

SOUTH AFRICA / JUDGMENT

Pienaar v Pienaar and Another (8713/2003) [2005] ZAWCHC 123 (1 January 2005) [2005] ZAWCHC 123

COURT

Western Cape High Court, Cape Town

BEFORE

Louw

CASE / FILE NUMBER

8713/2003

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IN

THE HIGH COURT OF SOUTH AFRICA
(CAPE
OF GOOD HOPE PROVINSIAL DIVISION)
CASE

NO: 8713/2003

In

the matter between:

ROSEMARY
MARGE PIENAAR Plaintiff
and
CHARL
DE VILLIERS PIENAAR 1st
Defendant
THE
TRUSTEES FOR THE TIME BEING OF
THE
C DE V PIENAAR TRUST 2nd
Defendant

JUDGMENT

DELIVERD ON THE DAY OF JULY 2005

LOUW, J:

- [1] In this divorce action the plaintiff and the first defendant were married out of community of property by antenuptial contract on 4 February 1983. The second defendant is the trustees for the time being of the C de V Pienaar Trust. I shall refer to the spouses as the plaintiff and defendant or the parties and to the second defendant as the trust.
- [2] The trust is the owner of a number of tracts of land which together are known as the farm Juriesfontein. Juriesfontein has been in the defendant's family for generations and when the defendant inherited the farm on his father's death on 12 June 1981, he became the 5th generation of Pienaar sons to own and farm Juriesfontein.
- [4] The trust was established on 1 January 1996. The defendant sold the farm to the trust on 15 March 1996 and thereafter transferred it into the name of the trust on 8 August 1996. Defendant has since rented Juriesfontein from the trust under two successive 5 year contracts of lease at an annual rental of R60 000,00 (VAT excluded). It is common cause that the sale, transfer and lease of Juriesfontein were effected with the knowledge of the plaintiff for estate planning purposes on the basis of advice received by the defendant.
- [5] After their marriage, the parties lived together on Juriesfontein for more than 20 years (save for a brief separation at the end of 1988 and the beginning of 1989), but on 23 July 2003 at the conclusion of the hunting season, the plaintiff left the farm for a vacation with friends in Norway and upon her return during August 2003, she settled in Cape Town. They have since lived apart and the evidence shows that the marriage has broken down irretrievably.
- [6] The parties have one child, a son Charl James, who is known as James and who was born 24 February 1987. He is now in his final year at school at Union High in Graaff Reinet, where he is a full time boarder. The parties agree that they should have joint custody of James and that the defendant shall primarily be responsible for the maintenance of James. James sees both his parents during the school vacations, but tends, because of the distances involved, to spend weekends with the defendant on the farm. The parties have the best interest of James at heart and it is clear that despite their other disputes, they will be able to communicate sensibly with regard to issues of joint custody. The plaintiff accepts that she should bear the costs of James when he is with her during vacations. In the circumstances, it is appropriate to make orders in terms of prayers (b) and (c) of defendant's counterclaim, as amended.

- [7] The principal disputes in this matter concern the plaintiff's claim for personal maintenance and her claim under section 7(3) of the Divorce Act, no 70 of 1979. In respect of the latter, the plaintiff seeks an order declaring the assets of the trust to be deemed to be part of the defendant's estate for the purposes of section 7(3) of the Divorce Act and that the defendant transfer 40% of the net assets of his estate, so constituted, to the plaintiff.
- [8] The issues were further limited when the defendant conceded during the course of his evidence that the plaintiff is entitled to rehabilitative maintenance. He now asks for an order that he pay rehabilitation maintenance to the Plaintiff at the rate of R4 500,00 per month for a period of 5 (five) years, the death of the plaintiff's mother (Mrs Ethel Wendy Jackson, who was born on 23 August 1923 and is now 81 years old) or the plaintiff's remarriage, whichever of the three events may first occur. The Plaintiff, however, persists with her claim for payment of maintenance in the sum of R12 500,00 per month together with certain further payments in regard to medical expenses and the like, until her death or remarriage.
- [9] The parties are both from karoo farming stock. They grew up in adjoining farms in the Beaufort West district, some 70 kilometres from that town.
- [10] The plaintiff was born on 5 March 1955. She was one of 5 daughters, one of whom has since died, and one brother. She grew up with her family on the farm Bakensrug which belonged to her late father Julius Ronald Jackson, who died on 23 October 2001. She first attended boarding school in Beaufort West and from standard six attended Rustenburg School in Cape Town where she matriculated at the end of
1972. She thereafter obtained a pre-primary teaching diploma at Barclay House College, Cape Town. During 1975, at the age of 20 and while she was in her third year of study, the plaintiff married Simon Burrow. After graduating, she taught for two years at a nursery school in Cape Town whereafter she and Simon Burrow relocated to live on and farm one of her father's other farms, Brakfontein in the Victoria West district. They lived on Brakfontein for approximately three years. The plaintiff and Simon Burrow have two sons, Shaun Burrow who was born during 1979 and Michael-Ross Burrow who was born on 11 March 1982. [11] Plaintiff and Simon Burrow were divorced during 1982 shortly after the birth of Michael-Ross and the Plaintiff, who was awarded custody of their two sons, relocated to Bakensrug. She and the defendant thereafter started dating and soon got married on 4 February 1983.
- [12] The Defendant who was born on 28 August 1953, matriculated a year before the Plaintiff did, in 1971 from Union High in Graaff Reinet and thereafter did 12 months military service. During 1973 he attended two farming related courses in wool and mechanics. He commenced farming with his father on Juriesfontein in 1974; The defendant's father died on 12 June 1981 and he inherited Juriesfontein together with the livestock and implements on the farm, subject, however to the life long usufruct over the land which was registered in favour of his mother Mrs Martha Petronella Pienaar (who was born on 30 January 1920 and is now 85 years old). The defendant continued to live on Juriesfontein with his mother until his marriage to the plaintiff. Shortly before the marriage, his mother moved to live in

Beaufort West where she rented a flat.

[13] After their marriage in 1983, the parties commenced living together on Juriesfontein with Shaun and Michael-Ross. The plaintiff's

maintenance for herself from Simon Burrow fell away on her marriage to defendant. Simon Burrow remained liable for the maintenance of Shuan and Michael-Ross, but plaintiff had problems to obtain regular payments of maintenance from him. It is common cause that the defendant soon formed and thereafter continued to have a good relationship with the plaintiff's two sons and that he was prepared to adopt them as his sons. While the adoption did not take place, the defendant did over the years look after them and did contribute to their maintenance MAINTENANCE FOR THE PLAINTIFF [14] Section 7 (2) of the Divorce Act, confers a 'very wide discretion' 1 upon a court to make a maintenance order which it finds just, having regard to the following factors:

- a. The existing and prospective means of each of the parties;
- b. the respective earning capacities of the parties;
- c. the financial needs and obligations of the parties;
- d. the age of each of the parties;
- e. the duration of the marriage; f . the standard of living of the parties prior to the divorce;
- g. the conduct of the parties in so far as it may be relevant to the break-down of the marriage;
- h. any redistribution order made in terms of section 7 (3) of the Divorce Act; and I. any other factor which in the opinion of the court should be taken into account. The existing and prospective means of each of the parties

[15] Apart from the evidence of the plaintiff and the defendant in regard to the parties' respective means and income, the plaintiff called a chartered accountant, Mr Colin Shelley, as an expert witness. An Attorney, Mr Landman, gave expert evidence on the value of Juriesfontein. Mnr Shelley and Mr Augustyn, an accountant on behalf of defendant came to an agreement in regard to certain issues. The agreement is reflected in Expert Bundle pages 191A-E and Mr Shelley was recalled to give evidence in regard thereto. Mr Augustyn did not give evidence.

[16] There is a dispute regarding the manner in which the plaintiff's assets and liabilities should be determined and what the amounts involved should be. The dispute largely concerns the plaintiff's position as a beneficiary in two trusts and her 21% share in a closed corporation, JR Jackson CC and her 10,5% share in the Bakensrug Farm partnership. This partnership between JR Jackson CC and Roland du Toit, the son of one of the plaintiff's sisters, commenced in 1996 when the plaintiff's father retired and was formalised in a written partnership agreement during October 1999. When her father died in 2001, the plaintiff inherited her interest in the CC and her share in the partnership.

[17] The JR Jackson Testamentary Trust was created by clause 14 of the will of the plaintiff's late father as a vehicle to hold the farms Bakensrug and Blinkfontein after his death, subject to the usufruct in favour of his wife, the plaintiff's mother. The capital beneficiaries of this trust are the testator's 4 surviving daughters. They all have equal voting powers, save that the surviving widow was given an absolute right to veto any transaction involving the farms. The testator's son Robert Jackson had been giving a farm of his own earlier and was therefore not a capital beneficiary. It was further provided that the trustees would have the right to continue to farm in partnership and in clause 14.8.1., the testator expressed the wish that the trustees should continue the partnership between JR Jackson CC and the testator's grandson Roland du Toit. 'for as long as it is mutually satisfactory to the capital beneficiaries of this Trust' and in a later codicil, the testator added that 'It is my wish that the partnership shall continue for a period of at least five years after the death of myself and my wife ETHEL WENDY JACKSON' The testator further provided that the net income of the trust be paid to his wife during her lifetime and thereafter to the capital

beneficiaries. In addition it is stipulated that the immovable property may, subject to the widow's veto, be sold during the

lifetime of his wife by majority decision of the capital beneficiaries. After her death, the trust may be terminated by the sale of the immovable property agreed to by majority decision of the capital beneficiaries.

