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REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/12734

DATE:23/11/2011

J M **Plaintiff/Applicant**

and

R S E M **First Defendant/Respondent**

F H-S **Second Defendant/Respondent**

JUDGMENT

SCHOLTZ A J

[1] In this matter I will refer to the applicant as the plaintiff and to the first and second respondents as the first and second defendants respectively.

[2] On 29 March 2011 the plaintiff issued summons against the first and second defendants in which the plaintiff alleged *inter alia* that:

(a) she and the first defendant were married to each other on 19 February 1986 at Randburg out of community of property and the marriage still subsists. A copy of the antenuptual contract was attached to the summons;

(b) there were two children born of the marriage, one of whom, Claire, was born on 31 January 1990 and was at present 21 years old. Claire remains dependant on the plaintiff and first defendant for emotional and financial support and care. The second child is deceased;

(c) the marriage relationship between the plaintiff and the first defendant has broken down irretrievably, and has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them. The reasons for the irretrievable breakdown of the marriage relationship included the allegation that the first defendant was having an adulterous affair with the second defendant;

(d) having regard to the reasons for the breakdown of the marriage, the first defendant's substantial misconduct, the fact that the marriage had endured for 25 years, the fact that the plaintiff was 55 years old, the plaintiff's expectation that the parties would be married for the rest of their natural lives and that she would be properly cared for in her retirement years until her death, the efforts, labour, services and skill employed and contributed by the plaintiff in the maintenance of the marriage, the family estate and homes, the up-bringing of the children, the support for the first defendant and his business venture, as well as any other factors which the court may consider, the first defendant would benefit unduly if "an order for the forfeiture of assets" was not made in favour of the plaintiff;

(e) in the alternative:

(i) in terms of the antenuptual contract entered into between the parties, the community of property, community of profit and loss and accrual sharing were excluded;

(ii) no agreement exists between the parties in respect of the division of the assets;

(iii) during the marriage, the plaintiff contributed directly and indirectly to the maintenance and increase of the estate of the first defendant by rendering services and by saving expenses that would otherwise be incurred;

(iv) as a result of the foregoing, it would be just and equitable if 50% of the first defendant's assets be transferred to the plaintiff, such "redistribution" to be determined by the court;

(f) in the further alterative the plaintiff pleaded that, in the event that the court may not be inclined to grant the plaintiff either a forfeiture of assets or a redistribution of assets as claimed, it would be just and equitable, based on the reasons for the breakdown of the marriage and the grounds set out in the particulars of claim, that the first defendant provide and supply the plaintiff with assets and financial means to enable her to continue her life in a manner to which she is accustomed.

[3] In view of the amendments, which the plaintiff seeks to introduce into her particulars of claim, it is not necessary to set out in detail the prayers which the plaintiff sought against the first and second defendants in her original particulars of claim. On or about 21 June 2011 the plaintiff's attorneys served on the defendants' attorneys a notice of amendment in terms of rule 28 of the rules of court, in which the plaintiff sought to effect substantial amendments to her particulars of claim dated 21 March 2011. For convenience, I set out hereunder the way in which the plaintiff's particulars of claim will read if the amendments are allowed:

1. The Plaintiff is J M, an adult female part time employee at Eberhardt-Martin CC, presently residing on the family equestrian estate ("**the equestrian estate**") situated at Plot 10 Elandsdrift, Beyers Naude Extension, Muldersdrift, Krugersdorp.

2. The First Defendant is Roger Samuel Eric Martin an adult male businessman, and qualified mechanical engineer and the main member of Eberhardt-Martin CC, presently residing at the family home situated at 37 Viljoen Street, Diswilmar, Krugersdorp.

3. The Second Defendant is F H-S an adult female whose personal details are unknown to the Plaintiff and who resides at Plot 10 Elandsdrift, Beyers Naude Extension, Muldersdrift, Krugersdorp.

4. Plaintiff and First Defendant are domiciled within the area of jurisdiction of the above Honourable Court.

5. The Plaintiff and First Defendant were married to each other on 19 February 1986, at Randburg, out of community of property and the marriage still subsists. A copy of the marriage certificate is annexed hereto as Annexure "JM1".

6. On 14 February 1986 and at Johannesburg the Plaintiff and the First Defendant entered into an antenuptial contract in terms of which they agreed to that there will be no community of property or profit or loss between them. The Plaintiff and Defendant further agreed that the accrual system defined in chapter 1 of the Matrimonial Property Act, 1984 is excluded. A copy of the antenuptial contract is attached hereto marked as Annexure "JM2".

6.1 In terms of clause 7 of the antenuptial contract the First Defendant agreed to "give, grant and make over" to the Plaintiff as her sole and absolute property all furniture, linen, plate and domestic effects to a value of not less than R15 000.00. The furniture and other effects shall be deemed and considered to be such as contained in the house or premises occupied by the Plaintiff and First Defendant from time to time.

7. There were two children born of the marriage, namely:

7.1 C M M, ("**C**") a female, born on the 31st January 1990, at present 21 years old;

7.1.1 C is currently a student at the University of Pretoria studying for a BSC degree in Plant Science.

7.1.2 C resides 50% of the time in a cottage in Pretoria and 50% of her time with the Plaintiff at the equestrian estate.

7.1.3 C is engaged in equestrian and show jumping activities and owns 10 horses which are stabled and maintained at the equestrian estate.

