

Should Spousal Maintenance be Left Solely to Judge's Discretion?

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Abstract

Parties to a divorce often do not only have to deal with the divorce itself but also with complex economic repercussions which the law seems inadequate to deal with adequately. An assessment of legislation that governs spousal maintenance, in particular section 7 of the Divorce Act 70 of 1979 makes this inadequacy clear especially if such assessment is done against the backdrop of court decisions that sought to interpret and apply this section. This inadequacy is more pronounced in marriages entered into out of community of property and out of community of profit and loss, where the most likely disadvantaged spouse is the female spouse who might not have worked during the marriage and so has not accumulated assets of her own. Although section 7(3) of the Divorce Act has attempted to provide for her, the paper seeks to argue that there is no consistency in the court's decisions regarding maintenance awards. It is submitted further that the continued dependence of women on their husbands in marriage and after divorce undermines the economic strides made by women in general. Women should not only be seen to demand social and political equality but should also strive for economic independence and should be equally responsible for their economic survival after divorce.

Keywords: Divorce, spousal maintenance, judge's discretion, equality, South Africa

1. Introduction

The economic challenges arising out of divorce are very complex and the law seems to provide inadequate solutions. This is clear from the legislation governing maintenance particularly section 7 of the Divorce Act. (Divorce Act of 1979) This inadequacy is more pronounced in marriages entered into out of community of property and out of community of profit and loss, (Matrimonial Property Act of 1984) where the most likely disadvantaged spouse is the female spouse who might not have worked during the marriage and so had not accumulated assets of her own. Although the legislature has recognized her plight and section 7(3) of the Divorce Act (in terms of section 7(3) a spouse may ask the court to transfer the other spouse's assets, or such part of the other spouses's assets as the court may deem just, to him or her, if the spouses did not enter into an agreement concerning the division of their assets) and has attempted to address her position, the section has not minimized the challenges. However, there are various factors which the courts consider in awarding maintenance. (Section 7(2) of the Divorce Act list the factors as follows: the spouse's existing or prospective means; the spouse's respective earning capacities; the spouse's financial needs and obligations; each spouse's age; the duration of the marriage; the spouse's standard of living during the marriage; the conduct of each spouse in so far as it may be relevant to the breakdown of the marriage; any redistribution order in terms of Section 7(3) of

Divorce Act; and any factor which in the court's opinion should be taken into account). Although these factors are merely guidelines, the court can accord them different meanings in exercising their discretionary powers. This unbridled interpretative power of the provisions of section 7(2) (*ibid*) can be seen from the decisions of the courts in a number of cases, for example, in *Rousalis v Rousalis* (1980) where the judges expressed the view that women who are homemakers and who in addition contribute materially to their husband's estate deserve more maintenance. (At 450G-H.) This *dictum* was cited with approval by Baker J in *Kroon v Kroon* (1986) where the learned judge pointed out that no maintenance will be awarded to a divorced woman who can support herself. He expressed doubt whether the divorced wife in *Rousali's* case (*ibid*) was employable at all especially since she had not worked for nearly twenty years. The impression that one draws from the above cases is that section 7(2) does not contain the notion that proprietary interests can be earned through intangible contributions such as homemaking. The tone of the judgment of *Rousalis* (*ibid*) seems to reveal a special sympathy for women married out of community of property whose husbands amass a substantial separate estate *stante matrimoni* and find themselves entitled to lamentably little when the marriage breaks down.

It is submitted that this approach cannot be sustained as it conflicts with the emerging trend towards economic independence required of divorced women and women in general. Furthermore, this reasoning seems to contribute to the

lack of uniformity in the application of section 7(2), leading to possible uncertainties in the law. It is contended herein that this section should either be repealed or the scope of its operation be widened to accommodate more guidelines with a view to improve the work of the judges. The burning issue would also be whether the duty of support created by marriage should or should not continue after divorce and by extension, whether there is a need for maintenance in this day and age where marriage is seen by some as the union for 'time being' of two economically independent persons. (Van Zyl, 1980) It has to be borne in mind that today's perception of marriage has changed in that marriage is no longer seen as a dependency-producing relationship but as a partnership of equals which terminates upon divorce. (Sinclair, 1983) This article will give an overview of spousal maintenance in South African law, question the continuation of this duty after divorce and the court's discretion. It will also give a brief overview of the likely impact of the equality clause as contained in section 9 of the Constitution (Constitution of the Republic of South Africa, 1996) on section 7 of the Divorce Act. (Divorce Act of 1979) Emphasis will be placed on the economic equality of the parties and their individuality rather than their interdependence as members of a family group.

