IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION, GEORGE)

Case No.: 13601/2011
H16/08

In the matter between:

DOROTHEA BORMANN **Plaintiff**

and

ERWIN EHRHART VOLKMAR BORMANN **Defendant**

JUDGMENT DELIVERED: THURSDAY 02 FEBRUARY 2012

SALDANHA, J

[1.] The plaintiff and the defendant were married to each other on the 9th January 1982 out of community of property and by anti-nuptial contract. The marital relationship between the parties has irretrievably broken down and the parties are in agreement as to its termination. The defendant in a counter claim to the plaintiff's claim for the divorce sought an order of redistribution in terms of section 7(3) of Act 70 of 1979 (the Divorce Act) in his favour in respect of the remainder of the 15 hectares of the immovable property situate at Klein Krantz in the district of George which property is registered in the name of the plaintiff. The plaintiff in her plea to the counter claim resisted any such redistribution order initially on three grounds, namely; that the immovable property had been donated to her by the defendant, that the parties had jointly contributed to the household

expenses and thirdly that as a result of the defendant's irresponsible handling of money and his abuse of dagga and alcohol had prejudiced the growth of the plaintiff's estate. The only issue that remained in dispute at the trial was the claim for the re-distribution order by the defendant, the basis thereof and the question of costs. Both the plaintiff and the defendant testified at the trial and the defendant accepted the onus of proof and the duty to lead evidence first.

[2.] Much of the historical background to the relationship between the parties was common cause. Both of the parties were of a mature age but remained intractable in respect of not only their differing views as to the real causes of the breakdown of the relationship between them, but also the basis, if any, for any redistribution order.

[3.] The parties were married to each other at Empangeni, Zululand. The plaintiff was a 28 year old divorcee with two young children aged eight and twelve and the defendant was approximately ten years older than her and also a divorcee. At the time of their marriage the defendant conducted an earthmoving business since about 1976 while the plaintiff had just given up her employment as a secretary. The plaintiff thereafter assisted the defendant with secretarial functions in his business. She was not paid any salary and it appeared that the defendant had embraced the responsibility for also providing for the plaintiff's minor children. He subsequently adopted the younger of the two, Marcel, as his own. In 1983 whilst the defendants business appeared to have flourished both

he and the plaintiff decided to purchase immovable property in the George area. They eventually chose a property in Hoekwil for an amount of R300 000.00. The defendant entered into an Agreement of Sale with the seller, a Walter Friedrich Karl Lessing (Lessing), on the 23rd May 1983 and agreed to pay the deposit of R100 000.00 and the remainder by way of monthly installments. The balance was to have been secured by a bond in favour of the seller. The property at that stage measured 42.0960 morgen and was described as portion 30 (a portion of Lot D) of the farm Klein Krantz situate in the district of George. The defendant paid the deposit as agreed. He claimed that both he and the plaintiff had considered the risk of the property being in his name given his business and also that on the advice of the plaintiff's mother it was agreed between the parties that the property would be registered in the name of the plaintiff. The plaintiff for her part disputed the defendant's version and claimed that the property was donated to her by the defendant. In September 1983, a second Agreement of Sale was entered into between the plaintiff and Lessing, essentially on the same terms and conditions as that which had been entered into between the defendant and Lessing. The property was eventually registered in the name of the plaintiff.

[4.] The defendant paid the second amount of R100 000.00 and as a result of financial problems was unable to pay the remainder of the purchase price. In consideration of the outstanding balance the plaintiff approached Lessing and they offered him a lifelong usufruct over the property, which he accepted. Lessing died a short while thereafter. In 1986 the defendant claimed that as a

result of the recession and financial difficulties his earthmoving business was placed into liquidation. In the process, two other properties which were registered in his name were also lost. He claimed that by 1988 his financial problems had been compounded and he was eventually sequestrated. It was common cause though that he continued to support the plaintiff and her children during this difficult period. They decided at that stage to relocate to the property in Hoekwil. They initially eked out a meagre existence through the making and selling of beads. The defendant borrowed an amount of R20 000.00 from his brother to purchase a truck with which he thereafter conducted a transport business. It was also common cause that up until that stage of their marriage the plaintiff had not formally worked save for the secretarial assistance she provided to the defendant's business and their joint endeavor at the making and selling of beads.