7.1.4 Claire remains dependant on the Plaintiff and First Defendant for emotional and financial support and care.

7.2 E B M, a male, born on 3 October 1986, who passed away in March 2005;

8. The marriage relationship between the Plaintiff and First Defendant has broken down irretrievably, and has reached such a state of disintegration, that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

9. The reasons for the irretrievable breakdown of the marriage relationship are:

9.1 During the later part of 2010 the First Defendant commenced an adulterous affair with the Second Defendant, F H-S, a woman in her forties, who also resides on the equestrian estate but in a separate dwelling which she is renting from the First Defendant;

9.2 In January 2011, the First Defendant admitted his adulterous affair with F H-S to the Plaintiff and requested that their marriage be terminated so that he can "have a life";

9.3 The First Defendant arranged for a consultation with a lawyer to institute divorce proceedings and in a cavalier manner requested the Plaintiff to accompany him with a list of her financial requirements; this appointment was postponed at the last minute due to the unavailability of the lawyer;

9.4 When the Plaintiff is absent from the equestrian estate and the family home at Viljoen Street Diswilmar, F H-S, with the knowledge of the First Defendant, assumes the role, duties and responsibilities of the Plaintiff and conducts herself as the "Lady of the Manor";

9.5 The First Defendant and F H-S are openly flaunting their adulterous relationship, having no respect for the Plaintiff or her marriage relationship with the First Defendant;

9.6 The First Defendant treats the Plaintiff with utter contempt and disrespect;

9.7 The Plaintiff and First Defendant no longer share common interests, save for their child, Claire;

9.8 The Plaintiff has lost all love, respect and affection for the First Defendant;

The Plaintiff and First Defendant no longer reside together.

9.10 During March 2011 the First Defendant, assisted by the Second Defendant, made an offer to Belinda Clauda Deverson to purchase a property described as Holding 46 situated at Lammermoor AH for the cash amount of R2.6 million for the benefit of the Second Defendant. The property is to be registered into a close corporation (to be formed) and the Second Defendant would be the sole member of the close corporation.

10. Having regard to:-

10.1 the reasons for the breakdown of the marriage as set out in paragraph 9 supra;

10.2 the First Defendant's substantial misconduct as set out in paragraph 9 supra;

10.3 the duration of the marriage i.e. 25 years;

10.4 the age of the Plaintiff i.e. 55 years and the fact that she without any qualifications has obtained invaluable experience in horses since the age of 12, managing the equestrian estates belonging to the family. Horse owners of different walks of life, entrusting their horses with her for stabling, caring and training over a period of 20 years and being a

committee member of the West Region Gauteng Horse Society and having assisted Claire, who has provincial colours in show jumping, showing, and cross country financially and emotionally without the assistance of the First Defendant over a period of 15 years;

10.5 The Plaintiff's expectation that the parties would be married for the rest of their natural lives and that she would be properly cared for in her retirement years until her death;

10.6 The efforts, labour, services and skill employed and contributed by the Plaintiff in the maintenance of the marriage, the family estates and homes, the upbringing of the children, the support for the First Defendant and his business venture;

10.7 During the marriage, the Plaintiff contributed directly and indirectly to the maintenance and increase of the estate of the First Defendant by rendering services and by saving expenses that would otherwise be incurred. The details of which are as follows:

10.7.1 The Plaintiff was employed by the Defendant's company, Eberhardt-Martin CC in the capacity as administrative clerk, with insubstantial remuneration, for the last 25 years. She was initially employed full-time and later on a part-time basis in order to look after and care for the minor children.

10.7.2 The Plaintiff also in addition to the above, assisted in the business of the First Defendant by managing the stores, stock, deliveries, and queries pertaining to the First Defendant's business.

10.7.3 The Plaintiff managed and maintained the common households and other family properties as listed on the asset schedule.

10.7.4 Until the death of their son, the Plaintiff was the sole caregiver of the children. The Plaintiff would also arrange all aspects of C's equestrian activities and horse jumping shows. Only after the death of their son did the First Defendant begin to display more interest in C.

10.7.5 The Plaintiff managed all aspects of the equestrian business conducted firstly on the Viljoen Street property and later on the equestrian estate.

10.7.6 The Plaintiff took care and managed all aspects of the marriage, home and family while the First Defendant concentrated on his business activities and ventures.

10.7.7 The Plaintiff has cared for, with the assistance of a caregiver, the First Defendant's father who suffered a stroke approximately 3 years ago, which includes taking him on holidays, sometimes without the First Defendant.

10.8 The existing and prospective means of the parties and the standard of living of the parties prior to the divorce action;

10.9 as well as any other factors which the Honourable Court may consider;

it would be just and equitable that the Honourable Court order the First Defendant to pay maintenance towards the Plaintiff in the form of a lump sum payment, having regard to the clean break principle, and a resettlement allowance.

11. The assets accumulated by the First Defendant during the subsistence of the marriage are set out in a schedule annexed hereto as Annexure "JM3".

12. The maintenance in the form of a lump sum payment and a resettlement allowance is calculated as follows:

12.1 A lump sum payment of R20 million to be paid to the Plaintiff, to be invested by the Plaintiff in order to secure and obtain an income for the Plaintiff for the remainder of her life.

