A 2.2 interest at a rate equal to the prime interest rate charged by the Standard Bank of South Africa Ltd plus 5% from 1 April 1997 to date of payment.

3. The respondents shall pay the applicant's costs. The respondents are given leave to deliver submissions (to which the applicant may B reply within seven days) as to the costs order within seven days of this judgment. I reserve the right to revise this paragraph of the order after consideration of the submissions.

Applicant's Attorneys: *Bell Dewar & Hall Inc.* Respondents' Attorneys: *Lex Inc.*

C

D

APPENDIX

ESTERHUIZEN v ESTERHUIZEN

E

CAPE PROVINCIAL DIVISION

JOSMAN AJ

1995 March 30; May 19 — Case No 9056/93

F *Husband and wife—Divorce—Proprietary rights—Redistribution order—Divorce Act 70 of 1979, s 7(3)—Application of to foreign marriages by antenuptial contract—Proprietary consequences of marriage determined by* lex domicilii matrimonii *at time of marriage—Section 7(3) not applicable to foreign marriage by antenuptial contract—Court, however,* G *entitled to use distributive powers in determining maintenance order in terms of s 7(2) of Divorce Act—*Semble: lex domicilii matrimonii *principle produces anomalous results in some circumstances and Legislature should decide whether it wants it to remain intact or whether it wishes benefits of s 7(3) of Divorce Act to apply to all marriages out of community of property, irrespective of whether this arises* ex lege *or by* H *virtue of antenuptial contract.*

In a divorce action the plaintiff sought an order for redistribution in terms of s 7(3) of the Divorce Act 70 of 1979. The defendant resisted the claim alleging that s 7(3) was of no application because the marriage had been contracted in Namibia and the proprietary consequences of the marriage I had to be determined according to Namibian law. The Court was called upon to determine whether s 7(3) had the effect of excluding the law of matrimonial domicile in circumstances where the parties had entered into a foreign antenuptial contract excluding community of property, community of profit and loss and accrual-sharing.

Held, that neither the Matrimonial Property Act 88 of 1984 nor the Marriage and J Matrimonial Property Law Amendment Act 3 of 1988 had intended to

displace the established principle that the *lex domicilii matrimonii* at the time A of marriage determined the proprietary consequences of the marriage. (At 500D–E.)

Held, further, that s 7(3) of the Divorce Act was not available to the plaintiff to achieve a redistribution of assets based on her past contributions to the maintenance or the increase of the estate of the defendant. (At 500I/J–J and 504C/D.) B

Held, further, that the Court was entitled not only to make a maintenance order in terms of s 7(2) of the Divorce Act but to use the redistributive power under s 7(3) to provide further maintenance. Clearly a different test would apply to determine the amount of assets to be redistributed. The Court first had to determine the amount of maintenance required by the plaintiff and thereafter, if appropriate, order a redistribution of assets sufficient to C provide for her needs. In the process a clean break could be achieved. (At 503I–504B and 504D.)

Semble: the *lex domicilii matrimonii* principle produces anomalous results in some circumstances and the Legislature must decide whether it wants it to remain intact or whether it wishes the benefits of s 7(3) of the Divorce Act to apply to all marriages out of community of property, irrespective of D whether this arises *ex lege* or by virtue of an antenuptial contract. (At 504E–F/G.)

Annotations:

Reported cases

Beaumont v Beaumont 1985 (4) SA 171 (W): considered E
Beaumont v Beaumont 1987 (1) SA 967 (A): considered
Bell v Bell 1991 (4) SA 195 (W): considered
Broom v Broom 1921 AD 478: referred to
Frankel's Estate and Another v The Master and Another 1950 (1) SA 220 (A): dictum at 251 applied
Katz v Katz 1989 (3) SA 1 (A): considered F
Lagesse v Lagesse 1992 (1) SA 173 (D): discussed and not followed
Milbourn v Milbourn 1987 (3) SA 62 (W): considered
Sperling v Sperling 1975 (3) SA 707 (A): applied.

Statutes

The Divorce Act 70 of 1979, ss 7(2) and 7(3): see *Juta's Statutes of South Africa 1995* vol 5 at 2-131 G
The Marriage and Matrimonial Property Law Amendment Act 3 of 1988: see *Juta's Statutes of South Africa 1995* vol 5 at 2-143
The Matrimonial Property Act 88 of 1984: see *Juta's Statutes of South Africa 1995* vol 5 at 2-135.

