REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 4073/2009

In the matter between:

ZELDA VON SCHAUROTH **Respondent/Plaintiff**

and

ERICH DIETER FRIEDERICH VON SCHAUROTH **Excipient/Defendant**

Neutral citation: *Von Schauroth v Von Schauroth* (I 4073-2009) [2013] NAHCMD 257 (16 September 2013)

Coram: VAN NIEKERK J

Heard: 23 April 2012; 30 August 2013; 13 September 2013

Delivered: 16 September 2013

Summary:

The parties were married at Durban, South Africa, on 7 January 1984 out of community of property by way of an ante-nuptial contract ('ANC'). The ANC was executed on 6 January 1984 at Pietermaritzburg, South Africa, and registered in terms of Chapter VII of the Deeds Registries Act, 1937 (Act 47 of 1937), as applicable in South Africa. The ANC stipulates, *inter alia*, that there shall, after their marriage, be no community of property or of profit and loss between them. It also states in clause (8) that the parties agree that, should any legislation by the Government of the Republic of South Africa come into force by which the so-called 'accrual system' shall become applicable to the estates of the parties, then such system cannot be enforced by the parties against one another.

In an action in which the first claim is for divorce, the plaintiff sought an order for redistribution of the defendant's assets in terms of section 7(3) of the Divorce Act, 70 of 1979 of South Africa. The plaintiff alleged (i) that at the time of the conclusion of the antenuptial contract both parties were domiciled in the Republic of South Africa; and (ii) that the proprietary rights of their marriage are, according to Namibian private international law, determined in accordance with the laws of South Africa; and (iii) therefore, this Court has the same power as a competent court in South Africa to issue an order dealing with the proprietary consequences of the marriage and to apply section 7(3)(a) of the SA Divorce Act.

The defendant raised an exception against the first claim on five grounds. The first ground was that the private international law rule that the proprietary consequences of a marriage are governed by the law of the husband's domicile at the time of the marriage does not apply where the parties have entered into an antenuptial contract and therefore section 7(3) of the RSA Divorcee Act is not available to the plaintiff.

Held, the private international law rule is that, in the absence of an antenuptial contract expressing a contrary intention, the patrimonial consequences of a marriage must be determined by the *lex domicilii matrimonii* and therefore the exception is not good.

The second ground for the exception was based on the contention that the parties agreed in the antenuptial contract that section 7(3) of the RSA Divorce Act would not apply to their marriage.

Held, the redistribution relief provided for by section 7(3) does not fall within the exclusion agreed upon by the parties.

The second ground for the exception further is that there is such a deep rooted friction between the fault based divorce law of Namibia and the absence of a fault requirement in South African divorce law that the Court should not apply South African law as this would be against public policy, justice and convenience.

Held, the mere fact that a foreign statue embodies a concept not recognized by our law does not in itself constitute a reason for our courts to refuse to apply that statute. A foreign rule should be rejected on grounds of public policy only if it flies in the face of some deep-rooted conception of good morals or if there is something fundamentally offensive about the application of the foreign law.

Held, further, the introduction of the RSA Divorce Act and the Matrimonial Property Act in South Africa has brought radical reforms to the laws of that country, while Namibian laws has, except for some changes, remained stuck in antiquity. There is nothing so repugnant in the no-fault divorce laws of South Africa as to preclude their application, in so far as their application is indicated by any of the relevant choice of law rules applicable. I further hold that, although Namibian law does not have an equivalent law allowing for a redistribution order similar in nature to that provided by section 7(3), there is likewise no public policy consideration tending to compel this Court not to apply section 7(3). The very purpose of section 7(3) is to effect justice between parties who have elected to enter into antenuptial contracts excluding community of property and of profit and loss as well as the accrual system. It would be ludicrous to state that public policy considerations require this Court not to apply a measure which is manifestly designed to effect justice.

As to the argument raised that the Namibian Court is not a ‘court’ as defined in the RSA Divorce Act; as a foreign court it therefore does not have jurisdiction with respect to a divorce action under that Act; and is therefore not ‘a court granting a decree of divorce’ as contemplated in section7(3).

Held, these jurisdictional matters applicable in the hierarchy of domestic courts are not of consequence in the working of the principles of private international law. The foreign court applies the law which the domestic court, having jurisdiction, would have applied. In so doing, the foreign court does not purport to be, nor is it, the domestic court.

The third ground for the exception against claim 1 was that section 7(3) of the RSA Divorce Act regulates the proprietary consequences of divorce rather than the proprietary consequences of the marriage and as such the *lex domicilii matrimonii* does not apply.

Held, this exception raises the issue of characterisation in private international i.e. how should the redistribution remedy in section 7(3) of the RSA Divorce Act be characterised –

does it relate to the proprietary consequences of the marriage or is it a divorce issue? Accepting that it is a legal rule or norm that must be classified, an obvious problem arises in that Namibian law does not have a provision or legal institution which is equivalent to the redistribution remedy provided for in section 7(3) of the RSA Divorce Act. The three stage *via media* approach should be adopted, which includes a provisional characterization taking the only other potential *lex causae*, namely South African law, into account. However, for this Court to do so, it should be provided with expert evidence of the juridical nature of the redistribution rule and, if possible, its characterization by domestic South African law. In Namibia the content of foreign law is a question of fact which must be proved by expert evidence. The particulars of claim clearly imply that the redistribution remedy relates to the patrimonial consequences of the marriage. Whether this is indeed so under South African law is a question of fact, which must be proved by expert evidence (unless the parties come to some other agreement). If such evidence can be led, a cause of action is disclosed, which means that the particulars of claim are not excipiable

The fourth ground for the exception against claim 1 is based on the contention that section 6 of the Matrimonial Causes Jurisdiction Act, 22 of 1939, provides that the mutual property rights of the spouses shall be determined in accordance with the practice and the law of the court in whose jurisdiction the defendant is domiciled. As the defendant is domiciled in Namibia, the RSA Divorce Act does not find application.

Held, section 6 of Act 22 of 1939 does not find application since Namibian Independence when the High Court of Namibia was no longer a division of the Supreme Court of South Africa.

The fifth ground for the exception against claim 1 is in essence that the plaintiff, by invoking section 7(3) of the RSA Divorce Act in the face of an antenuptial contract which excluded application of the accrual system, is in effect unilaterally revoking the terms of the antenuptial contract, which is not permissible in law.

Held, the exclusion of the accrual system in an antenuptial contract does not mean that section 7(3) cannot be invoked. On the contrary, section 7(3) may be only be invoked in circumstances where the marriage was 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, Furthermore, the plaintiff's claim is not based on the accrual system, it is based on section 7(3). The fact that section 7(3) is introduced into the RSA Divorce Act by section 36(b) of the Matrimonial Property Act, which deals with the accrual system is neither here nor there.

In the alternative to claim 1 the plaintiff alleged the existence of a universal partnership between the spouses in relation to certain shares in a company and in two businesses and that there was an agreement between the parties that the partnership assets would be divided equally upon termination of the partnership. The defendant raised an exception on the basis that the existence of the universal partnership amounts to an alteration of the antenuptial contract, which is impermissible.

Held, it is trite that spouses married out if community of property and of profit and loss may enter into partial or universal partnership with each other. The defendant's contention that the parties hold shares in the company in unequal proportions is based on information in claim 2 which has since been withdrawn. The particulars of claim make the allegation that

the parties are shareholders; that the shares are part of the partnership assets; and that there was a tacit agreement that the assets and profits would be divided equally upon dissolution. The plaintiff claims one half of the 'nett assets' of the partnership assets. This is a short way of saying that what is claimed is one half of the total value of the assets after liabilities, etc have been taken into account. These allegations are sufficient in my view to sustain the plaintiff's claim. It would depend on the evidence presented whether the shares are indeed assets of the partnership. The pleading is therefore not excipiable. A further reason to dismiss the exception is that it really amounts to a complaint that the claim constitutes a *plus petitio.*

The defendant raised an exception against the claim for divorce because that the particulars of claim do not allege that the plaintiff left the defendant as a result of the defendant's unlawful conduct. it is not necessary to allege or prove that the plaintiff left the common home as such. Desertion may take place even though the parties are still living under one roof. The exception was dismissed as there were sufficient allegations made to sustain a cause of action on constructive desertion.

ORDER

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1. All the exceptions are dismissed.
2. The application to strike is refused.
3. The defendant shall bear the costs of the plaintiff, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

VAN NIEKERK, J:

[1] The parties were married at Durban, South Africa, on 7 January 1984 out of community of property by way of an ante-nuptial contract ('ANC'). The ANC was executed on 6 January 1984 at Pietermaritzburg, South Africa, and registered in terms of Chapter VII of the Deeds Registries Act, 1937 (Act 47 of 1937), as applicable in South Africa. The ANC stipulates, *inter alia*, that there shall, after their marriage, be no community of property or of profit and loss between them. It also states in clause (8) that the parties agree that, should any legislation by the Government of the Republic of South Africa come into force by which the so-called 'accrual system' shall become applicable to the estates of the parties, then such system cannot be enforced by the parties against one another.

[2] In this action the plaintiff delivered particulars of claim (as further amended) dated 27 September 2011. The plaintiff's first claim is for divorce and ancillary relief. In respect of claim 1 there is an alternative claim based on allegations of a universal partnership between the parties. Her second claim was for declaratory relief in respect of the ownership of certain shares. Her third to ninth claims are in respect of monies lent and advanced.

[3] The defendant raises an exception against the first claim on five grounds and a second exception against the alternative claim. A further exception was raised and argued against the second claim, which claim was subsequently withdrawn with leave of the Court. Another exception and application to strike are raised against the alleged grounds for divorce.

[4] The defendant prays that (a) the exceptions be upheld and that sub-paragraph 14.2 of the plaintiff's particulars of claim be struck; and (b) the plaintiff's amended particulars of claim (apart from the claims for moneys lent and advanced) (as further amended) be struck out and the plaintiff's claim be dismissed with costs.

<u>The first ground of the exception against claim 1</u>

[5] The first claim is for divorce and ancillary relief. The ancillary relief includes the following prayer:

> 'An order directing the Defendant to transfer one half of his assets, alternatively the value thereof, to the Plaintiff. Alternatively, an order appointing a receiver with authority to realize the whole of the Defendant's assets, to pay the liabilities of the Defendant, to prepare a final liquidation and

distribution account, and thereafter to pay to the Plaintiff one half of the nett proceeds of the Defendant's assets.'

[6] In praying for this order the plaintiff relies on the provisions of section 7(3)(a) of the Divorce Act, 1979 (Act 70 of 1979), of the Republic of South Africa ("the SA Divorce Act"). The plaintiff further alleges (i) that at the time of the conclusion of the antenuptial contract both parties were domiciled in the Republic of South Africa; and (ii) that the proprietary rights of their marriage are, according to Namibian private international law, determined in accordance with the laws of South Africa; and (iii) therefore, this Court has the same power as a competent court in South Africa to issue an order dealing with the proprietary consequences of the marriage and to apply section 7(3)(a) of the SA Divorce Act. The plaintiff makes copious factual allegations in support of her claim for such an order.

[7] The relevant provisions of section 7(3)(a) read as follows:

> '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;
> (b) .....
>
> 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.'

[8] The exception raised against this claim is as follows:

> '**First ground for exception**
>
> 5. The common law rule, in terms of Private International Law, is that where the spouses have not executed an ante-nuptial contract, the proprietary consequences of their marriage are governed by the husband's *lex domicilii* at the time of marriage.
>
> 6. The plaintiff avers that the defendant's domicile at the time of the marriage was South Africa.
>
> 7. However, the plaintiff's reliance on the common law is misconceived, in that the rule expounded in paragraph 5 above, only applies in the **absence** of an ante-nuptial contract between the spouses.

8. On the plaintiff's own version, the parties entered into an ante-nuptial contract, which was subsequently also registered in the Deeds Office of Pietermaritzburg.

