. At least if the consent of the women could have been regulated as an approval to the polygamous marriage. Now whether the woman or women like it or not as long as the court approved, the husband has the right to enter into a polygamous marriage irrespective of his social and economic standard of living.

The reason for the introduction of the accrual system is especially to enable a wife who is married out of community of property and out of community of profit and loss, and who is not economically active, to share in the economic wealth of her ex-husband upon the dissolution of marriage. It was unfair that a wife who has usually contributed directly or indirectly to the growth in her husband's estate, has, in terms of the standard antenuptial contract, no claim to her husband's estate whatsoever. The objective of the accrual system is to cause some advantages of a marriage in community of property to apply also to a marriage out of community of property.

However, the statutory accrual system applies to marriages which apply with the following criteria:-

(1) the marriage concluded on or after 1st November 1984 in the case of Whites, Coloured and Asians and on or after 2nd December 1988 in the case of Blacks;

(2) the spouses must have excluded community of property and community of profit and loss through an antenuptial contract. This means it does not apply to marriages in community of property;

(3) the spouses must not have excluded the accrual system completely or partially through an antenuptial contract. It must be noted that marriages out of community of property and community of profit and loss automatically include accrual system unless the parties expressly exclude the accrual system in their antenuptial contract;

(4) the accrual system also applies in the case of marriages where spouses have changed their matrimonial property system in terms of Matrimonial Property Act, which provides that

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[46] Section 7(6)

the spouses may, in exceptional cases. And with the permission of the Supreme Court, amend the matrimonial property system under which their marriage falls, in order to include the accrual system.

The right to share in the accrual of the other spouse's estate comes into being only at the dissolution of marriage through death or divorce. In general, a spouse married out of community of property, may during the subsistence of marriage, control their separate estate as they wish. This is disturbing because a wealthy spouse may prejudice the right of the other spouse to share in his or her accrual. For example, the husband can dispose off or gamble away all his property or money and this reduces the accrual of his estate. To combat this, section 8 of the Matrimonial Property Act stipulates that a person may bring an application to the Supreme Court if he or she can show that his/ her share in the accrual of the estate of the other spouse is being or will probable be seriously prejudiced by the conduct or proposed conduct of the other spouse.

Section 4(1) of the Act defines the accrual of the estate of a spouse as the amount by which the net value of his estate at the dissolution of marriage exceeds the net value of his estate at the commencement of that marriage. The net initial value of an estate is the total value of the assets less any liabilities of the estate.

Section 7(1) provides that: - "The proprietary consequences of a customary marriage entered into before the commencements of this Act continue to be governed by customary law". However, parties who do not want customary law to apply to their proprietary consequences, may jointly apply to the court for leave to change the matrimonial property system[47] and partners to a subsisting customary marriage is competent to contract a marriage with each other under the marriage Act[48]. South African Government is to be complimented for ultimately recognizing the customary marriage which for centuries was disregarded and disrespected.

2.3 PENSION BENEFITS

[47] Section 7(4)

[48] Section 10(1)

The amendment of section 7 of the Divorce Act of 1979 by the addition of the two important provisions to that section is a step in the right direction in the sense that it was intended to resolve the crucial issues pertaining to the pension benefits of the spouse at the time of divorce. These amendments were brought about by section 2 of the Divorce Amendment Act[49] which added section 7(7)(a) and (b) and section 7(8)(a) and (b) to the section 7 of the Divorce Act.

None of the existing provisions of section 7 is repealed and therefore the amending Act must be read in conjunction with the earlier stipulations embodied in section 7. These amendments came into being as a result of the investigations conducted by the South African Law Commission[50] on issues pertaining to the pensions' benefits of a spouse at the time of divorce.

Prior to the above amendments, one point of interest which emerged from the description in section 1 of the Pension Funds Act 24 of 1956 of the beneficiary as a component of a pension scheme is that a divorced spouse will not be considered to be a dependant of a member and thus possibly entitled to a benefit, unless he or she is "in fact dependent on the member for maintenance, regardless of whether or not the member is legally liable for the maintenance of such as a person".

In the working paper[51] the wife's rights under each matrimonial property regime were considered. In marriages in community of property, pension contributions made by either spouse are charges on the joint estate. But the wife is generally considered to have no right in respect of her husband's pension expectations but only spes which ceases at divorce. In Clark's case[52] the court accepted that a spouse's interest in a pension which had not yet accrued did indeed form part of the community estate, as did a pension right which had accrued. This was also accepted by the

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[49] Divorce Amendment Act 7 of 1989

[50] The Report on the investigation into the possibility of making provision for a divorced woman to share in the pension of her former husband, Project 41 of 1986

[51] See footnote no. 50

[52] Clark v Clark 1949 (3) SA 226 (D)

court in Nolan's Estate case[53] where Hoexter, AJ stated that "The annuity enjoyed jointly by the deceased and his wife during his lifetime came into existence on his retirement. This judgment is evident that South African law did not recognize a right to pension benefits before retirement. However, in respect of marriages in community of property since both spouses contribute by their work to the joint estate from the pensions contributions are paid, there seems no reason why each spouse should not on divorce shares that portion of interest.

In marriages out of community of property each spouse's contributions are a charge on his/ her separate estate and on divorce neither spouse has a claim in respect of the pension expectations of the other. In marriage under the accrual system only pension benefits which have paid out before divorce form part of the spouse's accrual. Mere pension interests do not fall within the definition of accrual.

This follows a general outcry which centered on a party's pension benefits at the time of divorce which excluded from the category of assets when the property was transferred from one spouse to the other as contemplated in section 7(3) of the Act.

A further submission was that until the occurrence of a future event that will render the pension benefits payable, the member might not reduce, cede, pledge or hypothecate the pension benefits payable to him or her. Only tangible assets such as property and capital forming part of a person's property and capable of immediate valuation were regarded as assets. It follows that in relation to pension benefits, a member could only be described as holding a conditional *jus in personam* (personal right)[54]. The Commission concluded that the existing financial arrangements on divorce are unfair because the pension benefits of a party are not regarded as assets.

