

SOUTH AFRICA / JUDGMENT

**Gunter v Executor in the Estate of the Late
Chrisitian France Gunter (20342/2008) [2012]
ZAWCHC 51; 2013 (4) SA 387 (WCC) (6 June 2012)
[2012] ZAWCHC 51**

COURT

Western Cape High Court, Cape Town

BEFORE

Gangen

CASE / FILE NUMBER

20342/2008

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[Reportable]

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER: 20342/2008

In the matter between:

YVONNE LYNETTE GUNTERPlaintiff

and

THE EXECUTOR IN THE ESTATE OF THE LATE

CHRISTIAN FRANCE GUNTERDefendant

JUDGMENT DELIVERED ON 6 JUNE 2012

GANGEN, AJ:

Introduction

[1] This matter is brought before Court as a stated case. The issue is whether Plaintiff's claim for redistribution in terms of Section 7(3) of the Divorce Act 71 of 1979 ("the Act") was extinguished by the death of her husband ("the deceased")

which took place prior to the final determination of the pending divorce action and whether Plaintiff has a claim for redistribution

in terms of Section 7(3) against the executor of the estate of the deceased. Ms de Wet appeared for the Plaintiff and Mr de Villiers

appeared for the Defendant.

The

Facts

[2] For purposes of adjudicating the stated case the following facts were agreed. On 19 July 1969 in Cape Town, Plaintiff and the deceased were married out of community of property (with community of property and accrual being excluded). In December 2008 Plaintiff instituted divorce proceedings against the deceased. Plaintiff claimed, inter alia, a decree of divorce, redistribution in terms of Section 7(3) of the Act and personal maintenance in terms of Section 7(2). Plaintiff's claims were defended by the deceased. The deceased instituted a counterclaim for redistribution and for personal maintenance. The pleadings in the divorce action closed on 15 June 2009. The deceased died on 1 August 2010.

The law and the issues

- [3] Plaintiff by way of a formal amendment to the pleadings in the divorce action is proceeding with a claim for a redistribution order in terms of Section 7(3) of the Act, against the Executor of the deceased's estate. Plaintiff has however instituted a separate claim against the estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990,
- [4] Plaintiff submits that the death of the deceased took place after *litis contestatio* was reached and therefore her claim was not extinguished by the death of her late husband. Plaintiff's case is that, upon death, the deceased's estate vests in the executor of the estate and that Rule 15 of the Uniform Rules of Court provides that no proceedings shall terminate solely by reason of the death, marriage or change of status of any party thereto, unless the cause of such proceedings is thereby extinguished.
- [5] Plaintiff submits further that as the marriage was automatically dissolved by the death of the deceased, the court seized with the divorce action need not grant a decree of divorce but still has to determine Plaintiff's claim in terms of Section 7(3) of the Act. Plaintiff argues that as the pleadings have closed, *litis contestatio* has been reached. She submits that as the issue is crystallised and joined, the effect of the provisions of Rule 29 is that at the close of pleadings the Plaintiff's rights freeze at that moment Plaintiff relies on the dictum in *Jankowiak & Another v Parity Insurance Co Ltd* 1963(2) SA (W) at 288 as support for her contention that as *litis contestatio* had been reached during the deceased's lifetime, her claim for a Section 7(3) distribution may be persisted with after the death of the deceased.

- [6] The executor of the deceased's estate disputes Plaintiff's right to proceed with her action for redistribution. Plaintiff relies on the wording of the Act and the inter-relatedness of the subsections of Section 7 dealing with relief which is granted ancillary to a divorce order. It is submitted by the executor that the Plaintiff's claim had been extinguished as at date of death of the deceased. Alternatively, the Plaintiff's claim for redistribution had become unenforceable as a result of the death of the deceased.
- [7] It is trite that a marriage dissolves on the death of one of the parties. Therefore, Plaintiffs claim for divorce was extinguished by the death of her husband. That being so, the issue is whether the Plaintiff can proceed with a claim for relief which is ancillary to the order of divorce where a claim for divorce is no longer competent.
- [8] The definition of "divorce action" in the Act is of relevance. The Act states as follows-
- "divorce action' means an action by which a decree of divorce or other relief in connection therewith is applied for, and includes-
- (a) an application pendente lite for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
 - (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, in forma pauperis, or for the substituted service of process in, or the edictal citation of a party to, such action or such application;"
- [my emphasis]
- [9] This definition makes it clear that the claim for the decree of divorce is not independent of the ancillary claims for maintenance, redistribution or forfeiture but part of the divorce action. It reinforces the position that would indicate that the relief in terms of Section 7 is relief which is ancillary to the claim for divorce and is not available where an order of divorce is not claimed.
- [10] This is further borne out by the wording of the subsections of Section 7 of the Act. Both subsections 7(1) and 7(3) commence with the words "A court granting a decree of divorce ..." indicating that the relief provided for in Section 7 pertains only to orders granted in conjunction with a decree of divorce.
- [11] This position was confirmed in the case of *Schutte vs Schutte* 1996(1) SA 872 and *Sempapalele vs Sempapalele* 2001(2) SA 306 (O). These cases dealt with a Section 7(2) claim for maintenance and a Section 7(7) claim for a share in the pension interest respectively.
- [12] When the matter was heard, counsel was given an opportunity to address the Court further in writing on the impact of the *Schutte* and *Sempapalele* cases on their submissions. Written submissions from both counsel were received. Ms de Wet submitted that the decision in the *Schutte* case follows the common law position with regard to the duty of support that lapses on death and that the same did not apply to a claim for redistribution in terms of Section 7(3). She argued further that it did not decide the situation where *litis contestatio* was

