

SOUTH AFRICA / JUDGMENT

E.V (born S) v J.H.V and Others (135/2020) [2023] ZAECMKHC 41 (28 February 2023)

[2023] ZAECMKHC 41**COURT**

Eastern Cape High Court, Makhanda

BEFORE

Laing

CASE / FILE NUMBER

135/2020

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, MAKHANDA)****CASE****NO. 135/2020****In**

the matter between:

E[...]
V[...] (born
S[...])
Plaintiff
and
J[...]
H[...]
V[...]
First Defendant
J[...]
H[...] V[...]
N.O.
Second Defendant
J[...]
H[...] V[...]

N.O.
Third Defendant
J[...]
P[...] V[...]
N.O.
Fourth Defendant
THE
MASTER OF THE HIGH COURT,
BLOEMFONTEIN
Fifth Defendant

JUDGMENT

LAING J

- [1] This is an application for the respondents to provide further and better particulars in response to the applicant's request for trial particulars.

Background

- [2] The applicant and the first respondent married each other on 17 April 1992, out of community of property and with the application of the accrual system. Subsequently, the applicant instituted an action for divorce. She joined the second respondent in his capacity as trustee of the Lizann Trust, as well as the third and fourth respondents in their capacities as trustees of the Kesieberg Boerdery Trust.
- [3] In the divorce action, the applicant seeks, inter alia, an order declaring that the assets acquired by the above trusts are, in effect, owned by the first respondent in his personal capacity. She also seeks an order declaring that the net value of the trust assets must be considered when calculating accrual in relation to the first respondent's estate. She further seeks an order directing the first respondent to pay one-half of the difference between the accrual for the parties' respective estates. She seeks, too, an order directing the second to fourth respondents to transfer the trust assets to the first respondent in his personal capacity if he holds insufficient assets to satisfy the applicant's accrual claim.
- [4] The applicant delivered a request for trial particulars. The respondents delivered a reply, which the applicant contends is insufficient.
- [5] In her founding affidavit, the applicant details the nature of the request made. She requested, inter alia: particulars of the bank accounts operated by the first respondent, including the current balances held therein; details of the first respondent's shares or member's interests, investments, and loan accounts; information about any business entity in which he held an interest; particulars about his employment with C[...] F[...] C[...] (Pty) Ltd; details of his gross and nett income for the past five years; information about his monthly expenditure, and his anticipated financial obligations; and particulars of trust assets and liabilities.

- [6] The applicant asserts that the respondents have not supplied the particulars sought. Moreover, she alleges that their replies to the request are vague and lack the necessary specificity.
- [7] On their part, the respondents argue that an accrual claim only arises on the date of the dissolution of the marriage, and not before. Consequently, contend the respondents, any claim to that effect would be improper and irrelevant. There was no agreement between the parties that accrual could be determined at this stage of proceedings. There was, therefore, no need for the respondents to supply the particulars sought.
- [8] Furthermore, the respondents point out that they have already provided details of the value of the first respondent's estate. They have also made discovery regarding the trusts and have furnished

documentation that the applicant previously requested in terms of rule 35(3), notwithstanding the respondents' attitude that the information was irrelevant to the dispute. They argue that the applicant is in possession of all the particulars that she requires

in relation to the issues to be adjudicated at trial.

- [9] The respondents aver that they have discovered the financial statements of the business entities involved but admit that the first respondent has not discovered any in his personal capacity. He does not have any. Furthermore, the respondents state that the first respondent has already provided particulars in relation to his assets

and liabilities, as well as information about his monthly expenditure

- [10] In reply, the applicant draws attention to the contradictory nature of the particulars that the first respondent supplied in relation to his assets. Moreover, the trust documents, as discovered, were outdated, unsigned and incomplete. Without the particulars requested, asserts the applicant, she is unable to prepare properly for trial or to instruct an accountant for purposes of preparing an expert report.

Issues

to be decided

- [11] The court, in the present matter, is simply required to determine whether the applicant is entitled to further and better particulars. This will depend, primarily, on the nature of the relief sought in the divorce action.

- [12] We proceed to outline the applicable principles below.

Legal framework

- [13] A request for trial particulars is permitted under rule 21(2), which provides as follows:

‘After the close of pleadings any party may, not less than twenty days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial. Such request shall be complied with within ten days after receipt thereof.’