9. The *proviso* for the common law rule to find application, is that there should be no ante-nuptial contract in existence between the spouses. It only applies in the absence of an ante-nuptial contract between the spouses. In this matter, this *proviso* is absent, in that the spouses did execute (and caused to be registered) their ante-nuptial contract.

10. Consequently, the rule of Private International Law, which states that in the absence of an ante-nuptial contract between the spouses, the patrimonial consequences of the marriage are regulated by the defendant's *lex domicilii* at the time of the marriage, does not find application in this matter.

11. As a further consequence, the plaintiff's reliance on the RSA 1979 Divorce Act, and more specifically her reliance on section 7(3)(a) of that Act, is misplaced, by virtue of the fact that the common law rule expounded in Namibian International Private Law *(sic)*, does not apply to this matter.

12. The relief sought by the plaintiff in her first claim, namely that the Court order (*sic*) that the defendant must transfer half of his assets to the plaintiff, is incompetent relief, as the averments made by the plaintiff do not sustain the relief sought.'

[9] The parties are *ad idem* that, where there is no antenuptial contract, the legal position is that the proprietary consequences of the marriage are governed by the domiciliary law of the husband at the time of the marriage (*Brown v Brown* 1921 AD 478 at 482; *Anderson v The Master* 1949 4 SA 660 (E); *Frankel's Estate and Another v The Master and Another* 1950 1 SA 220 (A). In *Sperling v Sperling* 1975 3 SA 707 (A) at 716E-H the position is set out as follows:

> 'As I have mentioned, the problem is one of that branch of our law known as Private International Law. The claims of the parties to the matrimonial property - for the moment I leave to one side plaintiff's claim under sec. 3 of the Matrimonial Affairs Act - are to be classified as relating to the proprietary consequences of marriage. In a case such as this, where no ante-nuptial 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 (AD)), 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 which will constitute the *lex causae* whenever questions concerning the property

> relations between the spouses arise in a South African court. (*Frankel's case,supra; Brown v Brown*, 1921 AD 478 at p. 482). The position is not affected by a subsequent change of domicile (the so-called doctrine of immutability being accepted); nor is any distinction drawn in this regard between movable and immovable property or between property brought into the marriage or after-acquired property (*Shapiro v Shapiro*, 1904 T.S. 673; *Union Government (Minister of Finance) v Larkan*, 1915 CPD 681 at p. 685). What is termed the "unity principle" is applied.'

[10] In a nutshell, the defendant's first exception is based on the contention that, where there is an antenuptial contract, the common law rule does not apply and that one should only have regard to the terms of the contract, as they govern the proprietary consequences. The contention is further that *in casu* South African law therefore does not apply to the proprietary consequences of the marriage between the parties, which means that section 7(3)(a) of the SA Divorce Act cannot be applied and therefore the plaintiff's claim is excipiable.

[11] On the other hand, Mr *Vos* for the plaintiff, relying, *inter alia*, on *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C), submitted that it is only where the parties have chosen another legal system to govern the proprietary consequences of the marriage that the *lex domicilii matrimonii* does not apply.

[12] Mr *Heathcote*, who appeared with Ms *Schneider* for the excipient (to whom I shall refer as the defendant), takes issue with the plaintiff's reliance on *Esterhuizen v Esterhuizen*. In this case the parties were married by antenuptial contract in Namibia where they were also domiciled at the time. The plaintiff wife later sued her husband, the defendant, for divorce in the Cape Provincial Division of the Republic of South Africa. She also sought an order in terms of section 7(3) of the SA Divorce Act, requiring that one-half of the net value of the husband's assets be transferred to her upon divorce. The defendant resisted this claim, alleging that section 7(3) was of no application as the marriage had been contracted in Namibia and as the proprietary consequences of the marriage had to be determined according to Namibian law, being the *lex domicilii matrimonii.* The court was called upon to decide whether a claim in terms of section 7(3) was competent in these circumstances (at p494F), or put differently, whether section 7(3) has the effect of excluding the law of the matrimonial domicile in circumstances where the parties have entered into a foreign antenuptial contract

excluding community of property, community of profit and loss and accrual-sharing (at p496C).

[13] In the course of delivering judgment on the issue, Josman AJ dealt with a passage in *Bell v Bell* 1991 (4) SA 195 (W) in which Kuper AJ stated (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 the marriage. (*Brown v Brown* 1921 AD 478 at 482; *Anderson v The Master and Others* 1949 (4) SA 660 (E); *Frankel's Estate and Another v The Master and Another* 1950 (1) SA 220 (A); *Sperling v Sperling* 1975 (3) SA 707 (A).'

[14] Josman JA stated about the above quoted passage (at p495I-496B):

> '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.'

[15] Mr *Heathcote* submitted that this was indeed what Kuper AJ was saying and that she was, with respect, correct, based on what was stated to be the common law rule in *Frankel's Estate* and *Sperling's* case. He further submitted that Josman AJ was, with respect, clearly wrong in expressing disagreement as he did, as well as when he stated later in the judgment (at p497D): 'It is not every antenuptial contract which has the effect of excluding the *lex domicilii matrimonii.*' Counsel referred to this sentence as a 'throwaway line' in which Josman JA, so it was submitted, expressed himself contrary to the binding authority of *Frankel's Estate* and *Sperling*.

[16] I think where counsel's submission, with respect, went wrong, is when he took the general statement of the rule 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 mean that the opposite also holds true, namely where there *is* an antenuptial contract the proprietary consequences of a foreign marriage are *not* determined in accordance with the law of the matrimonial domicile. There is no statement to this effect in *Frankel's*

Estate and *Sperling*. It also is not a necessary implication of the common law rule as stated in *Frankel's Estate* and *Sperling.* Of course counsel is correct that one must have regard to the antenuptial contract. Depending on its terms, the domiciliary law of the husband at the time of marriage may or may not apply. Where there is no choice of law clause indicating that another legal system applies, the property rights of the parties as dealt with in the contract are determined in accordance with the legal rules of the husbands' matrimonial domicile.

[17] Josman AJ stated further in the run-up to the so-called throwaway line:

> '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.' (at p495J-496C).

and

> '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*.' (at p496J-497D)

[18] In an article by Jacqueline Heaton and Elsabe Schoeman, *'Foreign Marriages and Section 7(3) of the Divorce Act 70 of 1979'* 2000 (63) THRHR, to which the excipient drew my attention, the learned authors support the views expressed on this issue in *Esterhuizen v Esterhuizen.* They state as follows (the underlining is mine):

> 'It is often said that, in the absence of an antenuptial contract, the proprietary consequences of a marriage are governed by the *lex domicilii matrimonii* (see Josman AJ's references to *Frankel's Estate v The Master* (496I-J) and *Bell v Bell* (495A-C). Josman AJ pointed out, correctly, that the conclusion of an antenuptial contract does not automatically displace the *lex domicilii matrimonii* as the governing law. It is perfectly possible for a couple to select, by way of an antenuptial contract, a matrimonial property regime within the *lex domicilii matrimonii* without indicating another legal system as the *lex causae.* This is exactly what happened in the present case, where the parties entered into an antenuptial contract to avoid the community-of-property regime which applies automatically in Namibia. The fact that they entered into an antenuptial contract did not mean that the law of Namibia (as the *lex domicilii matrimonii)* did not apply to their marriage. <u>It is only when a legal system other than the *lex domicilii matrimonii* is selected by the parties to determine the proprietary consequences of their marriage that the law of the matrimonial domicile is displaced.'</u>

[19] The authors then express views to the effect that, in addition to an express choice by the parties of another legal system, a tacit choice of another legal system and, relying on *Ex parte Spinazze* 1985 (3) SA 650 (A), even an objective determination of another legal system as the proper law of the antenuptial contract, may also be effective to displace the *lex domicilii matrimonii.*

[20] While not agreeing with the views expressed by the authors, the defendant's counsel submitted in the alternative and with respect to the underlined sentence in the quotation above, that the parties *in casu*, by electing to be married out of community of property, which is not the proprietary regime of South African common law, the parties selected another legal system, namely that of out of community. The question immediately arises, the legal system of which country? There is no merit in this submission. While marriage at South African common law creates community of property and of profit and loss and all marriages are presumed to be in community until the contrary is proved (Hahlo, *The South African Law of Husband and Wife*, (4th ed), p213), that same legal system provides for another matrimonial property regime, namely a regime that excludes

community of property with certain variants (Hahlo, *supra*, p. 278 a.f.) as established by antenuptial contract. By opting for this property regime provided for by the legal system the parties do not select another legal system to govern their property rights.

[21] Counsel for the defendant also referred to Voet 23.2.87 and Graveson, *The Conflict of Laws*, (5th ed) p303 where they state that a subsequent change in domicile does not affect the proprietary rights of spouses. He submitted that Josman AJ in effect held, in defiance of this authority, that a change in domicile can sometimes change the antenuptial contract. There is no basis in the judgment for this submission. The judgment did not deal with a change in domicile at all.

[22] Another meritless submission is that the effect of the throwaway line is that uncertainty is created, as one does not know which antenuptial contracts displace the matrimonial domiciliary law and which do not, and that it would depend on the whims, likes and dislikes of the parties to such agreements when they would regard themselves bound to the agreement and when not. In my view this submission has its foundation in the erroneous assumption that the court in *Frankel's* case held that the private international law rule, in counsel's words, 'only finds application in the absence of an antenuptial contract'. The answer to counsel's first problem depends on whether the parties have selected the law of another country to apply. If they have, the matrimonial domiciliary law is displaced. The second problem is really no problem at all. The general principle is that the parties cannot change the contract.

[23] It should not be forgotten that the court in *Frankel's Estate* was not concerned with a factual situation where it had to determine whether the *lex domicilii matrimonii* governs the proprietary consequences of a marriage where the parties have entered into an antenuptial contract. The court dealt with the following question, as formulated by Schreiner JA (at p237 (in the digital version it is at p247):

> 'The question in this appeal is whether, where a man and woman at the time of their marriage intend to settle in a country other than that of the man's domicile, that country's law, and not the law of the man's domicile, governs the proprietary rights of the spouses. It is not in dispute that where no

> question of intention to settle in some other country is involved the law of the man's domicile at the time of the marriage governs those rights, unless before the marriage the parties have expressly agreed otherwise; but it is contended for the appellants that where there is such an intention to settle in another country this intention has in law the same effect as if the parties had expressly agreed that their proprietary rights should be governed by the law of the country of proposed settlement.'

[24] It is against the backdrop of this question and the arguments presented that the various judges made the statements to the effect that, in the absence of an agreement, the patrimonial consequences are governed by the *lex domicilii matrimonii* of the husband. None of the judges made any statement to the effect that the *lex domicilii matrimonii* does not apply in all cases where, or merely because, an antenuptial contract has been concluded.

[25] The defendant's counsel spent some time in analyzing and criticizing various passages in the *Esterhuizen* judgment in an attempt to persuade me that the judgment on the abovementioned aspect is not correct. I do not intend to deal with each and every aspect raised. It is not necessary to agree with each view expressed in the reasoning process leading up to the learned judge's statement in the so-called throwaway line. His view is in any event in agreement with the following statement in LAWSA, 'Conflict of Laws', Vol 2, First re-issue, par 441:

> 'In the absence of an antenuptial contract expressing a contrary intention, the proprietary consequences of a foreign marriage must be determined in accordance with the *lex domicilii matrimonii*, that is the domiciliary law of the husband at the time of the marriage.'

[26] Mr *Heathcote* further submitted that regard should only be had to the antenuptial contract and that the parties have clearly turned their backs on section 7(3) of the SA Divorce Act and in effect said, 'We don't want that', a choice which any court seized with the matter should respect. However, I agree with Mr *Vos* that the parties did not reject section 7(3). At the time section 7(3) did not even exist. They also did not reject something similar to or resembling section 7(3) or its import. The only election they made was to state that should any legislation by the Government of the Republic of South Africa come into force by which the so-called 'accrual system' shall become applicable to the estates of the parties, then such system cannot be enforced by the parties against one

another. The accrual system is not synonymous with the relief provided for by section 7(3).