[18] In my view the evidence establishes that it is extremely unlikely that the J R Jackson Testamentary Trust will be terminated before the death of the plaintiff's mother. Even after her death, it is far from clear what will happen and it is possible, perhaps probable, that the trust will continue for at least another five years to accord with the testator's wish expressed in the codicil referred to earlier.

[19] On 21 June 1999, the plaintiff's father set up the Ronald Jackson Family Trust, the beneficiaries of which are the plaintiff's mother, the plaintiff and her three surviving sisters. The trust owns a house in Fish Hoek which used to be the family holiday home, to which the plaintiff's father and mother retired and which is currently occupied by the plaintiff's mother. In addition, the trust owns cash investments overseas which is used to maintain the plaintiff's mother. The plaintiff, her mother and her sisters are discretionary beneficiaries as to the income of the trust and the plaintiff and her sisters are the ultimate capital beneficiaries of the trust. The plaintiff is not a trustee of the trust. Clause 12 provides that unless otherwise agreed to by all the trustees, the trust shall terminate on the death of the plaintiff's mother whereupon the capital and accumulated income are to be paid to the beneficiaries (or their issue) in equal shares. The trust may also be terminated earlier if the trustees unanimously agree thereto, whereupon the capital and accumulated income is to be paid out in the discretion of the trustees, to the any one or more of the beneficiaries. Finally, it is provided that with the unanimous agreement of the trustees and the remaining beneficiaries, they may choose to continue the trust until any one of the beneficiaries requires the trust to be terminated. The plaintiff's mother gave evidence. She appears to be

in good health and may live for a number of years to come. It is certainly seems very unlikely that the trust will be terminated before the death of the plaintiff's mother and, if this should occur, the plaintiff is no more than a discretionary beneficiary as to the capital. Even after the death of plaintiff's mother, the beneficiaries may, with the trustees, choose to continue the trust. In the latter event, however, any of the beneficiaries may require the trust to be terminated. In the circumstances, it would in my view be incorrect to include the plaintiff's potential interest of 25% in the net value of the trust property as a current asset. The plaintiff's interest in the trust is, however, a factor to be taken into account in determining the plaintiff's claim for maintenance. [20] During 1998 the plaintiff, with financial assistance from defendant, acquired control of the Jenna Trust and thereby, the flat 21 Hunting Towers, Wynberg owned by that Trust, for R185 000,00. Arising from this transaction, the plaintiff still owes the defendant the amount of R25 000,00. The flat was used by the plaintiff's sons Shuan and Michael-Ross when they were students at UCT. A property situated at 6 Stanbridge Street, Beaufort West, known as Ellwood, was also acquired by the Jenna Trust for R100 000,00 funded by the plaintiff. Plaintiff ran a guest house at this property. It was also used by her father when he visited Beaufort West. These properties were sold by the trust for R290 000,00 and R170 000,00, respectively during 2002 and 2003 and the proceeds were used by the plaintiff to purchase 3A Pearson Place, Kenilworth for some R460 000,00. The agreed current value of this property is R730 000,00. Initially Shuan and Michael-Ross used this property, but it is currently the plaintiff's home in Cape Town. Mr Shelley has calculated that arising from these transactions, the plaintiff is indebted to the Jenna Trust in the amount of R127 050,00. It was suggested on the defendant's behalf that since the plaintiff and the Jenna trust is in fact 'one', this debt should not be reflected as one of her liabilities. The plaintiff and the trust are separate entities and strictly speaking, the debt is part of her liabilities. However, the relationship between the plaintiff and the trust is a factor to be taken into account in determining her claim for maintenance.

[21] I agree with the contention on behalf of the plaintiff that the plaintiff's interest as beneficiary in the J R Jackson Testamentary

Trust (the owner of Bakensrug and Blinkfontein) and the JR Jackson Family Trust (the owner of the Fish Hoek property currently occupied by the plaintiff's mother) should be excluded as current assets. The fact that the plaintiff is a beneficiary in both these trusts, however, remains a factor to be taken into account when the amount and duration of any maintenance order is considered. The plaintiff's current assets and liabilities as they appear from the agreement reached, and where not agreed, the evidence, is as follows: ASSETS Dwelling

- 3A Pearson Park, Kenilworth R730 000 Household and personal effects (including at Juriesfontein) 100 000 1995 C220 Mercedes Benz Motor Vehicle 80 000 CRI Timeshare 4 000 JR Jackson CC (21% member's interest and net loan claims) 170 317 Ronald Jackson Family Trust (loan account) 8 150 FNB Credit card 1 944 FNB Money Market account 926 C de V Pienaar 45 247 TOTAL R1 140 584 LIABILITIES Mortgage Bond over Kenilworth Property R200 000 Loan EW Jackson (Mother) 30 420 Loan Jenna Trust 127 050 TOTAL R427 420 NET

ASSETS R713 114

LOUW, J:

- [1] In this divorce action the plaintiff and the first defendant were married out of community of property by antenuptial contract on 4 February 1983. The second defendant is the trustees for the time being of the C de V Pienaar Trust. I shall refer to the spouses as the plaintiff and defendant or the parties and to the second defendant as the trust.
- [2] The trust is the owner of a number of tracts of land which together are known as the farm Juriesfontein. Juriesfontein has been in the defendant's family for generations and when the defendant inherited the farm on his father's death on 12 June 1981, he became the 5th generation of Pienaar sons to own and farm Juriesfontein.
- [4] The trust was established on 1 January 1996. The defendant sold the farm to the trust on 15 March 1996 and thereafter transferred it into the name of the trust on 8 August 1996. Defendant has since rented Juriesfontein from the trust under two successive 5 year contracts of lease at an annual rental of R60 000,00 (VAT excluded). It is common cause that the sale, transfer and lease of Juriesfontein were effected with the knowledge of the plaintiff for estate planning purposes on the basis of advice received by the defendant.
- [5] After their marriage, the parties lived together on Juriesfontein for more than 20 years (save for a brief separation at the end of 1988 and the beginning of 1989), but on 23 July 2003 at the conclusion of the hunting season, the plaintiff left the farm for a vacation with friends in Norway and upon her return during August 2003, she settled in Cape Town. They have since lived apart and the evidence shows that the marriage has broken down irretrievably.
- [6] The parties have one child, a son Charl James, who is known as James and who was born 24 February 1987. He is now in his final year at school at Union High in Graaff Reinet, where he is a full time boarder. The parties agree that they should have joint custody of James and that the defendant shall primarily be responsible for the maintenance of James. James sees both his parents during the school vacations, but tends, because of the distances involved, to spend weekends with the defendant on the farm. The parties have the best interest of James at heart and it is clear that despite their other disputes, they will be able to communicate sensibly with regard to issues of joint custody. The plaintiff accepts that she should bear the costs of James when he is with her during vacations. In the circumstances, it is appropriate to make orders in terms of prayers (b) and (c) of defendant's counterclaim, as amended.
- [7] The principal disputes in this matter concern the plaintiff's claim for personal maintenance and her claim under section 7(3) of the Divorce Act, no 70 of 1979. In respect of the latter, the plaintiff seeks an order declaring the assets of the trust to be deemed to be part of the defendant's estate for the purposes of section 7(3) of the Divorce Act and that the defendant transfer 40% of the net assets of his estate, so constituted, to the plaintiff.

- [8] The issues were further limited when the defendant conceded during the course of his evidence that the plaintiff is entitled to rehabilitative maintenance. He now asks for an order that he pay rehabilitation maintenance to the Plaintiff at the rate of R4 500,00 per month for a period of 5 (five) years, the death of the plaintiff's mother

(Mrs Ethel Wendy Jackson, who was born on 23 August 1923 and is now 81 years old) or the plaintiff's remarriage, whichever of the three events may first occur. The Plaintiff, however, persists with her claim for payment of maintenance in the sum of R12 500,00 per month together with certain further payments in regard to medical expenses and the like, until her death of remarriage.

- [9] The parties are both from karoo farming stock. They grew up in adjoining farms in the Beaufort West district, some 70 kilometres from that town.

- [10] The plaintiff was born on 5 March 1955. She was one of 5 daughters, one of whom has since died, and one brother. She grew up with her family on the farm Bakensrug which belonged to her late father Julius Ronald Jackson, who died on 23 October 2001. She first attended boarding school in Beaufort West and from standard six attended Rustenburg School in Cape Town where she matriculated at the end of

1972. She thereafter obtained a pre-primary teaching diploma at Barclay House College, Cape Town. During 1975, at the age of 20 and while she was in her third year of study, the plaintiff married Simon Burrow. After graduating, she taught for two years at a nursery school in Cape Town whereafter she and Simon Burrow relocated to live on and farm one of her father's other farms, Brakfontein in the Victoria West district. They lived on Brakfontein for approximately three years. The plaintiff and Simon Burrow have two sons, Shaun Burrow who was born during 1979 and Michael-Ross Burrow who was born on 11 March 1982.

