

Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: 7407/2004

In the matter of

MARGARET JOY COETZER

Plaintiff

versus

BARRY MARK COETZER

Defendant

JUDGMENT DELIVERED : 8 DECEMBER 2005

MOOSA, J:

INTRODUCTION

1. The parties were married out of community of property on 10 December 1983.

Two children were born of the marriage. L.M. was born on [day/month] 1989 and D.K. was born on [day/month] 1992. The proprietary regime of the parties was regulated by an Ante-nuptial Contract.

2. The plaintiff, Margaret Joy Coetzer, instituted action for divorce and claimed, in addition thereto, custody of the minor children of the marriage, maintenance for the minor children in the sum of R2 000 per month per child, medical and schooling expenses for the children, one-third of the nett value of defendant's (Barry Mark Coetzer's), assets accumulated by him during the course of the marriage and costs.
3. It is common cause between the parties that the marriage has irretrievably broken down. The defendant is not disputing that it will be in the best interests of the minor children that custody of them be awarded to plaintiff with the right of reasonable access reserved to him.

ISSUES

4. The issues essentially in dispute between the parties are:
 - (a) the amount of maintenance payable by defendant to plaintiff for the minor children;
 - (b) the apportionment of the parties' liability in respect of the medical aid contributions and the educational expenses of the minor children; and
 - (c) the plaintiff's entitlement, if any, to a redistribution order in terms of Section 7(3) of the Divorce Act, No 70 of 1979 ("the Act") and, if so, the quantum of such a redistribution order.

MAINTENANCE

5. The defendant has offered an amount of R750 per month per child in respect of maintenance. He is presently paying R500 per month per child. The plaintiff has reduced her claim for maintenance from R2 000 per month to R1 000 per month per child. It is clear that the parties are not far apart as far as maintenance for the children is concerned.

6. It is also common cause that defendant was retrenched at the end of May 2005 and received a retrenchment package. He is currently unemployed and has no income. He has offered to contribute to the maintenance of the children from his capital resources for as long as he is able to do so.
7. The plaintiff testified that the total monthly expenses of the children are R2 810. She earns an average of R8 745 per month. She can make a contribution of half the childrens' monthly expenses and defendant should contribute the other half. The court is of the view that the amount offered by the defendant is fair and reasonable in the circumstances.
8. Insofar as the medical aid is concerned, the defendant had the children on his medical aid before he was retrenched. With his retrenchment the medical aid cover ceased. The plaintiff testified that if she obtains medical aid cover for herself and the children, the childrens' share would be R260 per month per child. The defendant offered to contribute half of such amount in respect of each child. Such amount would presently come from his capital resources. The court is of the view that defendant's offer, in the light of his present circumstances is eminently fair and reasonable.
9. As far as the present and future educational related expenses are concerned, the defendant has made a realistic offer. He has offered to contribute half of the school related expenses of the minor children. This would presently come from his capital resources. Before his retrenchment, he paid the full school fees of the children amounting to R1 800 per month. The defendant also offered to pay half of the costs in respect of their future tertiary education. The plaintiff claimed the full amount in respect of the school related expenses and the future tertiary education expenses of the minor children. As in the case of the medical aid, the court is of the view that defendant's offer in respect of school related expenses and tertiary education expenses, in the light of his present circumstances, is fair and reasonable.

10. Should the financial circumstances of defendant improve in the future or should he obtain gainful employment, plaintiff would be entitled to revisit the issues of maintenance, medical aid contributions and educational related expenses in the Maintenance Court.

REDISTRIBUTION ORDER

11. I now turn to the redistribution claim in terms of Section 7(3) of the Act. The plaintiff is claiming a sum equal to one-third of the nett value of the assets defendant had accumulated during the course of the marriage. The parties have agreed on the value of their respective estates as at the date of the hearing. It was agreed that plaintiff's nett estate is valued at R1 029 643 which includes the inheritance from her late mother and that defendant's estate is valued at R1 165 324 which included his retrenchment package.
12. It is further common cause that the estates of both parties increased substantially from the date of the separation to the date of the hearing. The plaintiff, during that period received an inheritance in the sum of R443 454 from her late mother's estate. Prior to the separation she received an amount of R14 817. The defendant, during the same period, received a retrenchment package in the amount of R233 774.
13. The value of the immovable properties owned by the parties comprises the other substantial asset of the parties. The immovable property of defendant was the common home of the parties which defendant acquired during the subsistence of the marriage. The defendant, who owned a property in Queenstown prior to his marriage, sold such property and used the proceeds thereof as part payment for the purchase price of the existing property. The plaintiff acquired her present property after the separation. The defendant contributed an amount of R22 000 towards plaintiff's legal costs for the purchase of the property. The defendant also repaid a loan taken by plaintiff from her father to acquire the property.