[27] Having regard to the contract it is clear that the parties did not expressly elect the law of any country to govern their property rights. I do not agree with Mr *Vos* that, by stating what part of South African law should not apply, they selected South African law. However, I do agree that they accepted that they were subject to the laws of South Africa and therefore specifically formulated the exclusion to be effective *inter se* in anticipation of future legislative changes which they expected would apply to them.

[28] In conclusion, my view is that for the reasons set out above, the first ground for the first exception raised is not good and is dismissed.

The second ground of the exception against claim 1

[29] This exception reads as follows:

> ‘**Second ground for exception**
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> 13. For purposes hereof, the defendant repeats *mutatis mutandis* what is stated in paragraphs 5 and 6 above.
>
> 14. In the event of it being found that the patrimonial consequences of the marriage between the parties are regulated by the defendant’s *lex domicilii* at the time of the marriage even if an ante-nuptial contract was entered into between the parties (which is denied), then and in that event, the order sought by the plaintiff that half of the defendant’s assets be transferred to her, remains incompetent relief in law, as the International Private Law (*sic)* rule plaintiff seeks to enforce will not be in accordance with justice and convenience in this case, and more particularly for the following reasons:
>
> 14.1 section 7(3) of the RSA 1979 Divorce Act was made applicable to plaintiff and defendant with retrospective effect;
>
> 14.2 the plaintiff wants to enforce section 7(3)(a) of the RSA Divorce Act in circumstances where she was a party to an ante-nuptial agreement in terms of which she agreed that the very legal provision she now wants to enforce against defendant, should not find application to their marriage;

14.3 Namibia's divorce regime is the common law regime based on fault. Fault plays a role in not only establishing grounds for divorce, but also in the consequences of a divorce. A plaintiff in an action for divorce in Namibia can apply that the guilty party forfeits the financial benefits of the marriage, and the court cannot refuse such an application. This is indicative of how important the fault principle is in Namibia;

14.4 the RSA Divorce Act of 1979 is not based on fault;

14.5 the basis on which the RSA Divorce Act applies section 7(3)(a) of the Divorce Act, 1979, is **"irretrievable breakdown"** which is not a ground for divorce in Namibia;

14.6 the wording of section 7(3)(a) refers to *"[A] court granting a decree of divorce"* (which is a South African court);

14.7 the court in this matter of divorce is the High Court of Namibia, which is established by the provisions of Article 78 of the Namibian Constitution. This Court thus does not fall within the ambit of the definition of *"court"* as contemplated in the RSA 1979 Divorce Act;

14.8 the word *"court"* in the RSA Act refers to a court *"which has jurisdiction with respect to a divorce action"* in South Africa (not any other country);

14.9 section 2 of the RSA 1979 Divorce Act contains the requirements which have to be met for a court to have jurisdiction in a divorce action. For ease of reference, the section is quoted: .....

14.10 the High Court of Namibia does not meet the requirements to establish jurisdiction, and thus cannot be held to be a *"court with jurisdiction with respect to a divorce action"* as contemplated in the definition of the word *"court"* as envisaged in the RSA 1979 Divorce Act;

14.11 the Namibian Court will not be *"granting a decree of divorce"* as contemplated in section 7(3) of the RSA 1979 Divorce Act.'

[30] The second exception is based on the assumption that this Court has found (as indeed it did) that the private international law rule which applies is the rule that the patrimonial consequences of the marriage are regulated by the husband's (the defendant's) domicile at the time of the marriage. The defendant avers that the relief sought by the plaintiff in terms of section 7(3) of

the RSA Divorce Act will not be entertained by this Court ‘as the International Private Law rule plaintiff seeks to enforce will not be in accordance with justice and convenience in this case.’

[31] Apart from the obvious mistake in referring to ‘International Private Law’, which I accept is a slip of the dictating tongue, the statement as quoted from the text of the exception is not carefully formulated. It cannot be that the particular Namibian rule of private international law is not in accordance with justice and convenience. What I think the drafter of the exception meant to say is that the consequence of following the particular rule will lead to injustice or inconvenience or that the application of the particular legal rule of the *lex causae* indicated by the international law rule, namely section 7(3) of the SA Divorce Act, will lead to injustice and inconvenience. This is in fact what I understood the defendant’s case to be on this issue.

[32] The grounds advanced in support of the above general contention are the following. The purpose of an antenuptial contract is to establish, once and for all, a particular proprietary regime at the time of marriage. The parties chose to establish a proprietary regime which entails the exclusion of community of property and of community of profit and loss. They further specifically included clause 8 in which they agreed that, should any South African legislation come into force by which the accrual system shall become applicable to their estates, then such system cannot be enforced *inter se*. The Matrimonial Property Act, 1984 (Act 88 of 1984), which came into force a few months after the marriage between the parties was concluded, introduced the accrual system into South African matrimonial property law. It is contended by the defendant that the parties specifically agreed that this legislation would not be applicable to them and because it was by virtue of section 36(b) of this Act that section 7(3) was inserted into the SA Divorce Act (which was later substituted by the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act 3 of 1988)), the plaintiff is requesting the Court to apply legislation which the parties specifically excluded in the antenuptial agreement. This would mean, it was further submitted, that the application of section 7(3) would work unjustly against the defendant.

[33] It is useful at this stage to deal with some of the contentions advanced before considering the defendant's further submissions. The first observation is that the parties did not agree to exclude Act 88 of 1984 or legislation with the same contents. They only agreed that the accrual system would not be enforced *inter se*. Act 88 of 1984 not only introduces the accrual system, but also deals with other matters. An agreement to exclude the accrual system does not mean that the provisions of the Act dealing with other matters must be taken to be excluded. Secondly, the redistribution relief provided for by section 7(3) and introduced by Act 88 of 1984 (and later substituted by Act 3 of 1988) does not have the effect of enforcing the accrual system *inter se*. It therefore does not fall within the exclusion agreed upon between the parties.

[34] The defendant correctly accepts that the legal position relating to the proprietary matrimonial regime is not necessarily frozen at the time of the marriage. This Court must have regard to changes in the laws of the husband's matrimonial domicile which affect the proprietary regime of the parties (*Sperling's* case, *supra*, at p721D-F). However, this general principle is subject to public policy.

[35] In this regard Mr *Heathcote* referred to what he called 'a deep rooted friction' and a 'deep divide' between South African and Namibian divorce laws. He referred to the fact that Namibian divorce law is still based on fault or guilt, whereas South African divorce law has moved away to allow divorce on two no-fault grounds namely, the irretrievable breakdown of the marriage and the mental illness or continuous unconsciousness of a party to the marriage.

[36] At this stage I pause to note that the argument presented on behalf of the plaintiff on the second exception is not helpful at all. The plaintiff's answer to the second exception is that with regard to the procedure relating to the divorce, the law of Namibia is applicable, but in so far as the property rights of the parties are concerned, which are matters of substance, the law of South Africa applies. For this submission the plaintiff's counsel relies on *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) at 399H. The defendant has no quarrel with this, but submitted that the case is of no assistance in the instant matter. I agree. The issue raised by the defendant is

not concerned with the distinction between procedural law and substantive law. The issue is concerned with the impact, if any, of public policy considerations on the applicability of the particular (substantive) law under the foreign *lex causae* indicated by the relevant conflict of law rule (of the *lex fori)* as governing the matter.

[37] In *Sperling v Sperling, supra*, Corbett, JA (as he then was) stated at p722D-E:

> 'It is undoubtedly true that public policy operates generally as an overriding check upon the application in our Courts of the rules of a foreign *lex causae* (See, e.g., *Weatherley v Weatherley*, 1879 Kotze 66 at pp. 83 - 5; *Seedat's Executors v The Master*, 1917 AD 302 at pp. 307 - 8); and there is no reason why this should not be the case where the choice of law rule of the forum points to the law of a foreign matrimonial domicile. In my view, however, public policy is not the only restricting criterion. Where, as in this case, there is no clear authority upon the point, it is, I consider, proper to have regard to the consequences of deciding the issue the one way or the other and to take into account which course appears to have in its favour "the balance of justice and convenience" (cf. *Starkowski's* case, *supra* at p. 172); see also *Frankel's Estate and Another v The Master and Another, supra* at pp. 221I, 239).'

[38] Although the exception at times refers to 'justice and convenience' and the defendant's counsel also used these notions at times during argument, I understood the thrust of his submissions to actually place the emphasis on invoking the exclusionary effect of public policy rather than relying on the balance of justice and convenience. I shall therefore consider his argument on this basis.

[39] In *Eden and another v Pienaar* 2001 (1) SA 158 (W) at p167J-168B Cloete J stated the following with which I respectfully agree:

> 'The mere fact that a foreign statute embodies a concept not recognised by our law, does not in itself constitute a reason for our courts to refuse to enforce a judgment granted pursuant to the provisions of such a statute. As Forsyth *Private International Law* 3rd ed (1996) says at 102:
>
> "In general our legal system reflects in its private law Western tolerance for the values of others and their legal institutions. Consequently, when our conflict rules direct that a particular case is to be governed by some foreign law, that law will generally be applied even although it may involve the

> recognition of a foreign institution or rule unknown to our legal system and quite foreign to it." '

[40] In *Laurens NO v Von Höhne* 1993 (2) SA 104 (W) the court declined to uphold an argument that certain German law rules were so repugnant to South African ways of thinking that he should refuse to follow them on grounds of public policy. In doing so the court stated with approval:

> 'Kahn, in the work on *Succession* at 633, says that a foreign rule should be rejected on grounds of public policy only if it flies 'in the face of some deep-rooted conception of good morals'.

[41] The author Forsyth in his authoritative work *Private International Law*, (5th ed) at p. 121-122 also states in regard to South African private international law:

> 'Our conflict rules should be directed towards resolving disputes which involve a number of legal systems; they should not be used to force foreigners to comply with the particular values which are encased within our legal system. Moreover, public policy in the international sense – ie the public policy which on occasion excludes foreign law – must be distinguished from internal public policy, the public policy which obtains in cases governed by the *lex fori*. Not every provision of a foreign law which runs counter to a mandatory provision (*ius cogens*) of the *lex fori* or some tenet of internal public policy is excluded ..... There must be something fundamentally offensive about the application about the application of the foreign law before public policy will exclude it.'

[42] In *Bell v Bell, supra,* the court stated (at p199A-F):

> 'The truth of the matter is that in the absence of repugnance or other compelling considerations our Courts will give substance and effect to the notion of comity which remains the building block of this branch of the law.
>
> The opinion of Cardozo J in *Loucks v Standard Oil Company of New York* (1919) 224 NY 99 at 110, 111 adopted in England by Parker LCJ in Phrantzes v Argenti [1960] 2 QB 19 ([1960] 1 All ER 778 (QB)) at 782I-783D at 33, constitutes, I am sure, an authoritative articulation of principle and philosophy to which our Courts also subscribe:
>
> > "If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare. . . . Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. A right of action is property. If a foreign statute gives the right, the mere fact that we do not even like the right, is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that

> every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance: its presence shows beyond question that the foreign statute does not offend the local policy, but its absence does not prove the contrary. It is not to be exalted into an indispensable condition. The misleading word "comity" has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles (Beale *Conflict of Laws* para 71). The sovereign in its discretion may refuse A to the foreign right. . . . From this it has been an easy step to the conclusion that a like freedom of choice has been confided to the Courts, but that of course is a false view. . . . The Courts are not free to refuse to enforce a foreign right at the pleasure of the Judges to suit the individual notion of expediency or fairness. They do not close their door unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." '

[43] I see no reason to follow a different approach in Namibia to that set out above in the case law and by the authors Kahn and Forsyth.

