

SOUTH AFRICA / JUDGMENT

R.S v I.S (8280/2015) [2018] ZAGPPHC 605 (4 May 2018) [2018] ZAGPPHC 605

COURT

North Gauteng High Court, Pretoria

BEFORE

Sethole

CASE / FILE NUMBER

8280/2015

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII Note: Certain

**personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII**

Policy

HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Not

reportable

Not

of interest to other Judges

CASE

NO: 8280/2015

4/5/2018

In

the matter between:

R

S

Plaintiff

And

I

S

Defendant

JUDGMENT

SETHOLE, AJ

1. This is a divorce action between the parties wherein the Plaintiff's claim includes a decree of divorce, a redistribution order, as provided for in Section 7(3) of the Divorce Act, 70 of 1979, as well as a claim for spousal maintenance and costs.
2. The Defendant defended the action and filed a counterclaim only and claimed a decree of divorce and costs.
3. From the pleadings, it is evident that the issue of divorce between the spouses is not in dispute. What is in dispute is Plaintiffs request for a redistribution order, spousal maintenance and costs. That is where the provisions of section 7(3) becomes applicable.
4. It was placed on record at the commencement of the hearing of this matter that the values of the properties involved in this matter are not in dispute and are as follows:

DEFENDANT'S ASSETS

4.1. Townhouse "Panorama" , Faerie Glen,

Pretoria

R1 300 000,00

4.2. Riverbella Properties CC "Plot"

R5 500 000, 00

4.3. Retirement annuities & Unit Trusts

R1 270 000,00

4.4. BMWX5

R 322 000,00

4.5. BMW 320 (in Plaintiff s use)

R 45 000,00

Subtotal

R8 437 000,00

PLAINTIFF ' S ASSETS:

4.6. Pension

R 50 000,00

4.7. Stanlib investment

R 300 000,00

4.8. ABSA investment

R 89 252,00

Subtotal:

R 439 252,00

TOTAL ASSETS:

R8 876 252,00

LESS LIABILITIES:

4.9. Bond over Riverbella Properties CC

R1 100 000,00

NET ASSETS

R7 776 252,00

5. On trial, and from the arguments by the defence counsel, it became apparent that defendant's defence is that Plaintiff should not

benefit from the provisions of section 7(3) in that:

5.1. their marriage was out of community of property;

5.2. that Plaintiff did not directly contribute anything to the estate of the Defendant.

6. Legislation applicable

Section 7 of the Divorce Act, 70 of 1979 provides as follows -

Division of assets and maintenance of parties:

- (1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.
- (2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, 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 each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it, may be relevant to the break-down of the marriage, an order in terms of subsection

- (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 the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur. [Sub-s. (2) substituted by s. 36 (a) of Act No. 88 of 1984.]
- (3) A court granting a decree of-divorce in respect of a marriage out of community of property-
 - (a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or
 - (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988, 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. [Sub-s. (3) added by s. 36
 - (b) of Act No. 88 of 1984 and substituted by s. 2 (a) of Act No. 3 of 1988.]
- (4) An order under subsection (3) shall not be granted unless 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 the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner. [Sub-s. (4) added by s. 36 (b) of Act No. 88 of 1984.]
- (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 (4), 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. [Sub-s. (5) added by
- s. 36 (b) of Act No. 88 of 1984 and substituted by s. 2 (b) of Act No. 3 of 1988.}
- (6) A court granting an order under subsection (3) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the_ payment of instalments, and the delivery or transfer of specified assets, as the court may deem, just. [Sub-s. (6) added by
- s. 36 (b) of Act No. 88 of 1984.}
- 7. In invoking the provisions of section 7(3) , the court has to take into account the provisions of section (4) in that the court must make a just and equitable order having consideration into the circumstances surrounding the parties, which circumstances are as follows:

7.1. That the parties were married on 4 October 1980, out of community of property, some years prior to the enactment of the matrimonial

property act, 88 of 1984. Before the two parties got married, Defendant was staying with his parents and had nothing to an extent

that Plaintiff had to organize food for Defendant while he was studying his electrical engineering.