- [14] If the other party fails to provide the requested particulars, then the requesting party may apply to court under rule 21(4). The court has a discretion to grant any such order as may seem appropriate in the circumstances.[1]
- [15] The courts have held that the purpose of allowing a party to request further particulars for trial is to prevent surprise, to ensure that the parties can be told with greater precision what the other party intends to prove so as to enable his or her opponent to prepare his or her case and combat counter-allegations, but (nevertheless) not to tie the other party down or to limit his or her case unfairly at trial.[2]
- [16] The purpose of requesting further particulars is not to secure evidence that will emerge during cross-examination. However, a party is not prevented from requesting particulars when it would result in the disclosure of evidence where the absence of such particulars would cause embarrassment or prejudice in the preparation of his or her case.[3]
- [17] It is also necessary to mention the Matrimonial Property Act 88 of 1984 (‘MPA’). The relevant provisions are set out as follows:

‘3. Accrual system.—(1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of

the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

- (2) Subject to the provisions of section 8(1), a claim in terms of sub-section (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.

4. Accrual of estate.—(1)

- (a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.

(b) ...

(2) ...

5. ...

6. ...

7. Obligation to furnish particulars of value of estate.— When it is necessary to determine the accrual of the estate of a spouse or a deceased spouse, that spouse or the executor of the estate of the deceased spouse, as the case may be, shall within a reasonable time at the request of the other spouse or the executor of the estate of the other spouse, as the case may be, furnish full particulars of the value of that estate.’

[18] The respondents in the present matter have relied on the provisions of section 3(1) as the primary basis for their opposition to the application. The application of the above principles will be considered in the paragraphs below.

Application to the facts

[19] The respondents argue that the applicant and first respondent are still married. They are not yet divorced. Accordingly, with reference to section 3(1) of the MPA, any accrual claim that the applicant may have will only arise upon the dissolution of the marriage. Consequently, there is no legal basis for the quantification of the claim since the date of quantification has not yet arisen. The further particulars sought by the applicant are irrelevant until an order for divorce has been granted.

[20] In support of their argument, the respondents refer to AB v JB,[4] where Tsoka AJA held that:

‘...The provisions of the MPA are clear and unambiguous. In terms of section 3 thereof, a spouse acquires a right to claim an accrual at the “dissolution of a marriage”. An exception arises in terms of section 8 of the MPA. In terms of this section, a spouse is entitled to approach the court for immediate division of the accrual, where his or her right to share in it at dissolution of the marriage “will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse”. It is only then that the date for determination of an accrual is brought forward, instead of at “dissolution of the marriage”. Furthermore, in terms of section 4 of the MPA the net value of the accrual of the estate of a spouse is determined at the dissolution of the marriage.’[5]

[21] The respondents assert that the applicant’s accrual claim may (or may not) arise at the dissolution of the marriage. It was still possible that a court could refuse to grant a divorce order or postpone the proceedings where it was not satisfied that the marriage relationship had broken down irretrievably. Consequently, because no accrual claim had yet arisen, there was no legal basis upon which it could be quantified at this stage. The further particulars requested by the applicant were irrelevant.

[22] In LD v JD,[6] say the respondents, Gilbert AJ followed the above principles and held that the accrual claim was contingent in nature until it vested upon the dissolution of the marriage. [7] Furthermore, the same principles found application in the full bench decision of PJ v HJ, [8] in the Free State Division, where the court dealt with a request for further particulars in divorce proceedings. Loubser J held that:

‘...The first question is then whether the trial Magistrate was correct in finding that the particulars were relevant as far as the issue of accrual is concerned. Unfortunately she was not correct in this respect. Section 4 of the Matrimonial Property Act provides that the accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage. It follows that at the trial proceedings for a divorce, the right to accrual has not yet accrued. It will only accrue when the divorce order is granted, and only at that time must the accrual be determined. For purposes of the divorce proceedings, the issue of accrual is therefore irrelevant. Particulars in respect thereof cannot be “strictly necessary” to prepare for trial.