[44] It is so that the introduction of the Divorce Act and the Matrimonial Property Act in South Africa has brought radical reforms to the divorce law and the matrimonial property law in that country, while Namibian law on these matters, except for some changes introduced by the Married Persons Equality Act, 1996 (Act 1 of 1996), has remained the same. With these reforms the South African law of husband and wife was praised as having been brought 'into line with the laws of other progressive countries' (Hahlo, *The South African Law of Husband and Wife* (5th ed.) p.v) and as having entered 'somewhat belatedly, the twentieth century' (Hahlo, *supra,* (5th ed.) p19). These words were first published in 1985. Although it is already the second decade of the twenty-first century, Namibia is, in this area of the law, still hobbling along in antiquity. It has remained stuck in the distant past instead of joining 'the world wide shift to irretrievable marriage break down as the main or only ground of divorce' (Hahlo *supra*, (5th ed.) p331) or some similar approach which more accurately reflects the reality of the modern marriage. I agree with the learned author's view that 'the guilt principle has long been little more than a polite fiction' in many, if not most, of the divorce cases that serve before this Court. In spite of many calls for reform, the current state of affairs continues, forcing this Court to continue to apply laws which, I am convinced, do not reflect the values and aspirations of the Namibian people who

have embraced a progressive Constitution based on modern democratic principles. (See also the critical remarks made by Damaseb JP in *Voigts v Voigts (I 1704/2009) [2013] NAHCMD 176 (24 June 2013)* at paras [6] – [10]).

[45] Applying the principles set out earlier in this part of the judgment I hold that there is indeed nothing so repugnant in the no-fault divorce laws of South Africa as to preclude their application, in so far as their application is indicated by any of the relevant choice of law rules applicable. In this regard I bear in mind that, as far as the grounds for divorce are concerned, the private international law rule is that the *lex fori* applies. This aspect will be dealt with in more detail below when the third exception is considered.

[46] I further hold that, although Namibian law does not have an equivalent law allowing for a redistribution order similar in nature to that provided by section 7(3), there is likewise no public policy consideration tending to compel this Court not to apply section 7(3). As Mr *Vos* submitted, the very purpose of section 7(3) is to effect justice between parties who have elected to enter into antenuptial contracts excluding community of property and of profit and loss as well as the accrual system. In *Beaumont v Beaumont* 1987 (1) SA 967 (A) stated (at p987H-I) that the creation of the power in section 7(3) enabling the court to make a redistribution order was a reforming and remedial measure designed to remedy –

> 'the inequity which could flow from the failure of the law to recognise a 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.'

[47] This being the case, it would be ludicrous to state that public policy considerations require this Court not to apply a measure which is manifestly designed to effect justice.

[48] During the course of his argument Mr *Heathcote* attempted to bolster his submissions by using the example of how the matter of forfeiture of benefits under Namibian law could be reconciled with section 7(3) relief and submitted that Namibian and South African law are irreconcilable, thereby providing illustration of the 'deep divide'. More specifically he pointed to the fact that in Namibian law forfeiture of benefits must be granted by the court if claimed by the innocent party in

an action for divorce, whereas under South African law even the party who caused the breakdown of the marriage may claim redistribution under section 7(3). He submitted that a court would be placed in an impossible position should it be called upon to grant both forms of relief in the same case because the two remedies are irreconcilably different. Although this issue does not actually arise on the current pleadings, I think I should deal with it in the same vein in which it was raised, namely as an argumentative device merely to illustrate a point.

[49] In section 9 thereof the RSA Divorce Act also provides for a forfeiture of benefits, although discretionary, where the decree of divorce is based on the irretrievable breakdown of the marriage. In such cases the court has a discretion to grant the order if the court, after having had regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order is not made, the one party will in relation to the other, be unduly benefited. Although there are important differences between the remedies of forfeiture of benefits under the two legal systems, there are also such similarities as to indicate that the concept is not unknown to current South African law. Furthermore, a court which is asked in the same case to grant a redistribution order under section 7(3), is enjoined by section 7(5)*(c)* to take into account any order given under section 9 or under any other law which affects the patrimonial position of the parties. Clearly a court in counsel's example would have to take into consideration that it has granted the forfeiture order under Namibian law to the innocent spouse. Bearing this in mind there does not seem to be, in principle, any difficulty that the remedy of forfeiture under Namibian law and the remedy of redistribution under South African law would be irreconcilable.

[50] The issue raised in paragraphs 14.6 – 14.11 of the exception was not addressed in oral argument although it is briefly covered by the defendant's heads of argument. As the point was not abandoned, I shall deal with it shortly. The point is that the Namibian Court is not a 'court' as defined in the RSA Divorce Act; as a foreign court it therefore does not have jurisdiction with respect to a divorce action under that Act; and is therefore not 'a court granting a decree of divorce' as contemplated in section7(3). A similar argument was raised by the defendant in *Bell v Bell*, *supra,* where the Witwatersrand Local Division was called upon by the plaintiff to grant

certain orders in terms of the Matrimonial Causes Act of 1973 of England. Kuper AJ made short shrift of this argument when she stated (at p. 198G-I):

> 'These jurisdictional matters applicable in the hierarchy of domestic courts are not of consequence in the working of the principles of private international law. The foreign Court applies the law which the domestic Court, having jurisdiction, would have applied. In so doing, the foreign Court does not purport to be, nor is it, the domestic Court.'

This answer is conclusively persuasive and I adopt it for purposes of this case.

The third ground for the exception against claim 1

[51] This exception is formulated as follows:

> '**Third ground**
>
> 15. For purposes hereof, the defendant repeats *mutatis mutandis* what is stated in paragraphs 5 and 6 above.
>
> 16. In the event of it being found that the patrimonial consequences of the marriage between the parties are regulated by the defendant's *lex domicilii* at the time of the marriage as later retrospectively amended, (which is denied), then even in that event, the order sought by the plaintiff that half of the defendant's assets be transferred to her, remains incompetent relief.
>
> 17. Private International Law dictates that, in the absence of an ante-nuptial contract, it is the *lex domicilii* of the husband at the time of the marriage that governs and regulates the proprietary consequences **of the marriage**. This is reference to the relationship between the spouses *inter se*.
>
> 18. By relying on the RSA 1979 Divorce Act for the division of the assets of the spouses, the plaintiff is relying on law which does not regulate the propriety *(sic)* consequences of the **marriage** but rather on a statute which regulates the propriety *(sic)* consequences of **divorce**. This is not what the International Private Law *(sic)* principle dictates.
>
> 19. It follows that the RSA 1979 Divorce Act does not find application, and the plaintiff's application in terms of section 7(3) of the foresaid Act, is misconceived. In the premises, the plaintiff fails to make the necessary averments to sustain the relief sought by relying on a statute which does not find application.'

[52] During argument, Counsel for the defendant expanded upon the points taken in the exception by *inter alia* drawing attention thereto that a proprietary consequence

of marriage, as opposed to a proprietary consequence of divorce, has the attribute that it is not only enforceable upon divorce, but also upon death.

[53] It is so that a marriage has personal and proprietary consequences. Prof. Kahn in *Jurisdiction and Conflict of Laws in the South African Law of Husband and Wife,* published as an *Appendix to* Hahlo, *supra*, (4th ed) describes the two kinds of consequences as follows (at p622-623):

> 'It would appear that the personal consequences concern chiefly the following topics: the personal rights and duties of the spouses which flow from the marital relationship, for instance, the duty of conjugal fidelity and the right and duty of support; the effect of marriage on the legal capacity of the parties, such as the capacity to contract to acquire and alienate property, to sue and be sued, to carry on a business; legal transactions between husband and wife, for example, the capacity of the spouses to contract with, make donations to, and sue each other, and the power of the wife to bind her husband's credit for household necessaries; the effect of marriage on the wife's name.
>
> The proprietary consequences of marriage concern chiefly the following topics: whether property is held in or out of community of property and, in systems of partial community, what property falls into the common estate and what property does not; the law relating to the joint estate (if any) and to the separate estates (if any) of the spouses; the law governing antenuptial and postnuptial contracts and their consequences; the effect of insolvency, voluntary or judicial separation, divorce and death on the property of the spouses; .....the liability of the joint or separate estates for debts incurred prenuptially or during marriage; when a spouse can demand division of the joint estate (*boedelscheiding*).'

[54] The general rule is that the personal consequences of marriage are determined by the *lex domicilii* of the spouses at the time of the relevant act (Kahn (Appendix), *Law of Husband and Wife*, 4th ed. p. 623.) On the other hand, as I have stated earlier in this judgment, the proprietary consequences of the marriage are governed, in the absence of an antenuptial contract expressing a contrary intention, by the law of the husband's domicile at the time of the marriage.

[55] In discussing the choice of law rules in divorce actions, Kahn states that the court applies its own law at common law *qua lex fori* (op. cit. p 637) and continues (at p. 638):

> 'The court would apply its own law not only to determine the grounds of divorce but also to decide ancillary claims such as those relating to property

> rights, maintenance and custody. For example, our courts should decide whether to grant a forfeiture of benefits arising from the marriage by South African law, treating the issue as distinct from the marital property regime.'

[56] In this context it has become the approach to distinguish between issues which relate to the marital property regime or to the proprietary consequences of the marriage on the one hand, and property issues which relate to divorce.

[57] In response to the point raised by the exception, counsel for the plaintiff submitted that the grounds for divorce should be decided on the basis of Namibian law, being the *lex fori,* and that the proprietary issues should be decided on the basis of the antenuptial contract and South African law, being the *lex domicilii matrimonii.* This submission begs the question, as the issue raised by the defendant is the problem of characterisation, i.e. how should the redistribution remedy in section 7(3) of the RSA Divorce Act be characterised – does it relate to the proprietary consequences of the marriage or is it a divorce issue?

[58] In LAWSA, Second Edition, Vol 2, Part 2, par. 284 the learned author discusses choice of law methodology and refers to the techniques which have been developed to resolve conflict problems. In the course of this discussion he states:

> 'Hence, the orthodox method of choosing the applicable law (*lex causae*) in a multi-jurisdictional situation may be summed up in three words: (a) characterisation; (b) selection; and (c) application. Although the courts, in the past, may have failed to distinguish these various stages, the choice of law process runs as follows: first, the forum looks at the issue before it and characterises the question in terms of its conflict rules; then it selects the appropriate connecting factor in accordance with the characterisation which it has made to determine whether its domestic law or the substantive law of a foreign country will apply; and finally it applies the rule of the legal system which it has selected.....
>
> .....In analysing a typical conflict rule, traditionalists see it as involving an abstract relationship having two aspects, namely, a classificatory aspect and a linking aspect, or connecting factor. The classificatory aspect is seen as but one of several broad categories of law .....Notable among such categories of law are: status; capacity, contract; delict; marriage; divorce; immovable property; movable property; procedure; succession. Connecting factors, seen as the other aspect of the typical conflict rule, do not exist in the substantive legal rules of countries. On the contrary, these points of contact have developed out of a common technique in Western legal practice for the use of the substantive law of all countries. Notable among such connecting factors are: domicile; habitual residence; nationality; place

> where property is situated (*situs*); place where the court is sitting; .....intention of the parties; law of the jurisdiction which has the "closest and most real connection" with the case. The connecting factor is as a rule determined by the *lex fori*, the law of the court seized with the matter.....
>
> .....[C]haracterisation of the issue before the court has been regarded, after jurisdiction of the court has been established, as the decisive step in resolving a conflicts issue before the court. In this sense, characterisation of the issue suggests an ascertainment of the juridical nature of the question raised by the legally material facts disclosed in the pleadings. Thus orthodoxy has taught: if the cause of action is incorrectly characterised, then the incorrect conflict rule may be applied *per incuriam*.'

[59] The author further traces the various phases through which the approach to characterization has developed in South African law. He concludes by referring to *Laurens v Von Höhne* 1993 (2) SA 104 (W) and states that since that judgment there is 'judicial acknowledgement, albeit from a single-judge court, that the so-called "*via media* style" of characterisation has become part of South African private international law.' Since the publication of these words the stance taken in the *Laurens* case was subsequently approved in *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA).