The Bill therefore envisages the possibility of making provision for a divorced woman to access part of the pension benefits of her former husband[55]. It follows that the accumulated

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[53] Commissioner for Inland Revenue v Nolan Estate 1962 (1) SA 785 (A)

[54] Ibid. See footnote no. 50. See also Annual Survey of SA Law 1989 p 4

[55] Ibid

pension interests of a party to a divorce action shall, for the purposes of the division of assets of the parties, be deemed to be an asset of his estate. Consequently the Commission recommended that:-

(1) where the marriage is in community of property, each spouse will have a half-share in the pension interest;

(2) here the marriage is subject to the accrual system, the pension interest will form part of the member spouse's accrual;c)

(3) where the marriage is entered into prior to the 1 November 1984 in terms of an antenuptial contract excluding community of property and community of profit and loss, the pension interest will form part of the member spouse's estate, but the non-member may apply for the judicial discretion to be exercised in his or her favour[56].

Another burning issue which the Commission had to deal with related to the quantification of the pension interests of the parties at the time of divorce. In an effort to resolve the above issue, section 1 of the Divorce Act[57] was amended by the addition of the definition of "pension interest". Consequently a pension interest other that a retirement annuity fund, has been defined as that amount to which the member would have been entitled in terms of the rules of that fund had his membership terminated, on the date of divorce, on account of his resignation from office. The Commission made further recommendation that the Amending Act should not cover insurance policies, since the Commission wanted to put the present provisions to test and see if they could produce satisfactory results before it investigates the possibility of introducing insurance policies into its project[58].

Section 7(7)(a) provides as follows:

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[56] Ibid

[57] Divorce Act 70 of 1979

[58] Ibid . See footnote no. 50

(1) in the determination of the patrimonial benefits to which the parties to any divorce suit may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets;

(2) 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 -

(1) was paid over or awarded to another party; or

(2) for the purpose of an agreement contemplated in subsection (i), was accounted in favour of another party;

(3) 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 systems are excluded[59].

Section 7(8)(a) provides that:

(1) the court granting a decree of divorce in respect of a member of such a fund, may make an order that;

(1) any part of the pension interest of that member which is due or assigned to the other party to a divorce action shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

(2) an endorsement be made in the records of that fund that the pension interest concerned is so payable to that other party;

(2) 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, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned.

Mention must be made that section 7(7)(a) is inconsistent with the provisions of section 7(3)

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[59] Ibid. See footnote no. 50

which deals with the transfer of property from one spouse to the other and the exercise of judicial discretion. Section 7(7)(a) was added to allow the court, when exercising its discretion in terms of section 7(3) to take into consideration the party's pension interests at the time of the transfer of property from one spouse to the other. In my view, the two provisions go hand in hand and therefore any attempt to separate them when dealing with the pension benefits would clearly defeat the object of both provisions.

However in marriages concluded on or after the 1 November 1984, the two provisions have been separated in the sense that section 7(3) does not apply to such marriages. It follows that if that was indeed what the Legislature had in mind when it amended the Act, then the provisions of section 7(7)(a) would clearly become unnecessary. The above situation has been cured by section 7(7)(c) which makes it clear that marriages entered into 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, will not fall within the ambit of section 7(7)(a).

Therefore where parties have made an option, after 1984, to exclude the accrual system, they are regarded as having made a choice in this regard and the sharing of pension interest will not be forced upon them. This is the same measure that was adopted by the Legislature during 1984 by excluding the judicial discretion to redistribute the assets on divorce in marriages of this kind as stated in section 7(3) of the Divorce Act[60]. It is clear that the provisions of section 7(3) do not target a specific group of spouse who were married on or before the 1 November 1984 but they also focus on the spouses' pension benefits at the time of divorce.

It is well known in South Africa that the financial and patrimonial consequences of divorce are incorporated in a deed of settlement the contents of which constitute the agreement between the two parties. Consequently, the parties to a divorce suit do not conclude an agreement in respect of the pension interests as such, but a general agreement in respect of the division of assets. One would submit that in as much as the agreement regarding the division of assets of the spouses is incorporated in a deed of settlement, pension benefits should also be included in that agreement. This is so because pension benefits do form part and parcel of the assets and they should also be

[60] Ibid. See footnote no.50

dealt with as such.

The Act does not make provision for the division of concrete pension interests, but rather that an amount representing the pension interests is available for division. Division of assets involves the totality of benefits on hand and these benefits incorporate the fictitious amount representing the pension interests. One cannot fully agree with this view because we cannot perceive a pension benefit as being a fictitious amount which represent the pension interest at the end of the marriage. In my view the pension interest should be calculated so that the court should be able to determine the value thereof and arrive at a proper decision regarding the sharing of such benefits.

To this end, the submission made by Sonnekus that the court should not exercise a discretion regarding the sharing of pension benefits but it should be obliged to order a division of those benefits so that each party should be entitled to a share, is correct. Where the date of claimability of the pension interest occurs before the retirement of a member spouse, the non-member's spouse's share should not be paid to him or her, but should be deposited into another pension fund or retirement annuity fund. This approach is correct because it makes provision for contingency plans such as old age, retirement due to ill health or disability. Although it might overburden the pension industry with a heavy workload, it does seem to be the best possible option that could be of assistance to the non-member spouse.

It was submitted that if the non-member's share of the pension interest is very large and the member spouse cannot commute it into compensatory assets or if the non-member so chooses, or if the parties cannot reach any agreement as to how the non-member's share of the pension should be paid, the court may order that, that part should be paid when the pension benefits eventually accrue. One would also take this argument a step further by submitting that the member spouse could, if he or she so desires, transfer part of his or her property to the non-member *in lieu* of interest. In this respect, consideration should be given to the degree of flexibility at the time of the division of property on divorce and would assist in alleviating unnecessary disputes between the parties.