Determination of a point of law in terms of Rule 33(4) of the Uniform H Rules of Court. The facts and the nature of the issues appear from the reasons for judgment.

P F Cloete for the plaintiff.
E Steyn for the defendant.

Cur adv vult. I

Postea (19 May 1995).

Josman AJ: The plaintiff in this divorce action, the wife, has sought an order in terms of s 7(3) of the Divorce Act 70 of 1979, requiring that one-half of the net value of her husband's assets be transferred to her J

upon divorce. She has also claimed maintenance at the rate of R1 500 per month. The remaining relief sought is not relevant for the purposes of the matter to be considered. The parties, who were domiciled in Namibia at the time of the marriage, had concluded an antenuptial contract there. The defendant, her husband, is resisting the claim, alleging that s 7(3) of the Divorce Act is of no application because the marriage between the parties was contracted in Namibia and that the proprietary consequences of the marriage are to be determined in accordance with the law of Namibia. In the alternative he has claimed, in a counterclaim, that if s 7(3) of the Divorce Act does apply then he is entitled to an order that specified immovable property be transferred to him by the plaintiff.

That the law governing the proprietary consequences of a marriage is determined by the *lex domicilii matrimonii* is now beyond question (*Frankel's Estate and Another v The Master and Another* 1950 (1) SA 220 (A); *Sperling v Sperling* 1975 (3) SA 707 (A)). The application of this principle in relation to s 7(3) of the Divorce Act, which deals with the proprietary consequences of marriage, has been considered in four cases recently, all of which have bearing on the matter to be decided.

Advocate *Steyn*, who appeared for the defendant in this matter, contends that s 7(3) of the Divorce Act is of no application where the parties have concluded an antenuptial contract *outside* of South Africa (unless of course the parties therein selected South African law as being the applicable law in anticipation of moving here). She argues that the cardinal rule that the *lex domicilii matrimonii* governs the proprietary consequences of a marriage cannot be taken to have been supplanted by s 7(3) of the Divorce Act.

The parties have agreed that the issue of whether a claim in terms of s 7(3) of the Divorce Act is competent should be decided as a preliminary issue in terms of Rule 33(4) of the Rules of this Court. I proceed to do so.

The current state of the case law

The first is the case of *Milbourn v Milbourn* 1987 (3) SA 62 (W), in which the parties were married to each other in England where, by the common law, marriages are out of community of property and of profit and loss and where the accrual sharing system does not exist. The plaintiff had sought an order in terms of s 7(3) of the Divorce Act and Coetzee DJP held that because the parties were not married by antenuptial contract the question of the applicability of s 7(3) of the Divorce Act did not arise. The mere fact that the marriage was out of community of property by operation of law as opposed to antenuptial contract precluded the section from operating. It was accepted as the basis of the judgment that the proprietary regime and proprietary consequences of the marriage were to be determined by the law of the husband's domicile at the time of marriage, being that of English law. The learned Judge did not consider the issue of whether English law provided any comparable relief, nor was the matter argued. The issue was soon to arise.

In *Bell v Bell* 1991 (4) SA 195 (W) the plaintiff, under virtually identical circumstances, instituted action for divorce in South Africa, claiming a redistribution of assets in terms of ss 23 and 24 of Part 2 of the Matrimonial Causes Act of 1973 of England. Issue was taken with the prayer by way of exception and, in dismissing the exception, Kuper AJ said the following at 196H–I:

> 'It is clear beyond doubt and has been clear for more than 70 years that *in the absence of an antenuptial contract* the proprietary consequences of a foreign marriage must be determined in accordance with the law of the matrimonial domicile, which is to say the domicile of the husband at the time of marriage.'

(My emphasis added. This point will be dealt with below.)

He went on to state at 197E:

> 'I am bound to decide this matter by reference to the laws of England as embodied in her common law and in her statutes (and it is immaterial whether for that purpose the private international law system of England is itself taken into account or not). Included in those statutes, of course, is the Matrimonial Causes Act of 1973.'

After reviewing the relevant sections, the learned Judge states (at 197J–198B):

> 'The powers thus conferred upon the Courts of England have an immediate and familiar ring to a South African lawyer. They are, after all, not dissimilar in ambit or object from those given to our own Courts under s 7 of the Divorce Act 70 of 1979. Considerations of equity and fair dealing underlie both. They both allow Judges to divide and distribute property by reference to the merits of each case, thereby discarding the previous adherence to imposed and inflexible formulae for such distribution.'