...In addition, the trial Magistrate ignored the fact that the Respondent had already obtained the information relating to accrual after she had served her notice in terms of Section 7 of the Matrimonial Property Act.’[9]

- [23] Consequently, contend the respondents, the applicant is entitled, at best, to particulars pertaining to the trusts. However, these would be limited to the issues regarding the order sought by the applicant for a declarator that the assets acquired by the trusts are, in effect, owned by the first respondent in his personal capacity.
- [24] The principles enunciated in *AB v JB* are well-established and accord with the language of sections 3 and 4 of the MPA. An accrual claim is only acquired upon the dissolution of a marriage.[10] The determination of the net value of the accrual for an estate can only be determined upon such date unless the exception under section 8 applies.
- [25] The decision in *PJ v HJ*, however, requires closer analysis. Here, the facts were that the appellant had instituted divorce proceedings in the Regional Court, claiming, inter alia, a decree of divorce, an order that he pay reasonable maintenance for the minor child, and compliance with the antenuptial contract. The respondent counter-claimed, seeking, inter alia, maintenance for herself. The appellant pleaded that the respondent was able to provide for her own maintenance needs. Both parties issued notices in terms of section 7 of the MPA, requesting details of the value of the assets and liabilities in each other’s estate for purposes of determining accrual. Details were subsequently supplied by both parties. Shortly afterwards, the respondent filed a request for further particulars for trial, consisting of a lengthy list of questions about the appellant’s financial position. The appellant refused the request, stating that the particulars were not necessary for trial and were irrelevant. This prompted the respondent to make application to compel.
- [26] The magistrate in the Regional Court referred to the decision of the Supreme Court of Appeal (‘SCA’) in *ST v CT*,[11] where Majiedt JA and Rogers AJA emphasised the duty of a spouse, in terms of section 7 of the MPA, to make full and frank disclosure of the particulars pertaining to the value of his or her estate. The failure to do so could lead to the drawing of an adverse inference that a party had hidden assets.[12] The magistrate stated that full disclosure was required for the court to decide the question of maintenance. Furthermore, she held that the request for further particulars concerned the issues of both maintenance

and accrual. The particulars were relevant for trial preparation since they related to the accrual in the respondent's estate.

[27] As apparent from the extract, the full bench found that the magistrate had not been correct regarding the issue of accrual.[13] The right to accrual had not yet vested. For purposes of the divorce proceedings, the court held that the issue of accrual was irrelevant. Regarding the issue of maintenance, the court examined the pleadings and pointed out that the respondent's claim for maintenance was met by the appellant's bare denial. The court, citing *Rall v Rall*, [14] found that a party cannot be required to provide particulars in such circumstances, especially when the information sought could simply be secured by means of cross-examination.[15]

[28] It is the respectful view of this court that the facts in *PJ v HJ* are distinguishable from those in the present matter. The respondent in the above proceedings did not seek, in terms of her counter-claim,

an order for the determination and payment of accrual. She merely sought maintenance for herself. Strictly speaking, the question of accrual was not an issue that was directly before the Regional Court. In the present matter, the applicant seeks, against the first respondent, a decree of divorce and spousal maintenance. Furthermore, she seeks, against the first to fourth respondents, declarators to the effect that the assets acquired by the trusts are owned by the first respondent in his personal capacity and that the net value thereof be considered when calculating accrual. She seeks, too, an order for payment of accrual. She seeks, finally, an order directing the second to fourth respondents to transfer the assets to the first respondent in his personal capacity if he cannot satisfy the applicant's accrual claim. The situation is somewhat different from that which confronted the Regional Court in *PJ v HJ*.

[29] That the applicant's accrual claim is contingent upon the court's granting of a decree of divorce is a principle that must be accepted on the strength of the legislation and the case law. So, too, is the principle that the determination of the net value of accrual in relation to the respondent's estate can only be made upon the dissolution of the marriage. There is, however, no reason why the applicant cannot seek a decree of divorce and the

determination

and payment of accrual in terms of the same action.

