IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 484/2014

In the matter between:

[D……..] [L…….] [G…….] **APPELLANT**

And

[D……..] [W……..] [V…….] [G……..]

(Nee [W……]) **RESPONDENT**

APPEAL JUDGMENT DELIVERED ON 29 JANUARY 2016

GAMBLE, J:

INTRODUCTION

[1] The parties, who for the sake of convenience I shall call “the husband” and “the wife”, were married to each other on 20 June 1981 in Cape Town. Their marriage was one out of community of property pursuant to an antenuptial contract, with the exclusion of profit and loss or any form of accrual regime. After many years, some good and some bad, and having seen their son and daughter each reach majority, the parties’ marriage foundered on the rocks and in January 2011 they separated.

[2] At the end of March 2011 the husband issued summons for a decree of divorce and ancillary relief in the regional court, Wynberg. Subsequently, and by agreement, the matter was transferred to the regional court Cape Town where the trial commenced on 15 June 2012. Both parties were represented before the magistrate by counsel, in the case of the wife by senior counsel. The trial was a protracted affair with many interruptions and a surfeit of evidence, much of it attributable to laborious cross examination of the parties.

[3] The evidence concluded on 15 May 2013 with judgment being reserved. Some 14 months later the magistrate delivered a detailed judgment which runs to 47 pages. The upshot of the judgement was that the husband was ordered to pay to the wife the sum of R3 428 333,00, the parties were ordered to retain such movable assets as were then in each one’s possession, and the husband was ordered to pay the bulk of the wife’s costs of suit. Unhappy with the decision of the magistrate, the husband lodged an appeal to this court. As with all civil appeals from the lower courts, the matter was heard by two judges in this Division.

[4] The appeal was originally enrolled for hearing in August 2015 but did not proceed for reasons which are not relevant. The matter subsequently came before this court

on Friday, 30 October 2015 with the husband being represented by Advs G. Myburgh SC and D.Watson (the latter having appeared for him alone before the court *a quo*) and the wife by Adv. S. van Embden.

THE ISSUES ON APPEAL

[5] Although the issues before the trial court were fairly extensive and included reciprocal claims for personal maintenance, on appeal the issues were limited to the proprietary consequences of the marriage and costs. While the issues were fairly limited the facts were not but I shall endeavour to send them out as succinctly as possible.

[6] Given that the parties were married prior to 11 November 1984 and in light of the fact that they were married out of community of property by antenuptial contract, upon divorce each party acquired the right to prefer against the other a claim for the transfer of assets in terms of section 7 (3) of the Divorce Act, 70 of 1979 ('the Act'). The husband, however, sought no such proprietary order, claiming rather the implementation of the provisions of the antenuptial contract and lifelong maintenance against the wife of R 10 000 per month[1]. The wife, on the other hand, sought lifelong personal maintenance in an amount considered to be just and equitable by the court, together with medical expenses and an annual inflationary increase in maintenance, as also an order in terms of section 7(3) of the Act in such amount as the court considered just and equitable in the circumstances. She also claimed costs of suit.

[1] This relief was eventually abandoned at trial

[7] The capital sum which the trial court ordered the husband to pay the wife was calculated by effectively massing the respective estates of the parties and awarding them each a half share therein. No order for maintenance was made either way and, as I have said, the husband was ordered to pay the wife's costs of suit save for the costs relating to the postponement of the matter on two occasions, when the parties were ordered to bear their own costs. It was common cause on appeal that the issue for consideration was the fairness or not of the section 7(3) order for the redistribution of assets by the husband to the wife. I shall discuss the import of that section of the Act later but it is first necessary to have regard to some historical background and the facts as they pertained at the time of divorce.

RELEVANT BACKGROUND FACTS

[8] When the parties met the husband was 42 years old and the wife 28. She was a theatre sister in Durban and he was running a successful steakhouse business in Paarl. The husband had previously held a sales position in a company selling business machines and office supplies. He decided to change tack and acquired an interest in a Spur 'steak ranch' (as the restaurants in that chain are known). The Spur group is a listed company in the food industry which made its name through the operation of franchised steakhouses throughout the country with each outlet bearing an appellation conjouring up reminiscences of the American Wild West. Names such as Golden Spur, Apache Spur, Arizona Spur and Red River Spur are examples thereof. The husband owned and ran the Pasadena Spur in Paarl at the time of their marriage.