The learned Judge referred to *Milbourn's* case which held that the provisions of s 7(3) of the Divorce Act cannot apply to parties domiciled and married in England for the reasons stated above. Approving the decision, the learned Judge stated that to allow the exception would have the effect

> '. . . that a person in the plaintiff's position would not enjoy her rights under English law and would simultaneously be disbarred from enjoying like rights under the South African law. As I see the position, that consequence does not flow, because recognition can be given to ss 23 and 24 of the English legislation. Mrs Bell, like Mrs Sperling before her, can expect a South African Court to afford her the benefits available under the law of the husband's domicile at the time of the marriage.'

(At 199J–B.)

At this stage I must return to the statement of Kuper AJ that 'in the absence of an antenuptial contract the proprietary consequences of a foreign marriage must be determined in accordance with the law of the matrimonial domicile'. To the extent that this suggests that where there is an antenuptial contract (other than one adopting a foreign law) the proprietary consequences of the marriage are not determined in accordance with the law of the matrimonial domicile, I would disagree. What I think the learned Judge was saying was that in the absence of an antenuptial contract the matrimonial regime and thus the proprietary consequences of the marriage are determined by the common law of the matrimonial domicile. If, however, the marital regime in terms of the

common law is out of community of property, and the parties enter into an antenuptial contract whereby they elect to be married in community of property, the consequences of such a marriage would nevertheless be determined in accordance with the domiciliary law relating to marriages in community of property. The converse would apply in circumstances where by antenuptial contract the parties in a country where the marital regime is in community of property opted for a marriage out of community of property. The proprietary consequences of the marriage out of community of property in that instance would nevertheless be determined in accordance with the law of the matrimonial domicile.

Whether s 7(3) of the Divorce Act has the effect of excluding the law of the matrimonial domicile in circumstances where parties have entered into a foreign antenuptial contract excluding community of property, community of profit loss and accrual-sharing is the issue to be decided in this case. It was not considered directly in either *Milbourn* or *Bell* because the approach adopted by the learned Judges in both instances was that the issue did not arise.

The confusion, if confusion there be, appears to arise from a *dictum* of Van den Heever JA in *Frankel's Estate v The Master* (*supra*). That case was concerned with a husband and wife who had been married in Czechoslovakia in 1933 but the husband had been domiciled in Germany at the time. The parties intended to leave for South Africa immediately after the marriage and to establish their permanent home in Johannesburg. They did so and lived the rest of their lives in South Africa. They had not entered into an antenuptial contract and the law of Germany, the husband's domicile at the relevant time, provided that a marriage without antenuptial contract was out of community of property. The issue came before the Court in an application for a declaratory order to the effect that the parties had been married in community of property in accordance with the laws of South Africa. Van den Heever JA accepted that according to our law, if upon marriage intended spouses expressly agree that the property rights flowing from the marriage will be governed by the law of another country, our Courts will give effect to their intentions. The prerequisite, however, is an express agreement to that effect. It is on this basis that Van den Heever JA's famous *dictum* was made as follows at 251:

> 'In the absence of ante-nuptial contract the rule is that which was formulated by Innes CJ in *Gunn v Gunn* (1910 TPD 423 at 427) and which seems to me to be in harmony with the real *rationes decidendi* of all our decisions:
>
> "When spouses are not, at the date of marriage, domiciled in the same country, then the law of the husband prevails." '

This is rendered as follows in the headnote:

> 'In the absence of an antenuptial contract, the matrimonial regime of spouses not domiciled in the same country is governed by the law of the husband's domicile at the time of marriage, and not by the law of another domicile which he then intends to acquire immediately or within a reasonable time after his marriage.'

Presumably the *dictum* of Kuper AJ quoted above derives from this source. Clearly, *Frankel's* case was considering an antenuptial contract in which the parties had selected the law of a country other than that of the

husband's domicile as being the applicable law relating to the proprietary consequences of their marriage. It held that in the absence of such an antenuptial contract the *lex domicilii matrimonii* applied. Clearly, this has to be distinguished from an antenuptial contract in which the parties do not select a foreign law but merely select another option available under the law of the domicile of the parties at the time of the marriage. What was decided in *Frankel's* case was that, had the Frankels entered into an antenuptial contract selecting South African law as being the applicable law relating to the proprietary consequences of the marriage, they would have been deemed to have been married in community of property in accordance with South African law. If, on the other hand, they had entered into a contract merely excluding the normal consequences of German marriage and opting for a marriage in community of property, then they would have been married in community of property but as a consequence of and in accordance with German law in that respect, being the *lex domicilii matrimonii* at the time. It is not every antenuptial contract which has the effect of excluding the *lex domicilii matrimonii*.