reached before the death of the Defendant. It was further submitted that those cases were not applicable because the divorce order was already granted when the Court dealt with those matters. Ms de Wet also submitted that it was the contribution of the party to the marriage that entitled that party to assets of the other and that contribution was not dependant on whether the Defendant was alive. Mr de Villiers submitted that the Schutte case confirms the view that the wording of Section 7 must be interpreted strictly and referred to the dictum of van Heerden A R at 882 B-D where he states -

"Vir huidige doeleindes is die belangrike feit egter dat die bevoegdhede waarvoor Art 7 voorsiening maak, toegese aan 'n Hof "wat 'n egskeidingsbevel verleen".

Mr de Villiers submitted further that the Sempapalele decision lends credence to his argument where Musi J remarked on the various subsections of Section 7,

[13] It is so that the decision in Schutte followed the common law position regarding maintenance, that the divorce order was already granted and that it did not deal pertinently with the position regarding *litis contestatio* having been reached before the Defendant's death. However, the relevance of the decision lies in the interpretation of the wording of the relevant sections of the Act. In the Schutte case (*supra*) the Court, after considering the interpretation of the words "a court granting a decree of divorce" held that a maintenance order cannot in terms of Section 7 of the Act be granted after the dissolution of the marriage. Van Heerden AR said "at 882 that-

"Dit volg dus dat 'n onderhoudsbevel nie ingevolge art 7 van die 1979 wet na ontbinding van 'n huwelik verleen kan word nie".

The relevance of the decision thus lies not only in the interpretation of the wording of the Act but also to the concluding reference to the dissolution of the marriage. Whether the cause of the dissolution of the marriage is death or a prior divorce order makes no difference to the outcome, namely that an order cannot in terms of Section 7 of the Act be granted after the dissolution of the marriage.

[14] This position is supported by the decision in the Sempapalele case dealing with a pension interest. The pension interest was not regarded as an asset of the spouse who was a member of the pension fund until the introduction of Section 7. Section 7 thus provided a mechanism for parties engaged in divorce proceedings to have access to the pension interest of either of them for the purpose of achieving an equitable distribution of their assets. In the Sempapalele case (*supra*), Musi J referring to the Schutte case (*supra*) stated -

"Similarly, a spouse seeking a share in the pension interest of the other spouse must apply for and obtain an appropriate Court order during the divorce proceeding. This much is clear from the provisions of ss(7)(a) which states: 'In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled..,' The phrase 'any divorce action' must mean any pending divorce action. This conclusion is supported by the other provisions of the section in terms of which the various orders provided for must be applied for and granted by the court

hearing the divorce case (Compare ss (2), (3), (4), (5), (6), (8) (a) and (9)-)"

[15] It is also dear from a reading of the subsections of Section 7 that they are inter-related and cannot be treated in isolation of one another. Section 7(2) states that-

"... the Court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct as far as it may be relevant to the breakdown of the marriage, an order in terms of section (3) and any other factor which in the opinion of the Court should be taken into account, make an order which the Court finds just in respect of the payment of maintenance by one party to the other ..." (my emphasis) Section 7(3) provides that- "A court granting a decree of divorce in respect of a marriage out of community of property— (g)entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; may, subject to the provisions of 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." (my emphasis). Section 7(5) reads: "(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3). the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (A), also take into account -

- (a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3)(b) of this section may have in terms of section 22(7) of the Black Administration Act, 1927 (Act No. 38 of 1927);
- (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;
- (c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and
- (d) any other factor which should in the opinion of the court be taken into account," (my emphasis)

[16] In Ex Parte Meyer N 0: In RE Meyer v Meyer 1962(2)SA 668 the executor of the deceased Plaintiff in a divorce action applied to have himself substituted as the Plaintiff to obtain an order of forfeiture of the benefits of the marriage on behalf of the estate. Henochsberg J stated at p689 that- "It is quite clear from the summons and declaration that the main relief sought was a decree of divorce and that all other relief sought was ancillary to a decree of divorce." And further at page 691 "If the main claim were to fail - and in the pending action it must, because of the death of the plaintiff - then the ancillary relief must also fail."