[9] The wife was undoubtedly a hard-working person when she met her husband and immediately set about helping him in the running of the Pasadena Spur. Having no experience in the restaurant trade she was thrown in at the deep-end but soon found her feet and was regarded by the husband as an integral part of the management team. That business took off well and the parties then looked to the North where firstly the San Antonio Spur (in Pietersburg, as Polokwane was then known), and later the Mohawk Spur (in Kimberley) were acquired. The former was run by the parties jointly for about 6 months and, having installed an equity partner as the manager there, they moved to Kimberley where, once again, both were actively involved in all aspects of running the Mohawk Spur.

[10] The husband was highly regarded within the Spur group due to his business acumen and hard work, and ultimately was asked to serve on the franchising committee of that company. Around 1985 the couple decided to move back to Cape Town where the Acapulco Spur in Bergvliet was established. This business was owned by the wife and she ran it with the assistance of the husband who had helped her financially to acquire the outlet. The wife later acquired the building which housed the Acapulco Spur thanks to the husband's expertise. At the time the trial court made its order the Acapulco Spur was still trading successfully and was capably managed by the wife's current business partner Mr Ackerman, who runs the business on a day-to-day basis.

[11] The husband dabbled in a couple of other Spur businesses and had a short interest in the Rocky Mountain Spur in Tokai as well as the Redhawk Spur nearby. Neither of these was a particularly successful venture and after managing to extricate himself from them the husband continued to assist the wife in the running of

the Acapulco Spur. The husband, it seems, had always dreamed of retiring early and about 10 years into the marriage (when he was about 53) he decided to retire and live off the proceeds of a substantial property and share portfolio. In retrospect it appears that the seeds of destruction of the parties' otherwise happy relationship were sown through the husband's premature decision to give up working. Subsequently he suffered from bouts of depression and the parties started to drift apart.

[12] As I said earlier, the parties have two children. For reasons which are not now material their son manifested antisocial behaviour and substance abuse, and later a change of sexual orientation. This placed the marriage under tremendous strain as the parties struggled to come to terms with the disappointment of seeing their eldest child battling not to fall apart. Their daughter too struggled at school due to learning difficulties but ultimately she was able to enter university. The wife, it seems, sought refuge in alcohol and her drinking habits only served to alienate the husband further. She complained of his abusive behaviour towards her and he of her persistent drinking with friends. Although the trial court heard extensive evidence relating to the breakdown of the marriage (since it was considered relevant to the competing maintenance claims and the section 7(3) claim) on appeal both parties accepted that the marriage had broken down irretrievably and that the reasons therefore were not material to the adjudication of the issues in the appeal.

[13] At the time of trial the parties' former common home in the affluent Cape Town suburb of Constantia had been sold. The husband bought a townhouse in Bloubergstrand on the West Coast where he was comfortably ensconced with a new partner, while the wife was struggling in relative penury in Plumstead sharing a one bedroomed flat with her son. Her source of income remained the Acapulco Spur

which was being run by Mr Ackerman, and the building in which it was housed, for commercial rentals.

[14] On appeal there was little in issue regarding the extent of the parties' respective estates. It was common cause that when she came into the marriage the wife had her personal effects and a motor scooter. The husband owned the Pasadena Spur, a motor car and a flat in Cape Town. It was common cause on appeal that, when the trial concluded, the husband's estate was valued at at least R8,6m and the wife's at R3,5m. The trial court heard detailed evidence from accountants appointed by both parties as to the value of their respective estates. Ultimately there was one amount in respect of capital gains tax (CGT) likely to be paid by the husband which remained in dispute between the experts. In the greater scheme of things this figure (approxiamately R500 000) is not particularly high and Mr van Embden was happy to argue the matter on the husband's expert's figures. In a nutshell then, the husband came into the marriage with fairly substantial assets while wife came in was nothing, and after 33 years of matrimony both parties estates had grown significantly, with the husband's estate worth more than double that of the wife.

[15] It was not in issue that the wife had contributed towards the growth in the husband's estate: the extent thereof was disputed somewhat. Further it was argued that the husband's contribution towards the establishment of the Acapulco Spur was substantial and that the wife had thereby been effectively compensated for her contributions to his estate. During argument,Mr Myburgh SC reluctantly conceded that a section 7(3) order in an amount not exceeding R850 000 might be appropriate.