A case decided prior to the *Bell* case but reported subsequently is *Lagesse v Lagesse* 1992 (1) SA 173 (D). This case differs from *Bell* and *Milbourn* in the important respect that the Court found that there was indeed a marriage by antenuptial contract in Mauritius. The operation of s 7(3) of the Divorce Act therefore could not be excluded on that account alone. Kriek J's reasons for concluding that there was an antenuptial contract in the circumstances are not relevant for the purposes of this matter. He held that the prerequisites for invoking the provisions of s 7(3) of the Divorce Act were met, but did not consider whether this section had the effect of overriding the *lex domicilii matrimonii* principle in the circumstances. He appears simply to have assumed that it did. The report fails to specify what relief Mrs Lagesse sought and in particular what order she sought in terms of s 7(3) of the Divorce Act. All that the learned Judge said at 180G–H is:

> 'My finding is therefore that the plaintiff has a claim in law against defendant under the provisions of s 7(3) of Act 70 of 1979.'

Save for what follows in the discussion below relating to maintenance, to the extent that the learned Judge found that the proprietary consequences of the marriage are governed by South African law, including s 7(3) of the Divorce Act, I must respectfully disagree with this conclusion.

In *Haines v Haines*, case No 1683/1991 in this Division (as yet unreported) Brand AJ (as he then was) delivered a judgment in which Berman J concurred dealing with some of these issues again, with additional wrinkles. As in the *Bell* case, the plaintiff, whose husband had been domiciled in England at the time of the marriage, sought an order for the transfer of some of her husband's assets to her in terms of the provisions of ss 24 and 25 of the Matrimonial Causes Act of 1973 (presumably ss 23 and 24). The husband excepted to the claim on the basis that the relief afforded by the English Matrimonial Causes Act 'is a consequence of divorce and not of the matrimonial property regime applicable to the parties' marriage'. After the exception was noted the

plaintiff sought to amend her particulars of claim by introducing a prayer in the alternative based on s 7(3) of the Divorce Act. Following the *Milbourn* case, the application to amend was refused. The Court then dealt with the applicability of the English Act and Brand AJ referred in particular to the work of Professor Kahn, in the appendix to Hahlo *The South African Law of Husband and Wife* 4th ed which deals with jurisdiction and conflict of law. He noted Kahn's classification of the proprietary consequences of marriage, amongst which is listed the effect of divorce on the property of the spouses. The learned Judge relied on the *Sperling* case and in particular the *dictum* of Corbett JA (as he then was) at 716E–G as follows:

> 'The claims of the parties to the matrimonial property . . . are to be classified as relating to the proprietary consequences of the marriage. In a case such as this, *where no antenuptial contract has been entered into,* the choice of law rule is that the proprietary consequences of a marriage are to be determined by reference to the law of the domicile of the husband at the time of the marriage (*Frankel's Estate and Another v The Master and Another* 1950 (1) SA 220 (A)) sometimes referred to, for the sake of brevity, as the "law of the matrimonial domicile". This connecting factor, the domicile of the husband at the time of the marriage, fixes once and for all and by operation of law the system that will continue to be the *lex causae* whenever questions concerning the property relations between the spouses arise in a South African Court.'

(My emphasis added.)

On this basis the Court held that English law applied and that the plaintiff was entitled to invoke the Matrimonial Causes Act of England. Brand AJ referred to *Bell's* case with approval. It is submitted that the same result could have been reached by holding that reliance upon s 7(3) of the Divorce Act was precluded and the invocation of the English Act was allowed because the *lex domicilii matrimonii* was to be applied. Corbett JA's reference to a marriage where no antenuptial contract has been entered into is subject to the same comment made above in relation to *Frankel's* case.