- [11] Plaintiff and Simon Burrow were divorced during 1982 shortly after the birth of Michael-Ross and the Plaintiff, who was awarded custody of their two sons, relocated to Bakensrug. She and the defendant thereafter started dating and soon got married on 4 February 1983.

- [12] The Defendant who was born on 28 August 1953, matriculated a year before the Plaintiff did, in 1971 from Union High in Graaff Reinet and thereafter did 12 months military service. During 1973 he attended two farming related courses in wool and mechanics. He commenced farming with his father on Juriesfontein in 1974; The defendant's father died on 12 June 1981 and he inherited Juriesfontein together with the livestock and implements on the farm, subject, however to the life long usufruct over the land which was registered in favour of his mother Mrs Martha Petronella Pienaar (who was born on 30 January 1920 and is now 85 years old). The defendant continued to live on Juriesfontein with his mother until his marriage to the plaintiff. Shortly before the marriage, his mother moved to live in Beaufort West where she rented a flat.

- [13] After their marriage in 1983, the parties commenced living together on Juriesfontein with Shaun and Michael-Ross. The plaintiff's

maintenance for herself from Simon Burrow fell away on her marriage to defendant. Simon Burrow remained liable for the maintenance of Shuan and Michael-Ross, but plaintiff had problems to obtain regular payments of maintenance from him. It is common cause that the defendant soon formed and thereafter continued to have a good relationship with the plaintiff's two sons and that he was prepared to adopt them as his sons. While the adoption did not take place, the defendant did over the years look after them and did contribute to their maintenance

MAINTENANCE FOR THE PLAINTIFF

[14] Section 7 (2) of the Divorce Act, confers a 'very wide discretion' 1 upon a court to make a maintenance order which it finds just, having regard to the following factors:

- a. The existing and prospective means of each of the parties;
- b. the respective earning capacities of the parties;
- c. the financial needs and obligations of the parties;
- d. the age of each of the parties;
- e. the duration of the marriage;
- f. the standard of living of the parties prior to the divorce;
- g. the conduct of the parties in so far as it may be relevant to the break-down of the marriage;
- h. any redistribution order made in terms of section 7 (3) of the Divorce Act; and
- I. any other factor which in the opinion of the court should be taken into account.

The existing and prospective means of each of the parties

[15] Apart from the evidence of the plaintiff and the defendant in regard to the parties' respective means and income, the plaintiff called a chartered accountant, Mr Colin Shelley, as an expert witness. An Attorney, Mr Landman, gave expert evidence on the value of Juriesfontein. Mnr Shelley and Mr Augustyn, an accountant on behalf of defendant came to an agreement in regard to certain issues. The agreement is reflected in Expert Bundle pages 191A-E and Mr Shelley was recalled to give evidence in regard thereto. Mr Augustyn did not give evidence.

[16] There is a dispute regarding the manner in which the plaintiff's assets and liabilities should be determined and what the amounts involved should be. The dispute largely concerns the plaintiff's position as a beneficiary in two trusts and her 21% share in a closed corporation, JR Jackson CC and her 10,5% share in the Bakensrug Farm partnership.

This partnership between JR Jackson CC and Roland du Toit, the son of one of the plaintiff's sisters, commenced in 1996 when the plaintiff's father retired and was formalised in a written partnership agreement during October 1999. When her father died in 2001, the plaintiff inherited her interest in the CC and her share in the partnership.

[17] The JR Jackson Testamentary Trust was created by clause 14 of the will of the plaintiff's late father as a vehicle to hold the farms Bakensrug and Blinkfontein after his death, subject to the usufruct in favour of his wife, the plaintiff's mother. The capital beneficiaries of this trust are the testator's 4 surviving daughters. They all have equal voting powers, save that the surviving widow was given an absolute right to veto any transaction involving the farms. The testator's son Robert Jackson had been giving a farm of his own earlier and was therefore not a capital beneficiary. It was further provided that the trustees would have the right to continue to farm in partnership and in clause 14.8.1., the testator expressed the wish that the trustees should continue the partnership between JR Jackson CC and the testator's grandson Roland du Toit.

'for as long as it is mutually satisfactory to the capital beneficiaries of this Trust'

and in a later codicil, the testator added that

'It is my wish that the partnership shall continue for a period of at least five years after the death of myself and my wife ETHEL WENDY JACKSON'

The testator further provided that the net income of the trust be paid to his wife during her lifetime and thereafter to the capital

beneficiaries. In addition it is stipulated that the immovable property may, subject to the widow's veto, be sold during the

lifetime of his wife by majority decision of the capital beneficiaries. After her death, the trust may be terminated by the sale of the immovable property agreed to by majority decision of the capital beneficiaries.

[18] In my view the evidence establishes that it is extremely unlikely that the J R Jackson Testamentary Trust will be terminated before the death of the plaintiff's mother. Even after her death, it is far from clear what will happen and it is possible, perhaps probable, that the trust will continue for at least another five years to accord with the testator's wish expressed in the codicil referred to earlier.

[19] On 21 June 1999, the plaintiff's father set up the Ronald Jackson Family Trust, the beneficiaries of which are the plaintiff's mother, the plaintiff and her three surviving sisters. The trust owns a house in Fish Hoek which used to be the family holiday home, to which the plaintiff's father and mother retired and which is currently occupied by the plaintiff's mother. In addition, the trust owns cash investments overseas which is used to maintain the plaintiff's mother. The plaintiff, her mother and her sisters are discretionary beneficiaries as to the income of the trust and the plaintiff and her sisters are the ultimate capital

beneficiaries of the trust. The plaintiff is not a trustee of the trust. Clause 12 provides that unless otherwise agreed to by all the trustees, the trust shall terminate on the death of the plaintiff's mother whereupon the capital and accumulated income are to be paid to the beneficiaries (or their issue) in equal shares. The trust may also be terminated earlier if the trustees unanimously agree thereto, whereupon the capital and accumulated income is to be paid out in the discretion of the trustees, to the any one or more of the beneficiaries. Finally, it is provided that with the unanimous agreement of the trustees and the remaining beneficiaries, they may choose to continue the trust until any one of the beneficiaries requires the trust to be terminated. The plaintiff's mother gave evidence. She appears to be in good health and may live for a number of years to come. It is certainly seems very unlikely that the trust will be terminated before the death of the plaintiff's mother and, if this should occur, the plaintiff is no more than a discretionary beneficiary as to the capital. Even after the death of plaintiff's mother, the beneficiaries may, with the trustees, choose to continue the trust. In the latter event, however, any of the beneficiaries may require the trust to be terminated. In the circumstances, it would in my view be incorrect to include the plaintiff's potential interest of 25% in the net value of the trust property as a current asset. The plaintiff's interest in the trust is, however, a factor to be taken into account in determining the plaintiff's claim for maintenance.

- [20] During 1998 the plaintiff, with financial assistance from defendant, acquired control of the Jenna Trust and thereby, the flat 21 Hunting Towers, Wynberg owned by that Trust, for R185 000,00. Arising from this transaction, the plaintiff still owes the defendant the amount of R25 000,00. The flat was used by the plaintiff's sons Shuan and Michael-Ross when they were students at UCT. A property situated at 6 Stanbridge Street, Beaufort West, known as Ellwood, was also acquired by the-Jenna Trust for R100 000,00 funded by the plaintiff. Plaintiff ran a guest house at this property. It was also used by her father when he visited Beaufort West. These properties were sold by the trust for R290 000,00 and R170 000,00, respectively during 2002 and 2003 and the proceeds were used by the plaintiff to purchase 3A Pearson Place, Kenilworth for some R460 000,00. The agreed current value of this property is R730 000,00. Initially Shuan and Michael-Ross used this property, but it is currently the plaintiff's home in Cape Town. Mr Shelley has calculated that arising from these transactions, the plaintiff is indebted to the Jenna Trust in the amount of R127 050,00. It was suggested on the defendant's behalf that since the plaintiff and the Jenna trust is in fact 'one', this debt should not be reflected as one of her liabilities. The plaintiff and the trust are separate entities and strictly speaking, the debt is part of her liabilities. However, the relationship between the plaintiff and the trust is a factor to be taken into account in determining her claim for maintenance.
- [21] I agree with the contention on behalf of the plaintiff that the plaintiff's interest as beneficiary in the J R Jackson Testamentary

Trust (the owner of Bakensrug and Blinkfontein) and the JR Jackson Family Trust (the owner of the Fish Hoek property currently occupied by the plaintiff's mother) should be excluded as current assets. The fact that the plaintiff is a beneficiary in both these trusts, however, remains a factor to be taken into account when the amount and duration of any maintenance order is considered. The plaintiff's current assets and liabilities as they appear from the agreement reached, and where not agreed, the evidence, is as follows:

ASSETS

Dwelling

- 3A Pearson Park, Kenilworth R730 000

Household and personal effects

(including at Juriesfontein) 100 000

1995 C220 Mercedes Benz Motor Vehicle 80 000

CRI Timeshare 4 000

JR Jackson CC (21% member's

interest and net loan claims) 170 317

Ronald Jackson Family Trust (loan account) 8 150

FNB Credit card 1 944

FNB Money Market account 926

C de V Pienaar 45 247

TOTAL R1 140 584

LIABILITIES

Mortgage Bond over Kenilworth Property R200 000

Loan EW Jackson (Mother) 30 420

Loan Jenna Trust 127 050

TOTAL R427 420

NET ASSETS R713 114

[22] The defendant's assets were largely agreed between the parties, the only items in dispute being the disputed investment with Oval Investments in the amount of 308 000,00 and the value of the defendant's livestock and the game on Juriesfontein. As regards the defendant's liabilities, there are a number of disputed items. These are the defendant's indebtedness to the plaintiff, a loan from Michael-Ross in respect of half of the Lloyds account, the defendant's liability for deferred tax and unpaid legal costs. In my view, the defendant's

assets can fairly be stated as follows ASSETS Mohair chip (2004) R138 600 Lloyds TSB Account 2 514 FNB Account (038) 100 Jenna Trust (loan account) 25 000 C de V Pienaar Trust (loan account) 5 000 Loan R Pienaar 30 420 Insurance Policies 252 778

[22] The defendant's assets were largely agreed between the parties, the only items in dispute being the disputed investment with Oval Investments in the amount of 308 000,00 and the value of the defendant's livestock and the game on Juriesfontein. As regards the defendant's liabilities, there are a number of disputed items. These are the defendant's indebtedness to the plaintiff, a loan from Michael-Ross in respect of half of the Lloyds account, the defendant's liability for deferred tax and unpaid legal costs. In my view, the defendant's assets can fairly be stated as follows

Mohair chip (2004) R138 600

Lloyds TSB Account 2 514

FNB Account (038) 100

Jenna Trust (loan account) 25 000

C de V Pienaar Trust (loan account) 5 000

Loan R Pienaar 30 420

Insurance Policies 252 778

Lonmin shares 2 310 Stanlib Investments 3 154 Dwelling in Beaufort West 160 000 Household and personal effects 60 000 Motor vehicles and farming equipment 290 000 Farm implements 146 000 Unlisted shares 2 730 Livestock 677 600 Game 228100 SARS 1 322 Oval Investments 308 000 Total Assets: R2 333 628 LIABILITIES Bank overdraft R1 18 000 Credit card 993 R Pienaar 45 247 Municipal costs (Beaufort West property) 940 District Municipality 4 349 M P Pienaar (contingent liability) 50 000 Total Liabilities: R219 529 NET ASSETS: R2 114 099 The respective earning capacities of the parties. [23] Hunting game, mainly springbok, has over the years been a feature of life during the winter months on both Juriesfontein and Bakenskraal. Initially it was, it seems, not seen as source of income, but over the years this has changed and hunting has become a real source of, largely undeclared, income on both farms. On Juriesfontein the hunters were accommodated in a foreman's house which was later renovated by the plaintiff's and defendant after their marriage. After renovations to the main house, the guesthouse

section was also used to accommodate the hunters and the plaintiff provided catering for those hunters who required it. Initially the income derived from the guesthouse and catering was used by the parties to defray expenses regarding the renovations and for the plaintiff's sons, but later the money went to plaintiff and was used for overseas travel. The plaintiff also received some income from her father and later from Roland du Toit arising from the hunting income on Bakensrug. The income from the game shot on Juriesfontein went to defendant.

- [24] I turn to plaintiff. During 1.986 she suffered a miscarriage during her pregnancy with the parties' first child. Their son James was born on 24 February 1997, but later that year the plaintiff was admitted to Tygerberg Hospital where she was treated for a psychiatric problem which was later during 1989, diagnosed as a chronic bi-polar disorder. She has had a history of swings between mania and depression from at least the birth of James in 1987. Defendant has, however, described earlier physical and verbal outburst from soon after their marriage in 1983 which he accepted at the time as being normal in a marriage.
- [25] Apart from the two years that she worked as a nursery school teacher in the 1977 and 1978, the plaintiff has not been in full time formal employment. From approximately 1990 to 2003, when she left Juriesfontein, she ran a guesthouse on the farm and also for a time in Beaufort West (Ellwood). She also did the catering for the hunting groups that visited Juriesfontein during the winter months. For the rest, she was a farmer's wife on a karoo farm. She testified that while she would prefer to work, she will not be able to cope with the demands of formal employment. She is currently on medication to keep her condition stable. Nevertheless, during the time the plaintiff spent in the witness box, she exhibited noticeable signs of becoming anxious, over excited and distracted and she appeared at times to be unable to restrain the flow of thoughts passing through her mind. Dr Fay Thornley, a psychiatrist and the clinical psychologists messers van Wyk and Kahn who had all examined the plaintiff, drew up a minute pursuant to their meeting on 31 January 2005 wherein they stated their agreement regarding the plaintiff's mental state, as follows:
1. She suffers from Bipolar disorder of long standing.
 2. Her prognosis is not good, but with optimal psychotropic medication she could be more controlled, stable, independent and able to conduct her own life.
 3. She is not a candidate for the open labour market, even with optimal treatment, and it is improbable that she would find and sustain employment. At best she may be able to function within a very supportive and lenient work environment, similar to what she had while she was on the farm.
- [26] The defendant testified that in his view and given the ability she had shown when they were living together, the plaintiff can work to support herself and that she will do so in due course. I do not think that the defendant has a proper understanding and insight into the plaintiff's mental state. I consequently accept the view of the mental health experts in regard to her ability to work at present. The plaintiff testified to an understanding of and insight into her condition. I nevertheless agree with the submission made by Mr Gamble on behalf of the plaintiff, that at this stage her employment prospects are too uncertain to attribute any earning capacity to her. The only income she does have is the approximately R 3000,00 per month she receives from the Bakensrug farming partnership.

[27] The defendant has been a fibre farmer (sheep and later also, angora goats) all his working life. He learned his trade from his father whose views he continues to hold in the highest regard as his teacher and mentor who taught him to have respect for the farm. By following his father's example and advice, he has farmed cautiously and successfully by not overgrazing the veld and by not incurring any

substantial debts. He is obviously a cautious, hardworking, responsible and diligent farmer. Over the years he has been directly

and actively involved in all aspects of the work on the farm. His dedication to and love for the farm was clear throughout his

evidence. His aim, he stated, is to be able to pass on the farm to the next generation in an improved state. He is clearly most afraid that any order which is made in this matter might jeopardise the farm and the farming enterprise on Juriesfontein.

[28] On 1 January 2005 the plaintiff concluded a written lease agreement in terms whereof he sub-let Juriesfontein for three years (with an option to renew for a further 3 years) to his older sister Mrs Valerie van Zyl. She is a teacher in de Aar which is situated about 200 kilometres from Juriesfontein. Her husband farms in the district of de Aar. The defendant testified that he concluded the lease after he experienced headaches during the course of 2004 and he had taken advice from his attorney in Beaufort West. His general practitioner told him that the headaches were probably stress related and prescribed medication which he has found affected his ability to think and act. He concluded that it would be best if he sub-let the farm 'for the sake of the farm and the family . . . until this divorce was (over) . . . and then I would have a good re-look and a re-think of things'. None of the defendant's sister, his attorney or his general practitioner gave evidence. The defendant continues to live on the farm and his sister, with the assistance of the farm manager on Juriesfontein, Mr Jan Barbers, is purportedly carrying on the farming operations, from de Aar. The lease is at a rental of R216 000,00 per year but is terminable on one months notice by either side. Mr Gamble argued that the sub-lease is a sham and is no more than an attempt by the defendant to limit his income for the purposes of this litigation. He pointed out that in May 2004 the defendant applied to his bank for an increase in his overdraft to R80 000,00. The internal bank report recommending the increase of R 30 000,00, contains the responsible bank official's statement that the increase was sought 'to allow him to sell his wool and mohair in November 2004'. In giving the background to the request, the official stated: Mr Pienaar is a customer of long standing who is very well to do and he approached us to increase his facility to R 80k to enable him to reduce his income through his account until his divorce is settled in November, which is a recommendation from his auditor. The divorce trial was set down for hearing during November 2004, but was postponed due to the plaintiff's mental health at the time.

[29] It appears to me that the conclusion of the lease was a desperate stratagem resorted to by the defendant to avoid any order which could jeopardise the future of his farming enterprise on Juriesfontein. At times the defendant was clearly in agony in the witness box at the mere thought that he might lose Juriesfontein for future generations. I have little doubt, given the kind of person he is and his close relationship with the farm and its well being, that the lease will be terminated and that he will resume full control over the farm as soon as the these proceedings have come to a conclusion. In saying all this, I do not intend to convey that the defendant is a devious person. He obviously received advice and resorted to these measures in a desperate attempt to ward off what he clearly perceived to be a threat to his position as custodian of Juriesfontein for future generations. It does mean, in my view, that the defendant's ability to pay maintenance must not be judged solely on the basis of his income as lessor. The defendant is clearly in a position to pay maintenance and has in fact, as indicated earlier, in effect conceded during the course of his evidence that he is able to do so. The only real issues are the amount and the period of such maintenance.