12.2 A fully paid immovable property of the Plaintiff's choice for the residence of the Plaintiff with a value of R3 million;

12.3 First Defendant to pay all costs pertaining to the transfer of the aforesaid immovable property into the Plaintiff's name including all utility connection fees;

12.4 First Defendant to pay all reasonable costs of furnishing the aforesaid immovable property, alternatively the Plaintiff shall be entitled to remove and retain all household movable and effects currently housed in all immovable properties occupied by the Plaintiff and First Defendant in terms of clause 7 of the antenuptial contract as set out in paragraphs 6 above;

12.5 First Defendant to transfer the Toyota Hi-Lux motor vehicle with registration letters and numbers XXL 284 GP into the Plaintiff's name. The First Defendant shall replace this vehicle with a vehicle of similar class and standard (to be registered in the Plaintiff's name) when the Toyota Hi-Lux reaches 100 000 kilometers or 5 years, whichever comes first. The First Defendant shall cover all running costs of the vehicles so provided including fuel up to 300 litres per month. This shall be conditional to the Plaintiff being the holder of a valid driver's license.

12.6 The First Defendant to provide and place at the disposal of the Plaintiff with one BMW X5 or similar motor vehicle for the purpose of towing a horsebox. The First Defendant to cover all running costs of the aforesaid vehicle.

12.7 First Defendant to retain the Plaintiff on his medical aid for the rest of her living years after the divorce order is granted. The First Defendant to cover payment of all medical expenses not covered by the medical aid locally or abroad.

12.8 The Plaintiff shall have a usufruct on the equestrian estate for the purpose of continuing to conduct and manage the equestrian business conducted on the said property. This usufruct shall lapse upon Claire selling her share in the said property.

12.9 The First Defendant to pay the Plaintiff's cell phone and data card to the value of R1 200.00 per month.

12.10 The Plaintiff shall be entitled to the use of the Umdloti apartment for three weeks of each year.

12.11 The Plaintiff shall be entitled to a one week holiday per year in the Kruger Park or surroundings.

12.12 The First Defendant to pay all medical expenses of one horse belonging to the Plaintiff. No single payment shall exceed R5000.00. Any amount in excess of R5000.00 shall be by agreement between the parties and will depend on the value of the horse in question.

13. With full knowledge of the existing marriage relationship between the Plaintiff and First Defendant, the Second Defendant enticed the First Defendant to enter into a relationship with the Second Defendant and to vacate the common home of the Plaintiff and the First Defendant in order to pursue an adulterous relationship with the Second Defendant.

13.1 Second Defendant committed adultery with the First Defendant at various places and times unknown to the Plaintiff and is still committing adultery.

14. As a result of the Second Defendant's conduct the Plaintiff suffered damages in that:

14.1 Plaintiff lost all love and consortium of the First Defendant as a result which the Plaintiff suffered damages in the amount of R250 000.00.

14.2 Plaintiff suffered an iniuria as a result of the adultery between the First and Second Defendant, as a result of which the Plaintiff suffered damages in the amount of R250 000.00.

Wherefore the Plaintiff prays against the First Defendant for:

1. A decree of divorce.

2. Payment of maintenance and a resettlement allowance to the Plaintiff calculated as follows:

2.1 A lump sum payment of R20 million;

2.2 A fully paid immovable property of the Plaintiff's choice for the residence of the Plaintiff with a value of R3 million;

2.3 First Defendant to pay all costs pertaining to the transfer of the aforesaid immovable property into the Plaintiff's name including all utility connection fees;

2.4 First Defendant to pay all reasonable costs of furnishing the aforesaid immovable property, alternatively the Plaintiff shall be entitled to remove and retain all household movables and effects, currently housed in all immovable properties occupied by the Plaintiff and First Defendant, in terms of clause 7 of the antenuptial contract as set out in paragraphs 6 above;

2.5 First Defendant to transfer the Toyota Hi-Lux motor vehicle with registration letters and numbers XXL 284 GP into the Plaintiff's name. The First Defendant shall replace this vehicle with a vehicle of similar class and standard (to be registered in the Plaintiff's name) when the Toyota Hi-Lux reaches 100 000 kilometers or 5 years, whichever comes first. The First Defendant shall cover all running costs of the vehicles so provided including fuel up to 300 litres per month. This shall be conditional to the Plaintiff being the holder of a valid driver's license.

2.6 The First Defendant to provide and place at the disposal of the Plaintiff with one BMW X5 or similar motor vehicle for the purpose of towing a horsebox. The First Defendant to cover all running costs of the aforesaid vehicle.

2.7 First Defendant to retain the Plaintiff on his medical aid for the rest of her living years after the divorce order is granted. The First Defendant to cover payment of all medical expenses not covered by the medical aid locally or abroad.

2.8 The Plaintiff shall have a usufruct on the equestrian estate for the purpose of continuing to conduct and manage the equestrian business conducted on the said property. This usufruct shall lapse upon Claire selling her share in the said property.

2.9 The First Defendant to pay the Plaintiff's cell phone and data card to the value of R1 200.00 per month.

2.10 The Plaintiff shall be entitled to the use of the Umdloti apartment for three weeks of each year.

2.11 The Plaintiff shall be entitled to a one week holiday per year in the Kruger Park or surroundings.

2.12 The First Defendant to pay all medical expenses of one horse belonging to the Plaintiff. No single payment shall exceed R5000.00. Any amount in excess of R5000.00 shall be by agreement between the parties and will depend on the value of the horse in question.