[60] In the *Laurens* case, Schutz AJ had this to say (at 116E-117E):

> 'In a case involving a multilateral conflict rule, such as the present case, one starts off by characterising the nature of the issue and, having done that, one applies the connecting factor. The problem in this case is characterisation and the question is which law determines the quantity, nature and quality of proof of payment? It is a difficult question and there is no direct authority on it.
>
> Among the writings, and the one case in which this kind of problem is discussed, are an article by C C Turpin 'Characterisation and Policy in the Conflict of Laws' 1959 *Acta Juridica* 222; an article by C Forsyth 'Enforcement of Arbitral Awards, Choice of Law in Contract, Characterisation and a New Attitude to Private International Law' (1987) 104 *SALJ* 4, especially at 8-11; the case of *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D); a note by Prof E Kahn in 1986 *Annual Survey of SA Law* 538; and the same author in the appendix to Corbett, Hahlo, Hofmeyr and Kahn *The Law of Succession in South Africa* at 620-22.
>
> The traditional rule has been that that *lex fori* characterises according to its own law without looking further. In some cases this can lead to unfortunate results and because of that various writers, Falconbridge being an important early one, have much stirred the question. Falconbridge's approach is a *via*

> *media* according to which the Court has regard to both the *lex fori* and the *lex causae* before determining the characterisation.
>
> According to him, although the matter is one for the law of the forum, the conflict rules of the forum should be construed '*sub specie orbis*', that is from a cosmopolitan or world-wide point of view, so as to be susceptible of application to foreign domestic rules. (*Turpin* (*op cit* at 223).)
>
> In doing so it will pay full attention to the 'nature, scope and purpose of the foreign rule in its context of foreign law. What the forum should do, so it is contended, is to make a provisional characterisation having regard to both systems of law applicable, followed by a final characterisation which takes into account policy considerations.
>
> The *via media* approach, it is contended, serves a particularly useful purpose where a foreign institution is not known to the *lex fori*. If no regard is had to foreign law, what is likely to ensue is that the nearest analogue of the *lex fori* is laid on a Procrustean bed and subjected to a process of chopping off or stretching. (See (1987) 104 *SALJ* at 9 above.) It is also contended for the *via media* that it tends to create international harmony and leads to the decision of cases in the same way regardless of which country's courts decide them. If one does not adopt this approach further evils may ensue, so argues Mr *Du Plessis*, namely forum shopping and even a defendant choosing a forum whose laws best suit him. (It is not suggested that the defendant in this case deliberately did that.)
>
> Various of the academic writers, and also Mr *Du Plessis* in his argument, welcome the apparent reception of the *via media* by Booysen J in the *Laconian* case (above), but criticise his judgment for not really having seen the *via media* through by his falling back on a residual *lex fori* approach. It is not necessary for me to go into that. For myself, I accept the *via media* and propose to follow it through wherever it leads. We may not dare to let our law stand still. Against this view it has been argued by Mr *Tuchten* that I am simply not entitled to adopt the *via media* in that I am bound by earlier decisions. I do not agree and I will say more on this subject below, but must emphasise now that private international law is a developing institution internationally, and that our own South African private international law cannot be allowed to languish in a straightjacket.'

[61] In *Society of Lloyd's v Price and Lee* the Court approved of the application in the *Laurens* case of the *via media* in a case where there was no conflict between the *lex fori* and the *lex causae* (at 401D)-E). In the *Price and Lee* case there was, however, a potential conflict, in regard to which the Court said (at 401E-F):

> 'However, to my mind, this *via media* approach is the appropriate one in dealing with the kind of problem with which we are now confronted. Not only does it take cognisance of both the *lex fori* and the *lex causae* in characterising the relevant legal rules but it also enables the court, after this

> characterisation has been made, to determine in a flexible and sensitive manner which legal system has the closest and most real connection with the dispute before it.'

[62] The court then set out a three stage approach to be followed in characterising the relevant legal rule, namely (i) a provisional determination according to the principles of the *lex fori*; (at 401F-G) (ii) a provisional determination according to the principles of the *lex causae*; (at 401I-402A) and then, where 'gap' occurs, (iii) a final determination taking into account policy considerations in determining which legal system has the closest and most real connection with the legal dispute before it (at 404E-F). In regard to the third stage the court stated (at 404F-406F):

> '[26] As suggested by Schutz J in the *Laurens* case, the resolution of the dilemma of the 'gap' involves making a choice between two competing legal systems. At this third stage of the *via media* approach, the Court must take into account policy considerations in determining which legal system has the closest and the most real connection with the legal dispute before it. As pointed out by Sieg Eiselen:
>
> > "The conflicts process is aimed at serving individual justice, equity or convenience by selecting the appropriate legal system to determine issues with an international character. The process ought to be neutral in the sense that it should display no bias in favour of the *lex fori*."
>
> [27] The selection of the appropriate legal system must, of course, be sensitive to considerations of international harmony or uniformity of decisions, as well as the policies underlying the relevant legal rule .....
> .....
> .....
>
> [31] It follows that in my view considerations of policy, international harmony of decisions, justice and convenience require the dilemma of the 'gap' in the present case to be resolved by dealing with the issue of prescription in terms of the relevant limitation provisions of the *lex causae*, the English law.'

[63] A cardinal feature of the *via media* approach is that it is non-mechanical and allows the judge in appropriate cases to depart from the categories created by the *lex fori* and to characterise with a greater measure of discretion.

[64] As I have said earlier, the question which arises in this case is how the issue before the Court should be characterised. Counsel for both parties did not refer me to any Namibian case law on the point and I am not aware of any. Accepting, as I do, that it is a legal rule or norm that must be classified, an obvious problem which

occurs in this case is that Namibian law does not have a provision or legal institution which is equivalent to the redistribution remedy provided for in section 7(3) of the RSA Divorce Act. In discussing the issue of classification of legal rules by the *lex fori*, the learned author Forsyth states (at 81):

> 'Such theories require the *lex fori*, when faced with the task of classifying a rule from a, foreign legal system, to do the best it can. Generally the *lex fori* in terms of such theories will, when faced with such a foreign rule, classify as it would that rule's closest analogue in the *lex fori*. Of course, the foreign rule sought to be classified may deal with legal institutions and concepts entirely unknown to the *lex fori*. In such circumstances, the *lex fori* can only 'muddle through' and its muddling through may create considerable confusion and uncertainty.'

[65] In a footnote to this text he refers to the writings of the eminent Sir Otto Kahn-Freund, *General Problems of Private International Law*, (1976) 226, who 'aptly named this the "Procrustean bed" argument, for if the *lex fori* attempts to characterize foreign rules it will end up either cutting them down to size or elongating them, "but in any case deprive them of life".' I respectfully agree that this unsatisfactory approach should rather be avoided b*y* following the *via media* approach as set out in *Society of Lloyd's v Price and Lee* and, more specifically, by also doing a provisional characterization taking the only other potential *lex causae*, namely South African law, into account.

[66] However, for this Court to do so, it should be provided with expert evidence of the juridical nature of the redistribution rule and, if possible, its characterization by domestic South African law (see Kahn, Part IV: Conflict of Laws in Corbett, Hofmeyr and Kahn, *The Law of Succession in South Africa* (2nd ed.), p597.) Of course this has not been done, nor was any agreement reached between the parties as to these matters. It is only when this information is properly before the Court that it can characterize the issue finally and then select the applicable *lex causae*.

[67] In Namibia the content of foreign law is a question of fact which must be proved by expert evidence (*Dowles Manor Properties Ltd v Bank of Namibia* 2005 NR 59 (HC) at p64D-F), unless the parties come to some other agreement. I accept that I am at liberty to have regard to the contents of the relevant statutes as these were incorporated in the pleadings and freely referred to by the parties throughout the hearing of the application without any objection. However, as far as the

characterisation of the South African redistribution rule is concerned, the parties did not address me in about the legal position in South Africa, nor did they refer to any case law. The arguments presented, perhaps unwittingly, rather related to how the matter should be characterised according to the rules of the *lex fori.*

[68] In my view the particulars of claim clearly imply that the redistribution remedy relates to the patrimonial consequences of the marriage. Whether this is indeed so under South African law is a question of fact, which must be proved by expert evidence (unless the parties come to some other agreement). If such evidence can be led, a cause of action is disclosed, which means that the particulars of claim are not excipiable ((*McKelvey v Cowan NO* 1980 4 SA 525 (z) at p526D; *Namibia Breweries v Seelenbinder, Henning & Partners* 2002 NR 155 (HC) at p158J-159A).

The fourth ground for the exception to claim 1

[69] This exception is set out in the following terms:

> ‘**Fourth ground**
>
> 20. For purposes hereof, the defendant repeats *mutatis mutandis* what is stated in paragraphs 5 and 6 above.
>
> 21. In the event of it being found that the patrimonial consequences of the marriage between the parties are regulated by the defendant’s *lex domicilii* at the time of the marriage as later retrospectively amended (which is denied), then even in that event, the order sought by the plaintiff that half of the defendant’s assets be transferred to her, remains incompetent because the Matrimonial Causes Jurisdiction Act, No 22 of 1939 is applicable in Namibia.
>
> 22. Section 6 of the aforesaid Act provides: .....
>
> 23. The aforesaid is Namibian law, applicable in Namibia by virtue of the provisions of Article 10 of the Namibian Constitution. It is the law that this Court is statutorily enjoined to apply when dealing with the propriety *(sic)* consequences of the divorce action. On application of the provisions ..... of the aforesaid statute in this matter, the following is clear –
>
> 23.1 the summons herein was issued in the High Court of Namibia – thus the High Court is dealing with the action for restitution of conjugal rights and eventual divorce;
>
> 23.2 the Namibian High Court is also determining the mutual property rights of the spouses;

23.3 the Namibian High Court is enjoined to do so *("shall do so")* in accordance with the practice and in accordance with the law of the court in whose jurisdiction the defendant is domiciled or resident;

23.4 the defendant herein is both domiciled and resident within the jurisdiction of the High Court of Namibia;

23.5 in terms of the laws and the practice of the Namibian High Court, The RSA 1979 Divorce Act does not find application.

24. In the premises, the plaintiff's reliance on the Private International Law and her consequential reliance on section 7(3)(a) of the RSA 1979 Divorce Act is misconceived, and the relief sought based on this reliance, is not competent.

25. Thus, the relief sought by the plaintiff in her first claim, namely that the Court order (*sic)* that the defendant must transfer half of his assets to the plaintiff, is incompetent relief, as the averments made by the plaintiff do not sustain the relief sought.

[70] The excipient's contention is that the relief sought by the plaintiff remains incompetent because the Matrimonial Causes Jurisdiction Act, 1939 (Act 22 of 1939), (as amended) is applicable in Namibia. The excipient relies on section 6 of this Act, but substitutes certain words in section 6. Section 6 refers to sections 1, 4 and 5 of the Act. In order to understand the statute and the implications of the excipient's contention, it is, in my view, necessary to have regard to the wording of Act 22 of 1939 before certain amendments were effected after Namibian Independence by virtue of section 17 of the Married Persons Equality Act, 1996 (Act 1 of 1996).

[71] Before the said amendments, Act 22 of 1939 read as follows:

'MATRIMONIAL CAUSES JURISDICTION ACT 22 OF 1939

To amend the law relating to the jurisdiction of the several divisions of the Supreme Court of South Africa in matrimonial causes.

1. Extended jurisdiction in matrimonial causes

(1) Any provincial or local division of the Supreme Court of South Africa shall have jurisdiction to try an action instituted by a wife against her husband for divorce or for restitution of conjugal rights or for judicial separation, if the wife has been ordinarily resident within the area of jurisdiction of that division for a period of one year immediately preceding the date on which the proceedings are instituted, and if –

(*a*) in any case in which the husband has deserted the wife and has departed from the Republic or has been deported from the Republic, he is at the said date or was immediately before the desertion or deportation domiciled within the Republic;

(*b*) in any other case of an action for divorce or for restitution of conjugal rights, the husband is, at the said date domiciled within the Republic; or

(*c*) in any other case of an action for judicial separation, the husband is, at the said date, domiciled or resident within the Republic.