[30] It is not possible on the evidence to establish clearly and exactly what the defendant's earnings as a farmer has been. Mnr Gamble has prepared a summary in the form of a table of the defendant's turnover and taxable income over the tax years 1999 to 2004: Tax Year (28 Feb) Turnover Net Income 1999 (Exhibit C4) 276 772 (2 467) 2000 297 675 33 208 2001 (Exhibit C24) 421 785 158 725 2002 483 194 196 436 2003 (Exhibit C44) 712 660 337 205 2004 426 048 64 853

Lonmin shares 2 310

Stanlib Investments 3 154

Dwelling in Beaufort West 160 000

Household and personal effects 60 000

Motor vehicles and farming equipment 290 000

Farm implements 146 000

Unlisted shares 2 730

Livestock 677 600

Game 228100

SARS 1 322

Oval Investments 308 000

Total Assets: R2 333 628

Bank overdraft R1 18 000

Credit card 993

R Pienaar 45 247

Municipal costs (Beaufort West property) 940

District Municipality 4 349

M P Pienaar (contingent liability) 50 000

Total Liabilities: R219 529

NET ASSETS: R2 114 099

The respective earning capacities of the parties.

[23] Hunting game, mainly springbok, has over the years been a feature of life during the winter months on both Juriesfontein and Bakenskraal. Initially it was, it seems, not seen as source of income, but over the years this has changed and hunting has become a real source of, largely undeclared, income on both farms. On Juriesfontein the hunters were accommodated in a foreman's house which was later renovated by the plaintiff's and defendant after their marriage. After renovations to the main house, the guesthouse

section was also used to accommodate the hunters and the plaintiff provided catering for those hunters who required it. Initially the income derived from the guesthouse and catering was used by the parties to defray expenses regarding the renovations and for the plaintiff's sons, but later the money went to plaintiff and was used for overseas travel. The plaintiff also received some income from her father and later from Roland du Toit arising from the hunting income on Bakensrug. The income from the game shot on Juriesfontein went to defendant.

[24] I turn to plaintiff. During 1.986 she suffered a miscarriage during her pregnancy with the parties' first child. Their son James was born on 24 February 1997, but later that year the plaintiff was admitted to Tygerberg Hospital where she was treated for a psychiatric problem which was later during 1989, diagnosed as a chronic bi-polar disorder. She has had a history of swings between mania and depression from at least the birth of James in 1987. Defendant has, however, described earlier physical and verbal outburst from soon after their marriage in 1983 which he accepted at the time as being normal in a marriage.

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[26] The defendant testified that in his view and given the ability she had shown when they were living together, the plaintiff can work to support herself and that she will do so in due course. I do not think that the defendant has a proper understanding and insight into the plaintiff's mental state. I consequently accept the view of the mental health experts in regard to her ability to work at present. The plaintiff testified to an understanding of and insight into her condition. I nevertheless agree with the submission made by Mr Gamble on behalf of the plaintiff, that at this stage her employment prospects are too uncertain to attribute any earning capacity to her. The only income she does have is the approximately R 3000,00 per month she receives from the Bakensrug farming partnership.

[27] The defendant has been a fibre farmer (sheep and later also, angora goats) all his working life. He learned his trade from his father whose views he continues to hold in the highest regard as his teacher and mentor who taught him to have respect for the farm. By following his father's example and advice, he has farmed cautiously and successfully by not overgrazing the veld and by not incurring any

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he has found affected his ability to think and act. He concluded that it would be best if he sub-let the farm

'for the sake of the farm and the family . . . until this divorce was (over) . . . and then I would have a good re-look and a re-think of things'.

None of the defendant's sister, his attorney or his general practitioner gave evidence. The defendant continues to live on the farm and his sister, with the assistance of the farm manager on Juriesfontein, Mr Jan Barbers, is purportedly carrying on the farming operations, from de Aar. The lease is at a rental of R216 000,00 per year but is terminable on one months notice by either side. Mr Gamble argued that the sub-lease is a sham and is no more than an attempt by the defendant to limit his income for the purposes of this litigation. He pointed out that in May 2004 the defendant applied to his bank for an increase in his overdraft to R80 000,00. The internal bank report recommending the increase of R 30 000,00, contains the responsible bank official's statement that the increase was sought

'to allow him to sell his wool and mohair in November 2004'.

In giving the background to the request, the official stated:

Mr Pienaar is a customer of long standing who is very well to do and he approached us to increase his facility to R 80k to enable him to reduce his income through his account until his divorce is settled in November, which is a recommendation from his auditor.

The divorce trial was set down for hearing during November 2004, but was postponed due to the plaintiff's mental health at the time.

[29] It appears to me that the conclusion of the lease was a desperate stratagem resorted to by the defendant to avoid any order which could jeopardise the future of his farming enterprise on Juriesfontein. At times the defendant was clearly in agony in the witness box at the mere thought that he might lose Juriesfontein for future generations. I have little doubt, given the kind of person he is and his close relationship with the farm and its well being, that the lease will be terminated and that he will resume full control over the farm as soon as these proceedings have come to a conclusion. In saying all this, I do not intend to convey that the defendant is a devious person. He obviously received advice and resorted to these measures in a desperate attempt to ward off what he clearly perceived to be a threat to his position as custodian of Juriesfontein for future generations. It does mean, in my view, that the defendant's ability to pay maintenance must not be judged solely on the basis of his income as lessor. The defendant is clearly in a position to pay maintenance and has in fact, as indicated earlier, in effect conceded during the course of his evidence that he is able to do so. The only real issues are the amount and the period of such maintenance.

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[31] It is correct, as Mr Gamble has pointed out, that not only was the substantial income of up to R80 000,00 per year derived from hunting not reported or underreported, but also that by the very nature of a farming enterprise, a substantial portion of personal expenses can be and are in practice reflected as farming expenses. Mr Shelley has attempted to determine the defendant's income by way of reconstructing his income, taking into account amounts not disclosed, as follows: 28 February 2001 R158 725 28 February 2002 R245 795 28February 2003 R423 934 29February 2004 R208 515

[32] Mr Gamble has suggested that the following is a fair statement if the defendant's income and expenses as at 30 June 2005: INCOME Land Bank Forced Stock Deposit R100 362 Rental for farm 216 000 Mohair clip (held back) 138 600

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INCOME

Land Bank Forced Stock Deposit R100 362

Rental for farm 216 000

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Hunting

- July 2005 season 80 000 Total income: R534 962 EXPENSES Rental payment to C de V Pienaar Trust R68 400 Usufruct mother 27 000 Medical aid and insurance (self) 25 560 Telephone 3 600 Cellphone (James and Charl) 4 604 Interest on overdraft 11 640 Bank costs 6 300 Mother's house rates and taxes 3 000 Water and electricity (mother's house) 3 000 Wages 9 000 Electricity and water (farm) 2 640 Fuel 7 200 Living expenses 13 356 Internet 1 020 Legal 125 000 DSTV 4 512 Accountant 5 000 Vehicle maintenance, tyres, ect 12 000 Sundries 6 000 Total expenses: R338 932 NET INCOME R196 130

- [33] In my view it is of little value to debate the various figures given. Mr Gamble has suggested that having regard to the defendant's income and expenditure properly adjusted, he has an amount of R 16 344,00 per month over to allocate to the plaintiff's maintenance. I do not think that it has been shown that the defendant would have such amount available on a consistent basis. The defendant is also responsible for the maintenance of his mother and James. The defendant is clearly a prudent and responsible entrepreneur and in the exercise of the wide discretion given to the court under section 7 (2) of the Divorce Act, I have to arrive at a figure which I consider just, having regard to the relevant circumstances. The financial needs and obligations of the parties.
- [34] The plaintiff testified to her monthly expenses as is reflected in a document which is part of the papers (A 473-4). Some of these figures were conceded in cross examination by Mr Smith on the defendant's behalf while others were disputed. During argument some of these claims were further reduced. The amount now claimed by the plaintiff is R1 4 085,00, which is arrived at as follows:

1. Levy (general) R806.00 Special levy (3 months) 200.00 Bond 2 000.00
2. Electricity 400.00
3. Telephones: Landline 600.00 Cellphone 350.00
4. Insurance: House contents and motor vehicle 500.00

Hunting

- July 2005 season 80 000

Total income: R534 962

EXPENSES

Rental payment to C de V Pienaar Trust R68 400

Usufruct mother 27 000

Medical aid and insurance (self) 25 560

Telephone 3 600

Cellphone (James and Charl) 4 604
Interest on overdraft 11 640
Bank costs 6 300
Mother's house rates and taxes 3 000
Water and electricity (mother's house) 3 000
Wages 9 000
Electricity and water (farm) 2 640
Fuel 7 200
Living expenses 13 356
Internet 1 020
Legal 125 000
DSTV 4 512
Accountant 5 000
Vehicle maintenance, tyres, ect 12 000
Sundries 6 000
Total expenses: R338 932
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2. Electricity 400.00