[30] The applicant referred to the decision in *JA v DA*, [16] where Sutherland J remarked that:

'...Without challenging the correctness of the finding that enforceability must await the date of dissolution, it does not seem to me inappropriate to sue for both a divorce and an order pursuant to s 3 of the MPA in a single action, in which the accrual order is made dependent upon the granting of a divorce order. For policy reasons, if no other, and the obvious saving of costs and avoidance of delay, the double-barrelled approach is preferable, a view shared by Olivier J but which he reluctantly disavowed because of what, in his view, would be infidelity to could

probably overcome that danger of infidelity. Practical factors alone ought to determine whether any post-dissolution revisions to provisional calculations become necessary. However, it is plain that there cannot be any basis to calculate the value of the estates at a moment earlier than the dissolution.’[17]

[31] As pointed out by the applicant, the above approach was approved (obiter) by Tsoka AJA in AB v JB,[18] and followed by Binns-Ward J in TN v NN and others.[19] Furthermore, in LD v JD,[20] Gilbert AJ observed that:

‘...Although the accrual claim only arises or vests upon the dissolution of the marriage in terms of section 3(1) [of the MPA] and therefore is only capable of being valued after it has arisen, the parties during the divorce proceedings can lead evidence to establish the value of the accrual claim and so enable the court to award a quantified monetary judgment in respect of the accrual claim contemporaneously upon granting the divorce. This has the advantage of avoiding a more costly and delayed two-stage process to the litigation, where in the first stage the divorce is granted with the resultant dissolution of the marriage giving rise to the accrual claim, and then a second stage in which the value of the accrual claim itself is determined.’[21]

[32] The above approach is a pragmatic and sensible response to the costs, delays (and trauma) of divorce proceedings. At the same time, it is in alignment with the provisions of sections 3 and 4 of the MPA and remains consistent with the principles indicated in AB v JB.[22]

[33] Returning to the request for trial particulars under rule 21(2), regard must be had to the pleadings to decide whether the particulars are strictly necessary for trial preparation.[23] The applicant raises squarely, in her particulars of claim, the determination of the ownership of the trust assets, the net value

thereof, the transfer thereof to the first respondent in his personal capacity, and the calculation and payment of accrual overall. No order has been made, at this stage, for the separation of issues.[24]

[34] Particulars pertaining to the respondent’s financial affairs, as well as trust assets and liabilities, are entirely relevant to the applicant’s claim. She cannot prepare properly for trial without the information sought.

[35] In passing, it would not be inappropriate to reiterate the principle expressed by the SCA in ST v CT.[25] A spouse must make full and frank disclosure of the value of his or her estate. Whereas the context thereof was section 7 of the MPA, it is the respectful view of this court that the principle applies in equal measure when a spouse relies on the provisions of rule 21 to request further particulars in circumstances where inadequate information has been furnished. The applicant drew the attention of the court to DEB v MGB,[26] where Gorven AJA remarked that:

‘...The attitude of many divorce parties, particularly in relation to money claims where they control the money, can be characterised as “catch me if you can”. These parties set themselves up as immovable objects in the hope that they will wear down the other party. They use every means to do so. They fail to discover properly, fail to provide any particulars of assets within their peculiar knowledge and generally delay and obfuscate in the hope that they will not be “caught” and have to disgorge what is in law due to the other party.’[27]

[36] The provisions of rule 21 are indeed susceptible to abuse. The qualification that a party is only entitled to such particulars as are strictly necessary to enable him or her to prepare for trial was obviously intended to mitigate against such a risk. Nevertheless, to expect a party in divorce proceedings to obtain, predominantly through cross-examination, sufficient evidence to produce a clear enough picture of the other party’s financial affairs when a substantial amount of complex and specialised information is involved would appear to run contrary to the openness and transparency encouraged by the SCA in the decisions mentioned earlier. A responsible and mature response to a timely request for further particulars to allow for proper trial preparation, including the possible involvement of experts as the present matter suggests, would seem to support the pragmatic and sensible approach espoused by Sutherland J in *JA v DA*.

[37] Trial proceedings, especially matrimonial matters, should not be akin to tooth extraction. If the rules permit the fair and necessary disclosure of particulars to streamline and expedite the dissolution of a marriage, inevitably a distressing experience for the spouses and families involved, then effect ought to be given thereto.

Relief and order

[38] Insofar as the respondent contends that the particulars sought by the applicant are irrelevant until a decree of divorce has been granted, the case law seems to indicate otherwise. The vesting of the applicant’s accrual claim and the determination of accrual regarding the first respondent’s estate can only occur upon the dissolution of the marriage. Nevertheless, the applicant is not prevented from seeking a decree of divorce, declarators in relation to the trust assets, and orders pertaining to the calculation and payment of accrual, in terms of the same action. The further particulars sought by the applicant are relevant to the above issues and are necessary for proper trial preparation.