[5.] In 1991, due to financial pressure the parties jointly decided to subdivide a portion of the property and 9 hectares were sold off for an amount of approximately R200 070.00. The proceeds were used to repay the debt to the defendant's brother in the amount of R44 000.00 and as well for various buildings and alterations to the house and cottage on the property with a view to the plaintiff conducting a bed and breakfast therefrom. The remainder of the proceeds was used for their living expenses and in the defendant's transport business.

[6.] The plaintiff for her part had taken the responsibility of conducting a bed and breakfast from the property over the period of 1991 to 1999, when she became seriously ill and underwent a number of operations. She claimed that all the profit that she had generated from the bed and breakfast had been ploughed back into the business. She also made various payments to the defendant during that period which he used to settle his bank overdraft and in the running of his transport business. The defendant for his part admitted that he had received various amounts from the plaintiff and with reference to various cheque counterfoils demonstrated that he had contributed to the payment of the overhead costs of the bed and breakfast and various household expenses such as the purchase of groceries and medical expenses.

[7.] As a result of the plaintiff's illness she was unable to continue running the bed and breakfast business. The defendant continued to run the transport business at least up to the year 2006. The financial statements prepared by the defendant's tax consultant and albeit unaudited demonstrated that for the period of 1999 to 2006 he generated an annual income which was offset by various expenditures. The income generated ranged from year to year in the amounts of between R27 949,06 to R922 025,87 The expenses reflected payments to the bank, the running costs of the transport business, insurance premiums municipal fees and other diverse expenses. In some years the expenses exceeded the income.

[8.] In 2005 the defendant was involved in a serious motor vehicle accident with one of his trucks and it appeared that he was not able to generate any substantial income thereafter. He claimed that in this period he was forced to surrender a number of policies and the proceeds were used to contribute to the living costs of the parties.

[9.] During the period 2002 and 2005 the parties subdivided four further portions of the property and sold them off separately which generated a total income of approximately 1.9 million. The proceeds were used for their living expenses, the purchase of two Mercedes Benz motor vehicles (both in the name of the plaintiff), various furniture items and for the purchase of a flat in Egypt, registered in both of their names, and its furnishing. Part of the proceeds was also used by the parties to travel overseas and at least two of the foreign trips were for the purpose of their recuperation. An amount was also used to settle the defendant's overdraft bank accounts and the outstanding installments on the defendant's truck and trailer. The plaintiff claimed that she has advanced approximately R900 000.00 of the proceeds to the defendant. She accepted in testimony that it was used by him for household expenses and the running of his transport business.

[10.] At the time of the trial the plaintiff had lived with her daughter in Kuwait where she was also employed and regarded her stay there as temporary. The defendant for his part was living in Kokstad with his son who he assisted in a

business. His income is also subsidized by a monthly pension. It appeared that there were outstanding amounts owed to the bank on various accounts held by the plaintiff and that the bond on the property was in arrears. The parties had amongst themselves agreed that they would retain their equal share in the flat in Sharam, Egypt, which represented an approximate amount of R272 500.00 each.

[11.] The defendant in his testimony readily admitted to his use of dagga which he claimed to have used from an early age. He disputed the plaintiff's claim that he had made no attempt at abstaining from alcohol and claimed that he had done so for approximately ten years during the course of the marriage. He claimed to have used alcohol thereafter only on a social basis. He emphatically denied that his addiction (to dagga)or his use of alcohol had contributed to the breakdown of the marriage and claimed that the marriage broke down due to the plaintiff having an adulterous affair with a young man in Egypt. The plaintiff for her part denied the existence of the affair and claimed that her relationship with the Egyptian was no more than as a friend of one of her daughters.

[12.] Mr. Maritz SC, who appeared on behalf of the plaintiff, correctly submitted that the approach to be adopted by the court in a redistribution claim in terms of 7(3) of the Divorce Act was primarily informed by the consideration of the principles of "justice and equity". Reliance therefore was placed directly on the provisions of the statute and its application in various decisions of the Supreme

Court of Appeal and in particular in that of the full bench in this division in the matter of **Kirkland v Kirkland 2006(6) SA 144 (C)**.

