HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

REPORTABLE: NO	
OF INTEREST TO OTHER JUDGES: NO	
REVISED.	Case no: A101/2020
SIGNATURE DATE	
…….. 14/02/2022	

M[....] J[....] S[....] Appellant

and

C[....] T[….] S[....] Respondent

DATE OF JUDGMENT: This Judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 14 February 2022.

JUDGMENT

N V KHUMALO J (with MANOIM J and NCONGWANE AJ concurring)

Introduction

[1] The Appellant, Mr M J S[....] is appealing against the judgment and order of Van Niekerk AJ which was delivered on 30 May 2016, and the reasons on

request furnished on 19 February 2019, in a divorce action instituted at the suit of the Respondent.

[2] The Appeal is with leave of the Supreme Court of Appeal granted on 16 March 2020. The Appellant is appealing only against paragraphs 2, 3, 4, 5 and 6 of the Order which concerns the division of the Appellant's estate in terms of s 7 of the Divorce Act 1979 (Act 70 of 1979) ("the Act"), maintenance and costs. The Appellant was in respect thereof ordered:

> "2. to contribute towards the maintenance of the Respondent by paying her an amount of R30 000 per month from the first day of the month, following the grant of the final order of divorce between the parties and thereafter on or before the first day of each and every successive month;
>
> 2.2. to retain the Respondent as a dependant on his medical aid scheme to which she belongs and pay all reasonable medical, dental, ophthalmic pharmaceutical medical expenses not so covered;
>
> 3. to transfer to the Respondent the property known as Plot [….] ("the property") within ninety (90) days from date of this order unencumbered;

4. to sign any and all documents to give effect to the order in paragraph 3 supra, failing which the sheriff for the district of Benoni authorised to sign on behalf of the Appellant;

5. to pay to the Respondent an amount of R2 000 000.00 (Two Million Rand) within 90 days"

6. to pay the costs.

[3] It is the Appellant 's contention that in granting the order in respect of Paragraphs **3, 4 and 5,** the court a quo erred:

[3.1] by granting relief not sought in the summons;

[3.2] by basing its decision on inadmissible settlement discussions;

[3.3] by ignoring the peremptory provisions of s 7 (5) of the Act to the effect that the court should consider both assets and liabilities of both parties. There was no evidence whatsoever regarding the Appellant's liabilities, and no finding could therefore have been made regarding the net asset value of the Appellant's estate. There was also no evidence at all regarding the Respondents assets and liabilities. The evidence of both parties' assets and liabilities being crucial in determining what percentage of assets, if any should be transferred to the Respondent.

[3.4] by finding that the trust was the alter ego of the Appellant, upon which the Court came to a legal conclusion which has not been alleged in the particulars of claim and made a finding which the Respondent had not even contended for, and for which there was no evidence whatsoever.

[3.5] In making the order that the Appellant should effect payment of R2 000 000.00 (Two Million Rand) within ninety (90) days of the date of the order, ignoring the evidence that payment thereof had allegedly been suggested premised on the sale of the business property at some future time. The court had no evidence whatsoever before it that the Applicant was financially able to give effect to the order.

[4] The relief granted by the court a quo in paragraphs 3, 4 and 5 of the order was, according to the Appellant, in a nutshell never sought by the Respondent in the summons, the basis for granting the relief bad in law, and thirdly, granted with no evidence to support the granting thereof even within the context of granting relief not sought in the particulars of claim but under the claim for further and alternative relief.

[5] In respect of maintenance, the Appellant contends that:

[5.1] the court a quo did not consider all the factors in s 7 (2) of the Act. In making an order in the absence of a complete picture of the financial affairs of the parties, the court could not exercise its discretion properly, and determine whether Respondent was entitled to maintenance and if so what amount was appropriate;

[5.2] The court specifically made an order in respect of the quantum of maintenance it knew was not based on the evidence before it.

[6] As a result the Appellant prays that the mentioned orders as per paragraph 2 to 6 of the Order be set aside and the determination thereof be referred back to trial for proper determination.

Factual background

[7] The Appellant and the Respondent were married on 9 August 1980, before the commencement of the Matrimonial Property Act 88 of 1984, with the conclusion of an ante-nuptial contract in terms of which community of property, profit and loss and accrual sharing were excluded.