Comment on the cases

In an article in the *Annual Survey of South African Law 1991* Professor Kahn, commenting on *Bell's* case, casts doubt on whether the relief afforded by the English Act of 1973 can correctly be classified as dealing with the matrimonial property system. He points out, however, that the proposed addition of ss (9) of s 7 of the Divorce Act (subsequently enacted) puts an end to the matter by providing that:

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

In an interesting article appearing in the *Tydskrif vir die Suid-Afrikaanse Reg* (1992) at 336, J L Neels of RAU comments on the *Bell* and *Lagesse* cases. His thesis is that s 7(3) of the Divorce Act allows not only the redistribution of property as one of the proprietary consequences of

marriage and divorce, but may also be used to provide for the maintenance requirements of a spouse. I will deal with this matter below. He concedes that, based simply on the wording of the Divorce Act, s 7(3) appears to be dealing only with the proprietary consequences of a marriage, but takes the matter further. He refers to two articles by J C Sonnekus in *TSAR* (1989) at 202 and 326, dealing with pension interests in s 7(8) of the Divorce Act and whether the rights created should be viewed as an aspect of the duty of support rather than a patrimonial interest. Based on *Sonnekus'* interpretation of the Divorce Act he concludes that, insofar as s 7(3) is dealing with the proprietary consequences of marriage and a redistribution in amplification thereof, this right can only be exercised in those circumstances where the husband was domiciled in South Africa at the time that the marriage was concluded. His interpretation of the *Lagesse* case, therefore, is that the finding of Kriek J that s 7(3)*(a)* of the Divorce Act is applicable must be confined to making provision for future maintenance (about which more below) and that it may not be used to achieve a redistribution of assets based on past contributions of the spouses, in amplification of the proprietary consequences of their marriage.

At 341 he stated the following:

> 'Die *lex domicilii matrimonii* is egter in die onderhawige geval die reg van Mauritius. In die lig van die voorafgaande is dit duidelik dat hierdie eis beperk moet word tot die eiser se *toekomstige onderhoudsbehoeftes* en dat dit nie *haar bydrae tot die groei of instandhouding van haar man se boedel* mag weerspieël nie. Vir sodanige eis, indien beskikbaar, sou sy op die reg van Maritius moes steun.'

(My emphasis added.)

The issues

The facts of this case crisply, and without creating the opportunity for avoiding the issue, call for a resolution of these apparently conflicting principles. The parties were married by antenuptial contract and were therefore not disqualified on this account alone (as in the other cases cited) from seeking relief under s 7(3) of the Divorce Act. The law of Namibia, which, in the absence of exclusion, would govern the proprietary consequences of the marital regime of the parties, makes no provision for any form of relief equivalent to that afforded by s 7(3) of the Divorce Act. In the circumstances s 7(9), recently introduced, is of no assistance to the plaintiff. Is relief under s 7(3) of the Divorce Act excluded entirely?

Conclusion re *lex domicilii matrimonii*

On the assumption that my interpretation of *Frankel's* case is correct, it remains to consider whether s 7(3) of the Divorce Act was intended to alter this principle in circumstances such as the present, where the parties had entered into a foreign antenuptial contract at a time when the husband was not domiciled in this country. The antenuptial contract did not adopt South African law for the parties. Clearly the wording of s 7(3) embraces the situation in the absence of some overriding principle of law.

A It seems clear that the legislation introduced by the Matrimonial Property Act 88 of 1984 was intended to deal with local marriages concluded in circumstances where the domicile of the husband at the time of the marriage was in South Africa. From 1984 onwards local marriages out of community of property concluded by antenuptial B contract were governed by the accrual system which in effect introduced community of property post-marriage. To deal with the inequity relating to marriages out of community of property concluded prior to 1984, s 7(3) of the Divorce Act was introduced so as to give the Court a discretion to redistribute the parties' assets based on their past contributions. In South Africa exclusion of community of property is usually C achieved by the parties concluding an antenuptial contract. The other possibility, now covered by s 7(3)(v) of the Divorce Act, arose by virtue of the Black Administration Act 38 of 1927, s 22(6) of which was repealed by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