(1A) A provincial or local division of the Supreme Court of South Africa shall have jurisdiction to try an action for divorce or restitution of conjugal rights instituted by a wife against her husband who is not domiciled in the Republic, if immediately before her marriage the wife was a South African citizen or was domiciled in the Republic, and she was ordinarily resident in the Republic for the period of one year immediately preceding the date on which the proceedings are instituted.

(2) For the purposes of sub-section (1) the proceedings shall be deemed to be instituted on the date on which the summons in the action is issued, or, if the action is preceded by an application by the wife for leave to sue her husband *in forma pauperis* or for an interdict pending the action or for an order compelling him to pay alimony *pendente lite* or to make a contribution towards the costs of instituting the action, on the date on which the petition or notice of motion is filed.

(3) Any issue in proceedings relating to an action referred to in sub-section (1A) shall be determined in accordance with the law which would be applicable if both parties were domiciled in the Republic at the time of the proceedings.

2. Preliminary orders

Any provincial or local division of the Supreme Court of South Africa which in terms of section *one* has or would have jurisdiction to try an action for divorce or for restitution of conjugal rights or for judicial separation shall have jurisdiction to hear an application made by the wife for leave to sue her husband *in forma pauperis* or for an interdict pending the action or for an order compelling him to pay alimony *pendente lite* or to make a contribution towards the costs of the action.

3. Setting aside of judicial separation decreed by another division of Supreme Court

Any provincial or local division of the Supreme Court of South Africa which in terms of section *one* has or would have jurisdiction to try an action for divorce or for restitution of conjugal rights shall have jurisdiction to set aside any order of judicial separation made by any other division of that

Court, in so far as it may be necessary to set aside that order before such an action may be instituted or a divorce may be granted or an order for restitution of conjugal rights may be made.

4. Claims in reconvention

Any provincial or local division of the Supreme Court of South Africa which in terms of section *one* has jurisdiction to try an action instituted by a wife shall have jurisdiction to try any claim in reconvention made by the husband for divorce or for restitution of conjugal rights or for judicial separation, and the provisions of sections *two*, *three* and *five* shall, *mutatis mutandis*, apply to any such claim in reconvention.

5. Orders as to property rights of spouses and custody guardianship and maintenance of children

Any division of the Supreme Court of South Africa which tries any action or claim in reconvention for divorce or for restitution of conjugal rights or for judicial separation by virtue of the jurisdiction conferred upon it by section *one* or *four* shall have jurisdiction to make an order determining the mutual property rights of the husband and wife or concerning the custody, guardianship and maintenance of any minor child born of the marriage subsisting between them; and any such division which has tried any such action or claim in reconvention by virtue of the jurisdiction so conferred upon it shall have jurisdiction at any time thereafter to amend any order made by it concerning the custody, guardianship or maintenance of any such child.

[Sec 5 amended by sec 7 of Act 37 of 1953.]

6. Law and practice applicable in actions or claims in reconvention for divorce or restitution of conjugal rights dealt with under this Act

Whenever any division of the Supreme Court of South Africa deals with any action or claim in reconvention for divorce or for restitution of conjugal rights by virtue of the jurisdiction conferred upon it by section *one* or *four* or determines the mutual property rights of the husband and wife by virtue of the jurisdiction conferred upon it by section *five*, it shall do so in accordance with the practice and the law in accordance with which the division within whose area of jurisdiction the defendant in convention or the plaintiff in reconvention is or was domiciled or is resident, as the case may be, would have dealt with it.

[Sec 6 amended by sec 8 of Act 37 of 1953.]

6*bis*. Recognition of certain decrees and orders

(1) The validity of any decree or order made in any country in any case in which the husband is not domiciled in that country, under the provisions of any law which are declared by the Governor-General by proclamation in the *Gazette* to be provisions substantially corresponding to the relevant provisions of paragraph (*a*) of subsection (1) of section *one*, or of

section *four* or *five*, read with the said paragraph, shall be recognized by the courts of the Republic.

(2) No proclamation shall be issued under subsection (1) unless the Governor-General is satisfied that adequate provision is made by the law of the country concerned for the recognition by the courts thereof of the decrees and orders made in any case in which the husband is not domiciled within the Republic, under the said paragraph, or under section *four* or *five*, read with the said paragraph.

(3) The Governor-General may at any time withdraw any such proclamation.

[Sec 6bis inserted by sec 9 of Act 37 of 1953.]

7. Saving

Nothing in this Act contained shall deprive any division of the Supreme Court of South Africa of any jurisdiction which it would have had if this Act had not been passed, or curtail any such jurisdiction.

7*bis*. Definition

In this Act "Republic" includes the Mandated Territory of South West Africa.

[Sec 7bis inserted by sec 1 of Act 17 of 1943.]

7*ter*. Application to South-West Africa

This Act and any amendment thereof shall apply also in the territory of South-West Africa, including the Eastern Caprivi Zipfel referred to in section 38(5) of the South-West Africa Constitution Act, 1968 (Act 39 of 1968).

[Sec 7ter inserted by sec 1 of Act 17 of 1943 and substituted by sec 22 of Act 70 of 1968 with effect from 18 October, 1953.]

8. Short title

This Act shall be called the Matrimonial Causes Jurisdiction Act, 1939.'

[72] Section 1 of Act 22 of 1939 was amended by the substitution for section 1 of the following section:

'**1 Jurisdiction**

(1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is-

> (a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
>
> (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in Namibia for a period of not less than one year immediately prior to that date.
>
> (2) A court which has jurisdiction in terms of subsection (1) shall also have jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned.
>
> (3) A court which has jurisdiction in terms of this section in a case where the parties are or either of the parties is not domiciled in Namibia shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in Namibia on the date on which the divorce action was instituted.
>
> (4) The provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law.
>
> (5) For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court, as the case may be.'

[73] Before I discuss the statute in more detail, I wish to deal with a submission as to its nature made on behalf of the defendant. It is this. Act 22 of 1939, more specifically section 6, is a 'directly applicable statute' as described by Forsyth, *supra,* (5th ed. p14) and as such override choice of law rules:

> 'All statutes represent in some sense an expression of public policy, but in some statutes the legislature feels so strongly about the policy that it directs that the particular statute is to apply to certain cases, notwithstanding that South African law is not the *lex causae* which would govern if the normal rules were applied; such enjoy a variety of names, but we shall call them directly applicable statutes. Such statutes are, indeed, little more than crystallized rules of public policy which ..... override the standard choice of law rules.'

[74] As I understand it a directly applicable statute will contain provisions which expressly or impliedly apply to the exclusion of the usual choice of law rules, i.e. the statute itself applies instead. In my view section 6 of Act 22 of 1939 does not contain such a provision and therefore it is not directly applicable.

[75] As the long title of the former Act 22 of 1939 indicates, its purpose was to amend the law relating to the jurisdiction of the several divisions of the Supreme Court of

South Africa in matrimonial causes, which divisions later included the South-West Africa Division of the Supreme Court. Kahn, *Appendix*, (Hahlo, *supra,* (4th ed), at p546) discusses the remedial purpose of the Act as follows:

> 'Its [The Act's] primary object was to alleviate the situation consequent on the fact that though theoretically a part of the Supreme Court of South Africa, each provincial and local division was in reality a little *territorium legis* of its own, requiring domicile to be established in its own area. In essence ..... the Act allowed the wife to sue for a restitution order or divorce in the division in which she was ordinarily resident, provided that at such date her husband was domiciled in South Africa. This extension of jurisdiction was expressly stated not to destroy or curtail any existent jurisdiction. The plaintiff wife was given relief not only by being able to sue in a division other than the one on whose area her husband was domiciled, which would assist greatly where he had deserted her, but also, it seems fairly clear, in the admittedly unlikely eventuality of her being able to establish her husband's domicile only in South Africa as a whole, and not in the area of any one particular division. Such advantage, however, was denied the husband when suing in convention; the extended jurisdiction applied to him only when counterclaiming.'

[76] The new statutory jurisdiction grounds did not give sufficient relief to women and as a result section (1A) was inserted in 1968. About this Kahn states (*op. cit.* at p549): 'The remedial legislation of 1968 does not dovetail closely with the 1953 legislation, and omits certain consequential amendments, resulting in a somewhat complex and untidy legal situation.' He continues (*op.cit.* at p549-550) to set out essentially two groups of statutory jurisdictional grounds in a divorce action brought by a wife in a provincial or local division of the South African Supreme Court. Apart from other differing requirements, the one relevant requirement for purposes of this judgment is that (i) in the first group, governed by section 1(1) of the Act, the husband is domiciled in South Africa at the time of the institution of the proceedings, or was immediately before deserting the wife and departing from South Africa, or before deportation from South Africa, domiciled there (for convenience I abbreviate this by merely stating that the husband is domiciled in South Africa; and that (ii) in the second group, governed by section 1(1A), the husband is not domiciled in South Africa.

[77] When Kahn later discusses the provisions of Act 22 of 1939 in relation to choice of law in divorce actions (op. cit. at 638-640), he argues convincingly that section 6 does not apply to the second group, but that section 1(3) governs proceedings under section 1(1A). Section 6 would then apply in section 1(1) proceedings, i.e. where the

husband is domiciled in South Africa. The effect of section 6 is that the practice and law of the division in which the husband is domiciled would be applied in any action for divorce or restitution of conjugal rights or in determining the property rights of the spouses.

[78] Returning to the Namibian Act 22 of 1939, I repeat that the only amendment effected to Act 22 of 1939 was to substitute section 1 and so to amend the law on jurisdiction for spouses as a result of the passing of Act 1 of 1996 which seeks to effect equality between spouses and which introduced a provision that the domicile of a married woman shall not only by virtue of the marriage be considered to be the same as that of her husband, but shall be ascertained by reference to the same factors as apply in the case of any other individual capable of acquiring a domicile of choice. However, the long title of the Act and various sections thereof continue to refer to the Supreme Court of South Africa and its provincial and local divisions. These divisions formerly included the South-West Africa Division of the Supreme Court of South Africa and later the immediate predecessor of the High Court of Namibia, the Supreme Court of South West Africa. Since Independence the High Court does not exist as a division of any court. By virtue of Article 138(2)(a) of the Constitution the High Court continued to have the jurisdiction granted by any law applicable before Independence until amended or repealed. The High Court therefore continued to have the jurisdiction provided for by section 1(1) and (1A) as they existed before amendment by Act 1 of 1996. For obvious reasons the reference to ‘Any provincial or local division of the Supreme Court of South Africa’ in section 1(1) and (1a) had to be read as a reference to the High Court of Namibia.

[79] In my view section 6 simply does not find application since Independence when the High Court of Namibia was no longer a division and as the High Court itself was not until recently, divided into divisions. The substitution of section 1 by Act 1 of 1996 had no effect on the non-applicability of section 6. The extent to which this might have changed, if at all, since the introduction of the Northern Local Division of the High Court of Namibia in is not relevant here as neither of the parties are domiciled or resident in that Local Division.

[80] The parties made their submissions about section 6 on the basis that certain words in that section should be changed to cater for the post-Independence situation. They argued on the assumption that the section should read as follows:

> 'Whenever [any division of the Supreme Court of South Africa] the High Court of Namibia deals with any action or claim in reconvention for divorce or for restitution of conjugal rights by virtue of the jurisdiction conferred upon it by section *one* or *four* or determines the mutual property rights of the husband and wife by virtue of the jurisdiction conferred upon it by section *five*, it shall do so in accordance with the practice and the law in accordance with which the [division] Court within whose area of jurisdiction the defendant in convention or the plaintiff in reconvention is or was domiciled or is resident, as the case may be, would have dealt with it.'