Finally the Act has failed to provide for the effect of inflation in cases where the accrual date comes long after the date on which the pension interests were calculated. In my view, interest has

to be calculated on from the date on which the order was made up to the date of accrual. Such interest should be calculated with specific reference to the provisions of the Prescribed Rate of Interest Act[61]. The rationale behind this approach would be to cater for the inflation rate in cases where the accrual date comes long after the calculation date.

This would have the effect of putting the non-member spouse in a better financial position at the time of divorce. A further submission is that the parties to a divorce suit should be allowed to discuss these issues and embody them in the deed of settlement. This would have added advantage of allowing the parties to work out the exact amount which represents the pension interests to which the non-member spouse is entitled. The services of experts such as Actuary could also be relevant for purposes of quantifying the amount which represents the pension interests at the time of divorce.

Therefore if the pension interests were not calculated from the date of the order to the date of accrual, the non-member spouse would surely emerge with an amount that was based on an outdated calculation because the inflation rate would not have been considered. This would clearly have a strong bearing on the amount of pension interest that would be transferred to the non-member spouse which would be insufficient. In the decision of Schenk[62] the court was called upon to deal with the question whether the Plaintiff (husband) was able to pay the Defendant interest from the date of divorce on that portion of his pension interest to which the Defendant was entitled in terms of the deed of settlement.

The defendant's portion of money was paid to her on the same day as the benefits accrued to the Plaintiff but there was a time gap between the making of the order and eventual payment - which led to the dispute between the parties. The Defendant, relying on the provisions of the Prescribed Rates of Interests Act 55 of 1975, contended that the word "payable" in section 2(1) of that Act (which provided that a judgment debt which could not otherwise bear any interest after the date of

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[61] Act 55 of 1975

[62] Schenk v Schenk 1993 (2) SA 346 (E)

judgment should bear interest from day on which such judgment debt was payable) did not only include that which that which was immediately due and payable, but also that which might have to be paid in future. This meant that when an order was made in terms of section 7(8)(a) of the Divorce Act, a member of a pension fund became liable to pay interest *ex lege* from the date of the order on that part of the pension that was due to the non-member.

Melunsky J held that in the absence of any contrary agreement, there was generally no obligation to pay interest until a debt becomes due, so that a party could not be held liable for interest a *tempore morae* unless he was in *mora*; in case of a judgment debtor this was from the date of payment fixed by judgment of the court, from which date the judgment creditor was, at Common Law, entitled to interest as of right.

The court held further that there was no indication that the Legislature, in enacting the Prescribed Rate Interests Act, intended to alter the applicable Common Law principles and it followed that the word "payable" in section 2(1) thereof meant "due and payable" and not also "payable at a future time". The court held accordingly that the Plaintiff was not liable to pay interest to the Defendant on the portion of his pension to which the Defendant was entitled in terms of the deed of settlement.

One would submit that the approach of Melunsky J in the above decision is with respect, incorrect because the court failed to give consideration to the inflation rate from the date of the order to the date of the accrual. Had the court considered this issue, it would have arrived at a different finding and the financial position of the non-member spouse would have been enhanced. It follows that although the new provisions should be applauded as a long-awaited piece of legislation, there is still a lot to be done in terms of adjusting the above provisions in order to suit the needs of the non-member spouses at the time of divorce.

2.4 MARRIAGES SOLEMNIZED IN FOREIGN COUNTRIES

Another burning issue which haunts married couples in South Africa relates to marriages solemnized in foreign countries. This issue also has a strong bearing on the property rights of spouses in cases where, after contracting the marriage in a foreign country, both spouses immigrated to South Africa and settled in the country. In this respect one needs to inquire as to what should happen to their marriage which is out of community of property, not because they entered into an antenuptial contract to that effect, but because the proprietary consequences are governed by a foreign legal system according to which marriages are out of community. Are they entitled to enjoy those same benefits under section 7(3) of the Act?

This issue came before the court in the decision of Milbourne[63]. The facts were briefly as follows: Both parties were married in England in 1943 and domiciled in that country. Although they did not enter into any form of an antenuptial contract, their marriage - being governed by the laws of England - was out of community of property and of profit and loss, and entailed no form of accrual sharing. In a divorce action instituted by the wife, she claimed that he should transfer 50% of his assets to her in terms of section 7 (3) of the Divorce Act. The court was called upon to determine whether a contract between the intending spouses in some form creating a separation of estates is essential to a Plaintiff seeking to rely on the provisions of section 7(3). The Defendant (husband) contended that a contract with the content stipulated by section 7(3) was essential, though not necessarily a notarially executed contract. The court held such a contract was indeed a requirement and declined to grant relief sought by the Plaintiff.

In the light of the above decision, it is clear that the Legislature could not have intended to discriminate against women who are now domiciled or resident in South Africa, but married out of community of property according to the laws of a foreign jurisdiction. Nor could it have intended to discriminate against Blacks South Africans. One could safely assume that the wording of the Act amounts to a mere legislative oversight in regard to the affected parties. Equity

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[63] Milbourne v Milbourne 1987 (3) SA 62 (W); See also Lupton: Divorce and Property Rights; Businessman's Law (1988) 17 p 119

demands that this provision be amended as speedily as possible.

Subsequent to the above decision, numerous cases came before the courts in which the same issues were raised in their court papers. In case of Bell[64], the Respondent had instituted divorce proceedings against her husband and claimed the transfer to her of certain immovable property and a portion of her husband's net estate in terms of subsections 23 and 24 of the Matrimonial Causes Act of 1973. At the time of the marriage, the parties were domiciled in England. The husband excepted to the claim on the ground that the court could not adjudicate on the proprietary disputes between the parties on the bases of the law of England, more particularly the Matrimonial Causes Act, and the averments did not disclose a cause of action.