2. An Overview of Spousal Maintenance in South African Law

Once parties are legally married, a reciprocal duty of support arises between husband and wife. This duty is terminated by divorce. However, parties may enter into a settlement agreement regarding maintenance that the one spouse will pay to the other or the court granting a decree of divorce may make an order with regard to the payment of maintenance in favour of one of the parties. (Section 7(2) of the Divorce Act) Such an order can remain in force until death or remarriage. If maintenance is not agreed to or Court ordered at the time of divorce, it cannot be claimed at a later date. (Skelton, 2010) It is pivotal that the person claiming maintenance must establish a need to be supported, and the person against whom an order is sought must have the resources to provide such maintenance. It was held in the case of *AV v CV* (2011) that the awarding of spousal maintenance was in the discretion of a court and not a right *per se*. The same sentiments were expressed by the court in the case of *Botha v Botha* (2009). What is particularly interesting about this case is that the judgement confirms that, taking into account the so-called 'clean break' and constitutional principles, there is no automatic right to maintenance after divorce. Entitlement to maintenance must first be shown before a court can determine the quantum and duration thereof.

The court will consider a wide range of factors when it decides on awarding the other party maintenance, viz: (Section 7 (2) of the Divorce Act)

- The existing and prospective means of the parties
- The respective earning capacities of the parties
- The financial needs and obligations of the parties
- The age of each party
- The duration of the marriage
- The standard of living of the parties prior to the divorce
- Any order in terms of section 7(3) of the Divorce Act (redistribution order)
- Any other factor that the court may take into consideration

It is very clear that a court can only grant an order for maintenance after a consideration of the factors listed. However, the court is not obliged to consider all factors nor to grant an order as a party is not as of right entitled to maintenance. The court must judge each case on its merits.

There are basically three types of maintenance orders: (Skelton, *op cit* p. 134.)

- Rehabilitative maintenance- where a maintenance order applies for a specific period of time. This is normally awarded to a younger or middle-aged women who have for years devoted themselves to the upbringing of the children and who were full time involved in the household. The purpose of this type of maintenance is to enable these women to be trained or retrained for a job or a profession.
- Permanent maintenance- the court may award lifelong maintenance to a woman that is too old/elderly to find a job
- Token maintenance- token maintenance is an order for a minimal amount. The court will make such an order if there is no reason to grant maintenance at the time of the divorce, but it foresees that the spouse may in future need maintenance. The court would then be able to increase the amount in future should the need arise.

3. Implication of the Divorce Act on the Financial Position of the Parties

The first fundamental proposition is that on divorce the courts are bound to give effect to the consequences of a marriage that automatically flows from the proprietary system chosen by the parties. (Sinclair *op cit* p. 469) There are effectively two types of marriages and both cater for the extreme: Marriage in community of property which involves the sharing of the joint state and marriage out of community of property by antenuptial contract in which there is no sharing involved and the wife enjoys full legal status. (*ibid*) Section 9 of the Divorce Act empowers the court to order a spouse to forfeit wholly, or in part, the financial benefits derived from the marriage. (Sinclair *ibid* p. 470) The reason for the forfeiture is, in essence, matrimonial misconduct. For example, a badly behaved wife may be compelled to forfeit any part of the joint estate not contributed by her. In a marriage out of community of property, she may be compelled to forfeit a marriage settlement contained in an antenuptial contract. (*ibid*) Apart from the forfeiture of benefits principle, the other device which can be employed to modify the natural results of dissolution of a marriage is the maintenance provision in the Divorce Act. (Divorce Act of 1979) Although there is no statutory right to maintenance by reason of marriage and no act proclaims that maintenance in any amount for any period will be ordered by reason solely of the marriage and the inability of one party to maintain the standard of living to which he or she has become accustomed, Section 7(2) permits the court to order one spouse to support the other after divorce. (*ibid*) However, it has to be acknowledged that this provision was not sufficient to bring solutions to all the problems arising from the financial consequences of a particular propriety system in the sense that the language of s 7(2) is clearly discretionary and the spouse seeking an award has no right as such. (Schafer Family Law Service First binder, under C26 .21) The discretionary power of the court to make an award includes the power to make no award at all. (*ibid*) Although Section 7(2) of the Act can and should be used by the courts to ensure fairness between the parties, The contrary has been achieved in some of the cases, for example, in the case of *Rousalis v Rousalis*, (*supra*) after 13 years of a marriage out of community of property the wife sued her husband for divorce on the ground of irretrievable breakdown of the marriage. (Section 4 of the Divorce Act) During the marriage, the parties had carried on a business in which the wife had worked as a partner. The business had been sold and the proceeds of R400 000 were deposited to a bank account in South Africa in the joint names of the spouses and their ten year old son of the marriage. The wife claimed two-thirds of the R400 000, as being her share and that of her child.