- [17] It is accordingly evident that only a Court granting a divorce order may grant the ancillary relief.
- [18] That being so, the question that arises is whether it is possible for a party to proceed with a claim in terms of Section 7(3) for redistribution in divorce proceedings where the marriage is dissolved by the death of one party after *litis contestatio* has been reached.
- [19] Rule 15(1) states that- "no proceedings shall terminate solely by reason of the death, marriage or other change of status of any party unless the cause of such proceedings is thereby extinguished"(mv emphasis). The issue raised is whether the cause of the proceedings is extinguished in the present case. In order for parties to apply for a divorce and ancillary relief in terms of the Divorce Act, there must be a marriage. In this case, the marriage was dissolved by reason of the death of the defendant and therefore the cause of the proceedings is extinguished.
- [20] Section 7(3) does not have its origin in the common law. The redistribution order was 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 in the estate of the one or the other "(Shafer on Family Law at p20).
- [21] The point of departure is the nature of the right that is being enforced. A divorce is a personal action and comes automatically to an end if one of the spouses dies before a divorce order is granted. (Shafer on Family Law at p 65). Similarly, the claim for redistribution is a personal right between the parties which only a Court granting an order of divorce has a discretion to entertain having regard to other ancillary relief to be granted in terms of the subsections of section 7 of the Divorce Act. [22] In a decision of the High Court of Zimbabwe in *Malyam Matsinde v Patricia Nyamukapa* case no 4352/05, the Court referred to *Ex parte Masimirembwa* NO 1995 (1)ZLR 144 H at 148 where it was stated- "It would appear that the transmissibility of rights or actions depends on whether they are rights or actions in rem or in personam. Real rights are transmissible, even where the holder dies before *litis contestatio*, whereas personal rights die with the holder. The situation appears different where the holder of personal rights dies after *litis contestatio*" [23] *Makarau J* in the *Malyam Matsinde* case (supra) went on to state - "...the distribution of the joint estate of spouses is a personal claim that is peculiar to husband and wife or former husband and wife. It is not a cause of action founded on a principle of common law. It is an action created by Parliament to achieve justice as between husband and wife in an area where the strict application of the principles of property law may work an injustice on those spouses who contribute towards the acquisition of assets registered in the other spouse's name. It is not a right that

can be enforced against a creditor for instance or shield the property from attachment in execution. It is not a preferent claim

at liquidation. It remains a personal right that one spouse can enforce against the other."

Makarau J went on further to state that - "While actions for general damages for personal injury may survive the plaintiff if the plaintiff dies after *litis contestatio*, it is my understanding of the law that not all personal claims can survive the plaintiff even after *litis contestatio* had been reached. Claims mainly in the realm of family law appear to me to die with the plaintiff."

[24] In the Malyam Matsinde case (*supra*), the Court then proceeded to deal with claims for redistribution. In doing so, the Court again referred to the Masimirembwa case (*supra*) at 149 where Chatikobo J stated- "a spouse who claims for an order of redistribution is not claiming what belongs to her, but in essence, is asking the Court to make a property adjustment order to strike a balance between her assets and those of the other spouse."

[25] The claim sought to be pursued by the Plaintiff is a personal claim which arises not from delict or injury, but from the provisions of the Divorce Act of 1979. The authorities cited by Plaintiff relate to the death of a plaintiff and not a defendant and the nature of the claims which are transmissible in the cases referred to by Plaintiff are under the *actio injuriarum*. They relate to claims for damages for personal injury. Those authorities are thus not relevant to the issue at hand. The provisions of Section 7 of the Divorce Act provide for ancillary relief, *inter alia*, in the form of orders for the division of assets and maintenance. Divorce proceedings are personal to the parties and it must be that relief which is ancillary to those proceedings are also of such personal nature.

[26] It is according my judgment that it is not competent for a party to a divorce action to pursue a claim for ancillary relief where the marriage is already dissolved. This is so irrespective of whether *litis contestatio* has taken place.

[27] It is accordingly ordered that-

- (a) Plaintiff's claim for redistribution in terms of Section 7(3) of the Divorce Act 71 of 1979 was extinguished by the death of her husband ("the deceased") which took place prior to the final determination of the pending divorce action and
- (b) Plaintiff does not have a claim for redistribution in terms of Section 7(3) of the Divorce Act 71 of 1979 against the executor of the estate of the deceased
- (c) Plaintiff pays the costs of this application. GANGEN, AJ For the Plaintiff(s) :

Adv. A de WET Instructed by : Messrs Kantor-Fialkov (Ref: JH/sp/G535) J HOLZBERG Tel. 021 674 3080 For the Defendant(s) : Adv. A S de VILLIERS Instructed by : Messrs Van der Spuy (Ref: M Posthumus-Meyjes/cc/LUT10872) Tel. 021 419 3622 Date(s) of hearing : Wednesday, 14 MARCH 2012.