D It is my conclusion that neither the Matrimonial Property Act of 1984 nor the Marriage and Matrimonial Property Law Amendment Act of 1988 intended to displace the established principle laid down in *Frankel's* case that the *lex domicilii matrimonii* at the time of marriage determines the proprietary consequences of the marriage. This is confirmed by the E recent introduction in 1992 of ss (9) to s 7 of the Divorce Act, granting a South African Court the same powers as the foreign Court would have to implement the patrimonial consequences of a marriage governed by the foreign law by ordering the transfer of assets from one spouse to the other. It would be illogical and inconsistent for the *lex domicilii matrimonii* F to apply to marriages which are in or out of community of property *ex lege*, but to exclude the *lex domicilii matrimonii* where community of property is excluded by antenuptial contract. Had Namibia, where community of property is achieved by antenuptial contract, provided for the redistribution of the spouses' assets in the same manner as the English Matrimonial Causes Act, s 7(9) of the Divorce Act would have been of no G application. Instead s 7(3) of the Divorce Act would have applied. An anomaly would arise in the case of parties domiciled in a country where marriages are normally out of community of property but no provision is made for redistribution of assets. Section 7(3) would not apply and s 7(9) would afford no relief because of the absence of a right of redistribution H under the *lex domicilii matrimonii*. A further anomaly would arise if the foreign antenuptial contract excluded community of property and profit and loss but not the accrual system. Would the *lex domicilii matrimonii* apply? Clearly the Legislature was not considering foreign marriages in 1984 and 1988 when the Divorce Act was amended. There are presumptions against I interpreting statutes so as to modify existing law, including international comity. Steyn *Die Uitleg van Wette* (1981) at 97*ff*; *Broom v Broom* 1921 AD 478 at 482–3.

It is my conclusion, therefore, that s 7(3) of the Divorce Act is not available to the plaintiff to achieve a redistribution of assets based on her past contributions to the maintenance or the increase of the estate of her J husband, the defendant. It appears, though it is not certain, that this is

what she is seeking to achieve by claiming half of the defendant's assets. A Nor is the defendant entitled to the relief he is seeking in terms of s 7(3) of the Divorce Act.

In the present matter the plaintiff has claimed in the alternative payment of R99 000 on the basis of contributions made to the joint household during the marriage and, in the further alternative, a decla- B ration that a universal partnership existed and the appointment of a liquidator to distribute the proceeds. These alternative claims are what the plaintiff would be entitled to if the *lex domicilii matrimonii* applies. In a different manner they also provide for a redistribution of assets of the parties on divorce. C

Maintenance, the clean break principle and s 7(3) of the Divorce Act

The matter does not, however, end there. As stated above, *Neels*, in his illuminating article, develops the thesis that s 7(3) of the Divorce Act may be used to achieve a redistribution of assets for the purposes of providing maintenance for a spouse. Based on the distinction made by D *Sonnekus*, he differentiates a distribution of assets based on past contributions to the increase and maintenance of a spouse's estate from an order to provide for the future maintenance requirements of the spouse by distributing assets rather than ordering the payment of periodical maintenance. The purpose of doing the former is to achieve the clean E break to which our Courts have repeatedly referred.

He relies on two cases which certainly do appear to provide the basis for his conclusion. In *Beaumont v Beaumont* 1985 (4) SA 171 (W) Kriegler J (as he then was) considered a wife's claim for redistribution of her husband's assets pursuant to s 7(3) of the Divorce Act and for F maintenance for herself. In considering the amount to be awarded, Kriegler J said at 184C:

> 'On the evidence the defendant is clearly in need of maintenance now. She will continue to be so, to a diminishing extent, once the marriage is dissolved. Mr *Sapire*, on behalf of the plaintiff, suggested that the capital contribution, properly invested, and the interest thereon pending its payment over, will extinguish the G need for any maintenance for the defendant. I do not think that is so. It would moreover be unfair to the defendant. In deciding what proportion of the plaintiff's estate should be transferred to the defendant I expressly kept in mind the fact that a maintenance order was going to be made. *Had that not been the case, the proportion to be transferred to the defendant may have been higher.* I cannot allow the defendant to lose on both the swings and the roundabout.' H

(My emphasis added.)