The court held that it had been clear for more than seventy years that, in the absence of an antenuptial contract, the proprietary consequences of a foreign marriage have to be determined in accordance with the law of the matrimonial domicile, which is to say the domicile of the husband at the time of the marriage. It was held further that the court was bound to decide the matter by reference to the laws of England as embodied in her Common Law and her statutes, and included in those statutes is the Matrimonial Causes Act.

However, in Sperling[65], the Plaintiff instituted an action for the restitution of conjugal rights. It appeared that the parties had been married in East Germany and the marriage was out of community of property. During 1965 the law governing the parties' proprietary regime was changed with retrospective effect. The law was to the effect that on marriage, the property of the parties remained their separate property but things, rights and savings acquired by one or both spouses during marriage, through work or income from work, belonged to both spouses in common. Prior to 1965, the parties had acquired a new domicile in South Africa.

The court *a quo* held the view that the law which governed the parties' proprietary regime was the law in force in East Germany. On Appeal it was held that there was no consideration of public policy which impelled the court in case like this to ignore changes in the *lex causae*, enacted with

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[64] Bell v Bell 1991 (4) SA 195 (WLD)

[65] Sperling v Sperling 1975 (3) SA 707 AD

retroactive effect, after the parties had acquired a new domicile in South Africa and that in fact the balance of justice and convenience favoured an adherence to the general principle that a *lex causae* included the transitional law thereof. It was accordingly that the court *a quo* had correctly approached the proprietary rights of the parties on the basis that the 1965 law applied. The decision of Kriek J in Lagesse[66]'s case has thrown more light on the meaning of the "words" an antenuptial contract by which community of property, community of loss and accrual sharing in any form are excluded. In section 7(3) of Divorce Act as well as on the question of whether foreign informal antenuptial contracts fall within the meaning, the parties were married when the Defendant was domiciled in Mauritius and the proprietary consequences of their marriage fell to be determined according to the law of the country. The party's marriage certificate bore a marginal note to the effect that they wished their marriage to be governed by the provisions of the Status of Married Women Ordinance 1949 of Mauritius[67]. The Plaintiff in divorce action contended that reference to "antenuptial contract" in the provisions of section 7(3) and (5) of the Divorce Act read section 36(b) of the Matrimonial Property Act contemplated in addition to a notarially executed contract an informal agreement entered into between the parties before their marriage regulating the proprietary consequences of their marriage whether concluded in the Republic or not.

The Defendant contended that an antenuptial contract contemplated by the section was a notarially executed contract and, in any event, if the court found otherwise; the contract entered into between parties did not comply with the further provisions of the section in that it did not exclude community of property, profit and loss and any form of accrual. Kriek J in his judgment pointed out that in South Africa, the formalities to be observed in the execution of an antenuptial contract vary whether the rights of third parties are affected or no. If the latter's rights are affected, the antenuptial contract will indeed only have effect if it is duly entered into and registered in accordance with section 86 and 87 of Deeds Registrar Act[68]. He further held that there was

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[66] Lagesse v Lagesse 1992 (1) SA 173 D

[67] Section 2(2) which provides that notwithstanding anything to the country in any enactment a married woman to whom the provisions of this ordinance shall apply retain her full capacity to deal with her property both movable and immovable and to act in all matters whatsoever as if she were not married

[68] Act 47 of 1937 as amended. See also ExParte Minister of Native Affairs in re-Molefe v Molefe 1946 AD 315 - 318

nothing in the language of section 7(3) which indicated that the narrower meaning of the antenuptial contract had been intended.

The court held further that the term antenuptial contract had not acquire such a specializing meaning that when it appeared in a statute book one could safely assume that it referred to a registered notarially executed contract only. The use of the term in the narrower sense in other provisions of the Act, in particular section 6(1), did not necessarily mean that it should be restricted to that meaning in all other instances in which it occurred in the Act. The intention of the parties had been to incorporate by reference the terms of the Status of Women Ordinance 50 of 1949 of Mauritius, which terms expressly excluded those matrimonial property regimes.

The court held accordingly that the Plaintiff had a claim against the Defendant in terms of section 7(3) of the Divorce Act 70 of 1979. One would submit that the principle laid down by the court in this instant case is correct because the court was mindful of the consequences that might flow from the narrower interpretation of the concept "antenuptial contract". Therefore a wider meaning attached to this concept is indicative of a bold step taken by the court in its attempt to address the social problems that came into being as a result of the promulgation of the Matrimonial property legislation.

Stegmann J in the decision of Mathabathe[69] held the view that section 7(3) applies to Blacks who are married out of community of property not by virtue of having entered into an antenuptial contract, but by reason of the provisions of section 22(6) of the Black Administration Act 38 of 1927. The court adopted a broad view of the phrase antenuptial contract and interpreted it to include a tacit or implied agreement. The court in this case followed the principle laid down in the decision of Lagesse[70] in which Kriek J also adopted a broad interpretation of the concept "antenuptial contract".

Although the approach of the courts in the above two decisions is a step in the right direction, it does not follow that it would go a long way to address the plight of the married couples in South

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[69] Mathabathe v Mathabathe 1987 (3) SA 45 (W)

[70] Supra

Africa. Consequently, legislative intervention is necessary in order to put the interest of married couples in proper perspective.

Having regard to the above decisions, it is abundantly clear that intervention alone would not suffice to purge some of the cracks which emanate from legislative omissions. This is so because the court's function is to interpret the law and not to make it. Mention must be made that the above problem had been received with mixed feelings from various authors. Professor Boberg argued that a court could not, in terms of section 7(3), refuse to redistribute the property of the spouses whose marriage is out of community of property because it is governed by a foreign legal system and not because of an antenuptial contract[71].