3. Costs of the suit jointly and severally with Second Defendant the one paying the other to be absolved.

4. Further and / or alternative relief.

Wherefore Plaintiff claims against the Second Defendant for an order in the following terms:

1. Damages in the amount of R500 000.00 with interest thereon at the rate of 15,5% a temporae mora from date of summons to date of payment.

2. Costs of suit jointly and severally with First Defendant the one paying the other to be absolved.

Further and/or alternative relief."

[4] On 5 July 2011 the first defendant's attorneys delivered a formal notice of objection to the proposed amendments on the grounds that the particulars of claim, as sought to be amended, would be excipiable in that they lack averments which are necessary to sustain an action against the first defendant, and/or are vague and embarrassing and/or contain allegations which are vexatious and/or irrelevant.

The notice set out 8 specific grounds of complaint relating to the proposed amendments, which may be summarised as follows:

(a) since the parties were married after 1 November 1984 out of community of property in terms of an antenuptual contract by which community of property, community of profit and loss and accrual sharing in any form are excluded, the plaintiff is not entitled to claim any orders against the first defendant in terms of s 7(3) of the Divorce Act, 70 of 1979, as amended ("**the Divorce Act**"). Albeit that the plaintiff has withdrawn her forfeiture and redistribution claims as against the first defendant in the proposed amended particulars of claim, the plaintiff has not withdrawn the forfeiture and redistribution allegations, which she made in support of such claims. Such allegations are irregularly relied on by the plaintiff in support of a new claim for "maintenance" in the form of a lump sum payment having regard to the clean break principle, and a resettlement allowance. The incorporation of the forfeiture allegations into other allegations in support of the plaintiff's lump sum maintenance and resettlement allowance claim renders the proposed amended particulars of claim vague and embarrassing and/or vexatious and/or irrelevant material in that:

(i) it is not clear whether the plaintiff is in need of maintenance per se from the first defendant, or whether the plaintiff is claiming an entitlement to receive the assets from the first defendant by virtue of any contribution on her part towards the accumulation of the estate of the first defendant ;

(ii) the plaintiff is ambivalent as to the legally sustainable relief which is being sought by her and as to the basis on which she relies for such relief as against the first defendant; and

(iii) no proper basis has been laid for the right of the plaintiff to the relief as against the first defendant;

(b) having regard to the context of the word "payment" in s 7(2) of the Divorce Act, the plaintiff is not legally entitled to the lump sum maintenance and resettlement allowance claim, as pleaded;

(c) there is no such thing in law as a "resettlement allowance claim" and the relief being sought by the plaintiff does not fall within the ambit of s 7(2) of the Divorce Act;

(d) the order sought by the plaintiff in accordance with paragraph 12.4 of the proposed amended particulars of claim is inconsistent with the antenuptual contract between the parties and therefore vague, embarrassing and legally unsustainable;

(e) the orders sought by the plaintiff in accordance with paragraphs 12.5 and 12.6 of the proposed amended particulars of claim are vague, embarrassing and inconsistent with the antenuptual contract between the parties and, in addition, the relief which is sought by the plaintiff is legally unsustainable;

(f) the items claimed by the plaintiff in paragraphs 12.2, 12.3, 12.4, 12.5, 12.6, 12.8, 12.10 and 12.11 of the proposed amended particulars of claim are vague, embarrassing and inconsistent with the antenuptual contact between the parties and, in addition, the relief which is sought by the plaintiff is legally unsustainable;

(g) in paragraph 12.12 of the proposed amended particulars of claim the plaintiff seeks payment of all medical expenses for a horse belonging to her. The claim for these expenses is legally and factually unsustainable;

(h) prayers 2.5, 2.6, 2.8, 2.9, 2.10, 2.11 and 2.12 in the proposed amended particulars of claim are inconsistent with the plaintiff's claim against the first defendant on the "clean break principle" as pleaded by the plaintiff.

[5] As a result of the notice of objection, on 19 July 2011 the plaintiff issued a formal notice of motion under rule 28(4) for orders that the plaintiff's particulars of claim be amended as set out in the notice of amendment and that the first defendant be ordered to pay the costs of the application on the attorney and client scale. The application was supported by an affidavit by the plaintiff's attorney in which she explained that, when the plaintiff's particulars of claim were originally drafted, counsel erroneously approached the matter on the basis that the marriage between the parties had taken place before 1984 whereas the marriage had taken place in 1986. Consequent to this incorrect approach, claims for forfeiture and redistribution of assets were included in the particulars of claim. These claims were clearly impermissible in law. The plaintiff's attorney made *inter alia* the following further averments in her supporting affidavit:

> "14 In law, the Plaintiff is only entitled to maintenance in terms of section 7(2) of the Divorce Act, 1979. This may include a resettlement allowance. The purpose of the amendment is to abandon the incorrect claims under section 7(3) of the Divorce Act, 1979 and to properly place the Plaintiff's claim under section 7(2) of the said Act.
>
> 15 I submit with respect that it is for the trial court to ultimately decide the Plaintiff's entitlement to maintenance and if so entitled, to give substance and content to such entitlement.
>
> 16 It is important to note that the First Defendant has not yet filed any plea in these proceedings. The legal proceedings are still at a very early stage and pleading have not yet closed.
>
> 17 Apart from being denied the opportunity to exploit an obviously defective pleading (if this may even constitute prejudice), I cannot envisage any possible prejudice to the First Defendant with the Plaintiff's proposed amendments of the particulars of claim.
>
> 18 It is further submitted that the First Defendant's objections to the proposed amendments are without merit and are more in the nature of legal arguments which are best to be place before the trial court at the appropriate time."

