

SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 26

REVIEW OF THE LAW OF DIVORCE

Amendment of section 7(3) of the Divorce Act, 1979

Closing date for comments: 31 July 1989

November 1988

ISBN 0-7970-1667-8

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice G Viljoen (Chairman)

The Honourable Mr Justice H J O van Heerden (Vice-Chairman)

The Honourable Mr Justice P J J Olivier

Prof D J Joubert

Mr J E Knoll

Mr P A J Kotzé

Mr G G Smit

The Secretary is Mr G J van Zyl. The Commission's offices are on the 8th floor, NG Kerk Sinodale Sentrum, 228 Visagie Street, Pretoria. Correspondence should be addressed to:

The Secretary
South African Law Commission
Private Bag X668
PRETORIA
0001

Telephone: (012) 322-6440

Closing date for comments: 31 July 1989.

PREFACE

This working paper was prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not, at this stage, be regarded as those of the Commission.

The working paper is published in full to provide sufficient background information to enable those wishing to comment or make suggestions for the development, improvement, modernisation or reform of this facet of the law to place reasoned submissions before the Commission.

Anyone who wishes to make oral representations to the Commission should initially submit a brief résumé of the proposed representations together with a written request to be heard by the Commission.

It would be appreciated if written comments or submissions could reach the Commission by 31 July 1989 at the address that appears on the previous page. Please contact the researcher if you cannot submit your comments in time.

The researcher responsible for the investigation, who may be contacted for further information, is O B Kellner.

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR.

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AMENDMENT OF SECTION 7(3) OF THE DIVORCE ACT, 1979
(ACT 70 OF 1979)

1. Introduction

1.1 Section 7(3) of the Divorce Act, 1979, was inserted in that Act by section 36(b) of the Matrimonial Property Act, 1984,¹ and at that stage provided 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 subsection (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

1.2 On 25 February 1988 the State President assented to the Marriage and Matrimonial Property Law Amendment Act, 1988,² in terms of section 2 of which section 7(3) of the Divorce Act was amended so as to extend its application to marriages entered into by Blacks in terms of section 22(6) of the Black Administration Act, 1927.³ As a result of this amendment, section 7(3) of the Divorce Act, 1979, now provides as follows:

(3) A court granting a decree of divorce in respect of a marriage out of community of property -

- (a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or
- (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No 38 of 1927), as it existed immediately prior to its repeal by

1 Act 88 of 1984.

2 Act 3 of 1988.

3 Act 38 of 1927.

the said Marriage and Matrimonial Property Law Amendment Act, 1988,

may, subject to the provisions of subsections (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.

1.3 In reporting on the Marriage and Matrimonial Property Law Amendment Bill during February 1988 the Parliamentary Select Committee stated, inter alia⁴ -

... U Komitee wens voorts verslag te doen dat hy die Minister van Justisie versoek om oorweging daaraan te skenk om die bepalings van artikel 7(3) van die Wet op Egskeiding, No 70 van 1979, uit te brei tot huwelike wat outomaties buite gemeenskap van goed gesluit word, met spesiale verwysing na huwelike buite die Republiek gesluit.

The Minister has referred the said request to the Commission for consideration, hence this discussion paper.

2. Present legal position

2.1 The present legal position with regard to persons domiciled in South Africa who are married out of community of property is as follows:

(a) Those married before the commencement of the Matrimonial Property Act, 1984, by antenuptial contract as contemplated by section 7(3) of the Divorce Act, 1979, can, upon divorce, request the court to use its discretion in redistributing a spouse's property on an equitable basis.