7.2. At the hearing of this matter, their marriage was 37 years old and Plaintiff was turning 61 in November 2017.

7.3. There are three major children born of the wedlock. The children, though are majors, were raised during the subsistence of the marriage

between Plaintiff and Defendant. Both of them as parents took care in the upbringing of the children but when Defendant was engaged she would be with the children.

7.4. Plaintiff is a qualified teacher by profession and has been working as a tea her all her life. After the birth of each child she stayed home and for some time thereafter. She at times sold glasses, Tupperware and jewelry products and from the income there from, she used for house hold necessities.

7.5. The Plaintiff explained that the Defendant was a hard worker but unfortunately also a hard drinker.

7.6. Around 1995 the Defendant got into a business venture and purchased shares in a BP Garage with a partner one Mr. Edwards. At that time Defendant was still employed as an engineer at a mine and the Plaintiff managed the business at the BP Garage as his "eyes and ears". She never received a salary for her services for about six years. Normally when Defendant arrived from work Plaintiff would knock off from the garage with the children and went home to do house chores. For the time that Plaintiff spent as a manager, she could not accumulate pension.

7.7. From the proceeds of the BP Garage, Defendant went on to purchase a beautiful property on the Vaal River which the Defendant chose to have registered in the name of a CC, Riverbella Properties.

7.8. It is the evidence of the Plaintiff that around 2005/2006, she discovered that Defendant had an extramarital affair with a one Elsie

du Toit. During this time the Plaintiff issued divorce summons but never proceeded with the action.

7.9. Plaintiff never received a formal salary for her services of close to six years at the BP garage. The Defendant claimed that the Plaintiff was allowed to utilize cash but also conceded that the cash she took was mostly spent on household expenses. The Defendant conceded that the Plaintiff did not have a formal contract, nor was she able to accumulate any pension.

7.10. Defendant had financial difficulties at BP garage and Plaintiff had to enter into a loan agreement for an amount of R200 000,00 with her mother on a basis that the Plaintiff would receive an early inheritance. Defendant only refunded an amount of R250 000 inclusive of interest in 2016 after this action was instituted.

7.11. Defendant transferred 50% of his shares in Riverbella Properties CC to Divan Smal, their son who is an accountant, after the commencement of this divorce action and same was registered in the Company's office on the 3rd of August 2015, about seven months after the divorce was instituted. It transpired during the trial that the transfer of the shares to Divan Smal, was fraudulent and as a result null and void as it was intended to defraud the Plaintiff.

7.12. Mr. Divan Smal conceded that he did not really hold a true interest in the CC and conceded that his father might have structured this transaction simply to defraud his mother. He conceded that it was indeed his father's property even though he appeared to be clueless about that transaction of transfer of shares in the CC.

8. The court is requested to exercise its discretion with regards to the Plaintiffs claim in terms of Section 7(3), the issues of spousal

maintenance and the costs of the action.

9. The Defendant is an electrical engineer but avers that he is not employed and has not been working since February 2017. He has no income but is looking for employment.

10. During this trial an expert report by Dr. Cillie-Schmidt, an industrial psychologist was by agreement handed in and admitted as evidence without calling the expert. The report records that Plaintiffs non-linear career path led to several financial disadvantages to her, specifically in terms of income and pension. Further, that Plaintiff had a non-linear career to the advantage of her family and children which played a major role in her not building up a large estate or sufficient pension.
11. The aforesaid report recorded further that Plaintiff is in the decline of her career, she is now desperately trying to build up a career, as a direct result of the divorce. Further that if it was not the divorce, Plaintiff would in all likelihood continued to be a housewife being fully maintained by her husband.