Judgment

delivered : Wednesday, 6 JUNE 2012.

"... the Court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct as far as it may be relevant to the breakdown of the marriage, an order in terms of section (3) and any other factor which in the opinion of the Court should be taken into account, make an order which the Court finds just in respect of the payment of maintenance by one party to the other ..." (my emphasis)

Section 7(3) provides that-

"A court granting a decree of divorce in respect of a marriage out of community of property—

(g)entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; may, subject to the provisions of 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." (my emphasis).

Section 7(5) reads:

"(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3). the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (A), also take into account -

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- (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;
- (c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and
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"It is quite clear from the summons and declaration that the main relief sought was a decree of divorce and that all other relief sought was ancillary to a decree of divorce."

And further at page 691

"If the main claim were to fail - and in the pending action it must, because of the death of the plaintiff - then the ancillary relief must also fail."

[17] It is accordingly evident that only a Court granting a divorce order may grant the ancillary relief.

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[20] Section 7(3) does not have its origin in the common law. The redistribution order was 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 in the estate of the one or the other "(Shafer on Family Law at p20).

[21] The point of departure is the nature of the right that is being enforced. A divorce is a personal action and comes automatically to an end if one of the spouses dies before a divorce order is granted. (Shafer on Family Law at p 65). Similarly, the claim for redistribution is a personal right between the parties which only a Court granting an order of divorce has a discretion to entertain having regard to other ancillary relief to be granted in terms of the subsections of section 7 of the Divorce Act.

"It would appear that the transmissibility of rights or actions depends on whether they are rights or actions in rem or in personam. Real rights are transmissible, even where the holder dies before *litis contestatio*, whereas personal rights die with the holder. The situation appears different where the holder of personal rights dies after *litis contestatio*"

[23] Makarau J in the Malyam Matsinde case (*supra*) went on to state -

"...the distribution of the joint estate of spouses is a personal claim that is peculiar to husband and wife or former husband and wife. It is not a cause of action founded on a principle of common law. It is an action created by Parliament to achieve justice as between husband and wife in an area where the strict application of the principles of property law may work an injustice on those spouses who contribute towards the acquisition of assets registered in the other spouse's name. It is not a right that

can be enforced against a creditor for instance or shield the property from attachment in execution. It is not a preferent claim

at liquidation. It remains a personal right that one spouse can enforce against the other."

Makarau J went on further to state that -

"While actions for general damages for personal injury may survive the plaintiff if the plaintiff dies after *litis contestatio*, it is my understanding of the law that not all personal claims can survive the plaintiff even after *litis contestatio* had been reached. Claims mainly in the realm of family law appear to me to die with the plaintiff."

[24] In the Malyam Matsinde case (*supra*), the Court then proceeded to deal with claims for redistribution. In doing so, the Court again referred to the Masimirembwa case (*supra*) at 149 where Chatikobo J stated-

"a spouse who claims for an order of redistribution is not claiming what belongs to her, but in essence, is asking the Court to make a property adjustment order to strike a balance between her assets and those of the other spouse."

[25] The claim sought to be pursued by the Plaintiff is a personal claim which arises not from delict or injury, but from the provisions of the Divorce Act of 1979. The authorities cited by Plaintiff relate to the death of a plaintiff and not a defendant and the nature of the claims which are transmissible in the cases referred to by Plaintiff are under the *actio injuriarum*. They relate to claims for damages for personal injury. Those authorities are thus not relevant to the issue at hand. The provisions of Section 7 of the Divorce Act provide for ancillary relief, *inter alia*, in the form of orders for the division of assets and maintenance. Divorce proceedings are personal to the parties and it must be that relief which is ancillary to those proceedings are also of such personal nature.

[26] It is according my judgment that it is not competent for a party to a divorce action to pursue a claim for ancillary relief where the marriage is already dissolved. This is so irrespective of whether *litis contestatio* has taken place.

[27] It is accordingly ordered that-

(a) Plaintiff's claim for redistribution in terms of Section 7(3) of the Divorce Act 71 of 1979 was extinguished by the death of her husband ("the deceased") which took place prior to the final determination of the pending divorce action and

- (b) Plaintiff does not have a claim for redistribution in terms of Section 7(3) of the Divorce Act 71 of 1979 against the executor of the estate of the deceased
- (c) Plaintiff pays the costs of this application.

GANGEN, AJ

For the Plaintiff(s) :

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Instructed by : Messrs Kantor-Fialkov

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For the Defendant(s) : Adv. A S de VILLIERS

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Date(s) of hearing : Wednesday, 14 MARCH 2012.

Judgment

delivered : Wednesday, 6 JUNE 2012.

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