3. Telephones:

Landline 600.00

Cellphone 350.00

4. Insurance:

House contents and motor vehicle 500.00

5. Domestic worker 500.00

6. Service and repair of household appliances, 500.00 replacement of furniture, electrical equipment, crockery, cutlery, linen, computer expenses, garden, curtains, carpets

7. Groceries including minerals, food, cleaning 1 800.00 materials (including having guests)

8. Motor vehicle: Licence 40.00 Parking 150.00 Petrol and oil 700.00 Provision for replacement of tyres every two years 100.00 Servicing and repairs 400.00 AA Membership 40.00

9. Television: Licence 19.00 M-Net/DSTV 380.00 Internet subscription 200.00

10. Hairdresser 200.00

11. Security service 350.00

12. Clothing and accessories 600.00

13. Donations 100.00 14. Pocket money (incidentals, yoga, milk and bread, etc) 500.00

15. Toiletries and cosmetics, beauty therapy, skin care, 200.00 cosmetics

16. Medical: Medical aid contribution 1 200.00 Therapies and massages 500.00

17. Newspapers and periodicals 150.00

18. Music: CD's/tapes 100.00

19. Stationery, photographs, photocopies 100.00

20. Entertainment: Shows, dining out, liquor, books and gifts 500.00

21. Recreation/Hobbies: Pottery (kiln and clay) 100.00 Gym membership 300.00

22. Gardener 250.00

23. Gardening

- plants, fertilizer, etc 150.00

24. Presents (birthdays, Christmas, etc) 250.00 Camera (batteries and film) 50.00 TOTAL: R14 085.00 The age of each of the parties.
- [35] The plaintiff turned 50 on 5 March this year and the defendant turns 52 on 28 August later this year. The duration of the marriage.
- [36] The parties have been married for 22 years and separated on 23 July 2003, after 20 years of marriage. They have now lived apart for 2 years. The standard of living of the parties prior to the divorce.
- [37] The parties enjoyed a comfortable lifestyle. Neither appear to have extravagant tastes and the defendant is obviously careful with his money and was not likely to spend it on luxuries. They clearly did not want for any necessities of life. The photographs which form part of attorney Landman's expert report show that the farm and farm buildings to be well kept and the farm house and surroundings to be very pleasant and comfortable. The plaintiff travelled overseas more than once, making use of money saved from income generated by accommodation and catering for the hunters. Defendant has also travelled overseas and so has their son. The conduct of the parties in relation to the breakdown of the marriage
- [38] In my view this is a neutral factor. The plaintiff was clearly in some respects a difficult and trying person to live with. It is clear that the defendant considers himself hard done by in the sense that he was not, in his view, responsible for the break-up. However, this has a lot to do with the disorder the plaintiff suffers from which initially went undiagnosed and was probably never fully understood by both of them while they were living together. An order made under section 7 (3) of the Divorce Act [39] One of the ways in which an order under section 7
- (3) would be relevant to the just determination of a maintenance for the plaintiff would be if she would as result of such order be able, or partly able, to maintain herself. 2 As will be seen • hereunder, such an order under section 7 (3) should in my view be made and the defendant be given an opportunity to pay off the amount to be paid in terms of such order. This, together with the other factors to which I refer hereunder, will result in a 'clean break' being achieved, albeit, after the elapse of some time. In my view this is a case where in due course there should be a complete termination of the financial dependence of the plaintiff on the defendant. Sections 7
- (2) and (3) allows the court to take ... an overall view, from the outset, of how justice could best be achieved between the parties in the light of possible orders under
- either ss (2) or ss (3) or both subsections, in relation to the means and obligations, and the needs of the parties, and all the other relevant factors.³
- [40] I came to this conclusion after having considered the desirability of making only a redistribution order and awarding no maintenance. I decided to award both but nevertheless to effect a clean break in due course. This is in my view a case where the facts (the financial position of the parties which includes the benefits the plaintiff will derive in

due course from her position as beneficiary in the two trusts, their respective means, obligations and needs, and other relevant factors) do allow justice to be done between the parties by effecting a final termination of the financial dependence of the plaintiff on the defendant. Any other factor which in the opinion of the court should be taken into account.

[41] I referred earlier to the potential benefits which will in due course accrue to the plaintiff from the J R Jackson Testamentary Trust and the Ronald Jackson Family Trust. During the course of these proceedings the values of Bakensrug and the Fish Hoek property were never reliably established. However, it is in my view clear from the evidence as a whole that the value of Bakensrug is more or less the same as Juriesfontein, that is, in excess of R7m and that the Fish Hoek property is probably worth in excess of R 2m. Although these benefits cannot presently fairly be seen as part of her current assets, the fact that she is a beneficiary in both trusts must clearly come into consideration. Mr Gamble submitted that, given the evidence regarding the wishes of the capital beneficiaries (the plaintiff and her three sisters), it is likely that the majority of them will wish Roland du Toit to continue farming on Bakensrug for the foreseeable future and that the farm will thus not be sold for an indefinite time after the death of the plaintiff's mother. As far as The Roland Jackson Family Trust is concerned, he pointed out that the beneficiaries may extend the termination of the trust after the death of the plaintiff's mother. It would therefore be inappropriate, he suggested, to limit the period of the plaintiff's maintenance to five years or her mother's death. It was more appropriate, he suggested, to leave it to the defendant to apply in due course for the reduction or termination of the maintenance if circumstances should merit such a change. The submissions by Mr Gamble are certainly attractive. In my view, the plaintiff will in due course be a person of some considerable means when she acquires her share in the assets of the two trusts. It would not be just, I think, in the circumstances, to leave the period of maintenance undetermined and to place the onus on the defendant to monitor matters and again come to court to change or terminate the maintenance. In my view, given the fact that the parties must ultimately go their separate ways, it would not achieve justice

between them to retain the financial link between them for an indefinite period. The decision by the beneficiaries after the death of the plaintiff's mother must in my view take account of the fact that the plaintiff's maintenance will come to an end or has already come to an end. They should not be in a position to prolong the life of the trust(s) in order for a maintenance order in favour of the plaintiff to continue. [42] Having regard to the foregoing considerations and factors, I consider it just that the defendant, pay maintenance to the plaintiff for the period of five years or her earlier death or remarriage, in the sum of R6 500,00 per month. I add, perhaps unnecessarily, that the aforesaid maintenance order remains open to be varied or rescinded under the provisions of section 8(1) of the Divorce Act, should a court find that there is sufficient reason therefor. PLAINTIFF'S CLAIM UNDER SECTION 7 (3) OF THE DIVORCE ACT [43] The principal asset which the defendant has brought to the marriage is the farm Juriesfontein, which he inherited from his father. This is also the principal asset in respect to which the plaintiff has contributed to the maintenance of and the increase of the defendant's assets. Mr Landman has valued Juriesfontein as at October 2004 at R 750,00 per hectare, which amounts to R 7 366M. Mr

Landman testified and was cross examined as to his knowledge and expertise and the method of valuation adopted by him. In my view, the evidence shows him to be competent and adequately qualified to express an expert opinion on the value of farm land in the area concerned. He testified fully to the facts on which he based his opinion and made use of an acceptable method, that of comparing recent sale of comparable land in the same area.

- [44] In 1996 the bare dominium of the land (the land is subject to the usufruct in favour of the defendant's mother) was sold and transferred to the trust. In my view, given the reason for these transactions (estate planning aimed at reducing or avoiding estate duties on his death) and the control which the defendant, who is not a beneficiary under the trust, retained over the land through his controlling position as donor/trustee of the trust (clauses 4.3 and
- 5) and the fact that he has, despite the separate existence of the trust and the separate bank account which was opened and operated by the trust, continued to treat the farm and the rental income of the trust as his own in all but name, the farm should, for the purposes of section 7(3) of the Divorce Act, be treated as if it is the defendant's personal property. Although the plaintiff was a co-trustee (until she was in effect removed in September 2003 and was replaced by Michael-Ross), with the defendant and his brother, she was not involved in any decisions regarding the affairs of the trust. The defendant, effectively made the decisions regarding the affairs of the trust alone or with his brother who would be inclined to serve his interests. It was always the intention of the parties that Juriesfontein would pass to defendant's progeny and this is what the trust seeks to accomplish in the various provisions regarding capital beneficiaries (see clauses 1.2.2. and 22.1.).
- [45] An order under section 7(3) may only be made as is provided in section 7(4), that is, if the the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by way of rendering services, the saving of expenses which would otherwise have been incurred, or in any other way Plaintiff's direct and indirect contribution towards the maintenance and increase in the estate of the defendant
- [46] The plaintiff testified in detail in regard to the various ways in which she was involved in and contributed directly and indirectly to the various activities on the farm. These included her role as knowledgeable farmer's wife, the mother of the parties' son (although James, like his elder brothers before him, was a full time boarder at his school from an early age), her part in the renovation of the farm house and surrounds over the period of three years soon after their marriage, the running of the guest house on the farm and her contribution towards the yearly hunting activities on the farm. She contributed not only her services, but also made some monetary contributions and brought with her some livestock donated by her father. The defendant has not denied that the plaintiff played some part in the affairs on the farm, but has sought to minimise the role played by the plaintiff. I think it must be borne in mind not only that there need not be a causal link between the contribution of the plaintiff and all the defendant's assets, but also that the role of a wife and mother should not be undervalued

because it is not measurable in money.⁴ In my view, the plaintiff's efforts entitle her to an order under section 7(3) of the Divorce Act. [47] In arriving at an order which is just and equitable, I must not depart from any starting point such as for instance that the plaintiff is entitled to one third or half of the defendant's estate. In this case, in particular, I think the order must be of such a nature that it will give due regard to the fact that the largest asset is the farm Juriesfontein which the defendant inherited from his father and which both parties agree should be preserved for the future generations. The order should also not place the defendant's farming enterprise in jeopardy.