PRELIMINARY ISSUES

14. There are two preliminary issues which need to be resolved. The first is whether the inheritance of plaintiff is to be included as an asset in her estate; the second is whether the threshold for the division of the assets ought to be at the time of the separation or the time of the divorce. With regard to the inheritance, the Ante-nuptial Contract of the parties stipulates that all inheritance which may devolve upon either party shall be the sole and exclusive property of such party.

THE INHERITANCE

15. The Will of plaintiff's late mother stipulates that:

"Any female hereunder shall take her inheritance for her own, sole and absolute use and benefit free from the debts, control and marital power of and exclude from any Community of Property or System of Accrual with any husband she may have or may marry and her receipt alone shall be sufficient discharge to my Executors and Trustees."

The stipulation is essentially meant to protect the inheritance from the control and marital power of the husband in the event of the marriage being in community of property or, in the event of the marriage being out of community of property, but the system of accrual applying. The inheritance was earmarked for the exclusive control, use and benefit of plaintiff.

16. Adv **Meyer**, for defendant, correctly pointed out that the marriage of the parties was not in community of property and the system of accrual did not apply. She submitted that the inheritance formed part of plaintiff's estate and was free from defendant's control and the stipulation in the late mother's Will is therefore not breached. I agree.

17. Section 7(3) of the Act does not specifically exclude inheritance from the assets of the spouses for the purpose of redistribution. It is trite that if the legislature

intended excluding inheritance from redistribution one would have expected it to make specific provision for such exclusion in the Act. The legislature specifically excluded inheritance in the accrual regime as contemplated in Section 5 of the Matrimonial Property Act No 88 of 1984, unless the parties agree otherwise, or the testator stipulates otherwise. (See: **Jordaan v Jordaan** 2001(3) SA 288 (C) at 297-298.)

18. In my view, it would only be fair and equitable for plaintiff's inheritance to be brought into consideration for the purpose of Section 7(3) redistribution. If the inheritance is included in the plaintiff's estate, the difference between her estate and that of defendant is R135 680, which is not substantial. Adv **McDonald** correctly submitted that the inheritance received by the plaintiff after the separation, in practical terms, served to tip the balance of the scales almost equally.

THRESHOLD FOR THE DIVISION OF THE ASSETS

19. I now turn to debate the second preliminary issue, namely whether the division of the parties' assets should be effective as at date of separation, or as at the date of divorce. The redistribution order is designed to remedy, according to **Beaumont v Beaumont** 1987 (1) SA 967 at 987H-I:

"...the inequity which could flow from the failure of the law to recognize a right of a spouse upon divorce to claim an adjustment of a disparity between the respective assets of the spouses which is incommensurate with their respective contributions during the subsistence of the marriage to the maintenance or increase in the estate of one or the other."

20. Adv **McDonald** submitted that the threshold for the division of the parties' assets should be at the time of separation. The rationale for such an approach, she argued, was the fact that both parties' assets increased substantially after the separation. The parties before then were not possessed of major assets at the time. The only substantial asset which defendant possessed was the

immovable property which formed the common home of the parties and which was bonded. Adv **Meyer** submitted in reply that the division should be made at the date of the divorce.

21. Sub-section 7(3) stipulates that a Court granting a divorce may make a redistribution order. The Section does not indicate at what point in time the division should be made. By implication it appears that it should be made at the time of the divorce as the marital and proprietary relationship of the parties terminates with the dissolution of the marriage. In this regard, the *dictum* of **Milne, JA** in **Katz v Katz** 1989 (3) SA 1 (A) at 6G, is apposite:

“In my view it is quite clear that the Court, in making an order in terms of S 7(3), is required to have regard, so far as that is practicable, to the assets and liabilities of the parties as at the date of the order ... There is nothing to indicate that the legislative had in mind any date other than the date of the Court's order.”

22. I am therefore not persuaded by the argument of Adv **Mc Donald** that the division, if any, should take place at the time of the separation of the parties. But even if that were to be the position, it is unlikely that the balance of scales between the respective estates of the parties would have been materially different.