On appeal, 1987 (1) SA 967 (A), the matter was considered by Botha JA, who said the following at 992B:

> 'From the judgment of Kriegler J it is clear that when he decided upon the sum of R150 000 to be paid in terms of ss (3) he had already made up his mind that I he would also make an order in terms of ss (2); *otherwise he might well have awarded a higher sum under ss (3)* (see at 181G and 184D–E). This, counsel argued, was putting the cart before the horse. Hence it was contended that the trial Judge had misdirected himself. I am unable to agree with this argument. *In my opinion it ascribes to the absence of a reference in ss (3) and (5) to ss (2) a significance which is unwarranted.* I cannot imagine that the Legislature could have J

A intended, in such oblique a manner, to require the Court to shut its eyes to the possibility of making an order in terms of ss (2) when considering what order to make in terms of ss (3). If the Court should find, for whatever reason (and that there may be many valid ones cannot be doubted), that an order in terms of ss (2) is necessary in order to do justice between the parties, *it is clear*, in my view, *that such an order would qualify to be taken into account under the wide terms of para* B *(d) of ss (5) in determining the nature or extent of a redistribution order which is to be made in terms of ss (3)*. Counsel's argument would prevent the Court from taking an *overall view*, from the outset, of how justice could best be achieved between the parties in the light of *possible orders under either ss (2) or ss (3) or both subsections, in relation to the means and obligations, and the needs of the parties, and all other relevant factors*. In my opinion such a limitation on the Court's exercise C in its discretion in terms of the section as a whole was not intended by the Legislature and must be rejected.'

(My emphasis added.)

The matter was considered in *Katz v Katz* 1989 (3) SA 1 (A) in the Appellate Division again. In this matter, which involved a wealthy D husband, the trial Court had concluded that the wife was entitled to maintenance of R500 000 per annum based on the husband's income and assets. The trial Court also considered the wife's entitlement to a redistribution of assets and, in order to achieve the desired clean break, awarded the sum of R3,5 m to the wife, which comprised a redistribution E of assets to provide for her maintenance as well as reward her for past contributions. On appeal the Court reduced the award to R1,5 m but did not alter the basis of the distribution. Milne JA said the following at 11B–H:

'When a Court makes an order for maintenance in terms of s 7(2) it may have F regard to the facts there set out, including "an order in terms of ss (3) and any other factor which in the opinion of the Court should be taken into account". There is nothing in ss (5) which specifically provides that in the determination of the assets to be transferred as contemplated in ss (3), regard may be had to the fact that no order is being made in terms of ss (2). *Nevertheless, such regard is not excluded (see ss (5)*(d)*)*. In terms of the decision in *Beaumont's* case *supra* the G "clean break" concept is not foreign to our law. It is obvious that a "complete termination of the financial dependence of one party on the other" cannot be achieved so long as there is to be an order for the periodical payment of maintenance. *It follows that it will frequently (one may almost say generally) be necessary, if a clean break is to be achieved, that the amount of the determination should be at least such that the spouse concerned will be in a financial position to maintain* H *herself or himself. In such circumstances a Court will take into account the spouse's maintenance needs.*

I have already referred to the trial Court's findings as to the capital sum required to provide the respondent with a new town house and a new motor car, and as to what sum she would reasonably require to maintain herself. On the basis of these findings and on the basis of a calculation contained in a document I which formed part of the agreed bundle of documents, the amount needed to maintain the respondent would be in the vicinity of R500 000. This is on the assumption that the R300 000 needed for the house and car and incidental expenses would be provided for by the amount of the net proceeds of the Melrose home together with the respondent's R26 000 invested in a savings account. The calculation referred to indicated that R500 000 would purchase an annuity J which would provide a monthly income of approximately R6 000 per month.

The respondent's claim was, however, not confined to one for maintenance. A The trial Court found that the respondent had, indeed, contributed to the increase or maintenance of the appellant's estate, and that she had done so in various ways. For the sake of convenience these may be divided into three broad categories.'

(My emphasis added.) B

At 17A Milne JA concluded as follows:

'In the light of all the circumstances I consider that, on the facts of this particular case (and I stress that I am laying down no principle nor even a general guide), *it would be just and equitable to make a redistribution order which would, so far as is reasonably practicable, enable the respondent to maintain the same standard of living as the parties enjoyed when the marriage broke up.*' C

Neels' conclusion, from an analysis of the cases, is as follows (at 338):

'Ingevolge die benadering van die Howe, het art 7(3) dus betreking én op die vermoënsregtelike én op die versorgingsregtelike aspekte van die huwelik.'

