

SOUTH AFRICA / JUDGMENT

S.V v H.V (19579/2013) [2017] ZAGPPHC 942 (8 December 2017)

[2017] ZAGPPHC 942

COURT

North Gauteng High Court, Pretoria

BEFORE

Petersen

CASE / FILE NUMBER

19579/2013

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 19579/2013

Not

Reportable

Not

of interest to other judges

8/12/17

In

the matter between:

S

V PLAINTIFF

and

H

V DEFENDANT

JUDGMENT

PETERSEN AJ

- [1] This is a divorce action. The parties were married out of community of property on 21 May 1977. An antenuptial contract was entered into on 09 May 1977 and duly registered on 17 May 1977. The marriage was entered into before the enactment of the Matrimonial Property Act, Act 88 of 1984 ("the Matrimonial Property Act"). The antenuptial contract excluded community of property and community of profit and loss. The accrual system was not applicable at the time.
- [2] The plaintiff instituted divorce proceedings against the defendant on 04 April 2013 claiming a decree of divorce and costs of the action if defended. The defendant served her Plea and Counterclaim on 01 October 2017 claiming a decree of divorce, an order that 50% (FIFTY PERCENT) of the plaintiff's assets be transferred to the defendant and an order that the plaintiff pay the costs of the action. The parties are in agreement that the marriage has broken down irretrievably. The sole issue for determination is whether a divorce decree should be granted with no further orders; or a divorce decree with a redistribution order should be granted.
- [3] The marriage relationship demonstrated by the evidence of the parties can be succinctly summarised as follows. At the time of the marriage of the parties on 21 May 1977, the plaintiff was initially employed by the then Department of Water of Affairs and subsequently by Kentron and Armscor (Krygkor) for about 2 years. The plaintiff was employed as such between 1977 and 1980. From 01 July 1980 until February 2009 the plaintiff worked at Nissan South Africa in the field of development engineering. He stopped working when diagnosed with severe depression. The defendant had a secretarial qualification and worked for a period of 9 years until the birth of the parties first daughter in 1986. The defendant initially testified that herself and the plaintiff had agreed that she would not have to work during the marriage but later testified that she was forced to stop working by the plaintiff. A conspectus of the evidence, however, demonstrates that the decision was a joint decision, with the defendant effectively becoming a home executive. The latter status quo presently remains.
- [4] The plaintiff was the primary breadwinner providing the financial backbone during the course of the marriage. During 1982 he started investments in various annuities and portfolios for the mutual benefit of himself and the defendant. The annuities and portfolios which are still active constitutes the greater value of the estate of the plaintiff, and is said to be valued at R10 111 885.00. The cash component of the investments which include an Allen Gray Unit Trust, FNB Share Investment, ABSA Money Market and ABSA Depositor Plus portfolio is valued at R2 204 750.00. The plaintiff's disability pension entitles him to receive 75% of his monthly salary until 01 November 2019. He has been rendered medically unfit and will never work again. The matrimonial home in which the defendant continues to reside after the plaintiff was prohibited by the conditions of a Protection Order from

returning to in 20 13 remains registered in the name of the Plaintiff.

- [5] The defendant who stopped working in 1986, managed the household with the assistance of a domestic worker for 3 years. She was the primary caregiver of her daughters, having assisted with, amongst others, their homework and transportation to extra mural activities. The administrative tasks required to run the household was her duty with the plaintiff determining the budget which the defendant had to utilize. The funds provided were at times insufficient resulting in her utilizing funds from an inheritance to cover shortfalls in household expenses. The money invested by the plaintiff in a Money Market account and later Stanlib investment in the name of the defendant for tax benefits was later utilised by the defendant for household expenses when the plaintiff refused to increase the household budget. The defendant maintains that the plaintiff was aware of this. The defendant contends that she contributed to the plaintiff's estate by using her own estate to pay for the household expenses thereby saving the plaintiff money which he did not have to disburse from his estate.
- [6] There is a factual dispute on the nature of the marriage relationship between the parties relating to misconduct. The plaintiff attributes his behaviour during the marriage to his medical condition and states that he takes "cognisance that his mood swings and behavioural inconsistencies, due to my diagnosis, presented difficulties for the Defendant and I, however, it was more often than not outside of my control despite my proper taking of my medication in an attempt to mitigate such sequelae. I wish I wasn't diagnosed with Bipolar disorder but I am trying my best to curb the effects in the circumstances." The defendant