Lupton on the other hand made a submission to the effect that a clear legislative oversight exists which calls for immediate rectification[72]. Finally, there are three ways of resolving this particular issue; firstly, the courts should do away with the strict definition of what falls under the concept matrimonial property, thus allowing distribution in accordance with foreign system. A further suggestion is that the *lacuna* be filled by legislation. A wider meaning should be attached to the concept "antenuptial contract" than the one adopted in the Milbourne[73] decision.

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[71] Boberg PQR: Sharing Matrimonial Assets; Businessman' Law (1987) 17 p 82

[72] Lupton M: Divorce and property Rights; Businessman's Law (1988) 17 p. 119

[73] Supra

CHAPTER 3

THE RIGHTS OF WOMEN UNDER THE CURRENT SOCIO-ECONOMIC, EDUCATIONAL AND CONSTITUTIONAL DEVELOPMENTS

There is no doubt that the South African family law has been undergoing a process of change as a result of commercialization, industrialization and urbanization. Social change denotes more than social motion or constant change in the population of every society. It implies fundamental alteration in the social structure or culture of people. This, however, goes beyond simple changes in technology, and encompasses the manner of which groups of people interact in the social system. It involves the transformation of the various social institutions, roles and status definitions, accepted ideologies, value patterns, pattern variable and value, profiles, and also includes perceptible shifts in the continuous interaction patterns of person-to person relationships.

The advent of western civilization coupled with commercialization, industrialization and urbanization, has resulted in the transformation from a subsistence to a money economy. This has had profound social implications for the African family structure, which was always largely depend on the subsistence economy. Similarly, education and exposure to new ideas often result in the questioning of familial and tribal loyalties. Significant migration from rural to urban areas brings about its own social problems. This often leads to the alteration of behavioural patterns as a result of new opportunities that have become available.

If law has to remain relevant to the lives of the people it purports to govern, it has to reflect these realities. Failure on the part of the law to do this will render it of no consequences to the people and consequently irrelevant to their lives. Law has to be used as an instrument of social change, to bring about certain desired objectives. It was because of the law of the country that women were oppressed and discriminated against. Every person has an innate desire to enjoy certain basis rights. The horrendous suffering of men, women and children during the Second World War aroused the conscience of mankind.

This prompted the people of the United States, of which South Africa is one of them, to reaffirm

the faith of fundamental human rights, in the dignity and worth of human persons in the equal rights of men and women[74]. South Africa ratified the United Nations Charter and thus committed and pledges itself to promote "universal respect for, and observance of human rights and fundamental freedom for all without the destination as to race, sex, language or religion[75]. But, ironically for well over four decades it dogmatically enforced apartheid hegemony by means of an elaborate panoply of legal and economic superstructures supported by a violently repressive state security machinery to systematically subdue the aspirations of the majority of South Africans. As a result the international community isolated South Africa from the international arena.

South Africa has since undergone a political transformation. It has a Constitution[76] which is suprema lex[77]. The Constitution is not solely entrusted to the Constitutional components of the judiciary to cultivate a human rights culture. It enjoys the Human Rights Commission to evaluate any proposed legislation against the fundamental rights provisions. The underlying assumption is that as far as it is possible the law must reflect human rights values.

This was illustrated in the case of Prior[78]. The facts of the case are as follows: The applicant, an adult woman, is married to the first respondent on 21st April 1994 in the Republic of Transkei. Their marriage was solemnized in terms of Transkei Marriage Act[79]. Prior to their marriage, they entered into an antenuptial contract which, inter alia, provided that the marriage is a marriage out of community of property and profit and loss. The applicant's application is for an order declaring that section 37, section 39(2)(ii) of the Transkei Marriage Act as well as the common-law rule that, upon marriage without an antenuptial contract which provides to the contrary, the husband acquires the marital power over the wife are inconsistent with the Constitution of the Republic of

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[74] The Charter signed on 2th June 1945 at San Franscisco

[75] Dugard J: International Law-A South African Perspective (1994) p 200-201

[76] South African Constitution Act 108 of 1996

[77] Section 2

[78] Prior v Battle and others 1999 (2) SA 850 TKD

[79] Act 21 of 1978

South Africa[80]. She further argued that these provisions violate a number of her fundamental rights entrenched in the Constitution.

It was held by Miller J that the disputed rules which conferred the marital power upon the husband in a civil marriage without the option of the parties did not only violate her fundamental rights[81] but were outmoded and anachronistic. The Common Law rule in terms of which the husband obtained the marital power over the person and property of his wife was abolished by the Legislature[82]. The whole Matrimonial Property Act was made applicable in Transkei by the Justice Laws Rationalisation Act[83] and the provisions of sections 11, 12 and 14 of the Matrimonial Property Act were clearly in conflict with provisions of sections 37(a) and 39(2)(ii)[84].
The Commission on Gender Equality is entrusted with the task to promote gender equality as well as to advise and to make recommendations to the parliament regarding laws or proposed legislation which affects gender and the status of women[85]. The Commission is required to have an intimate knowledge of the various instruments pertaining to women.

The unequal position of women and men in a democratic state is in contradiction with the philosophy and values underpinning human rights. Although a constitutional step has been taken to obtain the elimination of legal obstacles to the achievement of equal opportunities for women and men, inequalities continue to exist in that our reality continues to be anchored to structural and attitudinal factors, for an example the prevalence of sexist language.

During the change from oligarchy to constitutionalism, South African in 1993 acceded to the Convention on Consent Marriage, Minimum Age and Registration of Marriages and signed the Convention of the Political Rights of Women, the Convention on the Nationality of Married

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[80] Act 200 of 1993

[81] Ss 8, 10, 11(1), 22, 26 and 28 of the Constitution

[82] Sec 11 of the Matrimonial Property Act 88 of 1984

[83] Act 18 of 1996

[84] Transkei Marriage Act

[85] Section 9 of the Constitution

Women and the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW).