This part of her action failed because the court held that the Divorce Act (*ibid*) gave it jurisdiction to canvass matrimonial issues but not to resolve partnership disputes. That is to say, the proceeds of the sale of business in which the spouses had worked jointly, as husband and wife, could not be divided in accordance with the law of marriage, but only according to contracted or commercial principles. This decision implies that traditional marriage out of community of property really does mean that from the marriage itself no sharing arises. As a marriage out of community of property, it was held in this case, that the 'patrimonial benefits' that are subject to forfeiture are limited to formal marriage settlements contained in the antenuptial contract. In general, section 9 of the Divorce Act has provoked comments on the distribution of property.

It becomes important to consider the maintenance provision in section 7(2) of the Act. (*ibid*) This section featured prominently in the *Rousalis's* case (*supra*) and Van der Heever J, after affirming that section 7(2) provided the court with a wide discretion when awarding maintenance, said that a wife of long standing who has assisted her husband materially in building up his separate estate would be entitled to far more by way of maintenance than one who did no more for a few years than share his bed and keep his house. (*ibid* p. 450) This decision was followed by *Kroon v Kroon* (1986) the court found that, having regard to the duration of the marriage, that is, 20 years, during which the wife did not work in the open market but fulfilled the role of housewife and mother, she should be awarded maintenance. However, the court stated that it does not distribute maintenance with any degree of liberality to women who can and ought to work after divorce. (at 632F-G) The tone of the judgments seems to reveal a judicial sympathy for women married out of community of property whose husbands amassed substantial separate estates *stante matrimonio* and who find themselves entitled to little when the marriage breaks down. (Sinclair *op cit* p. 474) In particular, the obvious inclination of the learned judge to reward a woman who has been not only a homemaker but also an earner is highly significant. It is also clear from the judgment in *Rousalis* case (*supra*) that justice Van der Heever wished to recognize the wife's entitlement to some portion of her husband's estate as compensation for her dual role as a homemaker and an earner.

However, section 7(2) does not contain the notion that proprietary interests can be earned through intangible contribution such as homemaking. (*ibid*) It therefore, becomes difficult to attach a monetary value to a wife who has been exclusively preoccupied with the caring for the home and family. It is submitted that in the circumstances the courts should award an order for rehabilitative maintenance as of right. The purpose of a rehabilitative maintenance order is to eliminate the economic disadvantages a spouse has to suffer as a result of a divorce. In particular, it envisages that a woman who during the marriage has possibly done little or no work outside her home, should be paid maintenance while

she trains or retrains for employment.

This view is shared by Berman J in the case of *Grasso v Grasso* (1987) where he expressed doubts as to whether in South Africa a divorced wife who has not worked during the marriage is entitled to no more than rehabilitative maintenance. He further said that South Africa is a unique society in which the non-working wife is the norm in upper middle class and wealthy families and that it is certainly in the best interests of minor children that the divorced wife should not work. It is submitted that this approach is outdated as more women have joined the workforce, children are raised by nannies and the business of nursery schools is booming.