AUTHORITIES:

12. As referred to by Plaintiffs counsel in the matter of H-J v H-J [2002] 1 FLR 415 insofar as it pertained to what should be considered as a contribution made to the matrimonial home, the Honourable Mr. Justice

Colridge held as follows:

"For my part, I would find it repugnant as a judicial exercise to have, in effect to draw up a married table in which fund gradations of contributions give rise to an imaginary increase or decrease share in the financial spoils of marriage. By whose standards should I make such distinctions? . . . In this case, it is sufficient as I find, to record that both the husband and wife each made their full and equal contribution in their respective roles within this long marriage. The family has been financially successful and the job of raising any children and looking after various homes has a/so been successful. The role of the husband has been predominant in the financial success and, as I find the role of the mother and wife was predominant in keeping house and raising the children. Any further distinction is, in my judgment, impossible to draw on the evidence."

13. Further reference was made by Plaintiff's counsel that in the matter of Bezuidenhout v Bezuidenhout 2005 (2) SA 187 (SCA) the Supreme Court of Appeal held that the starting point when it came to a division of assets, should be that parties' assets should be equally divided, and that departing from this principle should only be done if there is a good reason for same:

"In establishing the legal foundation for his decision, Pincus AJ devoted a substantial part of his judgment (paras [23], [24] and [27] - [39]) to a relatively new approach by the English Courts, which was ultimately endorsed by the House of Lords in H White v White [2000] UKHL 54; [2001] 1 AC 596 (HL (E))([2001] 1 All ER 1; [2000] 2 FLR 981). This accepts that as a general guide, or starting point, the combined assets of the parties should be divided equally and that this principle should be departed from only if and to the extent that there is good reason for doing so (see eg White v White (supra at 605G - H (AC); 9e - f (All ER)). Closely aligned to this approach is the question sometimes posed by the English Courts, which is also referred to by the Court a

quo (paras [27] - [29] and [37]), namely 'what more could the wife have done to justify an award of 50%?' If the answer to this is that she had done her utmost and that therefore she could not have done more, it is accepted as a matter of course that there is no justification for deviating from the equality principle (see eg *Lambert v Lambert*

[2002] EWCA Civ 1685; [2003] Fam 103 (CA) ([2003] A 4 All ER 342), paras [14] and [53])."

14. Section (7)4 reads: "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". I am of the view that plaintiff contributed in the following ways:

14.1. Directly in providing a loan of R 200 000,00 to Defendant which was refunded after the divorce action was instituted. Defendant anticipated that should he not refund the loan provided by Plaintiff, it will be regarded as a contribution, hence he refunded the loan amount. Had it not for that the action was instituted by Plaintiff, it might have been that Defendant would not have refunded the loan provided by Plaintiff.

14.2. Indirectly in providing her services by doing house chores for the common household and taking care of the children while defendant was busy building his estate. It follows that she could not have the opportunity to accumulate her pension under the circumstances.

MEANS OF THE PARTIES AND EARNING CAPACITY OF THE PARTIES.

15. Regarding the spousal maintenance as prayed for by Plaintiff, there are factors that are taken into account such as, the Defendant is not a poor man. The Defendant is obviously heavily invested in fixed property and is a qualified engineer. Even though unemployed, he has a potential of being employed and is looking for employment. With his experience of working in the mine and eventually owning a BP garage, will in all probability earn a good salary. On the other hand the industrial psychologist recorded that due to the age of Plaintiff, she is unemployable.
16. Furthermore, although Defendant has not placed the court fully in the picture about his income and assets and liabilities and further that he tried to conceal the value of his property by transferring 50% of his shares in Riverbella Properties CC to Divan Smal, it is clear that Defendant owns and/or controls very valuable assets.
17. Plaintiff, at the hearing of this matter, their marriage was 37 years old and she was turning 61 in November 2017. Having regard to the fact that Defendant is unemployed, Plaintiff only request a (nominal) spousal maintenance from Defendant that in the event Defendant is employed, then she will be able to get maintenance.
18. In terms of section 7(2) of the Act the trial court has a wide discretion to determine the question of maintenance requirements