[39] It is not the intention of this court to decide precisely what the respondent is still required to provide. The applicant has merely sought further and better particulars. Where necessary, she can return to court on the same papers, amplified where required, to seek further relief.

[40] The only question remaining is that of costs. The court enjoys a wide discretion in that regard and sees no reason why the successful party is not entitled to her costs. The applicant argued for the costs of two counsel, but not with much conviction. The determination of the issues raised by the pleadings may, in due course, warrant the involvement of two counsel but not for purposes of the present proceedings.

[41] In the circumstances, the following order is made:

- (a) the first to fourth respondents are directed to provide further and better particulars in relation to paragraphs 2.2, 2.3, 2.5, 2.7, 6 (including paragraphs 6.1 to 6.10), 7.1, 8, 9, 12 to 14.12, and 15 to 19.9, of the applicant's Request for Trial Particulars, dated 10 June 2022; and
- (b) the first to fourth respondents are directed to pay the costs of the application jointly and severally, in the event of one paying the others being absolved.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

For the plaintiff: Adv Nepgen with Adv Williams, instructed by Neville Borman & Botha Attorneys, Makhanda For the 1st to 4th defendants: Adv Reinders, instructed by Netteltons Attorneys, Makhanda.

Date of hearing:

28 November 2022.

Date of delivery of judgment: 28 February 2023.

[1] Van der Walt v Van der Walt 2000

(4) SA 147 (E), at 150E-F; Bester NO v Target Brand Orchards (Pty) Ltd (unreported, WCC case no 22593/2019, dated 21 December 2020), at paragraph [46].

[2] Samuels v William Dunn & Company South Africa (Pty) Ltd 1949

(1) SA 1149 (T), at 1158. The principles have been adopted consistently in subsequent cases, e.g. Thompson v Barclays Bank DCO 1969 (2) SA 160 (W), at 165; Schmidt Plant Hire (Pty) Ltd v Pedrelli 1990 (1) SA 398 (D), at 402; and EH Hassim Hardware (Pty) Ltd v Segabokeng Building Construction CC (unreported, GP case no 69167/2017, dated 27 September 2021), at paragraph [16].

[3] Annandale v Bates 1956 (3) SA 549 (W), at 551; Von Gordon v Von Gordon 1961

(4) SA 211 (T), at 213; and Lotzoff v Connel 1968 (2) SA 127 (W), at 129.

[4] 2016 (5) SA 211 (SCA).

[5] At paragraph [16].

[6] [2021] 1 All SA 909 (GJ).

[7] At paragraph [14]. The court pointed out that the accrual claim could vest earlier if an immediate division of the accrual was granted in terms of section 8(1) of the MPA.

[8] 2022 JDR 3356 (FB).

- [9] At paragraphs [13] and [14]. The footnotes have been omitted.
- [10] In *LD v JD* (n 6, *supra*), Gilbert AJ described it as a deferred equalization claim, at paragraph [13].
- [11] 2018
- (5) SA 479 (SCA).
- [12] At paragraphs [33] to [36].
- [13] See n 9, *supra*.
- [14] Unreported, FS case no 2369/2009.
- [15] The court also referred to *Carte v Carte* 1982 (2) SA 318 (D) and *Von Gordon v Von Gordon* 1961 (4) SA 211 (T).
- [16] 2014
- (6) SA 233 (GJ).
- [17] At paragraph [20].
- [18] See n 4, *supra*, at paragraph [19].
- [19] 2018 (4) SA 316 (WCC), at paragraph [29].
- [20] See n 6, *supra*.
- [21] At paragraph [17].
- [22] See n 4, *supra*.
- [23] *Hardy v Hardy* 1961
- (1) SA 643 (W), at 646; *Swart v De Beer* 1989 (3) SA 622 (E); *DFPT Finance NPC v Vintage Distributors (Pty) Ltd* (unreported, WCC case no 9095/18, dated 23 November 2021).
- [24] Either of the parties may yet apply for the separation of issues, e.g. the determination of the divorce claim, under rule 33(4).
- [25] See n 11, *supra*.
- [26] [2014] JOL 32339 (SCA).
- [27] At paragraph [39].

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