And further:

'Volg 'n mens egter die Howe se benadering, kan die herverdelingsbevoegd- D heid in art 7(3) verleen, by alle omskrewe egskeidings toegepas word vir sover voorsiening daarmee gemaak wil word vir toekomstige onderhoudsbehoeftes. Wat betref die uitoefening van die bevoegdheid met die oog op vergoeding vir die instandhouding of groei van die ander gade se boedel, word dit beperk tot gevalle waar die Suid-Afrikaanse reg die *lex domicilii matrimonii* is. Is 'n ander regstelsel die *lex domicilii matrimonii*, kan die Hof 'n soortgelyke bevoegheid in terme E daarvan uitoefen, mits die bevoegdheid (soos geklassifiseer deur die *lex fori*) 'n vermoënsregtelike gevolg van die huwelik is.'

And further:

'Gesien die "clean break principle" sal daar juis gestreef word na die F bevrediging van toekomstige onderhoudsbehoeftes by wyse van 'n oordrag van bates ingevolge art 7(3). Die bevele ingevolge art 7(2) en 7(3) beïnvloed mekaar dus oor en weer, maar—wat meer is—die Hof neem ook 'n "overall view" van die situasie (die appèlhofuitspraak in die *Beaumont*-saak op 992; die *Katz*-saak op 11). Die vermoënsregtelike en die versorgingsregtelike aspekte van die huwelik word as synde ineengestrengel beoordeel.'

He then goes on to consider the situation where international private law G applies and says the following:

'Hierdie holistiese benadering kan egter nie toegepas word in heelwat gevalle waar die internasionale privaatreg 'n rol speel nie. 'n Mens kan byvoorbeeld dink aan die geval waar die *lex domicilii matrimonii* nie voorsiening maak vir 'n herverdeling van bates ten gunste van die een eggenoot as vergoeding vir die H instandhouding of groei van die ander gade se boedel nie, terwyl eersgenoemde eggenoot wel ingevolge art 7(3) kan vra vir 'n herverdeling met die oog op toekomstige onderhoudsbehoeftes (asook vir 'n gewone onderhoudsbevel ingevolge art 7(2)).'

Accordingly, *Neels* concludes that in a case such as the present the Court I is entitled not only to make a maintenance order in terms of s 7(2) but to use the redistributive powers under s 7(3) to provide for future maintenance. The fact that the wording of ss (4) and (5) of s 7 does not clearly embrace this conclusion has been considered by the Appellate Division and not been found to be determinative. I agree with *Neels'* analysis and conclusion. J

A Clearly a different test will apply to determine the amount of assets to be redistributed. The Court must first determine the amount of maintenance required by the plaintiff and thereafter, if appropriate, order a redistribution of assets sufficient to provide for her needs. In the process the clean break can be achieved. This was contemplated in *Katz's* case B *supra*. It is probable that the amount to be awarded by way of redistribution will be smaller than that which might have been awarded if the Court was seeking to achieve a redistribution of assets based on past contributions to the maintenance and growth of the defendant's estate.

C Conclusion

My conclusion, therefore, is that the plaintiff is not entitled to invoke s 7(3) of the Divorce Act in order to achieve a redistribution of assets based on her past contributions to the maintenance and growth of the defendant's estate. The Court may, however, make an order in terms of D s 7(2) for her maintenance and in lieu thereof may order the redistribution of assets in terms of s 7(3) in order to achieve a like result. (See, too, in this respect *Neels'* comments at 344–5.)

Although the process of arriving at this conclusion has been tortuous the application of the principle should not be difficult. The fact that the law in this respect is both complex and not entirely satisfactory is not, E however, something that the Courts can set right by means of interpretation. The Legislature must decide whether it wishes the *lex domicilii matrimonii* principle to remain intact, even if it does produce anomalous results in some circumstances, or whether it wishes the benefits of s 7(3) of the Divorce Act to apply to all marriages out of community of F property, irrespective of whether this arises *ex lege* or by virtue of an antenuptial contract. The latter will be more even-handed in this application but this is a policy decision to be taken by the Legislature. It will entail the repeal of s 7(9) of the Divorce Act.

Accordingly, to the extent that the plaintiff's claim for half the assets is G based upon a redistribution following the proprietary consequences of the marriage, it is not competent. The trial Court hearing this matter may, however, order a redistribution of such assets as would be sufficient to provide for the maintenance requirements of the plaintiff. In the alternative, it may simply make an order for the payment of periodical maintenance in terms of s 7(2) of the Divorce Act. It follows that the H defendant's claim for transfer of specified properties into his name in terms of s 3 of the Divorce Act is also not competent.

Plaintiff's Attorneys: *Horn & Horn*. Defendant's Attorneys: *Van der Spuy & Partners*.

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