Although an order for rehabilitative maintenance is supported, it is submitted that the views expressed by Berman J cannot be sustained in the today's economy. Furthermore, the majority of South Africans are black and poor and this population is not exempt from the astronomical divorce rate and concomitant financial implications. It is submitted that even though an order of rehabilitative maintenance can be considered, there is a need to move away from the idea that marriage ought to provide a woman with a bread-ticket for life. (*ibid*) Women ought to start working and make a living for themselves and their families. Their contributions in general will impact positively on the household costs. It is also in the best interest of children that their parents contribute equally financially and otherwise in their upbringing. If the wife is not disabled or sick upon divorce there is no reason why they should be supported for life.

Closely allied to the concept of rehabilitative maintenance is that of 'human capital' appreciation and depreciation. Each spouse's earning capacity is seen to be an asset of the marriage. Its value increases through the attainment of qualification, working experience and on-the-job training. Thus, in terms of this theory, one spouse who has worked to put the other one through university must be compensated. (Van Zyl *op cit* p. 26) However, the court in *Kroon v Kroon* (1986) rejected the idea that a notional earning capacity should be attributed to the wife. Based on the facts, the circumstances showed that the wife was not in a position to be trained especially since she had not worked for nearly twenty years. The court explained that bridegrooms must take their brides as they find them and they are not entitled to expect a Court to attribute a notional earning capacity to those wives upon divorce. Certainly women in general should have the earning capacity including housewives. Husbands should therefore not be burdened with maintenance after a divorce where a person made a choice of becoming a housewife. It is really up to an individual to decide what they want to become even when they are married.

From the above discussion it is clear that a spouse that was economically inactive during the marriage, but made a substantial direct or indirect contribution to the growth of the other spouse's estate will have no claim on the assets belonging to the other spouse. With the incorporation of the accrual system in 1984 the Matrimonial Property Act (*supra*) endeavored to reduce the occurrence of this unfortunate situation as far as possible. To mitigate the predicament of spouses still married under the old system, the legislature placed sections 7(3) to 7(6) on the statute book. (Robinson. *et al* 2002) The Appellate Division has had the opportunity to look at the question of the redistribution orders in terms of section 7(3) of the Divorce Act in the case of *Beaumont v Beaumont* (1981) In this case the appellant (husband) and the respondent (wife) were married in 1964. Before entering into their marriage, they entered into an antenuptial contract excluding community of property and of profit and loss. At the time of entering into the marriage, the spouses had no assets. Twenty years later, the appellant sued the respondent for divorce. At that stage, the appellant had an estate of R450 000 and the respondent had only R10 000. During the subsistence of the marriage, the respondent had kept house for her husband and children and fulfilled the duties of a wife and a mother. She also assisted her husband in his business without remuneration. When the appellant instituted divorce proceedings against the respondent she counterclaimed redistribution of assets in terms of section 7(3). (Divorce Act of 1979) The order was granted and the appellant appealed against the order. The court in arriving at its decision applied the provisions of subsection 3 which grant the court the power under certain circumstances to order a transfer of assets of one spouse to the other. The purpose of this provision is to recognize the right of a spouse upon divorce to claim an adjustment of a disparity between the respective assets of the spouses, which is incommensurate with their respective contributions during the subsistence of the marriage to the maintenance or increase of the estate of the one or the other. In terms of subsection 4, (section 7) what is required is that the claimant for a redistribution order must have:

'Contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by rendering of services or the saving of expenses which would otherwise have been incurred, or in any manner.'

The court in *Beaumont's* case (*ibid*) interpreted this subsection (*ibid*) in such a way that any contribution which a spouse makes is sufficient to be considered as a contribution in terms of the section. Even if, for example, the wife only performed her ordinary duties of looking after the home (*ibid* p. 997) and caring for the family, this will constitute a contribution. This is fair because it is effortless to estimate or quantify a positive act unlike a negative one. However, it is not straightforward to estimate an indirect contribution in monetary terms. The courts may adopt a conservative approach