[13.] At the outset of his argument Mr. Maritz emphasized that the first *"jurisdictional precondition to the exercise of the courts discretion"* in terms of Section 7(3) was the proof of a contribution made by the spouse that claimed a redistribution order to the estate of the other as described in subsection 7(4). The relevant provisions of the Act relating to the exercise by the court of its discretion under section 7(3) of the Act must be read together with section 7(4) and 7(5) which provide as follows:

"'(3) A Court granting a decree of divorce in respect of a marriage out of community of property -

(a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or

(b) . . .entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

may, subject to the provisions of ss (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the

assets, of the other party as the court may deem just be transferred to the first-mentioned party.

(4) An order under ss (3) shall not be granted unless the Court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.

(5) In the determination of the assets or part of the assets to be transferred as contemplated in ss (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 ss (4), also take into account -

(a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in ss (3)(b) of this section may have in terms of s 22(7) of the Black Administration Act 38 of 1927;

(b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;

(c) any order which the Court grants under s 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.'

[14.] In summary the defendant is required in terms of the Divorce Act to prove the following:

(i) That the parties were married before the 1st November 1984 out of community of property.

(ii) The absence of any agreement between the plaintiff and the defendant regarding the division of their assets or part thereof.

(iii) That the plaintiff's estate is constituted of a greater amount of assets than liabilities.

(iv) That the defendant had contributed directly or indirectly to the maintenance or the increase or the estate of the plaintiff during the subsistence of their marriage either by the rendering of services or the sharing of expenses which otherwise would have been incurred by the plaintiff or in any other manner.

[15.] It appeared from the pleadings and her oral testimony that her opposition to a redistribution order in favour of the defendant was based on the following:

(i) That the property was donated to her by the defendant and for no other reason than his sheer love and endearment for her.

(ii) That the defendant was not entitled to benefit from the impropriety of his actions by alienating his assets to the plaintiff in an attempt to defraud his creditors.

(iii) The defendant's alleged misconduct through the use of dagga and alcohol during the course of the marriage.

(iv) That the defendant had already received an amount of R900 000.00 from the plaintiff through the various subdivisions and sales of the immovable property which proceeds the plaintiff suggested that the defendant had squandered in an irresponsible manner.

(v) That the defendant's business enterprise in the earth moving and truck businesses had essentially failed and as a result therefore he could not have conceivably made any contribution to the growth of the estate of the plaintiff.

[16.] Mr. Maritz submitted that the conduct of the defendant in relation to his financial affairs must be considered with regard to various broad milestones during the course of the marriage, all of which he argued demonstrated a failure and dependency on his part on the plaintiff with regard to his business and financial affairs.

[17.] Ms. De Vos SC, who appeared on behalf of the defendant, submitted that quite a different perspective emerged from the defendant's financial and business affairs over the years. She submitted that the defendant had proved that he had in fact contributed substantially to the estate of the plaintiff and that without the property which he had purchased she would not have been able to have conducted a bed and breakfast nor would she have had the benefit of the proceeds of the subdivision and the sale of the portions of the property.

the household expenses and used whatever he earned in both the earthmoving and transport businesses in support of the expenses of both the plaintiff and her children.

[18.] In the evaluation of the evidence I am mindful that the financial statements and accounting of both parties did not accurately reflect the income and the expenses nor were they a complete statement but at best indicated how their respective estates were used during the course of the marriage. Neither of the parties disputed the financial statements which had been submitted into evidence and at best they provide an overall picture which I was able to use in considering whether a redistribution order is warranted under the circumstances and the extent of such order.

[19.] Ms. De Vos submitted that in the consideration of the credibility of the respective versions of the plaintiff and the defendant the defendant's versions should be preferred over that of the plaintiff. In this regard she submitted that the defendant had played open cards with the court and did not hesitate in making concessions even where they were to his own detriment such as his use of dagga and alcohol. On the other hand, Ms. De Vos submitted, the plaintiff was a poor witness who begrudgingly and only under pressure made concessions and adopted a wholly unreasonable attitude towards the claim of a redistribution by the defendant. In her evidence she attempted to portray the defendant in the most unfavourable light whenever she could. These contentions are not without

merit but I am acutely mindful of the schism in the relationship between the parties which has resulted in these divorce proceedings and the plaintiff's attitude must therefore be appreciated within that context. Moreover, the defendant had spared no quarter in making the unsubstantiated allegations against the plaintiff about her being involved in an extra marital affair as early as the 80's with the young Egyptian man.