- see *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 987E; *Katz v Katz* 1989 (3) SA 13 (A) at 11A-C and *Swiegelaar v Swiegelaar* 2001 (1) SA 1208 (SCA) par 7. The court is not limited to making an order for equal monthly instalments. The court may also order payment of an initial amount to enable a party to purchase household necessities to establish a new home - see *Swiegelaar v Swiegelaar* supra par 12-15. The court must conclude that in the light of all the relevant factors (i.e. those specified in the subsection as well as any other which, in the opinion of the court, should be taken into account) it is just for the order/s to be made - see *Buttner v Buttner* 2006 (3) SA 23 (SCA) par 36.
- 19. Before the commencement of the Divorce Act, it was said that no maintenance will be awarded to a wife who is able to maintain herself and that a wife cannot expect to enjoy, after divorce, the same standard of living that she had as a married person - see *Hahlo Husband and Wife* 5 ed 361 and the cases there cited. However it is clear from the factors enumerated in section 7(2) and the wide discretion which is conferred on the trial court that it is not bound to refuse a wife's claim for maintenance simply because she can support herself - see *Nilsson v Nilsson* 1984 (2) SA 294 (C) at 297B-H; *Rousalis v Rousalis* 1980 (3) SA 446 (C) at 450E-H; *Grasso v Grasso* 1987 (1) SA 48 (C) at 52C-G and 58H; *Pommerel v Pommerel* 1990 (1) SA "998 (E) at 1002A-D - and that the court may award her maintenance that will give her the same standard of living - see *Grasso v Grasso* supra at 52CD. It will always depend on the facts and circumstances and what the court considers to be just in the light of these facts and circumstances.
- 20. In this regard it is significant that the factors to be taken into account are not listed in any order of importance and that there is no indication of the weight to be attached to each of these factors. Furthermore, as already mentioned, the court is free to have regard to any other factor which, in its opinion, ought to be taken into account in coming to a just decision
- see *Grasso v Grasso* supra at 52E-G.
- 21. In conclusion, I am of the view that Plaintiff has succeeded in proving her claim for decree of divorce, a redistribution order, as provided for in Section 7(3) of the Divorce Act, 70 of 1979, as well as a claim for spousal maintenance taking into account the duration of the marriage, the conduct of the Defendant in relation to his extramarital affair, the attempt to conceal property by transferring shares of his cc to his son after the commencement of the divorce action etc...
- 22. It would be just for the Defendant to pay the costs.
- 23. The following order is made:
 - 1. A decree of divorce.
 - 2. A redistribution order in favor of the Plaintiff in the following manner:
 - 2.1. A 50/50 division, each party to be awarded in the amount of R3 888 126.00.

2.2. The Plaintiff is to retain the following assets which should be deducted from the 50% portion:

2.2.1. The Panorama Faerie Glen property to be transferred to the name of the Plaintiff at the costs of the Defendant, the Defendant to sign all documentation necessary to effect such transfer on request.

2.2.2. The BMW 320 to be transferred to the name of the Plaintiff at the costs of the Defendant, the Defendant to sign all documentation necessary to effect such transfer on request.

2.2.3. The Plaintiffs Stanlib investment.

2.2.4. The Plaintiff's ABSA investment.

2.2.5. The balance in cash value amounting to R2 153 874.00.

3. The cash value of R2 153 874.00 payable to the Plaintiff by the Defendant should be paid to her within one year from date of divorce failing which the Plaintiff will be entitled to execute on the property of the Defendant or the Riverbella Properties CC. The immovable property registered in the CC may not be sold nor may the membership be transferred until the Plaintiffs claim is satisfied.
4. The Defendant is ordered to pay nominal maintenance to the Plaintiff in the amount of R1.00 per annum and the Plaintiff is entitled to approach the Maintenance Court for a variation of this maintenance order should there be a substantial change in circumstances.
5. The Defendant is ordered to pay the costs of this action on a party and party scale, such cost order shall include the cost orders previously reserved as well as the qualifying fees of all the experts employed by the Plaintiff.

E E SETHOLE

Acting Judge of the High Court

Date of judgment:

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2018/605.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/rs-v-is-unknown-topic-agpphc-2018>

Prepared on 9 October 2026 · Esheria