[8] The Respondent instituted the divorce on 10 April 2016 after 36 years of marriage. At that time the Respondent was 56 years old and their only child had

long attained the age of majority. They both still resided at Plot 1/110 Queensberry Road, Benoni, ("the immovable property") which was their common home. The property is registered in the name of the Appellant.

[9] The Respondent was for 29 years employed by Fluid Pumps CC ('Fluid Pumps"), a family business, as a financial manager. She and the Appellant, who is a businessman and the sole member of Fluid Pumps, have been running the business of Fluid Pumps since after the birth of their child.

[10] The Appellant on being served with the summons did not enter an appearance to defend. He instead initiated without prejudice settlement negotiations with the Respondent. At the time the matter was to be heard the parties were yet to finalise the negotiations. No agreement was concluded and the Respondent still did not file a notice to oppose. The Respondent proceeded to set the matter down for trial on 30 May 2016 as an uncontested divorce.

[11] The Respondent in her particulars of claim, besides the decree of divorce prayed for the following order:

> [11.1] that the Appellant pay spousal maintenance in the sum of R30 000 per month and retain her on his medical aid and pay all reasonable

medical, dental, ophthalmic, pharmaceutical and related medical expenses not covered.

[11.2] transfer of 50% of the Appellant's net assets or such portion as the above honourable court may deem just and equitable, alternatively pay to the Respondent an amount equal to one half of the nett value of Appellant's estate or such amount the honourable court may deem just and equitable, regard being had to the provisions of s 7 (3) of the Divorce Act 70 of 1979.

[11.3] be granted costs and such further and or alternative relief as the above honourable court may deem just and equitable.

[12] By virtue of their marriage being prior to 1984, it is common cause that the provisions of s 7 of the Divorce Act as intended to be enforced by the Respondent is applicable.

Legal framework

[13] Section 7 of the Divorce Act regulates the process of division of the assets and the payment of maintenance. The relevant parts read:

7. 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.

[subsection (2) substituted by section 36(a) of Act 88 of 1984]

(3) A court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded, may, subject to the provisions of subsection (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.

[subsection (3) added by section 36(b) of Act 88 of 1984

(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.

[subsection (4) added by section 36(b) of Act 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;

(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.

[subsection (5) added by section 36(b) of Act 88 of 1984]

Analysis

[14] The evidence led by the Respondent during the trial in support of her claims for maintenance and the application of the provisions of s 7 (3) (a) of the Act (transfer of assets) to their separate estate, was briefly that: Shortly before the birth of their son, she, together with the Appellant started a business that was later deregistered and thereafter they started Fluid Pumps. She, for the

entire period of their marriage was employed in the business and contributed her income to the maintenance of the family and the common home. She single-handedly looked after the family, running the home and caring for their child. She supervised the child's educational, extra mural and social activities, whilst also taking care of Respondent's needs, even purchasing his toiletries. She attended to the financial needs of the family whilst the Appellant did not.

[15] The Respondent was the financial manager at Fluid Pumps for the whole period of her employment whilst also carrying the responsibility of taking the child to school and collecting him from the grandparents in the afternoon. She put money in the business in the amount of R365 000.00 without the prospects of repayment. The amount was reflected in the statement of accounts. A further amount of R15 000.00 was paid into the business from her personal account. She also sometimes did not draw any salary when there was not enough turnover to pay employees' salaries.

[16] In respect of her s 7 (3) (a) claim, the Respondent further testified that she no longer sought a transfer of 50 % of the Appellant's nett assets as prayed for in her particulars but a transfer of the immovable property, that is their common home, and a payment of a specific amount from the proceeds of a sale of a certain asset which she alleged was in accordance with the agreement they reached during the without prejudice settlement negotiations.

[17] The Respondent pointed out that the Appellant's business premises are registered in the name of Fluid Investment Property Trust of which the Appellant and herself were the Trustees which was evaluated to be worth between R7.9 Million and R8.1 Million Rand.

[18] Moreover she mentioned that during their negotiations the Appellant made certain calculations which he reduced to writing. The Appellant had added together the value of the immovable property, the business and the business premises, which was R4 Million and R8 Million Rand respectively, and divided the total amount by 2 which came to a total of R6 Million Rand. The Respondent alleged that, that would have been her share in the estate and the Appellant would then have paid her a cash amount of R2 Million Rand from the proceeds of the sale of the business and also transferred their common home to her. The other proposal by the Appellant was to sell the assets and then divide the proceeds. The Appellant confirmed that proposal by writing on the note "sell the lot and split the difference.'