testified that she lived with the plaintiff in the same bedroom for approximately 75% of the marriage as he could not be left unattended

and could not do anything for himself. The defendant maintains that she accompanied the plaintiff to his doctor and psychiatrist visits when he was diagnosed with depression and was at his side when he was admitted to for severe depression at the Denmar Clinic and later at Vista Clinic for Bipolar disorder. She denies abandoning the plaintiff's needs after his diagnosis. She described the plaintiff's demeanour as being that of a monster whilst later describing his personailty as being very pleasant but manipulative. Under cross examination she conceded that in consideration of the plaintiff's diagnosis he could not control the way he behaved. The defendant's evidence is further that the plaintiff was physically, emotionally and financially abusive. The concession was made that she had not laid any criminal charges against the plaintiff prior to 2013. A great deal of emphasis was placed on the 2013 incident where the plaintiff is alleged to have threatened the defendant with a firearm, leading to his arrest, criminal charges being laid and a Domestic Violence application initiated. In brief what emanated from the defendant's evidence is that the criminal charges were withdrawn against the plaintiff with no cogent reason given and the Domestic Violence application resulted in a Protection Order being granted against the plaintiff, with no indication as to what transpired during those proceedings resulting in the granting of the order. It would appear on a conspectus of the evidence that the

plaintiff acceded to the granting of the Protection Order when regard is had to the terms of the order and that the withdrawal of the criminal charges is related to terms of the Protection Order.

[7] The plaintiff pays a monthly maintenance amount of R13 000-00 to the defendant in accordance with the terms of a Rule 43 order granted on 08 May 2015. The further terms of the order allows the plaintiff to reside in the matrimonial home and to remain on the plaintiff's medical aid. Prior to the rule 43 order being granted, the plaintiff had not paid maintenance to the defendant for certain periods in 2013 and the entire 2014 . The defendant does not own any immovable property or a motor vehicle. A motor vehicle purchased by the plaintiff and registered in the defendant's name for insurance purposes which the defendant claims was purchased for the daughters born of the marriage has been sold.

[8] The Plaintiff has offered to transfer the matrimonial home which he claims was valued at R900 000-00 in 2013 to the Defendant. He further has no objection to a just and equitable amount of post-divorce spousal maintenance which he offers to pay in a lump sum in accordance with the clean-break principle totalling R1 500 000-00 . The plaintiff further undertakes to maintain the defendant on the medical aid policy until 2022. The plaintiff disputes the defendant's claim entitling her to 50% of his estate. The matrimonial

notwithstanding the dispute as to its value is said to be valued at R830 000-00. The value of the medical aid policy on which the

plaintiff offers to retain the defendant is said to be valued at R377 852-00 until 2022, calculated on the current premium with an annual escalation of 8.75%. The plaintiff it is said therefore effectively tenders 26.7% of his estate to the defendant, without having regard to the defendant's estate. The defendant has rejected the tender of the plaintiff and persists with her claim for a 50% redistribution of the assets.

[9] This court is faced with two separate claims, which should ordinarily be considered separately according to Milne JA in *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) where it was held:

'Even if the actions proceed at the same time, the fact that one party has counterclaimed cannot deprive the other of the right to have his or her claim separately considered. There may, possibly, be cases where the facts relevant to both claims are so inextricably interrelated that a globular approach is the only possible one, but, save in such circumstances , the claims must, at least initially , be considered separately.'

[10] In *Buttner v Buttner* [2006] 1 All SA 429 (SCA), Van Heerden JA had the following to say about the aforesaid approach:

'This view seems to me to be rather too inflexible and may have to be reconsidered in the future in light of (inter a/ia) the fact that, as pointed out by Botha JA in the *Beaumont* case:[1]

'It is certainly a very prominent and important feature of [subsec 7 (4)] that ultimately, when once the factual requirements of ss (3) and (4) are satisfied, the determination of whether or not a redistribution order is to be made at all is entrusted by the Legislature to the wholly unfettered discretionary judgment of the Court as to whether it would be equitable and just to do so.'