JURISDICTIONAL FACTS

23. Before the court can exercise its discretion in terms of subsection 7(3), whether it is just and equitable to make a distribution order, certain jurisdictional facts must be present. (See **Katz v Katz** (*supra*) at 15B-C; **Cadbury (Pty) Ltd v Beacon Sweets & Chocolates (Pty) Ltd** 2000 (2) SA 771 (A) at 780F-G.) The first set of jurisdictional facts that must be present is that the marriage between the parties should have been concluded before the commencement of the Matrimonial Property Act, 1984, in terms of an ante-nuptial contract by which community of property, community of profit and loss and the accrual system are excluded. The second set of jurisdictional facts that must be present is that the party in whose favour the order is to be made, should have contributed directly or indirectly to

the maintenance or increase of the estate of the other party during the subsistence of the marriage. The presence or absence of the first and second sets of jurisdictional facts forms the first leg of the enquiry. It is a factual enquiry and the test to be applied is an objective one. (**South African Defence and Aid Fund v Minister of Justice** 1967 (1) SA 31 (C) at 34G-H.)

24. Once these facts are present, the next enquiry is to determine whether or not it is just and equitable to transfer any assets to the party concerned. In the exercise of such power, the court shall, apart from the contribution made by the party seeking the order, as envisaged in sub-section 7(4), also take into consideration

- (a) the existing means and obligations of the parties;
- (b) any donation made by the one party to the other or which is owing and enforceable in terms of the Ante-nuptial Contract;
- (c) any court order which affects the patrimonial position of the parties; and
- (d) any other factor which in the opinion of the court is appropriate.

(**Katz v Katz (supra)** at 15C-D.) In the determination of the latter enquiry, the court has a wide discretion.

25. With regard to the question of discretion, the dictum of **Botha, JA** in **Beaufort v Beaufort (supra)** at 998F-G, in response to the in one-third starting point advanced by **Lord Denning, MR** in **Wachtel v Wachtel** (1973) 1 All ER 829 (CA) at 839b-840d, is apposite:

"I do not see any real difficulty in starting with a clean slate, then filling in the void by looking at all the relevant facts and working through all the relevant considerations, and finally exercising a discretion as to what would be just, completely unfettered by any starting point."

This statement was approved in a very recent judgment of the Supreme Court of Appeal in **Bezuidenhout v Bezuidenhout** 2005 (2) SA 187 (SCA) where **Brand, JA** at 197B-E says:

"I find myself in respectful agreement with this statement. I also

*believe that Courts should refrain from putting shackles on a discretionary power which the legislature has left largely unfettered through the acceptance of 'starting points' or guidelines (see **Beaufort** at 991G-H). Though practitioners may, understandably, prefer guidelines or formulae which may assist in settlement, the problem is that there is such 'an infinite variety of circumstances under which s 7(3) falls to be applied' (**Beaufort** at 990G-H) that we cannot afford to trade the wide discretion of s 7(3), once it is found to apply, for formulae albeit in the guise of 'guidelines' or 'starting points'."*

THE FIRST LEG OF THE ENQUIRY

26. The first leg of the enquiry comprises the examination of two sets of jurisdictional facts. The first set of jurisdictional facts is of a formal nature, namely the date of the marriage and the nature of the proprietary regime of the marriage. The parties were married on 10 December 1983, i e before the commencement of the Matrimonial Property Act of 1984. The parties were married by ante-nuptial contract in terms of which the marriage was out of community of property and community of profit and loss and the accrual system were excluded. These facts were common cause. I am therefore satisfied that there is compliance with the first set of jurisdictional facts.

27. The second set of jurisdictional facts relates to the contribution of the one party to the maintenance or increase of the estate of the other party. It is common cause that for the entire duration of the marriage, plaintiff was not employed for approximately 51 months. For 18 months of such period, she received maternity benefits and for six months thereof she received unemployment benefits. During the subsistence of the marriage, her income, together with her maternity and unemployment benefits, were utilised for joint household and general expenses. In 1989 when she left the employment of Cerebos Food Corporation, her pension payout amounting to R4 500 was utilised for the improvement of the common home. In October 1999 she received an amount of R19 687 as a retrenchment package and this amount was paid into

defendant's bond account in respect of the immovable property which comprised the common home.

28. The parties for the major part of their marriage operated a joint banking account into which the salaries of the parties were deposited for the benefit of the family. The plaintiff effected the payments of the household and general expenses of the parties. It is not disputed that even after they operated separate banking accounts for a period of five years, her entire salary went towards the general expenses and for the upkeep of the household.

29. It is also common cause that defendant, during the subsistence of the marriage, earned 70% of the joint income and plaintiff 30% thereof. The total of such income was used for the benefit of the family. It is also common cause that plaintiff played a greater role in the running of the home and the upbringing of the children. Neither plaintiff nor defendant was able to build up substantial assets during the subsistence of the marriage. The defendant during that time acquired the immovable property which formed the common home of the parties. The defendant used the proceeds of a property, which he owned in Queenstown and which he acquired prior to the marriage, as part payment for the purchase of the existing property.