(b) Those married in terms of section 22(6) of the Black Administration Act, 1927, can now also ask the court to use its discretion in terms of section 7(3) of the Divorce Act, 1979.⁵

4 Minutes of the Proceedings of the House of Assembly dated Monday, 8 February 1988 (Annexure, item 5).

5 As amended by Act 3 of 1988.

- (c) Those who were married after the commencement of the Matrimonial Property Act, 1984, either have a system of accruals applicable to them in terms of the Act or have expressly chosen to exclude such a system in their antenuptial agreement,⁶ usually after having received legal advice on the consequences.
- (d) Those whose marriage is out of community of property by virtue of the law of the country of the husband's domicile at the time when the marriage was solemnised⁷ have no such remedy as section 7(3) of the Divorce Act, 1979, is not applicable to their marriage.⁸

2.2 Section 7(3) of the Divorce Act, 1979, does not, of course, apply to marriages in community of property, this being the only category of matrimonial property regime not dealt with above.

3. Views of the writers

3.1 The two main issues that have thus far attracted the attention of academic writers commenting on section 7(3) of the Divorce Act, 1979, are the reasons for its limitation to marriages solemnised before 1 November 1984⁹ and the exclusion of Blacks (now remedied)¹⁰ and other persons married out of community of property otherwise than by antenuptial contract, e.g. those married outside the Republic.

A. Marriages contracted after 1 November 1984

6 See section 2 of the Matrimonial Property Act, 1984 (Act 88 of 1984).

7 See e.g. Frankel's Estate v The Master 1950 (1) SA 220 (AD) and H R Hahlo The South African Law of Husband and Wife 4th edition Cape Town: Juta 1975, p 627 et seq.

8 See Milbourn v Milbourn 1987 (3) SA 62 (WLD).

9 The date of commencement of the Matrimonial Property Act, 1984.

10 See section 2 of Act 3 of 1988 – paragraph 1.2 above.

3.2 Professor June Sinclair is one who is critical of the restriction of the subsection to marriages entered into before 1 November 1984. She raises the matter thus¹¹ -

Is it 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? It seems possible, even likely, that some people will exclude the accrual system in their antenuptial contracts.

Women whose marriages were entered into later, and with the exclusion of the accrual system, will be in exactly the same economic position on divorce as those whose unenviable position has been deplored and has now been improved by the introduction of the discretion. Why is the new device to ensure justice not to serve them also?

The argument against extending S 36(b) to marriages entered into after the Act was that in such cases a discretion would interfere with the contractual choice of the parties made at the time of marriage. Spurious this distinction must surely be, for interference is accepted if the parties chose to marry a certain way before some arbitrary date fixed for the coming into operation of the Act. Why has this date been chosen to determine the fate of the divorced, over the similarity of their circumstances? Moreover, interference with the contractual choice of the parties is provided for in the case of economic misconduct, regardless of when the spouses were married. Is it defensible in one breath to spurn contractual freedom and in another to sanctify it? Even more importantly, in a country with exiguous statutory welfare provisions, it may be doubted whether we can allow people to contract into poverty for themselves, and for their children.

3.3 Another writer who criticises this restriction of the discretion to marriages contracted before 1 November 1984 is Nicholas D C Dillon.¹² He feels that the mere introduction by the Matrimonial Property Act, 1984, of the system of accruals as an alternative does not prevent persons from choosing, or from being badly advised to choose, strict separation of estates as in the past.

Thus, he argues, people so choosing (presumably after bad advice) are in the same position as those who so chose before the advent of the

11 June Sinclair An Introduction to the Matrimonial Property Act, 1984 Cape Town: Juta 1984 p 48-49.

12 "The Financial Consequences of Divorce: S 7(3) of the Divorce Act 1979 - a Comparative Study" 1986 XIX CILSA p 271 et seq.

Matrimonial Property Act, 1984, and, accordingly, should not be treated differently. He states¹³ -

... the form of relief provided by S 7(3) is not designed to protect those who have made an 'informed' choice, it is to protect those who contracted, for whatever reason, be it ignorance, coercion or even foolishness, to their disadvantage.