[11] The facts of the present matter are distinguishable from those in *Kritzinger*. The facts relevant to the Plaintiff's case and those of the defendant are inextricably linked calling for a globular approach. This view is embellished by the fact that the Plaintiff subsequent to his pleaded case tenders a redistribution of assets.

[12] Section 7(3) and related sub-sections of section 7 of the Divorce Act, Act 70 of 1979 provide as follows:

'7(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 [on 1 November 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) . . . 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.

(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.

(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...;

(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.'

- [13] The principles which have developed in determining a redistribution of assets are trite. In terms of section 7(3) of the Divorce Act 70 of 1979 ("the Divorce Act"), one spouse may ask the court, which grants the decree of divorce, to transfer the other spouse's assets, or such part of the other spouse's assets as the court may deem just, to him or her.
- [14] The pre-requisites (as set in section 7(3) of the Divorce Act) for seeking a redistribution order are:
1. The marriage must have been entered into before the commencement of the Matrimonial Property Act, 1984 [on 1 November 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
 2. The absence of an agreement between the spouses regarding the division of their assets.
- [15] In the present matter, the prerequisites provided for in section 7(3) have clearly been met. The court is accordingly called upon to satisfy itself in terms of section 7(4), before granting a redistribution order, that the defendant contributed directly or indirectly to the maintenance or increase of the plaintiff's estate during the subsistence of the marriage and that the redistribution will be equitable and just. The Court in exercising its discretion in this regard must be led by the evidence.
- [16] The parties have been married for more than 40 years and had until 2013 lived together as husband and wife for close on 37 years. It cannot be gainsaid that the defendant was a home executive for the greatest part of the marriage. The defendant portrays her marriage as being manifested by emotional, psychological and financial abuse by the plaintiff whilst at the same time the defendant's evidence reflects that she stood by the plaintiff's side, even in the darkest hours of his illness. The evidence reflects that, save for, the 2013 incident there were no reports made to the police or courts indicative of the various forms of abuse the defendant alleged in evidence. The defendant has stood by the plaintiff until 2013. The dominant precursor to the marital problems which stands out from the evidence is the medical conditions of the plaintiff. I can find no indication in the evidence that the alleged misconduct complained of by the defendant during the duration of the marriage is of any significant relevance to the determination of the central issue, that is, whether or not she contributed to the maintenance or increase of the plaintiff's estate.
- [17] The evidence demonstrates that the defendant undoubtedly contributed to both the maintenance and increase of the plaintiff's estate during the course of the marriage. It cannot be gainsaid that she raised the children from infancy to adulthood while the plaintiff provided the necessary financial backbone. The fact that the defendant ploughed monies from an inheritance into the household is not contradicted. It remains undisputed that the utilisation of funds from an investment created by the plaintiff for the benefit of the defendant was utilised since 2013 when the parties were separated for the maintenance of the defendant and the household. The defendant was only awarded interim maintenance in 2015.

[18] A value judgment is called for by the court on the extent of the defendant's contribution to the plaintiff's estate. Having regard to the totality of the evidence, I am satisfied that the defendant has contributed substantially to the maintenance and increase of the plaintiffs estate. The plaintiff has tendered an offer of redistribution on the clean break principle, tantamount to an admission that the defendant contributed to his estate. The defendant has no financial means of her own whilst the plaintiff is still vested with the sole financial means.

[19] I am accordingly satisfied that, on a consideration of the totality of the evidence, a case has been made by the defendant for an order in terms of section 7(3) of the Divorce Act. The extent of the contribution made, I find, justifies an equal redistribution order.

[20] In the result, it is ordered that:

1. A decree of divorce is granted.
2. 50% (FIFTY PERCENT) of the plaintiff's assets are to be transferred to the defendant.
3. The plaintiff is ordered to pay the costs of the action.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

APPEARANCES

For the Plaintiff: Adv Cliff

Instructed by: Werner Roos and Immelman

For the Defendant: Adv Kyriazis

Instructed by: Couzyn Hertzog and Horak

Dates heard: 13 October 2017 and 19 October 2017

Date of judgment: 08 December 2017

[1] 1987 (1) SA 967 (A) at 988J-989A

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