Recent decades have witnessed advances in women's political participation. In many parts of the world, women's organizations, networks and movements have grown in number and strength and have begun to influence local, national and international politics. At the same time few individual women attained high political office. Despite these gains gender discrimination remains a formidable barrier to women's participation in formal decision-making processes and their control of material and political resources.

The exclusion of women from political participation is rooted in history as well as economic and legal realities. Compared to men, women have a shorter history of participation in electoral politics, and, as a result, substantially less experience in all aspects of the political process.

Women's participation in public life is also constrained by the gender-based violence that has reached epidemic proportions in many parts of the world. In some cases, this violence reflects a backlash against women who manage to gain political sway in their communities and who encourage other women to do so.

Women all over the world perform multiple duties in productive labour, paid and unpaid, that is not reflected in official measures of economic activity. Their access to equal pay for comparable work, family benefits, financial credit and the right to own and inherit are either non-existent or are sharply limited by law and the traditional or religious practices that continue to undergird economic life, For an example:-

- traditional measures of economic output dramatically undervalue women's contributions;
- land title acts and traditional practice often exclude women, particularly married women, from taking title land, even in progressive redistribution schemes;
- legal and cultural obstacles to owning and managing property are a major cause of women's poverty.

Virtually every system whether state socialist, authoritarian or democratic, has neglected the

situation of women in examining the class or racial inequalities of national economic life. The traditional sexual division of labour, which treats domestic caretaking and home maintenance as expected, voluntary contribution by women prevails at every income level and perpetuates inequity. Governments need to create legislative measures to enable and spur women's economic participation, including the right to equity in property ownership and administration, inheritance, access to credit, and all other matters of property, labour and finance.

The international Convention on the Elimination of All forms of Discrimination against Women (CEDAW) promotes gender equality as the engine of law and policy reform. Indeed, many governments and international bodies have begun the process of revising discriminatory laws and enacting new measures that affirm women's right to personal liberty and protect them from bias. These are positive developments, but formidable challenges remain. Women's low status everywhere has been encoded in law and women continue to face injustice solely on the basis of their gender. Where legal reform has been won, reality generally lags far behind.

Even where gender equality has been constitutionally mandated, legal remedies for discrimination are typically non-existent or exasperatingly slow to work. The resulting injustices have not only undermined women's personal liberty and security, they have also limited their economic capacity, impoverishing millions of women and their dependants.

Legal traditions and legal systems may discriminate against women in many ways, first, gender bias may be institutionalized through laws, that explicitly discriminate against women. For example the Constitution of Kenya states that the prohibition of discrimination against women does not apply to matters governed by personal or customary law or matters regarding property. Another example is that of Zambia where employment statutes legalize discrimination against women in terms of wages, promotions, and benefits, including training opportunities. Land ownership laws such as those in Zimababwe limit women's rights to own land.

Finally, economic and political factors also limit women's capacity to realize the rights guaranteed to them by law. The gender perspective needs to be positioned in the courtroom as well as in the Constitution. Ensuring legal personhood means not only revising laws that are discriminatory and enforcing laws that bar discrimination, but also launching programmes in gender education for

court personnel or officials. After all, institutions that enact and enforce laws are not neutral, they been constructed by societies dominated by men and they reflect their interest and bias. The people who enact, interpret and enforce legal codes are not immune to the force of culture and tradition. Their actions and decisions tend to reflect the attitudes of their culture, including assumptions about the role f women and the nature of male-female relations.

It is my submission that a powerful tool in the struggle for social, economic and political justice is the law. A single standard of gender equity must prevail beyond considerations of family, culture or nation. It is the duty of the Government to promote women's rights to personal liberty and freedom from discrimination by making laws that will criminalize any action which is discriminatory towards women.

CHAPTER FOUR

CONCLUSION

The Matrimonial Property Act has to some extent alleviated some of the problems that pertained to the property rights of the spouses who were married out of community of property, and out of community of profit and loss in South Africa. However other issues are still outstanding and they need to be addressed by the legislature by way of amending the Act in order to put it in line with the needs of the spouses.

This is so because the Act has not covered a wide range of issues which are pertinent to the property rights of the spouses at the time of divorce. Although the whole idea was to combine the advantages of both matrimonial property systems whilst excluding their disadvantages, some of the provisions of the Act have failed to put the spouses in better financial position at the time of divorce.

The loopholes which are discernible in section 7(3)to 7(6) of the Act are a clear indication of the shortcomings in the application of the provisions of the Act. At the root of these shortcomings is the meaning attached to the phrase "direct and indirect contribution to the maintenance or increase of the other party's estate." This phrase does not clearly deal with the equality rendered by an unemployed woman by taking care of family and household. It does not even make reference to the Common Law duties which are performed by the wife during the day to day running of the family and household. These Common law duties could only be inferred from the phrase itself.

Similarly the phrase "or in any other manner" as contemplated in section 7(4) does not specifically deal with categories of the Common Law duties which could properly be classified as a contribution. However, the court in the Beaumont[86]'s decision took a bold step by extending the meaning of the word "contribution" to include the services rendered by an unemployed woman. In my view, this is a step in the right direction. The valuation of services rendered by an unemployed woman remains a crucial issue and it follows therefore that such valuation becomes useless unless

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[86] Supra

the services have been recognized.

The same applies to the services rendered by an unemployed woman who doesn't engages the services of a domestic worker with the view to saving the expenses which would otherwise have been incurred. For as long as such services have not been recognized, it might not be easy to weigh the means by which the expenses could be saved by not engaging the services of a domestic worker. To this end the phrase "the rendering of services or the saving of expenses which would otherwise have been incurred" does not take us anywhere because it does not address the issues at stake.