[81] If the word 'Court' is read into the place of the word 'division' where it occurs for the second time, the startling effect would be that where the defendant in convention or the plaintiff in reconvention is domiciled in a foreign country, the High Court would have to apply the practice and law of the foreign country in dealing with any action or claim in reconvention for divorce or for restitution of conjugal rights. In other words, even the grounds of divorce would be determined by the law of that country. In my view this was never the intention of the Legislature. One would have expected a clear indication that the common law rule in this regard is changed. In this regard I can only echo *mutatis mutandis* what Kahn stated: 'The remedial legislation of 1996 does not dovetail closely with the 1939 legislation, and omits certain consequential amendments, resulting in a somewhat complex and untidy legal situation.' To sum up, my conclusion is that, as section 6 does not apply, the exception is not good.

[82] Before I step off this matter I should deal briefly with a certain line of argument used by counsel for the plaintiff in support of his submission that the court must still apply private international law when applying section 6. Firstly he relied on section 1(4) of Act 22 of 1939, as amended, which currently provides that '[t]he provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law.' He submitted that the common law includes private international law. He further submitted that section 1(4) specifically provides that the court may apply the common law and that section 6, which *inter alia* deals with property rights, should be read subject to the express provisions of section 1(4) which preserves the common law and therefore private international law. He

submitted in conclusion that Act 22 of 1939 empowers this Court to apply the common law and private international law.

[83] In my view this argument rather serves to obscure the matter and tends towards confusion between the law that may be applied to establish jurisdiction and the law that may be applied once jurisdiction has been established. Section 1(4) merely provides for non-derogation from the common law or any other law to establish jurisdiction. It does not provide that the common law or private international law may be used to deal with matters under section 6. There is no doubt that this Court has jurisdiction to deal with the matter before it. The issue is what law it should apply in terms of section 6 in resolving the issues before it. Is it the law of Namibia excluding its rules of private international law, or is it the law of Namibia including its rules of private international law? No rules relating to jurisdiction will assist it in resolving this issue.

The fifth ground for the exception to claim 1

[83] This exception reads as follows:

> **'Fifth ground**
>
> 26. The plaintiff has attached to her amended particulars of claim, a sworn translation into the English language of the original Afrikaans ante-nuptial contract. Clause 8 thereof reads:
>
> *"The parties agree that, should any legislation by the Government of the Republic of South Africa come into force by which the so-called 'accrual system' shall become applicable to the estates of the parties, then such system cannot be enforced by the parties against one another."*
>
> 27. The effect of the aforesaid is that there is an agreement between the parties that they do not want the accrual system to apply to their estates. The implication of this agreement is that the parties agreed that, at the dissolution of their marriage, be it through divorce or death, the accrual system shall not find application on their estates. The effect is that the parties came to an agreement pertaining to their estates at dissolution of their marriage. (i.e. an agreement not subject to and excluding the accrual system).
>
> 28. On the plaintiff's own version the ante-nuptial contract entered into and between the (intended) spouses before their marriage on 7 January 1984, was *"duly registered"* on 16 January 1984 in terms of Chapter VII of the RSA Deeds Registries Act No 47 of 1937.

29. The attempt by the plaintiff to make the RSA Matrimonial Property Act No 88 of 1984 applicable to the estates of the parties at the dissolution of the marriage by divorce, amounts to an attempt to amend and/or revoke the provisions of a *"duly registered"* ante-nuptial contract.

30. An ante-nuptial contract once entered into is final: neither of the spouses has any right to revoke either the whole or any part thereof. It is a general rule of law that an ante-nuptial contract, once registered, cannot be altered *inter partes*. This is in accordance with the adopted principle of immutability, which has been adopted by this Court.

31. In the premises, the plaintiff's reliance on section 36(b) of the RSA Matrimonial Property Act No 88 of 1984, and as a consequence thereof, on section 7(3) of the RSA 1979 Divorce Act, is misplaced as the consequence of such reliance, amounts to a unilateral revocation by the plaintiff of the agreement reached in the registered ante-nuptial contract.

32. Thus, the relief sought by the plaintiff in her first claim, namely that the Court order (*sic*) that the defendant must transfer half of his assets to the plaintiff, is incompetent relief, as the averments made by the plaintiff do not sustain the relief sought.'

[84] In essence the fifth exception amounts thereto that the plaintiff, by invoking section 7(3) of the RSA Divorce Act in the face of an antenuptial contract in which the parties specifically excluded the application of the accrual system, is in effect unilaterally revoking the terms of the antenuptial contract, which revocation is not permissible under the law, as the antenuptial contract, once registered, cannot be altered *inter partes*. The relief sought in terms of section 7(3) is therefore incompetent, as the averments made by the plaintiff does not sustain the relief sought.

[85] I have already indicated elsewhere in this judgment that the exclusion of the accrual system in an antenuptial contract does not mean that section 7(3) cannot be invoked. On the contrary, section 7(3) may be only be invoked in circumstances where the marriage was 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, i.e. section 7(3) caters specifically for the circumstances of the parties *in casu*.

[86] Furthermore, as Mr *Vos* submitted, the plaintiff's claim is not based on the accrual system, it is based on section 7(3). The fact that section 7(3) is introduced into the RSA Divorce Act by section 36(b) of the Matrimonial Property Act, which deals with the accrual system is neither here nor there.

[87] There is no merit in this ground of the first exception.

The exception against the alternative claim to claim 1.

[88] In her particulars of claim (as further amended) the plaintiff includes an alternative claim to claim 1 which alternative claim reads as follows:

> '23. During the subsistence of the marriage, the Plaintiff and the Defendant acted as follows:
>
> 23.1 both parties are shareholders and directors of Neu-Nochabeb Farms (S.W.A.) (Pty) Ltd;
>
> 23.2 both parties contributed labour, services and skill towards the management and operations of Neu-Nochabeb Farms (S.W.A.) (Pty) Ltd;
>
> 23.3 both parties contributed labour, services and skill towards the management and operating of the farming business conducted on the farm *"Neu-Nochabeb",* district of Keetmanshoop;
>
> 23.4 both parties contributed labour, services and skill with regard to a guesthouse known as *"Savanna Guesthouse"*;
>
> 23.5 both parties carried on the business of Neu-Nochabeb Farms (S.W.A.) (Pty) Ltd, the farming business conducted on *"Neu-Nochabeb",* and the business of *"Savanna Guesthouse"* for the joint benefit of the parties and with the common object of making a profit;
>
> 23.6 the parties and their children have lived on the income and profits earned by Neu-Nochabeb Farms (S.W.A.) (Pty) Ltd, the farming business conducted on the farm *"Neu-Nochabeb"* and *"Savanna Guesthouse"*;
>
> 23.7 both parties shared in the profits of Neu-Nochabeb Farms (S.W.A.) (Pty) Ltd, the farming business conducted on the farm *"Neu-Nochabeb"* and *"Savanna Guesthouse"*;
>
> 23.8 further particulars of the conduct of the Plaintiff is (*sic*) set out in paragraph 21 above, the contents of which is hereby repeated.

24. The abovementioned conduct of the Plaintiff and the Defendant, constituted a universal partnership in respect of Neu-Nochabeb Farms (S.W.A.) (Pty) Ltd, the farming business conducted on the farm *"Neu-Nochabeb"* and the business of *"Savanna Guesthouse"*, which represents the product of the joint endeavour and aforementioned contributions of the parties to the universal partnership.

25. No express agreement as to the division of the profits and/or assets of Neu-Nochabeb Farms (S.W.A.) (Pty) Ltd, the farming business conducted on *"Neu-Nochabeb"* and the business of *"Savanna Guesthouse"* was arrived at between the parties, but the Plaintiff avers that, in the premises, it was tacitly agreed between the parties that the assets and the profits of the aforementioned businesses, will be divided in equal shares between the parties at the dissolution of the universal partnership.

26. As a result of the conduct of the Defendant, as set out in claim 1 above, the relationship between the Plaintiff and the Defendant has broken down irretrievable (*sic*) to such an extent that it is no longer possible or reasonable to continue the universal partnership.

27. In the premises the Plaintiff is entitled to an order that a universal partnership exists between the parties, that the Plaintiff is entitled to dissolution of the partnership and to be awarded one half of the nett assets of the aforementioned partnership assets, being:

    27.1 the shares in Neu-Nochabeb Farms (S.W.A.) (Pty) Ltd;

    27.2 the farming business conducted on the farm *"Neu-Nochabeb"*;

    27.3 the business known as *"Savanna Guesthouse"*.'

[89] The prayer in regard to this claim is for:

'8. An order declaring that a universal partnership existed between the Plaintiff and the Defendant in respect of Neu-Nochabeb Farms (S.W.A.) (Pty) Ltd (with registration number 419), the farming business conducted on *"Neu-Nochabeb"* and the business of *"Savanna Guesthouse"* in equal shares, alternatively in such shares as determined by the court.

9. An order dissolving the aforesaid partnership.

10. An order appointing a receiver with authority to realize the whole of the partnership's assets, to pay the liabilities of the partnership, to prepare the final liquidation and distribution account, and thereafter to pay to the Plaintiff one half of the nett proceeds of the partnership.'

[90] The exception raised is as follows (the omission and insertion are mine):

> ’33. Defendant excepts to plaintiff’s ..... [alternative claim] as it does not disclose a cause of action, alternatively the necessary allegations are not made to sustain a cause of action, and more particularly for the following reasons:
>
> 33.1 the plaintiff claims that certain conduct of the parties *“constituted a universal partnership”*, and that it was *“tacitly agreed between the parties”* how the assets and profits of the universal partnership be dissolved;
>
> 33.2 however, the plaintiff also pleads and annexes an ante-nuptial contract and alleges that it was registered in the Deeds Office;
>
> 33.3 for the universal partnership to be in existence, the parties must have altered the ante-nuptial contract (tacitly or otherwise);
>
> 33.4 according to the Namibia and South African law, an ante-nuptial contract, once registered, cannot be altered *inter partes*.
>
> Accordingly, the allegations made by the plaintiff do not and cannot sustain the existence of a universal partnership.’

[91] Counsel for the excipient submitted with reference to the case of *Ex parte De Swaan and another* 1909 TS 676 at 676-677 that an antenuptial contract, once registered, may not be altered *inter partes*.

[92] Mr *Vos* on behalf of the plaintiff submitted that the allegation is only that the parties are partners in relation to the three businesses mentioned in the particulars of claim. While he agreed with the principle that the antenuptial contract may not be changed, he submitted that the partnership agreement does not seek to amend or contradict the antenuptial contract, nor does it have that effect. He further submitted that it is perfectly legal for spouses who are married out of community of property by antenuptial contract to enter into a partnership agreement with respect to a specific business. He used the example of such spouses who decide to buy a coffee shop after the children have left the home. By this time the husband has built up an estate of N$50 million by practicing as a lawyer. They agree that the wife should manage the day to day activities of the business and that the husband manages the finances while continuing to practice his profession. They also agree that the wife will take 80% of the profits and bear 80% of the losses, while the husband will take 20% of the profits and bear 20% of the losses. He submitted that this is a valid partnership agreement. However, should the marriage be dissolved by divorce, the wife would

not be entitled to claim half of the husband's estate of N$50 million. He further submitted that the corollary of the defendant's argument would be that spouses married out of community by antenuptial contract would never be able to enter into a partnership and that this would be incorrect.

[93] Mr *Heathcote* agreed that the kind of partnership agreement used in the example would be lawful. However, he submitted, this is not the kind of partnership which is alleged in the particulars of claim. He referred to the fact that in paragraph 23.1 of the particulars of claim (as further amended), there is no mention of the proportion in which the parties hold shares in Neu-Nochabeb Farms (S.W.A.) (Pty) Ltd. However, he pointed to claim 2 in which the allegation is made that the plaintiff holds 25% and by implication that the defendant holds 75% of the shares. He submitted that by claiming an equal division of, *inter alia*, the shares, at dissolution of the alleged universal partnership, while the spouses held the shares unequally during the existence of the partnership, the plaintiff is amending the antenuptial contract. In conclusion he submitted that the plaintiff cannot by way of a tacit universal partnership take from the defendant what is his under the antenuptial contract. Mr *Vos* did not directly address this part of the argument, which seems to be the crux of the excipient's complaint.