3.4 On this point, Professor H R Hahlo has the following to say:¹⁴

In marriages out of community of property entered into after the commencement of the Matrimonial Property Act the accrual system applies, unless the spouses have in their antenuptial contract expressly excluded it, ensuring that the spouses share in each other's accruals during the subsistence of the marriage. And where they have excluded the accrual system, they have made a deliberate choice against sharing. No accrual system operated before the Matrimonial Property Act came into force, and this may lead to inequitable results when a marriage entered into before the commencement of the Matrimonial Property Act is dissolved by divorce. It is to enable the courts to remedy such inequities that section 7(3) was inserted.

B. Marriages governed by foreign law

3.5 Although it was probably apparent that section 7(3) of the Divorce Act, 1979, did not apply to marriages which are out of community of property by virtue of the law of a foreign country, it was not until the decisions in Mathabathe v Mathabathe¹⁵ and Milbourn v Milbourn¹⁶ that a spate of articles exposing this lacuna appeared.

3.6 Professor P Q R Boberg, in an article dealing mainly with section 7(4) of the said Act, mentions in passing that a court cannot, in terms of section 7(3), redistribute the property of spouses whose marriage is out of

13 Op cit p 277.

14 The South African Law of Husband and Wife 5th edition Cape Town: Juta 1985 p 384.

15 1987 (3) SA 45 (W).

16 1987 (3) SA 62 (W).

community of property because it is governed by a foreign legal system and not because of an antenuptial contract.¹⁷

3.7 Both Michael Lupton¹⁸ and Rita Jordaan¹⁹ discuss the above-mentioned two decisions and come to the conclusion that a clear lacuna exists that calls for legislative rectification.

3.8 H C Roodt²⁰ discusses the problems caused by the lacuna and suggests three ways of resolving them. Her first suggestion is that the courts should do away with the strict "definition" of what falls under the concept of "matrimonial property" so that distribution of assets on divorce can be classified as dealing with "matrimonial property", thus allowing a distribution in accordance with a foreign system. Her second suggestion is that the lacuna be filled by means of legislation. Her third suggestion is that the courts, in interpreting section 7(3), should give a wider meaning to the concept "antenuptial contract" than that given in the Milbourn decision²¹ and should hold that -

... (D)ie blote besluit om te trou is 'n 'kontrak' vir doeleindes van a 7(3).

This would have the effect of bringing all marriages out of community of property within the ambit of section 7(3).

3.9 Prof A H van Wyk of Stellenbosch University, in a contribution on the present topic to the Commission, offers this solution:

17 P Q R Boberg "Sharing Matrimonial Assets" 1987 (17) Businessman's Law 82.

18 Michael Lupton "Divorce and Property Rights" 1988 (17) Businessman's Law 119.

19 Rita Jordaan "Oordrag van Bates in Geval van Egskeiding ingevolge artikel 36 van die Wet op Huweliksgoedere 88 van 1984" in 1988 (51) THRHR 109.

20 H C Roodt "Artikel 7(3) van die Egskeidingswet: talle vroue feitlik sonder remedie" in January 1988 De Rebus Procuratoriis 59.

21 See footnote 16 above.

Ek wil verder vermeld dat dit na my mening die teoreties suiwer manier sou wees om die kwessie eerder vanuit die hoek van die IPR te benader en deur wetgewing 'n meer korrekte karakterisering van die betrokke judisiële diskresie as 'n vermoënsgevolg van die huwelik voor te skryf. So 'n benadering sou veel meer in ooreenstemming met die Romeïns-Hollandse indelings van ons internasionale Huweliksgoederereg wees, sowel as met die funksionele rol wat die judisiële verdelingsdiskresie in die Angelsaksiese huwelikstelsels speel. Dit mag wees dat 'n wysiging van art 7(3) van die Wet op Egskeiding uit die hoek van wetsopstelling 'n eenvoudiger paadjie is, maar dan bly die basiese anomalie voortbestaan: omdat bv die Oostenrykse reg sý judisiële diskresie as huweliksgoederereg karakteriseer, doen ons dit ook en pas ons dus Oostenrykse reg toe; maar omdat die Engelse reg sý judisiële diskresie as egskeidingsreg karakteriseer, volg ons dit na en pas ons die Suid-Afrikaanse lex fori toe!