[6] The plaintiff's application is opposed by the first defendant. In the answering affidavit, which was deposed to by the first defendant's attorney, she stated *inter alia* the following:

"**The issues in brief**

6. The Applicant's Notice to Amend, if allowed, would render her Particulars of Claim excipiable.

7. The Applicant's original cause of action is based on claims to the forfeiture of patrimonial benefits and a redistribution of assets, with certain relief flowing from this.

8. This was entirely at variance with the antenuptial contract executed by the parties after the commencement of the Matrimonial Property Act 88 of 1984, and which excluded the operation of accrual.

9. The Applicant also incorrectly arrogated to herself the locus standi to make claims for maintenance and a redistribution of assets on the part of the parties' daughter, C. C turned 18 on 31 January 2008. The Applicant had no locus standi to prosecute claims against the First Respondent on the part of their major daughter. The proposed amendment now excludes relief for C. Mention of this aspect is omitted in the Applicant's Founding Affidavit in this Application.

10. The Applicant is now seeking to introduce a new substitute cause of action based on her claim to personal maintenance, including a resettlement allowance. But, in essence, the same relief claimed by her for herself in the current Particulars of Claim is claimed in her Notice to Amend.

11. The Applicant has persisted in claims which are in substance proprietary in nature, in flagrant disregard for the antenuptial contract which expressly excludes them and with reckless disregard for the well-established legal precept that "pacta sunt servanda".

12. The Applicant has entirely misconstrued the rationale behind the permissibility of a resettlement allowance, as articulated in prevailing case-law on the subject. She has sought to introduce claims under its ambit which cannot be sustained, and which, if sustained, would negate the entire rationale behind the execution of an antenuptial contract. She is seeking to vitiate the antenuptial contract without saying so in as many words.

13. For the reasons comprehensively set out in the First Respondent's Notice of Objection, an amendment of the Applicant's Particulars of Claim along the lines envisaged will amount to an exercise in futility.

14. If the amendment were allowed, the First Respondent would be severely prejudiced in preparation for trial on claims which are, quite simply, bad in law.

15 With due respect, it would constitute a disservice to the trial Court if the issues in this Application were not adjudicated at this juncture, in advance of the hearing in the divorce action."

"Paragraphs 14 and 15

20. With respect, I submit that it is legally untenable for the Applicant to bring the claims in question under the umbrella of a "resettlement allowance".

21. If this were permitted, all antenuptial contracts excluding proprietary claims could be entirely negated through this expedient mechanism.

22. Members of the public would have no confidence in the validity of their contracts, and the floodgates would open.

23. The issue here is squarely one of law, which enjoins this Honourable Court to interpret the provisions of section 7 of the Divorce Act 70 of 1979 in its determination of what falls within the purview of a "resettlement allowance."

24. The adjudication of this issue is plainly one which falls within the province of the the Court hearing this Application. It would certainly assist in narrowing issues and curtailing what could become an unduly costly and protracted trial, to the ultimate detriment of both parties."

"Paragraph 17

27. The prejudice which the First Respondent will suffer if the amendment were granted is patent.

28. The grant of the contemplated amendment would, in effect, recognize a claim to a redistribution of assets under the guise of a resettlement allowance. This in the face of an antenuptial contract which expressly excludes a claim to accrual. This in the face of legislation which prohibits a claim to a redistribution for marriages contracted after 1 November 1984, (when the Matrimonial Property Act 88 of 1984 came into operation).

29. The First Respondent and the Applicant will be obliged to make discovery of documents which would ordinarily be irrelevant for purposes of trial. The trial will become unduly protracted and unduly costly.

30 In the best interests of both parties, there is every reason to curtail the trial by resolving issues which, in law, are not triable."

[7] In prayers 2.1 - 2.12 of the proposed amended particulars of claim the plaintiff has not claimed payment of a monthly amount to cover her living expenses. It appears from paragraph 12.1 that the claim for the lump sum of R20 million is "in lieu of" such claim. The fundamental question, which is raised by the first defendant's objections, is whether some or all of prayers 2.1 - 2.12 could be awarded in terms of s 7(2) of the Divorce Act, since it is common cause that the plaintiff does not have a claim in terms of s 7(3) of the Divorce Act.

[8] Ss 7(1) and (2) of the Divorce Act provide as follows:

"(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."

[9] The application for amendment was argued before this court on 20 October 2011. During the argument the plaintiff's counsel contended that s 7(2) of the Divorce Act confers a wide discretion on the court and that, in an appropriate case, it would be open for the trial court to grant orders as claimed in prayers 2.1 - 2.12 of the proposed amended particulars of claim. She relied heavily on the judgment in *Zwiegelaar v Zwiegelaar 2001 (1) SA 1208 (SCA).* In this case the trial court dissolved the marital regime between the parties and made certain ancillary orders. The court accepted the appellant's evidence that, having been ordered out of the common home, she was obliged to acquire certain household necessaries to render her home habitable. The trial court also found that the respondent was financially able to provide these. Paragraph 2 of the order, which was made by the trial court, reads as follows:

" Verweerder word gelas om, as onderhoud ingevolge die bepalings van art 7(2) van die Wet:

(a) die bedrag van R8 000 per maand aan eiseres te betaal vanaf 1 Januarie 1997 tot haar dood of hertroue, welke ookal eerste mag plaasvind;

(b) die bedrag van R50 000 voor of op 15 Januarie 1997 aan eiseres te betaal vir die aankoop van huishoudelike benodigdhede."