[48] In all the circumstances, a just and equitable distribution would be for the defendant to pay the plaintiff an amount of R500 000,00. This will amount to a distribution of less than 10 % of the defendant's assets (which includes, for purposes of the order, Juriesfontein).

[49] I turn to the issue of costs. Although some of the issue between the parties were resolved by agreement before and during the trial, the plaintiff has been successful in obtaining an order for maintenance in excess of what was ultimately offered by the defendant. In this regard the plaintiff's ability to work remained as a principal issue and the qualifying expenses of the experts on behalf of the plaintiff who filed expert summaries in this regard must therefore be included in the costs despite the fact that all of them did not testify. The plaintiff was also successful in obtaining an order under section 7(3) of the Divorce Act, an issue which remained in dispute up to the end. Mr Smith, on behalf of the defendant submitted that the trial was unnecessarily prolonged as a result of the plaintiff's persistence with certain issues and the manner in which the evidence was presented on behalf of the plaintiff. It is true that in retrospect, the trial may have been shortened had both parties taken a different approach both in leading the evidence and in cross-examination. However, in my view, it would not be fair to punish any of the parties by an adverse cost order in this regard. To do so would not give adequate recognition to the vicissitudes of litigation and fact that it is difficult to predict and plan in with any exactitude in advance how a trial will evolve during the course of the proceedings. Ultimately, there is in my view no reason to deviate from the ordinary approach, namely, that the costs should follow the result. [50] In the result, the following orders are made:

- a) A degree of divorce.
- b) An order in terms of which joint custody of the parties' minor son, CHARL JAMES is awarded to the parties, with the First Defendant as the parent of primary residence;
- c) An order directing First Defendant to maintain CHARL JAMES until he attains majority of becomes self -supporting, whichever shall first occur, by paying:

- (i) All his reasonable medical, dental, chiropractic, hospital, orthodontic, pharmaceutical (on prescription), ophthalmologic (including spectacles and/or contact lenses) and related expenses during the subsistence of the maintenance obligations; (ii) All costs and expenses (including the cost of school uniforms, accommodation, extra-mural activities, sporting equipment, books,

stationery and related expenses) incurred by of in respect of the secondary education of the said child; (iii) All costs and expenses (including the cost of accommodation, books, stationery and related expenses) attendant on the tertiary education of the said child at a university, technikon, college of other recognised institute of higher learning in South Africa provided only that the child displays due aptitude and proclivity for the course of tertiary learning embarked upon, and evidences

due progress therein;

- d) An order directing the First Defendant to maintain the plaintiff as set out below, from 1 August 2005, for a period of 5 (five) years, her death or remarriage, whichever event shall first occur:
- (i) By paying to her the sum of R6 500,00 per month on or before the first (1st) day of every month by debit order into such bank account as she may nominate from time to time; (ii) By paying the cost of all reasonable medical, dental, surgical, hospital, orthodontic and ophthalmologic treatment required by the Defendant, including any sums payable to a physiotherapist, occupational therapist, practitioner of holistic medicine,

psychiatrist, psychologist and chiropractor, as well as the cost of prescribed medication and the provision where necessary of

spectacles and/or contact lenses, to the extent that the said costs are not covered by the plaintiff's current medical aid scheme.

- e) An order in terms whereof the maintenance payable by the First Defendant in terms of payers (d) above shall escalate on each

anniversary of the granting of a decree of divorce in accordance with the rise which has occurred during the preceding year in the weighted average of the consumer price index for the middle income group as notified by the Central Statistics Bureau from time to time.

- f) In terms of section 7(3) of the Divorce Act, the First Defendant is ordered to pay the Plaintiff the sum of R500 000,00, subject thereto that in terms of section 7(6) of the Divorce Act: (i) Payment of the said amount is deferred for a period of five (5) years, commencing on the date of this judgment; (ii) The said amount shall attract interest at the prescribed rate from date of judgment to date of payment; and (iii) Payment of the said amount shall be secured by the First Defendant, who is directed to procure (at his expense) the passing of a first covering mortgage bond in the said amount over the property of the Second Defendant, in favour of the Plaintiff.

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- g) An order directing the trustees for the time being of the C DE V PIENAAR TRUST to sign all documents and take all steps as may be necessary go give effect to the relief granted in terms of prayers
- (f) above.
- i) Costs of suit, such cost to include the qualifying expenses of:
5. Domestic worker 500.00
6. Service and repair of household appliances, 500.00 replacement of furniture, electrical equipment,
crockery, cutlery, linen, computer expenses, garden, curtains, carpets
7. Groceries including minerals, food, cleaning 1 800.00 materials (including having guests)
8. Motor vehicle:
Licence 40.00
Parking 150.00
Petrol and oil 700.00
Provision for replacement of tyres every two years 100.00
Servicing and repairs 400.00
AA Membership 40.00
9. Television:
Licence 19.00
M-Net/DSTV 380.00
Internet subscription 200.00
10. Hairdresser 200.00
11. Security service 350.00
12. Clothing and accessories 600.00
13. Donations 100.00
14. Pocket money (incidentals, yoga, milk and bread, etc) 500.00
15. Toiletries and cosmetics, beauty therapy, skin care, 200.00 cosmetics
16. Medical:
Medical aid contribution 1 200.00

Therapies and massages 500.00

17. Newspapers and periodicals 150.00

18. Music: CD's/tapes 100.00

19. Stationery, photographs, photocopies 100.00

20. Entertainment:

Shows, dining out, liquor, books and gifts 500.00

21. Recreation/Hobbies:

Pottery (kiln and clay) 100.00

Gym membership 300.00

22. Gardener 250.00

23. Gardening

- plants, fertilizer, etc 150.00

24. Presents (birthdays, Christmas, etc) 250.00

Camera (batteries and film) 50.00

TOTAL: R14 085.00

The age of each of the parties.

[35] The plaintiff turned 50 on 5 March this year and the defendant turns 52 on 28 August later this year.

The duration of the marriage.

[36] The parties have been married for 22 years and separated on 23 July 2003, after 20 years of marriage. They have now lived apart for 2 years.

The standard of living of the parties prior to the divorce.

[37] The parties enjoyed a comfortable lifestyle. Neither appear to have extravagant tastes and the defendant is obviously careful with his money and was not likely to spend it on luxuries. They clearly did not want for any necessities of life. The photographs which form part of attorney Landman's expert report show that the farm and farm buildings to be well kept and the farm house and surroundings to be very pleasant and comfortable. The plaintiff travelled overseas more than once, making use of money saved from income generated by accommodation and catering for the hunters. Defendant has also travelled overseas and so has their son.

The conduct of the parties in relation to the breakdown of the marriage

[38] In my view this is a neutral factor. The plaintiff was clearly in some respects a difficult and trying person to live with. It is clear that the defendant considers himself hard done by in the sense that he was not, in his view, responsible for the break-up. However, this has a lot to do with the disorder the plaintiff suffers from which initially went undiagnosed and was probably never fully understood by both of them while they were living together.

An order made under section 7 (3) of the Divorce Act

... an overall view, from the outset, of how justice could best be achieved between the parties in the light of possible orders under

either ss (2) or ss (3) or both subsections, in relation to the means and obligations, and the needs of the parties, and all the other relevant factors.³

[40] I came to this conclusion after having considered the desirability of making only a redistribution order and awarding no maintenance. I decided to award both but nevertheless to effect a clean break in due course. This is in my view a case where the facts (the financial position of the parties which includes the benefits the plaintiff will derive in due course from her position as beneficiary in the two trusts, their respective means, obligations and needs, and other relevant factors) do allow justice to be done between the parties by effecting a final termination of the financial dependence of the plaintiff on the defendant.

Any other factor which in the opinion of the court should be taken into account.