30. The defendant expressly admitted that plaintiff contributed directly and indirectly to his estate. I am satisfied that plaintiff, during the subsistence of the marriage, contributed directly and indirectly to the maintenance and/or increase of defendant's estate as contemplated in subsection 7 (4) of the Act. There has accordingly been compliance with the second set of jurisdictional facts.

THE SECOND LEG OF THE ENQUIRY

31. I now turn to the second leg of the enquiry and, that is, what assets or part of the assets of defendant, as the court may deem just, are to be transferred to plaintiff. I have already alluded to the factors that ought to be taken into consideration in determining such issue. I will thus examine those factors.

32. The existing means and obligations of the plaintiff are as follows: She owns a house valued at R760 800, she has a positive banking account of R15 221, an investment at Investec of R378 679, after tax pension benefit of R378 680, jewellery valued at R2 000 and insurance policies valued at R472. She has a permanent position, earning in excess of R10 000 per month, with a company car of which all expenses are paid. She has a bond on the property amounting to R144 538 and is liable for the payment of legal fees amounting to R20 000. She has a nett asset base of R1 029 643.

33. The existing means and obligations of defendant are as follows: He owns a house valued at R801 600, after tax pension benefit of R313 500, retirement annuity benefit of R31 824, vehicle valued at R30 000, and a savings account of R41 774. He has an existing bond of R50 000. He has been retrenched and is presently unemployed. He is a middle-aged white male whose prospects of obtaining a suitable position, in the light of affirmative action and equity considerations, are slim. He has donated an amount of R57 000 to plaintiff to enable her to acquire her immovable property. He has undertaken to maintain the children and contribute towards their medical expenses and educational expenses from his capital resources.

34. If the court should give effect to the claim of plaintiff, that one-third of defendant's assets should be transferred to plaintiff, the balance of scale becomes so skewed in favour of plaintiff that it becomes not only inequitable but also unjust and unfair. This can be illustrated as follows: one-third of the nett asset of defendant, in terms of the agreed figures, would amount to R388 441; if that amount is subtracted from his estate and added to plaintiff's estate, the estate of defendant would amount to R776 883 and that of plaintiff to R1 418 084. The value of defendant's estate would amount to half of that of plaintiff. If one takes into consideration his existing means and obligations, that defendant has been retrenched, is presently unemployed and that he has agreed to contribute maintenance towards the children from his capital, the inequity is compounded.

35. It is common cause that the defendant donated a total amount of R57 000 to

plaintiff after the separation. This amount was effectively utilized towards the acquisition of her immovable property. The equity in the property substantially increased from the time of the purchase to the time of the divorce.

36. The defendant has undertaken to contribute towards maintenance, medical aid and education expenses for the children from his capital resources and a court order to that effect will be made. Such order will adversely affect the patrimonial position of defendant.

37. In the light of all the circumstances, the court in exercising its discretion, finds that it will be just and equitable that no assets of defendant be transferred to plaintiff as contemplated in terms of subsection 7(3) of the Act.

COSTS

38. The normal rule is that costs follow the result. However, Section 10 of the Act provides that the court may depart from the rule and make an order which it considers just, having regard to the means of the parties and their conduct insofar as it may be relevant. I am of the opinion that this is an appropriate matter where the court should order that each party pay his or her own costs.

THE ORDER

39. In the premises the court makes the following order:

- (a) a decree of divorce is granted;
- (b) that plaintiff is granted custody of the minor children born of the marriage, with the right of reasonable access reserved to defendant;
- (c) that defendant maintains the minor children until each child attains the age of 21 years or becomes self-supporting whichever event occurs earlier, by:
 - (i) effecting payment of maintenance in the sum of R750 (seven hundred and fifty rand) per month per child;

(ii) effecting payment of half of the amount payable to the Medical Aid taken out by plaintiff in respect of the two minor children;

(iii) effecting payment of half of the childrens' schooling expenses, such expenses to include the costs of school fees, books, stationery, uniforms, sporting equipment and the costs of extra-mural activities;

(iv) effecting payment of half of the costs of tertiary education at a University or Technicon in the Republic of South Africa in the event of the children showing a desire and aptitude for tertiary

education and as long as the children apply themselves with due diligence to their studies;

No order is made in respect of the s 7(3) claim.

(d) that either party shall pay his or her own costs.

.....
E MOOSA