[19] The trial court, following on the Respondent's evidence, granted the order for payment of the amount sought by the Respondent for maintenance and of a cash amount of R2 Million Rands including an order for transfer of the

immovable property, having taken into account the following factors and found as mentioned in its judgment, *inter alia*, that:

> [19.1] The Respondent had shown that she has made a contribution to the growth of the Appellant's estate by working in the business. She has also sacrificed by allowing the business to be conducted from their common home for a period.
>
> [19.2] The Appellant's estate consisted of the immovable property (common home), his membership in Floyd Pumps including the business and premises from which the business was being operated that is supposedly owned and registered in the name of the Trust. The basis for his conclusion was that the Appellant managed and controlled the Trust business as if it is his own and its assets as if they belong to him, finding that the trust was consequently the Appellant's alter ego and should be taken into account when calculating Appellant's assets and considering the redistribution of assets.

[20] Markedly, no such evidence on the Trust was led or facts alleged and proven by the Respondent. As a result, there was no basis for such a finding. The conclusion was evidently unjustifiable, for it is trite that it is impermissible for judicial officers to rely for their decisions on matters not put before them by

litigants either in evidence or in oral or written submissions; see in this regard *Kauesa v Minister of Home Affairs & others* 1996 (4) SA 965 (NmS) at 973J-974A; *Welkom Municipality v Masureik & Herman t/a Lotus Corporation & another* [1997] ZASCA 14; 1997 (3) SA 363 (SCA) at 371G-H.)

[21] The declaration that the Trust is to be treated as an alter ego of the Appellant and its property declared to belong to the Appellant was not sought in the particulars of claim either, as well as the transfer of immovable property and the payment of the cash amount of R2 000 000.00. Any deviation and or amendment by the Respondent to its cause as stated in its particulars of claim or prayers sought was to be on notice to the Appellant even if the matter was unopposed, as the Respondent was now proceeding to seek an additional and or different order from the one that the Appellant was notified about with the resultant prejudice to the Appellant.

[22] The test for meeting the problem of inadequate pleading, more so in an unopposed action, is that of potential prejudice in dealing with the point on a factual or legal level; see *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 39; *Prince v President, Cape Law Society* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22. The injustice that would be brought to bear

upon the Appellant by the order issued under such circumstances is indefensible and therefore not to be condoned.

[23] Jafta J opined in *South African Transport & Allied Workers Union v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (Garvas) at para 113 that:

> 'Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded.'

[24] A party contemplating a certain relief should therefore know the requirements it needs to satisfy and every other party likely to be affected by the relief to be sought must know precisely the case it is expected to meet. Even in the context of further and alternative relief, a point sufficiently elucidated by the Appellant in its heads of argument by pointing what was stated in *Port Nolloth Municipality v Xhalisa; Luwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C) that:

> "Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefore has been fully canvassed vis the party against whom such relief is to be granted has been fully apprised that relief in this

particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of "further or alternative relief."

[25] Furthermore, and fatal to the proceedings, as correctly pointed out by the Appellant, is the fact that neither was the Trust cited nor was it served with papers even though it was to be adversely affected by such a decision. The potential prejudice to be suffered was supposedly glaringly obvious to the trial court; see *Golden Dividend v Absa Bank* (569/2015) [2016] ZASCA 78 (30 May 2016) at [10]. The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation, which may be prejudicially affected by the judgment or order; see *Tlouamma and others vs. Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa and another* 2016 (1) SA 534 (WCC).

[26] In *Gordon v Department of Health, Kwazulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. It is clearly stated in Gordon at par 9 of the judgement that:

"In the *Amalgamated Engineering Union* case (supra) it was found that 'the question of joinder should. . . not depend on the nature of the subject matter . .

> . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'.[5] The court formulated the approach as, first, to consider whether the third party would have *locus standi* to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.[6] This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."

It is inevitable in this matter that the Trust might also have to take its own action in order to assert any of its rights that it might wish to affirm in the litigation between the parties.