[41] I referred earlier to the potential benefits which will in due course accrue to the plaintiff from the J R Jackson Testamentary Trust and the Ronald Jackson Family Trust. During the course of these proceedings the values of Bakensrug and the Fish Hoek property were never reliably established. However, it is in my view clear from the evidence as a whole that the value of Bakensrug is more or less the same as Juriesfontein, that is, in excess of R7m and that the Fish Hoek property is probably worth in excess of R 2m. Although these benefits cannot presently fairly be seen as part of her current assets, the fact that she is a beneficiary in both trusts must clearly come into consideration. Mr Gamble submitted that, given the evidence regarding the wishes of the capital beneficiaries (the plaintiff and her three sisters), it is likely that the majority of them will wish Roland du Toit to continue farming on Bakensrug for the foreseeable future and that the farm will thus not be sold for an indefinite time after the death of the plaintiff's mother. As far as The Roland Jackson Family Trust is concerned, he pointed out that the beneficiaries may extend the termination of the trust after the death of the plaintiff's mother. It would therefore be inappropriate, he suggested, to limit the period of the plaintiff's maintenance to five years or her mother's death. It was more appropriate, he suggested, to leave it to the defendant to apply in due course for the reduction or termination of the maintenance if circumstances should merit such a change. The submissions by Mr Gamble are certainly attractive. In my view, the plaintiff will in due course be a person of some considerable means when she acquires her share in the assets of the two trusts. It would not be just, I think, in the circumstances, to leave the period of

maintenance undetermined and to place the onus on the defendant to monitor matters and again come to court to change or terminate the maintenance. In my view, given the fact that the parties must ultimately go their separate ways, it would not achieve justice

between them to retain the financial link between them for an indefinite period. The decision by the beneficiaries after the death of the plaintiff's mother must in my view take account of the fact that the plaintiff's maintenance will come to an end or has already come to an end. They should not be in a position to prolong the life of the trust(s) in order for a maintenance order in favour of the plaintiff to continue.

[42] Having regard to the foregoing considerations and factors, I consider it just that the defendant, pay maintenance to the plaintiff for the period of five years or her earlier death or remarriage, in the sum of R6 500,00 per month. I add, perhaps unnecessarily, that the aforesaid maintenance order remains open to be varied or rescinded under the provisions of section 8(1) of the Divorce Act, should a court find that there is sufficient reason therefor.

PLAINTIFF'S CLAIM UNDER SECTION 7 (3) OF THE DIVORCE ACT

[44] In 1996 the bare dominium of the land (the land is subject to the usufruct in favour of the defendant's mother) was sold and transferred to the trust. In my view, given the reason for these transactions (estate planning aimed at reducing or avoiding estate duties on his death) and the control which the defendant, who is not a beneficiary under the trust, retained over the land through his controlling position as donor/trustee of the trust (clauses 4.3 and

5) and the fact that he has, despite the separate existence of the trust and the separate bank account which was opened and operated by the trust, continued to treat the farm and the rental income of the trust as his own in all but name, the farm should, for the purposes of section 7(3) of the Divorce Act, be treated as if it is the defendant's personal property. Although the plaintiff was a co-trustee (until she was in effect removed in September 2003 and was replaced by Michael-Ross), with the defendant and his brother, she was not involved in any decisions regarding the affairs of the trust. The defendant, effectively made the decisions regarding the affairs of the trust alone or with his brother who would be inclined to serve his interests. It was always the intention of the parties that Juriesfontein would pass to defendant's progeny and this is what the trust seeks to accomplish in the various provisions regarding capital beneficiaries (see clauses 1.2.2. and 22.1.).

[45] An order under section 7(3) may only be made as is provided in section 7(4), that is, if the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by way of rendering services, the saving of expenses which would otherwise have been incurred, or in any other way

Plaintiff's direct and indirect contribution towards the maintenance and increase in the estate of the defendant

[46] The plaintiff testified in detail in regard to the various ways in which she was involved in and contributed directly and indirectly to the various activities on the farm. These included her role as knowledgeable farmer's wife, the mother of the parties' son (although James, like his elder brothers before him, was a full time boarder at his school from an early age), her part in the renovation of the farm house and surrounds over the period of three years soon after their marriage, the running of the guest house on the farm and her contribution towards the yearly hunting activities on the farm. She contributed not only her services, but also made some monetary contributions and brought with her some livestock donated by her father. The defendant has not denied that the plaintiff played some part in the affairs on the farm, but has sought to minimise the role played by the plaintiff. I think it must be borne in mind not only that there need not be a causal link between the contribution of the plaintiff and all the defendant's assets, but also that the role of a wife and mother should not be undervalued because it is not measurable in money.⁴ In my view, the plaintiff's efforts entitle her to an order under section 7(3) of the Divorce Act.

[48] In all the circumstances, a just and equitable distribution would be for the defendant to pay the plaintiff an amount of R500 000,00. This will amount to a distribution of less than 10 % of the defendant's assets (which includes, for purposes of the order, Juriesfontein).

[49] I turn to the issue of costs. Although some of the issue between the parties were resolved by agreement before and during the trial, the plaintiff has been successful in obtaining an order for maintenance in excess of what was ultimately offered by the defendant. In this regard the plaintiff's ability to work remained as a principal issue and the qualifying expenses of the experts on behalf of the plaintiff who filed expert summaries in this regard must therefore be included in the costs despite the fact that all of them did not testify. The plaintiff was also successful in obtaining an order under section 7(3) of the Divorce Act, an issue which remained in dispute up to the end. Mr Smith, on behalf of the defendant submitted that the trial was unnecessarily prolonged as a result of the plaintiff's persistence with certain issues and the manner in which the evidence was presented on behalf of the plaintiff. It is true that in retrospect, the trial may have been shortened had both parties taken a different approach both in leading the evidence and in cross-examination. However, in my view, it would not be fair to punish any of the parties by an adverse cost order in this regard. To do so would not give adequate recognition to the vicissitudes of litigation and fact that it is difficult to predict and plan in with any exactitude in advance how a trial will evolve during the course of the proceedings. Ultimately, there is in my view no reason to deviate from the ordinary approach, namely, that the costs should follow the result.

[50] In the result, the following orders are made:

- a) A degree of divorce.

- b) An order in terms of which joint custody of the parties' minor son, CHARL JAMES is awarded to the parties, with the First Defendant as the parent of primary residence;
- c) An order directing First Defendant to maintain CHARL JAMES until he attains majority of becomes self-supporting, whichever shall first occur, by paying:
- (i) All his reasonable medical, dental, chiropractic, hospital, orthodontic, pharmaceutical (on prescription), ophthalmologic (including spectacles and/or contact lenses) and related expenses during the subsistence of the maintenance obligations;
- (ii) All costs and expenses (including the cost of school uniforms, accommodation, extra-mural activities, sporting equipment, books, stationery and related expenses) incurred by of in respect of the secondary education of the said child;
- (iii) All costs and expenses (including the cost of accommodation, books, stationery and related expenses) attendant on the tertiary education of the said child at a university, technikon, college of other recognised institute of higher learning in South Africa provided only that the child displays due aptitude and proclivity for the course of tertiary learning embarked upon, and evidences due progress therein;
- d) An order directing the First Defendant to maintain the plaintiff as set out below, from 1 August 2005, for a period of 5 (five) years, her death or remarriage, whichever event shall first occur:
- (i) By paying to her the sum of R6 500,00 per month on or before the first (1st) day of every month by debit order into such bank account as she may nominate from time to time;
- (ii) By paying the cost of all reasonable medical, dental, surgical, hospital, orthodontic and ophthalmologic treatment required by the Defendant, including any sums payable to a physiotherapist, occupational therapist, practitioner of holistic medicine, psychiatrist, psychologist and chiropractor, as well as the cost of prescribed medication and the provision where necessary of spectacles and/or contact lenses, to the extent that the said costs are not covered by the plaintiff's current medical aid scheme.
- e) An order in terms whereof the maintenance payable by the First Defendant in terms of payers (d) above shall escalate on each anniversary of the granting of a decree of divorce in accordance with the rise which has occurred during the preceding year in the weighted average of the consumer price index for the middle income group as notified by the Central Statistics Bureau from time to time.

- f) In terms of section 7(3) of the Divorce Act, the First Defendant is ordered to pay the Plaintiff the sum of R500 000,00, subject thereto that in terms of section 7(6) of the Divorce Act:
- (ii) The said amount shall attract interest at the prescribed rate from date of judgment to date of payment; and
- (iii) Payment of the said amount shall be secured by the First Defendant, who is directed to procure (at his expense) the passing of a first covering mortgage bond in the said amount over the property of the Second Defendant, in favour of the Plaintiff.
- g) An order directing the trustees for the time being of the C DE V PIENAAR TRUST to sign all documents and take all steps as may be necessary to give effect to the relief granted in terms of prayers
- (f) above.
- i) Costs of suit, such cost to include the qualifying expenses of:
- (i) Mr Colin Shelley; (ii) Mr Andries Landman; (iii) Mr Gerrit van Wyk; (iv) Dr Fay Thornley;
- (v) Ms Sonja Botes (industrial psychologist). W J LOUW, J
- (i) Mr Colin Shelley;
- (ii) Mr Andries Landman;
- (iii) Mr Gerrit van Wyk;
- (iv) Dr Fay Thornley;
- (v) Ms Sonja Botes (industrial psychologist).

W J LOUW, J

1 Beaumont v Beaumont 1987 (1) SA 976 (AD) at 987E

2 Katz v Katz 1989 (3) SA 1 (AD) at 11B-D

3. Beaumont v Beaumont, 992 F

4 Bezuidenhout v Bezuidenhout 2005 (2) SA 187 (SCA) at 198 G; 200 H.

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