A (3) The amendment dated 5 March 1985 which I have marked 'second amendment' is allowed.

(4) The trial of this action will stand down until 10h00 tomorrow morning 7 March 1985 to enable the plaintiff to formulate an amended plea in reconvention which is to be delivered by that time.

B (5) I reserve my decision on the remaining questions of costs until the end of the trial.

Plaintiff's Attorneys: *Webber, Wentzel & Co.* Defendant's Attorneys: *Henry Mellman & Co.*

C

D # MILBOURN v MILBOURN

WITWATERSRAND LOCAL DIVISION

COETZEE DJP

1986 August 18, 20

E

Husband and wife—Divorce—Proprietary rights—Redistribution order —Act 70 of 1979 s 7(3)—Contract with provisions described in s 7(3) is an indispensable prerequisite to operation of section—Parties domiciled and married in England who did not enter into any
F *form of antenuptial contract before marriage cannot rely on section for a redistribution of their assets.*

A contract containing the provisions described in s 7(3) of the Divorce Act 70 of 1979 is an indispensable prerequisite to the operation of s 7(3) of the Act. In its absence, the proprietary results of a marriage are irreievant and a plaintiff claiming an order for the redistribution of the parties' assets cannot rely on s 7(3). Parties domiciled and
G married in England who did not enter into any form of antenuptial contract before their marriage cannot rely on s 7(3) for a redistribution of their assets.

Argument *in limine* on the applicability of s 7(3) of the Divorce Act 70 of 1979 to a claim in divorce proceedings. The facts appear from the reasons for judgment.

H *J G Wasserman* for the plaintiff.
R T Sutherland for the defendant.

[The Court held on 18 August 1986 that s 7(3) of the Divorce Act 70 of 1979 did not apply to the plaintiff's claim for a redistribution order and filed the following reasons for judgment on 20 August 1986.]

I

Coetzee DJP: This is an action for divorce and ancillary relief, *inter alia*, for the transfer to the plaintiff of 50% of the defendant's assets in terms of s 7(3) of the Divorce Act 70 of 1979. Counsel agreed that the applicability of this provision should be argued *in limine* on the basis of the following
J facts which are common cause:

1. The parties were married in England on 25 June 1943. A
2. They were then domiciled in England.
3. They did not enter into any form of antenuptial contract before the marriage.
4. Their marriage, being governed by the laws of England, is legally out of community of property and of profit and loss; moreover accrual sharing does not exist in English law. B

Section 7(3) of the Divorce Act, which was ntroduced by s 36(*b*) of the Matrimonial Property Act 88 of 1984, reads as follows:

'(3) A Court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the Matrimonial Property Act 1984 *in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded*, may, subject to the provisions of ss (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the Court may deem just be transferred to the first-mentioned party.' C

The argument revolves around the correct interpretation of the D italicised words in this section. The plaintiff contends that, properly construed, no contract as such is necessarily envisaged by the Legislature as a prerequisite and that this requirement is satisfied if the legal implication of their marriage is that they are married out of community of property and of profit and loss with exclusion of accrual sharing in any form. Since this is the result in English law, the plaintiff is entitled to E invoke the provisions of s 7(3).

The defendant on the other hand, contends that a contract, with the stipulated content, not necessarily a notarially executed one, is an indispensable prerequisite to the operation of the section. In its absence, the proprietary results of a marriage are irrelevant and the plaintiff cannot F rely on s 7(3).

I upheld the defendant's contention that s 7(3) is not available to the plaintiff and indicated that I would give written reasons later. These are the reasons.

The plaintiff's counsel relied heavily on *dicta* of Stegmann J contained G in a judgment in *Mathabathe v Mathabathe*, which he delivered in this Division on 26 February 1986 (not yet reported).* He held that s 7(3) could be invoked by a Black plaintiff who had not entered into a distinct contract of the kind described in this section. By virtue of s 22(6) of the Black Administration Act 38 of 1927, a marriage between Blacks does not produce the legal consequences of a marriage in community of property. H The learned Judge interpreted s 7(3) to mean that its requirements are satisfied in the case of Black persons as community of property, profit and loss and any form of accrual sharing are excluded by operation of law. On behalf of defendant it was argued that these *dicta*, in so far as they might be applicable to marriages between Whites, are clearly wrong.

Stegmann J based his judgment on his view of 'antenuptial contract'. I This, he says, could mean, in a narrow sense, a notarially executed antenuptial contract but in its broadest sense is simply a contract

*See *ante* at p 45—Eds. J

A concluded before the marriage and relating to the intended marriage. Whenever two persons, be they Black or White persons, become betrothed or engaged to be married, they conclude such a contract. There is no reason, he holds, why this expression should not also, when used in an appropriate context, be understood to be used in this broadest sense 'to
B refer to a pre-marital agreement which does not deal with proprietary rights expressly or tacitly and which leaves them to be dealt with by implication of law'. The learned Judge disagreed with certain views expressed by Professor June Sinclair in her booklet *An Introduction to the Matrimonial Property Act 1984*. The following passages from his judgment are apposite:

C 'With great respect to the learned professor I find the reasoning, if I have understood it correctly, to be unconvincing. The argument appears to me to be of a semantic nature and to overlook the practical needs for which the Legislature was making provision. The argument provides no convincing reason why the term "antenuptial contract", where it is used in ss 21(2) and 36(*b*), should not be understood to have the broad meaning contended for by Mr *Nel* and outlined above. It is to be presumed that the Legislature intended all persons who could benefit from ss 21(2) and 36(*b*) to enjoy the
D benefits thereof. That is a clear reason for concluding that the Legislature used the term "antenuptial contract" in its broad sense in ss 21(2) and 36(*b*). The fact that the Legislature used the same term in a narrow sense in chap I is not an overriding consideration. That is so firstly because the respective contexts are materially different, and secondly because that semantic consistency, if applied, would produce a serious anomaly. I turn to deal with the anomaly.

E The use of "antenuptial contract" in its narrow sense in chap I does not exclude any Black couple who marry after 1 November 1984 from applying the accrual system to their marriage if they so choose. It merely requires them (like everyone else) to execute a notarial antenuptial contract in order to do so. The introduction of such a uniform provision for all race groups is entirely understandable.

Apart from the learned professor's semantic argument (which was adopted by Mr *Tuchten* in the present matter) there appears to be no sensible, practical consideration to
F support the view that the Legislature (which did *not* withhold chap I and the accrual system from Blacks, even though their marriages are *also* governed by s 22 of the Black Administration Act 1927) nevertheless intended to withhold the benefits of s 21(1) (providing one of two methods of introducing the accrual system to an existing marriage) and s 36(*b*) (providing relief where marriage out of community has provided a division of property between the spouses that will be inequitable on divorce) from Blacks. The anomaly of such a result is both obvious and absurd. The Legislature has
G not expressly excluded Blacks from those benefits. It is not lightly to be concluded that it intended to do so by implication.'

And:

'In support of his contention that s 36(*b*) did not apply to the marriage in this case, Mr *Tuchten* also argued that it would not apply to a marriage concluded between parties who at the time of entering into the marriage were domiciled in a jurisdiction in which
H the matrimonial property regime was automatically one which excluded community of property, community of profit and loss and the accrual system. I doubt if that argument was correct. However, in view of the conclusion which I have reached as set out above, it is unnecessary to deal with that argument further.'

Professor *Sinclair's* view of the meaning of s 7(3) is very explicitly
I expressed in footnotes 172 at 48 and 186 at 53 of her booklet. The particular wording of this section, she says, clearly excludes from the ambit of the judicial discretion marriages automatically out of community of property by virtue of the law of the husband's domicile at the time of marriage; that immigrants whose marriages are governed by English law are in this position. Moreover she regards 'antenuptial contract' as
J referring to the 'standard-form antenuptial contract prior to the Act'.

I find myself in respectful disagreement with my Colleague about the meaning of these words in s 7(3). It does not seem to me that, grammatically, 'contract' can possibly refer to any contract other than one which relates, *in terminis*, to the proprietary rights of the parties. The only other possibility which is posited by the learned Judge is that it relates to the very contract to marry, the engagement in other words. I do not agree with this suggestion but, even if that were so, then that engagement contract must consist of more than just the single term to marry each other. It must contain the further terms relating to the proprietary regime after marriage for the judicial discretion to be exercisable. It may very well be that a *lacuna* exists, but that is no reason for straining otherwise clear language so as to fill it. That amounts to legislation and not interpretation.

Whatever the position may be in the case of marriages between Blacks, about which I express no opinion, I am driven to the conclusion that, in so far as Whites are concerned, the learned Judge's *dicta* relating to the meaning of s 7(3) to the effect that no specific contract relating to the postnuptial proprietary rights of intending spouses was intended by the Legislature are, with respect, clearly wrong. Whether 'antenuptial contract' means what *Sinclair* thinks it means, namely the 'standard-form' contract (impliedly the usual notarially executed one) as opposed to any underhand one between the parties is another matter about which I also express no opinion. It does not arise in this case.

Plaintiff's Attorneys: *De Wet & Van der Watt*. Defendant's Attorneys: *Postan & Van der Merwe*.

GLENDALE SUGAR MILLERS (PTY) LTD v SOUTH AFRICAN SUGAR ASSOCIATION

NATAL PROVINCIAL DIVISION

BOOYSEN J

1985 December 6; 1986 December 17

Sugar—Sugar Industry Agreement of 1979—Claim by sugar miller for payment of balance of transport costs in respect of transport other than transport by rail—Claim made in terms of clause 55 of agreement—Words 'in such manner' in clause 55(4) qualify the words 'may apply the provisions of subclauses (1), (2) and (3) mutatis mutandis*'—Clause 55(4) interpreted to mean that cost of transport by form of transport other than rail to be treated as though it were rail transport in terms of clause 55(1)—Miller entitled to claim refund of such costs which it had paid to transport operator, recovered from customer and paid to the Sugar Association.*