[94] I pause at this stage to note that the alternative claim to claim 1 does not mention the antenuptial contract between the parties. The alternative claim only incorporates certain allegations in claim 1 by reference. These do not include any allegations about the antenuptial contract. On the pleadings as they stand, it seems to me that the short answer to this exception is that the alternative claim is therefore not excipiable. However, as the matter was not argued on this basis, I shall deal with the arguments set out above.

[95] It is trite that spouses married out of community of property and of profit and loss may enter into partial or universal partnership with each other. Such partnerships may be express or tacit. (*Fink v Fink* 1945 WLD 226 at 228*; Mühlmann v Mühlmann* 1981 (4) SA 632 (W) at 634C-F; *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) at 123H)

[96] In *Mühlmann v Mühlmann* the husband already before the marriage started a business which was later taken over by the formation of a private company, the "EE

company", in which the husband held 99 of the shares and his brother 1 share. At the time of the marriage the business was flourishing. Based, *inter alia*, on certain conduct and contributions by the wife in the form of capital, labour and skills, the Court held that there was a tacit agreement of partnership between the spouses which commenced at about the time of the marriage. Long after the commencement of the partnership and a few years before its dissolution the wife obtained the brother's share in the company. Certain immovable assets were bought with the profits from this business and registered in the name of private companies in which the spouses held equal shares. At some time during the marriage the husband bought in his name all the shares and loan accounts in another private company with money derived from the profits of the EE company. At a certain stage problems in the marriage came to a head and the wife left the husband. After she instituted divorce proceedings, she terminated the partnership by notice. In her particulars of claim the wife averred (AD judgment at 111C-F):

> '(a) that during the subsistence of the marriage the parties had jointly conducted an electroplating business to which both had equally contributed labour, services and skill;
>
> (b) that the parties and their children had lived on the income and profits earned by the business and that they had used certain profits of the business to buy other assets;
>
> (c) that the said conduct of the parties constituted a universal partnership in equal shares and that the business, its goodwill and assets, and the further assets purchased from the profits of the business, represented the product of the joint endeavours and contributions of the partners;
>
> (d) that on 30 July 1979 the plaintiff terminated the universal partnership.
>
> Accordingly the plaintiff further claimed an order for the division, in equal shares, of the partnership estate.'

[97] As stated before, at the end of the trial the court *a quo* found in favour of the wife that a universal partnership had existed from the date of the marriage. The court identified the assets of the partnership as being, *inter alia*, the business of EE Company, its goodwill and its assets; and the shares in and the shareholders' account claims against the other private companies formed later. The court then determined that the partnership estate should be divided in the proportion of 20% to the wife and 80% to the husband, based on their respective contributions. Although the court did not state this, it seems to me that the shareholding and shareholders'

account claims against EE Company were not considered partnership assets because the company already existed before the formation of the partnership. It was not formed for the purpose of the partnership or with partnership profits or to hold assets purchased with partnership profits. However, the business of the company, its assets and goodwill were considered to be assets of the partnership, which, despite the shareholding of 99% by the husband and 1% by the wife, were to be divided in the proportion of 80% and 20%.

[98] The particulars of claim *in casu* make the allegation that the parties are shareholders; that the shares are part of the partnership assets; and that there was a tacit agreement that the assets and profits would be divided equally upon dissolution. The plaintiff claims one half of the 'nett assets' of the partnership assets. This is a short way of saying that what is claimed is one half of the total value of the assets after liabilities, etc have been taken into account. These allegations are sufficient in my view to sustain the plaintiff's claim. In this regard I agree with Mr *Vos* that it would depend on the evidence presented whether the shares are indeed assets of the partnership. The pleading is therefore not excipiable (*McKelvey v Cowan, supra*; *Namibia Breweries v Seelenbinder, Henning & Partners, supra*).

[99] I furthermore bear in mind that Mr *Heathcote's* submissions are based partly on information, namely the unequal proportion of the shareholding in Neu-Nochabeb Farms (S.W.A.) (Pty) Ltd, which is contained in another claim, which has in any event been withdrawn.

[100] A further reason to dismiss the exception is that it really amounts to a complaint that the claim constitutes a *plus petitio*, because the plaintiff will, in principle, be entitled to at least some assets upon division, which does not afford the defendant a basis for saying that the pleading fails to disclose a cause of action (*Van Diggelen v De Bruin* 1954 1 SA 188 (SWA) at p195B-E).

<u>The eighth exception and the application to strike out</u>

[101] This exception is in the following terms:

> '35. The defendant excepts to plaintiff's claim for divorce as it does not disclose a cause of action alternatively the necessary allegations are not made to sustain a cause of action, and more particularly for the following reasons:

35.1 The plaintiff's claim is for divorce based on constructive desertion;

35.2 to claim for a divorce based on constructive desertion, plaintiff must make the necessary factual allegations from which it can be concluded that:

35.2.1 the defendant acted unlawfully;

35.2.2 that such unlaw[ful] conduct caused cohabitation to become dangerous or intolerable; and

35.2.3 that, as a result of 35.2.1 and 35.2.2 above, plaintiff left the common home.

35.2 the plaintiff does not allege any facts from which it can be concluded that the defendant acted unlawfully or that such unlawful conduct made it dangerous or intolerable for her to remain in the common home; or that she left the common home as a result of such unlawful conduct.'

[102] In order to consider the exception it is necessary to set out the relevant paragraphs of the particulars of claim:

'12. During the subsistence of the marriage and with the settled and unlawful intention to terminate the marital relationship between the parties, the Defendant wrongfully conducted himself as follows:

12.1 he has shown no serious intention to continue with the marriage;

12.2 he has shown no love, affection and respect towards the Plaintiff;

12.3 he has failed to communicate meaningfully with the Plaintiff;

12.4 he has failed and refused to share in the Plaintiff's interests;

12.5 he regularly quarrelled with the Plaintiff, without any reason existing to justify the quarrelling.

13. On or about 28 September 2009 the parties mutually agreed that they could no longer share the common bedroom, and the Defendant permanently moved out of the common bedroom. In doing so, the Defendant unlawfully and wrongfully deserted the Plaintiff and persists with his conduct which is incompatible with a normal marriage relationship.

14. Given the above described conduct of the Defendant, the Plaintiff avers that:

14.1 the Defendant has wrongfully, maliciously and constructively deserted the Plaintiff in which desertion the Defendant persists; and

14.2 the marriage relationship between the parties has broken down irretrievably and there is no reasonable prospect of the continuation of a normal marriage relationship.

15. The Plaintiff accordingly avers that she is entitled to a decree of divorce.'

[103] When the wording of the exception is compared with the arguments presented on behalf of the defendant, they do not dovetail in all respects. For instance, while the one complaint is that the plaintiff did not allege facts from which it can be concluded that the defendant made life intolerable or dangerous for the plaintiff, it was in fact submitted that at most the plaintiff might have made out a case for judicial separation, for which the law requires that the plaintiff must show that further cohabitation with the defendant has become dangerous or intolerable; and that this state of affairs was brought about by the unlawful conduct of the defendant. In oral argument the focus of the defendant's argument was the complaint that the particulars of claim do not allege that the plaintiff left the defendant as a result of the defendant's unlawful conduct.

[104] In his submissions on the exception counsel for the defendant relied on the exposition of the law as set out in Hahlo, *supra*, (4th ed) p. 393-395, who states that three requirements must be satisfied if an action for divorce on the ground of constructive desertion is to succeed. These may be summarized as follows:

(i) The consortium of the spouses must have come to an end as a result of the plaintiff's having left the defendant. Whereas in actual desertion it is the defendant who leaves the plaintiff, in constructive desertion it is the plaintiff who leaves the defendant.

(ii) It must have been the defendant's unlawful conduct that has caused the plaintiff to leave. In other words the defendant must have been guilty of conduct equivalent to driving the plaintiff away.

(iii) The defendant's conduct must have been attributable to a fixed intention to put an end to the marriage, or, in other words, the co-habitation of the spouses.

[105] Mr *Vos* countered by submitting that the plaintiff only has to establish two elements to succeed with a claim for constructive desertion. The first is unlawful conduct and the second is that the conduct must have been committed with the intention of terminating the marital relationship. He further submitted that there is no third element, namely that the plaintiff must leave the common home. He relies on *Morgan v Morgan* 1964 (1) SA 687 (O); *Vrey v Vrey* 1951 (2) SA 453 (N) at 454E-F; *Smith v Smith* 1962 (2) SA 257 (O) 258B-C; *Koch v Koch* (misspelled as "Kock v Kock" in SAFLII (I 1361/2007) [2011] NAHC 14 (31 January 2011). He nevertheless referred to the fact that the amended particulars of claim mention that the parties reside at different addresses and sought to rely on certain allegations in the defendant's counterclaim, filed before the current particulars of claim were amended, which indicate that the parties are living apart. I shall not have regard to any allegation in the counterclaim in deciding the exception.

[106] I agree with Mr *Vos* in the sense that it is not necessary to allege or prove that the plaintiff left the common home as such. Desertion may take place even though the parties are still living under one roof, for example, where one of the spouses withdraws from life in common (*Hattingh v Hattingh* 1948 (4) SA 727 (N); or where the one spouse abandons her life to religion to such an extent that the marital relationship broke down completely while they still lived under one roof (*Holland v Holland* 1973 2 PH B9(C)); or where the one spouse permanently moves from the common bedroom thereby ending the sexual relationship between the spouses. Using the last example I take Mr *Heathcote's* point that this may constitute actual desertion as opposed to constructive desertion, however, it would, in my opinion, very much depend on the actual facts.

[107] Counsel for the plaintiff submitted that the particulars of claim, read in context, must be interpreted to mean that the defendant's unlawful conduct set out in paragraph 12 committed with the malicious intention to thereby end the marriage, has led to the parties mutually agreeing that they could no longer share a bedroom, whereupon the defendant left the bedroom. In this sense, he submitted, the

defendant has driven the plaintiff away. This may be so. The plaintiff indeed makes the allegation that it was the defendant that deserted the plaintiff. In spite of certain doubts which I expressed during argument, on reflection I think that this is a matter in which much will depend on the details of the evidence presented. Although the particulars of claim are perhaps not as clearly framed as they might have been, it seems to me that there are sufficient allegations to sustain the cause of action.

[108] The application to strike is aimed at sub-paragraph 14.2 on the basis that these allegations cannot, in law, constitute a ground for divorce in Namibia. Without expressly conceding the point, the plaintiff has also not directed any opposition to this application or made any submissions in regard thereto in spite of defendant's counsel drawing attention thereto. In light hereof I have considered granting the application, but decided against it. In my view paragraph 14.2, in spite of its similarities with section 4(1) of the RSA Divorce Act, may, in the context of the particulars of claim, be interpreted not as an independent ground for divorce in itself, but merely as a factual statement that the marriage relationship is at an end as a result of the unlawful conduct of the defendant, which was committed with the intention to achieve that very aim, namely to put an end to the marital relationship. It being a requirement for divorce based on constructive desertion that the defendant should have had such an intention, I do not think that it is irrelevant to allege that the intention was achieved.

Conclusion

[109] To sum up, the defendant has not succeeded in persuading me that any of the exceptions should be upheld. The following order is made:

1. All the exceptions are dismissed.

2. The application to strike is refused.

3. The defendant shall bear the costs of the plaintiff, such costs to include the costs of one instructing and one instructed counsel.

_____(signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the excipient/defendant:	Adv R Heathcote SC
	With him Adv H Schneider
	Instr. by Kirsten & Co.
For the respondent/plaintiff:	Adv W Vos
	Instr. by Koep & Partners