[10] On appeal, the full court of the Cape Provincial Division of the High Court allowed the appeal and held that s 7(2) of the Divorce Act precluded the trial court from granting paragraph 2(b) of the order.

[11] On further appeal to the Supreme Court of Appeal the court said *inter alia* the following in 2001 (1) SA 1208 (SCA) at 1211 H - 1212 D and 1212 G - 1213 F:

"[8] It was submitted on behalf of the respondent that in as much as the term 'maintenance' is not defined in the Act its proper meaning is to be gleaned from the definition of the words 'maintenance order' in the Maintenance Act 23 of 1963, where it is defined as

'. . . any order for the periodical payment of sums of money towards the maintenance of any person made by any court (including the Supreme Court of South Africa) in the Republic . . . '.

Consequently, where s 7 of the Divorce Act refers to maintenance, it must be understood to mean periodic payments and specifically excludes the payment of a lump sum.

[9] In dealing with the argument advanced on behalf of the respondent, the trial Court stated:

'Ek is van mening dat die betaling van 'n eenmalige bedrag, nie instede van nie, maar tesame met ander periodieke bedrae, as deel van 'n onderhoudsbevel in terme van art 7(2) van die Wet gelas kan word.'

[10] The argument that maintenance in terms of s 7(2) is restricted to periodical payments is supported by the academic literature. Hahlo in *The South African Law of Husband and Wife* 5th ed at 357 stated with reference to s 7(1) and (2) of the Act respectively:

'An agreement for the payment of a lump sum, even where it is expressly stated that the lump sum is to be paid in lieu of maintenance, is not an agreement for the payment of maintenance in terms of s 7(1). Section 1 of the Maintenance Act 23 of 1963 defines a maintenance order as "any order for the *periodical* payment of sums of money towards the maintenance of any person made by any court . . .". [My emphasis.] It may, however, amount to an agreement as to the division of assets, which the court may embody in its order.'

And:

'Section 7(2) envisages periodical payments. It does not allow the Court to make an award of a lump sum, in lieu of maintenance.'

(See also Lesbury Van Zyl *Family Law Service* C36 and Joubert (ed) *The Law of South Africa* vol 16 (1st reissue) at para 191.) For the purposes of this judgment I shall assume, without deciding, that s 7(2) envisages periodical payments." (my emphasis)

"[13] It was not submitted, nor indeed could it be argued, that the term 'maintenance' should be narrowly construed. Sinclair in *The Law of Marriage* vol 1 at 443 correctly refers to maintenance in the matrimonial context as a reciprocal duty of support which

'entails the provision of accommodation, food, clothing, medical and dental attention, and whatever else the spouses reasonably require'.

[14] Upon dissolution of the marriage, the word cannot attract a different meaning. Where a Court is satisfied that the one spouse is entitled to maintenance and the jurisdictional requirements as laid down in s 7(2) of the Act have been met, then it is entitled to make an order which is 'just'. 'Just', in the context of s 7(2), entails a recognition in an appropriate case that the accommodation requirements of the one spouse have to be met as part of such spouse's reasonable maintenance needs. To hold otherwise would be to render nugatory the clear requirement that the maintenance award be 'just'.

[15] It is implicit in the judgment of the trial Court that, notwithstanding the imprecise formulation of the order, the learned Judge intended to award the appellant a sum of money as part of her maintenance requirements for the purchase by her of household necessaries in order to establish a home - she having been ordered out of the common home. This sum was awarded not in lieu of, but in addition to, what she reasonably required for her monthly maintenance needs. (my emphasis)

[16] The effect of the order does not offend against s 7(2) and, seen in proper perspective (ie having regard to its substance rather than its form), the order is clearly valid. Mr *Cloete* was constrained to concede that a reformulation of the order which in effect achieves the same result would not offend against s 7(2). Whilst the section may envisage periodic payments, these need not be equal. In principle there can be no objection to an order which in effect makes provision for fixed monthly payments but in respect of one or more months makes provision for the payment of an increased amount, or provides for recurring, unquantified future amounts such as medical expenses or school fees - cf *Schmidt v Schmidt* 1996 (2) SA 211 (W). In doing so, the Court must of course take into account the prospective means of the parties and the ability of the party in respect of whom the order is made to comply therewith. By way of example, the sum of R50 000 awarded to the appellant could have been spread over the first ten months and the respondent ordered to pay R13 000 per month over that period and R8 000 per month thereafter. Mr *Cloete* did not dispute that Louw J could legitimately have done so to give effect to what he intended." (my emphasis)

[12] The SCA accordingly allowed the appeal in *Zwiegelaar* and held that, in the application s 7(2) of the Divorce Act, it was permissible for the court to grant an order that one spouse pay to the other as "maintenance" (a) a monthly amount until her death or remarriage and (b) a once off amount to enable her to pay for household necessaries.