4. Discussion

A. Marriages contracted by South Africans after 1 November 1984

4.1 Before the commencement of the Matrimonial Property Act, 1984 the choice of property regime available to prospective spouses was, for all practical purposes, limited to the then existing form of marriage in community of property and the complete separation of estates in accordance with the standard form of antenuptial contract in vogue at the time. Each of these regimes had disadvantages that the above-mentioned Act aimed at removing. The accrual system was introduced to enable spouses to share in the wealth acquired during the marriage without subjecting them to the restrictions resulting from a system of community of property. It was, however, recognised that there will always be spouses who prefer a system of complete separation of property and this option is thus still available. It must, however, now be exercised in a positive manner, since the accrual system must expressly be excluded in the antenuptial contract.²² This implies that the legal consequences of the two systems will be weighed against each other and an informed choice made, in most cases after the consideration of legal advice.

22 Section 2 of the Matrimonial Property Act, 1984.

Because this choice was not available to spouses who married before 1 November 1984 it was (as noted by Hahlo²³) found necessary to introduce the remedy provided by section 7(3) of the Divorce Act, 1979. It was, however, not intended that this remedy be available to all spouses who chose a system of complete separation of property. The Commission has, however, in the light of the views expressed, inter alia, by Sinclair and Dillon, as mentioned above, considered whether a case can be made out for the extension of the provisions of section 7(3) of the Divorce Act, 1979, to marriages out of community of property entered into after 1 November 1984. In this regard the Commission wishes to put forward for comment the tentative amendment contained in the proposed section 7(3)(c) as reflected in the draft Bill hereunder.

B. Marriages governed by foreign law

4.2 Spouses whose marriage is out of community of property and without an accrual system by virtue of the law of the country governing their matrimonial property regime (as opposed to those married out of community of property by virtue of an antenuptial contract) cannot, upon divorce in South Africa, ask the court to use the discretion granted to it by section 7(3) of the Divorce Act, 1979.²⁴ In some cases they are also at a disadvantage compared with their former compatriots who can, upon divorce in their countries, rely on their courts' exercising a discretion similar to that exercised by South African courts in terms of the said section 7(3).

The Commission accordingly adopted the preliminary view that the discretion under section 7(3) of the Divorce Act, 1979, should be extended to those marriages, whose proprietary consequences are governed by the law of a foreign country in terms of which no provision is made stante matrimonio for the sharing of profit and loss or for accrual sharing in any form. The Commission would especially appreciate comment on this matter.

23 See paragraph 3.4 above.

24 Milbourn v Milbourn 1987 (3) SA 62 (W).

5. Preliminary recommendations

The Commission's preliminary recommendations, regarding which comment is invited, are embodied in the draft Bill hereunder.

6. Draft Bill

BILL

To amend the Divorce Act, 1979, so as to extend the discretion of the court in respect of the division of assets to all marriages that are out of community of property; and to provide for matters connected therewith.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

**Amendment of section 7 of Act 70 of 1979
as amended by section 36 of Act 88 of 1984
and section 2 of Act 3 of 1988.**

1. Section 7 of the Divorce Act, 1979, is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) A court granting a decree of divorce in respect of a marriage out of community of property -

- (a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or
- (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988; or
- (c) entered into after 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, where the court is satisfied that exceptional circumstances exist which justify an order for the distribution of the assets of the spouses between them on an equitable basis; or
- (d) entered into at any time to which the matrimonial property rules applicable are those of a foreign country and which rules do not provide for community of profit and loss or for accrual sharing in any form,

may, subject to the provisions of subsections (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."

Short title and commencement.

2. This Act shall be called the Divorce Amendment Act, 19.., and shall come into operation on a date fixed by the State President by proclamation in the Gazette.