and sometimes not. This would certainly depend on who sits on the bench. For example, it was impossible for the court in the case of *Kritzenger v Kritzenger* (1989) to put a 'figure' on the defendant's sacrifice of not settling overseas and thus forfeiting promotion. It was also impossible to put a price on her blameworthiness in bringing their marriage to an end. What the court actually required was a casual connection between the applicant's conduct and the growth or maintenance of the other spouse's estate in determining the nature of the contribution. (At 88B-C) The court further stated in this case that normally, only a positive act would constitute a contribution which implies that an indirect contribution would not be regarded as a contribution. However, the Appellate Division in *Katz v Katz* (1989) made it quite clear that it is not a prerequisite that a contribution must be of such nature that monetary value could be placed upon it. (*ibid*) This dictum contradicted *Kritzenger's* case (*supra*) which appears to have required that a monetary value be placed upon the contribution. In *Badenhorst v Badenhorst* (2005) the issues before the trial court were the appellant's claim for maintenance and the redistribution order sought in terms of section 7(3) of the Act. The issues in the appeal was whether, when making a redistribution order in terms of section 7(3) of the Act, the assets of an *inter vivos* discretionary trust created during the marriage must be taken into account. The judge in the court a quo held that the assets of the trust were to be disregarded when deciding what redistribution order to make. He considered that the parties had started with a clean slate, that each had contributed to the growth in the other's estate and concluded that although they were married out of community of property, the way they grew their respective estates was as though they were married in community of property. The respondent he held, had benefitted more from their joint labour as his nett value was double that of the appellants. To bring the parties on 'equal par,' he ordered the respondent to transfer to the appellant the sum of R400 000 thereby leaving him with an estate with a value of R1 492 093 00 and her with one worth R1 378 320, 00. On appeal the court held that the trial judge erred in excluding the trust assets and disagreed with the trial judge's finding that the parties be placed on an equal footing. In determining what a just and equitable redistribution would be, due regard was given to factors referred to in section 7(5). For example, the respondent brought into the marriage from its inception a working farm complete with livestock, machinery, vehicles and everything else necessary for a successful farm. The farm was originally the sole source of the parties' income and is the origin of the funds which enabled them and the Jubli trust to build up their relatively substantial estates. Recognition was also given to the appellant's contribution to the maintenance and increase of the respondent's estate by ordering him to pay to the appellant the sum of R1 250 000, 00. This amount was arrived at by taking the total of the nett asset value of the parties' estates and that of the trust, calculating a percentage which was considered just and equitable for the appellant's contribution and deducting what she already stands possessed of. In *Bezuidenhout v Bezuidenhout* (2005) the parties were married out of community of property in 1975. The major asset was the business of the husband in which both parties were involved. After 25 years of marriage the respondent (the wife) instituted divorce proceedings against the appellant (the husband) in the Cape High Court. Apart from a decree of divorce, the only substantive relief she sought was an order for redistribution of their assets under s7 (3) of the Divorce Act on the basis that their combined assets be divided equally. Pincus AJ ordered an equal division of the net combined assets of the parties. However, this decision was reversed by the appeal court which gave due regard to the fact that although the respondent never assumed the traditional role, she was the financial director of the company and she spent almost all her time in the business. Therefore, her additional contributions as a mother homemaker must be afforded due weight. In dealing with the husband's contributions, the court found that it was his contribution which caused the business to be exceptionally successful. The court accordingly found that Pincus AJ had misdirected himself in that his conclusion that the contributions of the parties were equal could not be justified. In all the circumstances, the court found that the just redistribution contemplated in s 7(3) would be achieved if the husband was ordered to pay the wife the sum of R4, 5m which resulted in a division of the combined net assets of the parties in a split of 60: 40% in favour of the husband. The appeal succeeded and the judgment in favour of the wife was reduced from R7,7m to R4,5m. It is submitted that the court's reasoning that the legislature does not allow parties to treat all marriages upon divorce as if they were in community of property and without antenuptial contract is fully supported. In *Buttner v Buttner* (2006) the parties were married in 1977 and their marriage was governed by an antenuptial contract excluding community of property, community of property of profit and loss and thus, by implication, accrual sharing in any form, between them. In April 2003, the appellant husband instituted divorce proceedings against the respondent wife in the Cape High Court. He claimed, inter alia, a redistribution order in terms of s 7(3) of the Divorce Act in respect of the respondent's member's interest in a property-owning close corporation known as Wanderer Night 20 CC. At the time of the divorce their net value, consisting mainly of the net proceeds of the sale of a house, amounted to about R1 004 000. The Court determined on the facts and history of the parties and their modus operandi during the marriage, that they would have shared equally and ordered a redistribution of the amount so that each party received a half share (50/50). (Skelton. *op cit* p. 164) As the respondent only received R284 000 while the appellant retained R720 000, the Court ordered that the respondent be paid R218 000. (*ibid*) The Court seems to have followed (*Child v Childs*, 2003) where the