[27] The trial court further noted the Respondent's evidence on the settlement negotiations, and pronounced that, although they took place, no settlement agreement was reached, and therefore, no weight was to be put on that evidence. The court however proceeded to take into consideration the note that Appellant allegedly wrote setting out his without prejudice proposal and also what was allegedly discussed during the without prejudice settlement negotiations

regarding the transfer of their common home, as well as the alleged fact of Appellant having at that time pledged in his own words that 'he will not, on divorce, send the Respondent to the world without a cent." On that finding, the trial court granted the Respondent the order for the transfer of their common home.

[28] It is common place that discussions that form part of genuine negotiations towards the settlement of a matter are privileged and inadmissible in court; see *Millward v Glazer* 1950 (3) SA 547 (W); *Gcabashe v Nene* 1975 (3) SA 617 (A). They are therefore to be excluded from the evidence in the current or subsequent proceedings between the parties to the dispute. The trial court failed to indicate its reasons why in this instance it would ignore such a fundamental principle.

[29] Finally on the maintenance, the Respondent was granted an order for the amount of R30 000. I am mindful that a claim for maintenance post-divorce in terms of s 7 (2) and a claim for redistribution of assets in terms of Sections 7 (3) to (5) of the Act are discretionary awards which the High Court can only interfere with the exercise thereof if done capriciously; see; *Ex parte Neethling & Others* 1954 (1) SA 331 (A) at 335.

[30] Section s 7 (2) is instructive on the factors that are to be considered prior to making a decision on maintenance. 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) para 36.

[31] In *casu*, not much of the required facts were put before the court. The evidence upon which the assessment was made to determine the amount to be payable was the fact that the Respondent earns a salary of R20 000 to R25 000 per month, 56 years of age and has been married for 36 years. Notwithstanding the court confirming that if the Respondent continues working she will need an amount between R5 000 – R10 000 per month to make up for the shortfall on her salary, the Appellant was ordered to pay her an amount of R30 000.00, which is three times the amount that was recognised might meet with her needs whilst she was to continue earning the amount of approximately R25 000. Furthermore, the court failed to establish the nature and extent of the Respondent's prospective needs and means in relation to her assets and liabilities, and the Appellant's affordability in relation to his prospective needs and obligations when the maintenance order was made.

[32] The trial court also ignored that where a wife is able to maintain herself because she is in fact working or has assets from which she can support herself

or where a notional earning capacity is attributed to her, depending on the circumstances of each case, it may not be expected of the husband to maintain her after divorce; see *Pommerel v Pommerel* 1990 (1) SA 998 (E) at 1002A – C. Invariably that will affect the decision on the amount that is to be paid if it is found that the need for maintenance under those circumstances still exist.

[33] It is evident that the trial court erred when it failed to take into consideration the applicable principles and the law in deciding on the relief that was sought by the Respondent in the matter, resulting in the improper exercise of his discretion. It would therefore be appropriate for the matter, as has been advocated by both parties, to be sent back to the trial court for proper adjudication.

It is therefore ordered, that:

1. The appeal is upheld.

2. The orders as per paragraph 2, 3, 4, 5 and 6 of Van Niekerk AJ ‘s Order dated 30 May 2016 is set aside and substituted with the following:

2.1. The matter is referred back to the Trial Court to determine the proprietary interests of the Applicant and the Respondent from their dissolved marriage;

2.2. The relief sought by Respondent in paragraphs 2, 3, 4, 5 and 6 of her particulars of claim are postponed sine die;

2.3. The Appellant may enter an appearance to defend the aforesaid relief within ten (10) days of this order where after the normal periods in respect of pleadings will apply;

2.4. Nothing in this order will bar any party from amending their pleadings in relation to the determination of their proprietary interests arising from the marriage prior the date of the divorce order;

2.5. The matter to be heard before another Judge, other than the Judge who sat in the court a quo;

2.6. Costs of this appeal and the costs reserved in the Supreme Court of Appeal be costs in the cause in the action which is to determine the outstanding issues (the proprietary interests) arising from the marriage."

_____

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION; PRETORIA

I agree

_____

N MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA

I agree

_____

T. NCONGWANE ACTING JUDGE

OF THE HIGH COURT

GAUTENG DIVISION; PRETORIA

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Heard: 25 August 2021