The meaningful role played by the courts in addressing these issues should not be underestimated. In this regard the approach of the court *a quo* in the Kritzinger[87] case should be applauded because it shows commitment in addressing the plight of the spouses at the time of divorce. On the other side of the spectrum is the principle laid down by the Appeal Court which clearly shows the attitude of non-committal. Therefore this approach is with respect incorrect because the Appeal Court failed to adopt a broad view addressing these issues. In essence it failed to take cognizance of the fact that a positive act, without any financial strings attached, could very well result in direct contribution to the maintenance or increase of the other party's estate.

In the same breath, the decision of Beaumont should also be applauded because it has addressed the above issues at length. Consequently the principles which were evolved in these two decisions could be regarded as milestone because they have to some extent attempted to balance the interests of the spouses by extending the meaning of the word "contribution". However such efforts are still not sufficient and there is a need for legislative intervention.

The cut-off date which separates marriages contracted before and after 1st November 1984 should be done away with because it causes a lot of despair among the spouses who were married out of community and out of profit and loss. It does not serve any purpose except to offer some benefits to a category, which is unfair. Therefore this is a clear-cut case that could be referred to the Constitutional Court for an appropriate ruling.

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[87] Supra

Marriages solemnized in foreign countries should be afforded recognition by amending the law to accommodate the proprietary consequences of such marriages. Although the courts have also played a meaningful role in this issue, it follows that legislative omission such as this one cannot be purged by the courts as the stroke of a pen. It is the legislation itself that could fill the gap in these situations. One would submit that the history of the Matrimonial Property Legislation should be followed with a view to identifying all loopholes that might be present in the Act.

Consideration should be given the wholesale amendment of the provision of the Act to put it line with the needs of the spouses at the time of divorce. It follows therefore these that amendments should not be effected piecemeal as they would stall the whole process of removing the social evil of the Act.

The limitation of marriages solemnized before and after 1st November1984 constitutes yet another problem that affects the property rights of the spouse at the time of divorce. This problem needs to be carefully assessed to determine the extent to which it affects the property rights of the spouses at the end of the marriage. The gist of the problem is the cut-off date, which separates marriages solemnized before and after 1st November 1984, which also attracted considerable academic attention. Section 2 of the Act provides as follows:

> Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into in so far after the commencement of this Act, is subject to the accrual system except in so far as that system is expressly exclude by the antenuptial contract[88].

By way of analogy, the regime of separation of property in regard to marriages entered into after the Act, shall only come into being where the parties enter into an antenuptial contract which expressly excludes the accrual system.

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[88] The Matrimonial property Act 88 of 1984

However if the parties marry subject to an antenuptial contract, the marriage is subject to an accrual system. Therefore the spouses remain free to contract out of community regimes and to place their marriage in separation of property by expressly excluding any sharing of accruals[89]. The Act does not apply retrospectively to marriages concluded before the 1st November 1984. Apart from the restriction in the reach of section 7(3) of the Act in that it operates in respects of old marriages only, three other restrictions exist.

First, the subsection only applies to marriages entered into terms of an antenuptial contract by which the community of property, community of profit and loss and the accrual sharing in any form is excluded. Secondly, the discretion of the court is only to be used where the parties are not in agreement regarding the division of their property. Thirdly, the section is not to apply unless the party in whose favour it would operate has contributed directly or indirectly to the maintenance or increase of the estate of the other party.

Dillion correctly argued that;

> The introduction of section 7(3) of the Act allows a wider discretion to the courts for the first time. Nonetheless the reach of this power only extends to those marriages entered into before the 1st November 1984. The subsection is therefore bound by time and in time it will become defunct. Why should this be so difficult to fathom?

One fails to understand why this provision should cater for old marriages only because in my view, when the Act was promulgated, it was aimed at removing the social evil that affects the property rights of all the spouses who were married out of community of property, and out of community of profit and loss. It was not aimed at offering a benefit to a specific category of spouses to the exclusion of the other spouses.

Consideration must be given to the fact that as years go by, we would obviously have a high

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Dillion NDC: The financial consequences o0f divorce; Section7(3) of the Divorce Act: A Comparative Study (1986) 19 p 272; The legislature felt it necessary to introduce special provisions in regard to marriages in strict separation of property concluded before the coming into effect of the Act.

percentage of married couples who were married after 1st November 1984 and who would certainly not get any benefit or protection from this provision. In the same breath, the percentage of couples who contracted their marriages before the 1st November 1984 would decline over the years with the result that the protection afforded to them by these provisions would fall away.

To this end, the provision itself is not prospective in nature and this clearly shows that the protection afforded to the spouses is inadequate. La Lock submitted that the discretion granted to the courts by this particular provision is geared towards assisting a spouse who finds himself or herself bound to a contract made perhaps some twenty years ago, entered into without proper, if any, legal advice, the consequences of which either of them did not comprehend or even contemplate[90]. This submission is crucial because it tends to overlook the fate of all those spouses who were married before the commencement of the Act and who find themselves without any similar protection based on the same grounds.

Consequently, this line of demarcation serves no purpose whatsoever other than to separate marriages contracted before and after the Act which sounds to be unnecessary. A more practical example will clearly illustrate this problem: Couples who were married prior to the promulgation of the Act, i.e. on the 31st October 1984 cannot get the same treatment as those who were married immediately after the coming into operation of the new Act, i.e. on the 2nd November 1984.

At the time of divorce, the proprietary consequences of their respective marriages would be dealt with differently in the sense that those who were married before the commencement of the Act will not enjoy the benefits arising from the provisions of section 7(3) and those whose marriage was contracted after the promulgation of the Act will enjoy the benefits. There is no doubt that this line of demarcation causes a lot of concern between married couples and it clearly leads to some inequitable results which have a strong bearing on the application of these provisions.

The view put by Professor Sinclair is in line with above submission especially when she stated that;

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La Lock J: Marriage by way of antenuptial contact; De Rebus (1994) p 76; The prime motivation for spouses to choose to be married by an antenuptial contract instituting a regime of separation of property was because they felt that they were being modern and fashionable.