[13] The judgment of the trial court in *Zwiegelaar* was delivered on 12 December1996. (See para [1] of the judgment of the Full Court, 1999 (1) SA 1182 C)). At the time the Maintenance Act 23 of 1963, as amended ("**the 1963 Maintenance Act**") was in operation. This Act defined "maintenance order" as follows:

"**maintenance order**" means any order for the periodical payment of sums of money towards the maintenance of any person made by any court (including the Supreme Court of South Africa) in the Republic and, except for the purposes of section *eleven*, includes any sentence suspended on condition that the convicted person make periodical payments of sums of money towards the maintenance of any other person. (my emphasis)

[14] The 1963 Maintenance Act was repealed and replaced by the Maintenance Act 99 of 1998, as amended ("**the 1998 Maintenance Act**"), which came into operation on 26 November 1999. This Act now defines "maintenance order" as follows:

> "**maintenance order**" means any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person." (my emphasis)

[15] When the legislature enacted the 1998 Maintenance Act it clearly recognized that a maintenance order need not be limited to one for the "periodical payment" of sums of money. In essence, this is what the Supreme Court of Appeal held in *Zwiegelaar.*

[16] At the hearing of the application for amendment the first defendant's counsel contended that the plaintiff's claims for prayers 2.1, 2.6 and 2.8 - 2.12 in the proposed amended particulars of claim could not be made in term of s 7(2) of the Divorce Act. She correctly conceded that the claims for prayers 2.2, 2.3, 2.4, 2.5 and 2.7 could be made in terms of s 7(2) of the Divorce Act.

[17] There is ample authority that a court will not allow an amendment of a pleading if the amendment will render the pleading excipiable. For instance, in *De Klerk v Du Plessis* 1995 (2) SA 40 (T) at 43I - 44A van Dijkhorst J stated the following:

> "The application for amendment was opposed on the ground that the incorporated part of the plea would then be excipiable for a number of reasons. An amendment which would render a pleading excipiable should not be allowed. Whether a pleading would or would not become excipiable is a matter of law which should be decided by the Court hearing the application for amendment. It would be incorrect, in my view, to hold that it is arguable that the amendment would not render the pleading excipiable, allow it, and send the parties away to prepare for another battle on exception on the same point. I agree with the views expressed in this respect in *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 (C) 256H-259C. Insofar as certain remarks in *Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C) and *National Union of South African Students v Meyer* 1973 (1) SA 363 (T) 368H are susceptible of a different interpretation, I respectfully differ."

[18] There is however sound authority that an exception cannot be taken to particulars of claim on the ground that the particulars do not support one of several claims arising out of one cause of action. In *Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A)* the plaintiff claimed from the defendant about £10 403, which was made up as to £9 500 for the balance of the purchase price of certain vehicles and equipment which the plaintiff had sold to the defendant in terms of a written agreement, interest in terms of the agreement in the sum of £1 900 and certain credits for payments which had been made by the defendant. In response to the particulars of claim the defendant filed 2 exceptions, the first of which read as follows:

> 1.
> Defendant excepts to plaintiff's declaration as being bad in law and not sufficient to sustain in whole or in part his claim for the sum of £1,900, in that
> *(a)* plaintiff alleges a breach of the agreement, annexure A to his declaration.
> *(b)* In terms of clause 8 of the said agreement, plaintiff is entitled to claim payment of the entire balance of the purchase price then owing, or to cancel the said agreement and retake possession of the motor buses.
> *(c)* Plaintiff has elected to claim payment of the entire balance then owing.
> *(d)* The sum of £1,900 claimed as interest in terms of the agreement is not a sum which can be included in the entire balance 'then owing'.

[19] At 705 A-D Hoexter JA stated the following:

> "I begin by defining the action in the present case. It is one for the balance of the purchase price of certain buses and for the interest thereon. There is only one cause of action, viz., the breach of contract committed by the excipient, and both the claim for the balance of the capital of the purchase price and the claim for interest are based on that cause of action. The first claim, to which I shall refer as the major claim, is just as much part of the action as the second, to which I shall refer as the minor claim. It follows that if the averments in the declaration are sufficient to sustain the major claim, then, even if they are not sufficient to sustain the minor claim, they are sufficient to sustain the action *in part*. The excipient is not entitled to have the declaration set aside because it is not sufficient to sustain both the major and the minor claims in the action. That is nevertheless what the excipient asks the Court to do in his first exception. He excepts to the whole declaration on the ground that the averments therein do not sustain merely the minor claim. In my opinion such an exception cannot be countenanced in the face of the express words of Rule 55."

[20] At 706 A-G Hoexter JA proceeded to state the following:

> "As far as I am aware there are no Rules of Court in the other Provinces similar to Rule 55 of Natal. In spite of this fact the position in the other Provinces appears to be no different from that in Natal. The Transvaal case of *Goller and Others v van der Merwe*, 1903 T.S. 157, was followed in the Orange Free State

in the case of *Sugden Baron St.Leonards v Kannemeyer*, 1921 OPD 121, and both these cases were followed in the Cape in the case of *Stein v Giese*, 1939 CPD 336. In the last-mentioned case JONES, J., stated the legal position as follows at p. 338:

'Now it has been laid down, and, I think, if I may say so, correctly laid down by the Orange Free State Provincial Division, and by a full Court in the Transvaal, that it is not open to a defendant to except to one of several claims arising out of one and the same cause of action. What I mean is this, that where a cause of action is the breach of a contract for instance, and there are several separate claims made because of that breach, an exception to the summons that it discloses no cause of action in respect of one of those claims, cannot, and will not be sustained.'