court stated that there is no place for discrimination between husband and wife in their respective roles. (Skelton. *supra* p. 163) If in their different spheres, husband and wife contributed equally to the family, it does not matter in principle which of them earned the money and built up the assets. There is no bias in favour of the money-earner and against the homemaker and child carer. (*ibid*) It is submitted that it is clear therefore, that the Court in *Buttner (supra)* appears to have deviated from its previous decisions in *Beaumont (supra)* and *Kritzinger, (supra)* and to accept that it may be appropriate in particular circumstances to begin with a starting point of equal sharing. (*ibid*)

In *Jordaan v Jordaan* (2001) the judgement was to the same effect. The court held that one of the factors that a court will consider in exercising its discretion was whether the trust is merely an alter ego. If the trust is proved to be the alter ego of a party, the trust assets are to be included in the determination of the means of such a party. There must also be proof that there was *de facto* control over the trust assets.

Another aspect which the court will look at is conduct, that is, conduct which contributed to the breakdown of the marriage, in determining the redistribution of assets. It was held in the *Beaumont's* case that a conservative approach to misconduct should not be considered 'where there is no conspicuous disparity between the conduct of one party and that of the other.' (*supra*) Conduct was also taken into account by the court in the case of *Kritzinger, (supra)* however, such conduct was not regarded as a significant factor. In *Redgard v Redgard* (1989) it was held that where the parties have no assets, no order of distribution could be made although an order for the payment of future maintenance could be made in terms of section 7(2) if the circumstances justify such order.

Having outlined the effects of section 7, the question now is whether one can reconcile this section with section 9 of the Constitution. (Constitution of the Republic of South Africa, 1996) Equality is a fundamental principle of our law and it is important in the discussion on maintenance of spouses upon divorce because equality between men and women and the people of all races is guaranteed. Subsections (3) and (4) provide that neither the state nor any other person may discriminate unfairly against any other person on the basis of any one or more of the following grounds:

'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

There can be no doubt that the guarantee of equality lies at the heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. Equality is fundamental to the nature and the content of the Bill of Rights and to the maintenance and propaganda of human rights in a democratic body politic, particularly in an acutely divided society. (Devenish. 1999) Its importance lies in its first listing in chapter 2, thereby giving it *de facto* a 'position of pre-eminence.' (*ibid* at 35) However, equality notwithstanding that it is symbolically the most important right in the Constitution, is a highly problematic concept riddled with all kinds of difficulties. (*Harksen v Lane, 1998*)

It is submitted that an interpretation of this section should be that equality of responsibility is also entrenched in the Constitution. Women should not only be seen to demand social and political equality but they should also move in the direction of achieving economic independence and should be equally responsible for their economic survival after divorce. Many writers consider the payment of maintenance to divorced spouses to be psychologically undesirable in that it encourages or reinforces attitudes of dependency. (Van Zyl *op cit* p. 73) In the circumstances, the rationale for burdening husbands with a duty for support should be questioned. Women should be aware of a shift towards equality and away from marriage as a dependency-producing relationship.

4. The Court's Discretion

However, there is always the problem relating to the discretion of the courts in awarding such an order. It is submitted that the existence of judicial power to vary the financial consequences that flow naturally from a particular matrimonial propriety regime creates a degree of uncertainty. However, if the guidelines and principles upon which the discretionary decision must be based are realistic and workable, the apparent disadvantage of uncertainty may be outweighed by the fact that the preservation by the court of the 'outmost elasticity' to deal with each case on its own facts will be conducive to a more equitable resolution of family conflicts. It is true that guidelines will stifle the development of our law but we should not reject them outright as it was done by the Appellate Division in *Beaumont's* case. (*supra*) There should be at least some framework upon which the court can rely. The ones that are provided for in subsection 5 are not sufficient. Such guidelines should not be regarded as hard and fast rules. It must be noted that our courts are administered by human beings and human beings have the tendency of abusing their powers, hence the need for checks and balances. The exercise of one's discretion is a very difficult task as indicated above. Although judicial officers are adequately trained they are easily influenced. Some of them would be sympathetic towards one party to the case for various reasons and some would not even care and just grant or refuse the order.