It is not justifiable to treat marriages entered into before the Act according to the system of complete separation of goods differently from those entered into after it according to exactly the same system[91].

The above arguments clearly indicate that much work still needs to be done by the Legislature in so far as the filling of this gap is concerned. Therefore this is a clear-cut case that could properly be referred to the Constitutional Court for an appropriate ruling with a view to addressing these issues.

Finally it would be premature for one to predict that the interest of the spouses will soon be taken care of because a lot of work still needs to be done by Parliament in this area of the law. A further recommendation is that the office of the Family Advocates should be expanded to assist in investigating these issues. Women should take up the lead by embarking upon the awareness campaigns to educate fellow South Africans about this problem.

In terms of customary law, control of property is also the key to social empowerment, and, had married women acquired clear rights and powers over property, their overall position would have been improved. Unfortunately, property relations happened to be one of the least explored areas of customary law. While it is quite likely that many women, independently work for and hold property. The vagueness of customary law allows men to invoke patriarchal tradition to their own advantage.

The reason why customary law was so vague on question of property was because before colonization, people had a relative abundance of food and land, and the economy was geared mainly to subsistence. An individual responsibility to support dependents was given a greater emphasis[92]. In a polygamous household there is a need to keep estates strictly separate. On marriage, each wife established a house that, according to the date of marriage, was ranked in relation to the other houses[93]. Within the family, rights to an item of property were determined by the position of the person acquiring and having regular control over it, and the use to which the item would be put.

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[91] Review of the law of Divorce: Amendment of Section 7(3) of the Divorce Act 1979, South African law Commission Working Paper 26

[92] Bennett, African Journal of International and comparative Law (1997) 9 p 91-92

[93] Sections 68 and 69 of the Codes establish the hierarchy of houses in KwaZulu Natal

The courts drew distinction between house and family estate. Anything obtained by or through a member of a house accrued automatically to the house concerned. For example, lobola given to a daughter's marriage or the damages paid for her seduction. Apart from property accruing automatically to a house, a family head could make specific allotments, for an example, in rural areas, would be the agricultural fields. Thus every wife would be entitled to one or more plots of land on which to grow food for her and her children.

Any unallotted property, together with the family head earnings, accrued to the family estate. All the assets in a house estate fell under the husband's overall control, to be administered for the common good. The customary principle that acquisition accrue to a house has serious implications for modern working women, because it gives family heads an almost unlimited control over their wives' income. Rights that women traditionally enjoyed to livestock of ritual significance are irrelevant in modern economic contexts.

Nothing has been done in South Africa to adjust customary law to changes in the economic relationships of family members. The courts were reluctant to interfere with the privileges of patriarchy, which they saw as the basis of a valuable asset in Native Law, namely, communal support. All the provisions regulating control of property in polygamous households have no bearing on the requirements of modern marriages, which are nearly all monogamous. It must be noted that, since 2nd December 1988, all civil and Christian marriages between Blacks or Africans are automatically in community of property and profit and loss[94].

For those who are already married out of community, a court granting a divorce has a measure of discretion to distribute property equitably. The court's power arose from the amendment of section 7 of the Divorce Act[95], a power that expressly extended to African civil marriages by section 2 of Act 3 of 1988. The reform legislation did not, however, repeal section 22(7) of Black Administration Act, which preserves the material rights of the so-called "discarded" wife, that is, the

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94 Section 1(e) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1998 when repealed section 22 (6) of the Black Administration Act 38 of 1927

95 By section 36 of the Matrimonial Property Act 88 of 1984

woman whose customary marriage had been nullified by her husband's subsequent civil marriage to another woman. Section 7(5)(a) of the Divorce Act was amended by section 2(b) of the Marriage and Matrimonial Property Law Amendment Act to include as one of the factors the courts are required to take into account to determining the extent of assets to be transferred to the wife of the civil marriage[96].

The recognition of customary marriage is a step to the right direction[97]. A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage brings about community of property and of profit and loss between the spouses[98]. Though this Act recognizes polygamous marriage, this section is clear and indicated that only customary marriage entered into between one man and one woman brings about community of property and of profit and loss, unless these consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

If the husband wishes to enter into a polygamous marriage he must make an application to the court to suspend the matrimonial property system which is applicable to the existing marriage, to effect a division of the matrimonial property of the spouses in such a marriage and to approve a written contract which would regulate the future matrimonial property dispensation of all the spouses in all customary marriages in which the applicant is or would be a partner. All persons having an interest in the matter, and in particular all the existing spouses of the applicant and the prospective spouse, must be joined in the proceedings[99].

In terms of the Act only the court of law is entitled to dissolve the customary marriage. The court granting a decree for the dissolution of a customary marriage has the powers contemplated in sections, 7, 8, 9 and 10 of the Divorce Act and section 24(1) of the Matrimonial Property Act.

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[96] Sinclair J: The Law of Marriage p 243

[97] The Recognition of Customary Marriage s Act of 1998

[98] Section 7(2)

[99] Section 7(5)

In terms of section 6 of the Recognition of Customary Marriages Act, the wife in a customary marriage has a status equal to that of her husband in all respects. I have a problem with this section because in terms of section 7(5), the same Act gives the husband a higher status than that of the woman by creating a polygamous marriage. It is my submission that polygamy infringes the constitutional prohibition on discrimination against women because it gives the husband more rights than the wife or wives and the conjugal relationship structured on one husband and several wives inevitably result in prejudice to women.

It is my final submission therefore that for customary marriage to have some status as that of a civil marriage let these marriages be equal in all respect. In reality no woman will, in this constitutional era give consent to her husband to take another woman or openly share her husband with another woman. The Government is busy canvassing the prevention of abuse against women and on the other hand encourages women abuse in the form of polygamous marriage. Besides majority of women are against polygamous marriages.

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