In Beck on *Pleadings, loc. cit.*, it is stated that the case of *Stein v Giese* has been approved by the Appellate Division. That statement is, however, not correct; in the case of *du Plessis v Nel*, 1952 (1) SA 513 (AD), the case of *Stein v Giese* was referred to with approval by only one of the Judges in a dissenting judgment. The other members of the Court did not deal with the particular point which necessitated reference to that case. In my opinion, however, the three cases to which I have referred were correctly decided. The main purpose of the exception that a declaration discloses no cause of action is to avoid the leading of unnecessary evidence. That purpose cannot be served by taking exception to a declaration on the ground that it does not support one of several claims arising out of one cause of action. In the present case, for instance, the upholding of the exception that the declaration does not support the minor claim would make no difference whatever to the evidence to be led at the trial. All the averments in the declaration would have to be proved by evidence in order to establish the major claim. Even assuming that the declaration does not support the minor claim, I cannot see in what way the defendant will be embarrassed in pleading, in view of the fact that it is bound to plead to the declaration as framed in order to meet the major claim. The legal point raised by the exception can be argued at the trial. If there are indeed circumstances which would make it more convenient that this point should be decided before evidence is led, the defendant could apply to the Court in terms of Rule 59 for an order directing the question of law to be decided before evidence is led." (my emphasis)

[21] I assume that Natal Rule 59, to which Hoexter JA referred in the above passage, was the predecessor to Rule 33(4) of the Uniform Rules of Court.

[22] In Santos and Others v Standard General Co Ltd 1971 (3) SA 434 (O) at 437B-E de Villiers J stated the following:

"It is trite law that an exception that a particular claim discloses no cause of action, cannot succeed unless it goes to the root thereof, that is to say unless the upholding of the exception would have the effect of destroying it altogether. (See *Dharumpal Transport (Pty.) Ltd*. v *Dhurampal*, 1956 (1) SA 700 (AD) at p. 706). In the present case third plaintiff prefers two distinct claims against second defendant, one on her own behalf and one on behalf of her minor daughter. Even if the construction placed upon sec. 11 (1) (ii) (*aa*) by Mr. *Lichtenberg* is correct, that will not have the effect of destroying either of these claims. Both will still remain, but each for a lesser amount. The main function of the exception will not have been attained, namely the elimination of unnecessary evidence. The legal issue involved can just as effectively be argued and determined at the trial and second defendant will in no way be prejudiced: it is at liberty to tender the amount it considers legally due. (Cf. *Thornton v Royal Insurance Co. Ltd. and*

Another, 1958 (4) SA 171 (C) at p. 174). Moreover, second defendant's real complaint is that third plaintiff's claims contain a *plus petitio* and a complaint of this nature can never be a good ground for an exception that a pleading does not disclose a cause of action. (Cf. *Melmed v Proprietors, Park Hotel, Port Elizabeth*, 1946 CPD 503 at p. 504, and *Thornton v Royal Insurance Co. Ltd. and Another, supra)*."

[23] The plaintiff has made the averments in paragraphs 5, 6, 8, 9 and 10 of the proposed particulars of claim in support of the claims in paragraphs 12.1 - 12.12, which are repeated in prayers 2.1 - 2.12. In my view any claim, which the plaintiff has against the first defendant for maintenance in terms of s 7(2) of the Divorce Act, will be a single cause of action, albeit that the claim may have several components. As I have indicated, during argument in this matter the first defendant's counsel correctly conceded that prayers 2.2, 2.3, 2.4, 2.5 and 2.7 of the proposed amended particulars of claim could be claimed in terms of s 7(2) of the Divorce Act. Even if prayers 2.1, 2.6 and 2.8 - 2.12 cannot be claimed in terms of s 7(2) of the Divorce Act, on the principle set out in *Dharumpal,* the proposed amended particulars of claim are not excipiable, either on the ground that they are vague and embarrassing or on the ground that they do not sustain an action. At worst for the plaintiff, these further prayers amount to a "*plus petitio*". The first defendant should not have any difficulty pleading to the proposed amended particulars of claim. I have accordingly decided to allow the proposed amendments.

[24] I need not decide whether, in terms of s 7(2) of the Divorce Act, the court may order that maintenance in the form of a lump sum be paid "in lieu of" periodical payments to cover the living expenses of the person in question. I however doubt that such an order could be made. What would the position be if the recipient of the lump sum were to re-marry or die shortly after the payment was made? Would the person who made the payment be entitled to any refund? Furthermore, would a maintenance court be entitled to increase the lump sum in an appropriate case in terms of the 1998 Maintenance Act?

[25] Since I have decided to allow the proposed amendments, the plaintiff has been substantially successful in the application.

In the result, I make the following orders:

1. The Plaintiff is granted leave to amend her Particulars of Claim in accordance with the Plaintiff's Notice of Amendment, which was served on the First Defendant's attorneys on 21 June 2011;

2. The First Defendant is to pay the costs of the Plaintiff's application for leave to amend, including the costs of two counsel.

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D. R. SCHOLTZ
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Heard on:	**20 October 2011**
For the Plaintiff:	**Adv R Ferreira** **Adv C McKelvey**
Instructed by:	**Masilo Freimond Inc.**
For the First Defendant:	**Adv K Bailey SC**
Instructed by:	**Tanya Brenner Attorney**
Date of judgment:	**23 November 2011**