Indeed although there are guidelines provided for in subsection 8, (section 7 of the Divorce Act of 1979) courts

have been influenced by various factors in the cases that have been surveyed for this article. For example, future employment of the female spouse, the trend in this regard seems to be that a wife who has been of long-standing, faithful and a good mother, has the chances of receiving a generous maintenance award in terms of section 7(2) or equitable division of the property under section 7(3). This prevents her from being forced unwillingly onto the labour market. In *Beaumont's* case (*supra*) Kriegler J drew a link between Mary, the chaste domestic wife and someone who is unsuited to positions of authority. The inference that can be drawn from this distinction is that judge Kriegler was aware of Mrs Beaumont's vulnerability in the labour market. Unfortunately, judicial recognition of this tends to occur exclusively where the divorcing woman is middle-class and white.

5. The Concept of a Clean Break and the Equality Clause

A "clean break" is an English concept which implies that upon divorce the court should only make a redistribution order and no maintenance order. Although in the United Kingdom they have accepted this concept and removed the "continuing obligation" from the statute book, it is acknowledged that a clean break is possible only in exceptional circumstances. (English Matrimonial Property Act of 1984). For example, in the case of a brief childless marriage where the wife had an income or earning capacity and secondly in the case of a long marriage where there was enough capital to divide. It was contended by Botha JA in the case of *Beaumont (supra)* that he did not consider the concept to be foreign to our law, and indicated that our courts will exercise their discretionary powers in imposing a 'clean break' only when circumstances permitted it. According to Botha JA this could be achieved by making only a redistribution order and no maintenance order.

It was further held by the court that the "clean break" principle could not be used in all the divorce actions and suggested that it should only be used if the spouse's financial position was such that both of them would have sufficient means to make a living. This approach was also adopted by the court in the case of *Katz v Katz (supra)* and the case of *Kretzinger (supra)*.

It is contended that our courts should try and use the "clean break" concept in all divorce matters as this will foster the concept of equality between the spouses. No adult should be held responsible for the maintenance of another. This approach would also encourage women not to marry for security and also not to consider marriage as a "meal ticket" for life. It is reasonable to agree with Botha JA when he suggests that a "clean break" could be achieved by making only a redistribution order and no maintenance order. However, there is always the problem relating to the discretion of the courts in awarding such an order.

6. Conclusion

It is submitted that the duty of support between the spouses created by marriage should terminate on divorce and each party should be responsible for their own maintenance. The parties to a marriage should strive for economic equality and independence. One cannot choose to be equal and dependent at the same time. The continued dependence of women on their husbands in marriage and after divorce undermines the economic strides made by women in general. Many of today's women are educated, heads of their households, powerful and hold positions of authority. Therefore, they cannot continue to consider marriage and the consequences of divorce as their 'meal tickets'. This tendency is unacceptable as it compromise the dignity and prevents women from reaching their full potential. It is submitted that the practice must be discouraged in favour of women's economic independence.

The ongoing maintenance by husbands of their former wives brings about economic hardship in their lives because they are never free from these continuing financial obligations. These obligations also impact on the individual's freedom to remarry. These husbands are faced with the burden of maintaining a new wife and an ex-wife plus children from the previous marriage. With the current economic climate this obligation becomes a challenge for the husbands more so that society does not expect husbands to be claiming maintenance from their wives.