[20.] The defendant from his evidence came across as a hardworking person and single-minded about his business affairs. He clearly lacked an astute business skill but had nonetheless persevered with a sense of determination. He sought to provide not only for himself but for the plaintiff and her two children. This, he sought to do notwithstanding his own shortcomings of an addiction to dagga. The plaintiff for her part came across as sophisticated and had successfully used the opportunity of the running of the bed and breakfast. She displayed a keen sense of pride in her refurbishment of the property and the attractiveness of the guest house as was depicted in photographs handed into evidence. She likewise appeared to be strong willed, hardworking and with a history as a generous provider. Unfortunately, the breakup of the marriage appeared to have brought about a dissipation in both of them of their care and concern for one another.

[21.] The defendant readily conceded in testimony that both he and the plaintiff had deliberately and consciously adopted a marital regime out of community of

property. Both had previously been married and it would be fair to assume that they had appreciated the consequences of the marital regime. The defendant for his part was a business man with properties. He ran an earthmoving business and claimed that he was aware of the vagaries and unpredictability of the market. It was for those reasons, he claimed, rather than blind love and endearment for the plaintiff that both he and the plaintiff chose to register the immovable property into the name of the plaintiff. This arrangement he claimed was also in part instigated by the advice of the plaintiff's mother.

[22.] In respect of the alleged donation of the property by the defendant to the plaintiff Ms. Vos pointed out there was no evidence of any written Deed of Donation which was an essential requirement in terms of the law. Moreover she argued that whether or not a donation had in fact been made did not detract from the consideration as to whether a redistribution should be made. The defendant emphatically disputed the notion of a donation and claimed that it was held in the name of the plaintiff for the benefit of both of them and in particular as financial security for their pension years. The notion that the immovable property was in fact for the benefit of both of them found support in the repeated references by the plaintiff in her evidence to "ons" (us) when decisions were made about the property and generally in the handling of the proceeds of the sale of the portions thereof. The plaintiff suggested though that a substantial part of the proceeds was used to pay off the defendant's bank liabilities while the defendant claimed that the bank loans and part of the proceeds of his transport business were used

for the maintenance of the household and in particular in respect of the overhead expenses of the guest house. It is clear that without the initial contribution of the R200 000.00 which the defendant made towards the purchase of the property the plaintiff would not have had any assets with which to have started her guest house enterprise, or for the purchase of the property in Egypt and generally for the maintenance of what appeared to be a comfortable lifestyle which at times was enjoyed by the parties, and which included a number of overseas vacations. The defendant also claimed that he had physically assisted with the building alterations to the guest house and the cottage on the property in further support of his claim of having contributed to the plaintiff's estate.

[23.] Mr. Maritz submitted that the most significant milestones of the defendant's business career were characterized by failure, such as the liquidation of his company, his sequestration and the desperate resort he and the plaintiff made to selling off portions of the immovable property to maintain their survival. Moreover he claimed that the defendant's own financial statements for the period 1999 to 2006 revealed that he had in fact made a nett loss despite the earnings made during that period. As such, his business dealings were no more than a failure and in such circumstances it would be inconceivable to find that he could have contributed to the estate of the plaintiff in any meaningful way. Mr. Maritz's analysis however is not borne out by the actual evidence before the court. Besides the contribution of the R200 000.00 to the purchase of the property which subsequently grew as an investment to a value

over R7 million the statements and the cheques submitted into evidence indicated a clear contribution by the defendant not only to the running of their joint household but also in the guest house and in the improvements to the buildings on the premises. It appeared that a superficial portrayal of the milestones of the defendant's failure belied the actual physical and financial contribution made by the defendant to the estate of the plaintiff and the fact that the property appeared to have been considered by both the plaintiff and the defendant during the more happier times of their marriage as belonging to both of them.