Resentments also arise if the wife was responsible for the breakdown of the marriage. (Sinclair *op cit*). It is, therefore, not far-fetched that such resentments can lead to domestic violence. However, this does not imply that wives do not experience these hardships. By and large, emphasis has been placed on their husbands because they have been seen by society as bread-winners in the past. Secondly, subsequent spouses are also forced to accept the reduced standard of living because of the commitments of husbands to their former wives. (*ibid*) They allege that they are often forced to work while former wives remain at home. (*ibid*)

While the concept of a clean break is supported herein as ideal in dealing with spousal maintenance, the movement thereto has to accommodate the differentiated levels and rate of economic development and empowerment among women especially black women. That would entail consideration of each individual case on its merits but within

the general framework of spousal maintenance being the exception than the norm. This can be achieved easily by enhancing the move from permanent maintenance awards to property adjustments on divorce. However, married women should begin to realize that they cannot rely on property adjustments upon divorce but should participate positively in the acquisition of property and investments during the marriage. Our courts are increasingly expecting women to take up paid employment after divorce and have granted employable women rehabilitative maintenance only. (*V v V* 1998; *Joubert v Joubert*, 2004) Society should also encourage women to take up employment even whilst they are still married. This would entrench economic equality and independence of the spouses. To safeguard their financial position at the time of divorce, and to avoid this gender trap, it is important that women make correct long-term financial decisions, before and during their marriage. (Carnelley, M. & Bhamjee, S. (2012))

It will also be reasonable to follow the American example of not regarding marriage as status but as a contract and at the same time acknowledging the fact that, the socio-economic realities of South Africans, especially women do not compare favourably with their western counterparts. The American system gives wider judicial acceptance to premarital agreements reflecting financial and personal expectations. (Van Zyl, 1989) It is submitted that this would be a better option to consider in addition to a redistribution order as envisaged by section 7(3) of the Divorce Act. Again if the American option is adopted without consideration of the redistribution order, then computation of indirect contribution would not arise because parties would have indicated clearly their terms in prenuptial agreements.

References

Books

- Devenish, G. E. (1999). A Commentary on South African Constitution Butterworths Durban
Skelton, A. (ed). *et al* (2010) Family law in South Africa (1st ed) Oxford University Press
Hahlo, H.R. (1985) South African law of Husband and Wife (5th ed) Juta, Cape Town
Robinson, J.A., Human, S., Boshoff, A. & Smith B.S. (2008) (3rd ed) Printing things (Pty) Ltd

Journal articles

- Carnelley, M. & Bhamjee, S. (2012) Protecting a wife financially at the time of divorce- a comparison between South African civil-law and Islamic law, *OBITER*, Vol 33 Issue 3, 482-502.
Heaton, J. (2005). Striving for substantive gender equality in family law: Selected Issues *South African Journal on Human Rights* Issue 4 547-574
Sinclair, J. (1983). Marriage: Is it still a commitment for life entailing a lifelong duty of support? *ACTA JURIDICA*
Sinclair, J. (1981). Financial Provision on Divorce: Need, compensation or entitlement? *SALJ*
Van Zyl, L. (1980). Post-divorce Spousal Support, Theory and Practice *De Jure*

Case law

- Av v Cv* 2011 (6) SA 189 (KZP)
Badenhorst v Badenhorst 2005 (2) SA 253 (C)
Beaumont v Beaumont 1987 (1) SA 967 (A)
Bezuidenhout v Bezuidenhout 2005 (2) SA 187 (SCA)
Botha v Botha 2009 (3) SA 89 (W)
Buttner v Buttner 2006 (3) SA 23 (SCA)
Child v Childs 2003 (3) SA 133 (C)
Harksen v Lane 1998 (1) SA 300 (C)
Jordaan v Jordaan 2001 (3) SA 288 (C)
Joubert v Joubert 2004 (1) All SA 426 (C)
Katz v Katz 1989 (1) SA 1 (A)
Kritzenger v Kritzenger 1989 (1) SA 67 (A)
Kroon v Kroon 1986 (4) SA 616 (EC)
Redgard v Redgard 1989 (1) SA 113 (E)
Rousalis v Rousalis 1980 (3) SA 446 (C)
V v V 1998 (4) SA 169 (C)

Legislation

South Africa

- Constitution of the Republic of South Africa, 1996
Divorce Act 70 of 1979
Maintenance Act 99 of 1998
Matrimonial Property Act 84 of 1988

UK

- English Matrimonial Property Act of 1984