[24.] The plaintiff also claimed that the defendant had already received the benefit of an amount in excess of R900 000.00 from her estate during the course of the marriage. The plaintiff however enjoyed the benefit of an equal amount from the sale of the portions of the property to finance the guest house business and her contribution to the joint expenses of the marriage and their overseas holidays. Moreover the plaintiff claimed and without any proof that the defendant had simply squandered the amounts that he had received from her. There was no evidence tendered that the defendant had either recklessly misused any monies received or that he had used it in any irresponsible manner. If anything, the evidence reveals that besides using the money in his beleaguered transport business, he used part of the money for the expenses of the joint household.

[25.] Having considered the respective versions of the parties and the probabilities thereof. I am satisfied that the defendant has proved an entitlement to the benefit of redistribution of the estate of the plaintiff. Ms. De Vos submitted that the plaintiff's evidence supported a claim for no less than 50% thereof while Mr. Maritz in argument submitted that should the court find that the defendant had successfully proved a basis for a redistribution order, the defendant would be entitled to no more than between 30 and 36% thereof. During the course of the trial the property had been valued with the portion with the house and the cottage approximately three hectares in size valued at R2.9million while the remaining twelve hectares at R3 million. Mr. Maritz submitted that a redistribution of no more than 30 to 36% should be made in the defendant's favour in the light of various factors. The defendant had contributed R200 000.00 towards the purchase of the property yet he had during the course of the marriage made no substantial contribution to the plaintiff's estate, but had rather through his successive business failures depleted the property from 37 hectares to no more than fifteen hectares. The plaintiff had however successfully run the guest house for more than ten years, and, further, had made contributions to the defendant's expenses and his half share of the property in Egypt. Furthermore, the plaintiff's own estate had diminished. It is my view however as already indicated, notwithstanding the financial failures of the defendant he had contributed substantially to the estate of the plaintiff and without the initial investment of R200 000.00 the plaintiff would not have been in any position to have started the guest house. Moreover it was apparent from the evidence and the financial

guest house. Moreover it was apparent from the evidence and the financial statements that the defendant had in fact contributed to the plaintiff's estate and that money he received from the surrender of policies he used for the sustenance of the joint household. The evidence also indicated that the parties had treated their respective estates as part of the joint estate in respect of which they jointly took significant decisions. The plaintiff had also testified that in her initial will she had bequeathed to the defendant half of her estate and the remaining half to her two children. She claimed that she had subsequently lost confidence in the defendant to look after her children in the event of her death and changed her will with a bequest of only one third in favour of the defendant. It is not clear from the evidence whether the will had since been changed but it could safely be assumed that the defendant was not as of the date of the trial any longer a beneficiary under the will.

[26.] I am satisfied that the defendant has proved an entitlement to 50% of the nett value of the immovable property less the amount of approximately R300 000.00 owed on the Absa Bank account in the name of the plaintiff.

[27.] Mr. Maritz submitted that the plaintiff was being assisted *pro-amico* and had not sought an order of costs against the defendant should she have been successful. In the light thereof he submitted that each party should be ordered to pay their own costs. Mr. Vos on the other hand submitted that the defendant if successful would be entitled to an indemnification of his costs and that there was

costs. I am mindful of the attitude adopted by the plaintiff with regard to any redistribution that the defendant would have been entitled to and that she remained adamant in her position. I am mindful though that negotiations between the parties had also broken down. The defendant however without any factual basis chose to ascribe an illicit affair by the plaintiff as being the cause of the breakdown of the marriage. I am also mindful that both parties are presently dependent on an income which they earn. The defendant has to work at his age for his son and the plaintiff for her part has the inconvenience of having to work outside the country in order to earn a living . In the circumstances I am of the view that it would be fair that the plaintiff contributes no more than 50% towards the costs of the defendant.

The following order is made:

1. A decree of divorce is granted between the parties.
2. The defendant is entitled to 50% of the nett proceeds of the remainder of the erf at Hoekwil, George which is registered in the name of the plaintiff less the amount owed to Absa bank.
3. The plaintiff is ordered to pay 50% of the defendant's taxed or agreed costs.

It is noted for the record that the parties have arrived at a settlement amongst themselves with regard to their equal shares in the flat in Egypt.

SALDANHA J