SECTION 7(3) OF THE DIVORCE ACT

[16] Section 7 (3) of the Act reads 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 is excluded;

(b) ……..*[Not applicable]*

may, subject to the provisions of sub-sections (4),(5) and (6), on application by one of the parties to that marriage, in the absence of agreement between them regarding a 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."

[17] As the proviso requires, that sub-section of the Act must be considered in conjunction with, *inter alia,* sub-sections (4) and (5) which are to the following effect:

(4) An order under sub-section (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 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 by sub-section (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 sub-section (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 an antenuptial contract;

(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;

(d) any other factor which should in the opinion of the court be taken into account."

[18] Much litigation has ensued over the last 30 years or so in relation to proprietary claims brought under this section of the Act, and a plethora of judgments dealing with the import of the section has been delivered. The leading judgment, however, is still Beaumont[2] in which Botha JA set out the purpose of the section in its historical context and discussed the application thereof in fine detail. At 987G *et seq* the Learned Judge of Appeal said the following in regard to the historical setting of the section:

> *"Subsection (3) introduced an entirely novel concept into this branch of our law: the power of a Court under certain circumstances to order the transfer of assets of the one spouse to the other. An order in terms of ss(3) may be conveniently be referred to as a redistribution order. The creation of a power enabling a Court to make a redistribution order was obviously a reforming and remedial measure (cf Kriegler J [in the court a quo] at 179G-H). What the measure was designed to remedy is trenchantly demonstrated by the facts of the present case: the inequity which could flow from the failure of the law to recognise 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 of the estate of the one or the other…..*
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> *…. On satisfaction of the requirements laid down in ss(3) itself and those incorporated by reference to ss(4), the Court may order the*

[2] Beaumont v Beaumont 1987(1) SA 967 (AD)

transfer of such assets or such part of the assets of the one spouse to the other 'as the Court may deem just'…. The legislature clearly intended to confer a very wide discretion upon a Court exercising its jurisdiction under ss(3)."

[19] After observing that sub-section (4) comprises two "*conjoined jurisdictional preconditions"* relevant to the exercise of a court's discretion when applying sub-section (3), Botha JA discussed the preconditions and their application thus at 988H – 989A:

"The one is a contribution by the one spouse to the estate of the other, of a kind described in the subsection; the wording of the subsection in this regard and its meaning and effect will be examined later in this judgement. The other is that the Court must be satisfied that, by reason of such a contribution, it would be 'equitable and just' to make a redistribution order. The first requirement involves a purely factual finding. The second involves the exercise of a purely discretionary judgement in equity. It is certainly a very prominent and important feature of ss(4) that ultimately, when once the factual requirements of ss(3) and (4) are satisfied, the determination of whether or not a redistribution order is to be made at all is entrusted by the Legislature to the wholly unfettered discretionary judgment of the court as to whether it would be equitable and just to do so."

[20] Mr Myburgh SC mounted a novel argument, which he candidly acknowledged had not been advanced before the trial court, nor in any reported case

since the introduction of section 7(3) in 1984. The argument asserts that the main purpose of the Matrimonial Property Act of 1984 was to

> "*channel the 'marrying public' into a system of accrual as the default regime. The legislature considered this to be in keeping with the mores of society consistent with the increase in the divorce rate and the changed view of marriage as being a partnership quite possibly (and indeed frequently) of limited duration rather than as a commitment for life in which the parties pooled all resources. The promulgation of the Matrimonial Property Act accordingly entailed a ground shift in the legal position based on a perceived change in social mores."*

Reliance for this assertion is placed on Schafer.[3]

[21] The argument then goes on to suggest that in the adjudication of section 7(3) claims the courts should attempt to achieve redress of the historical inequities arising from marriages out of community of property in terms of antenuptial contracts by making orders which seek to effectively apply the accrual regime. It was said that the court should look at each party's assets as at the commencement of the marriage, compare that with the values at divorce and share the difference in increase equitably.

[22] There is no merit in this argument whatsoever. In the first place the reliance on the professed extract from Schafer does not sustain any such argument. Secondly, there is nothing in the express wording of sub-sections (3), (4) and particularly (5) which warrants such an approach. It must be borne in mind that we are

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[3] Schafer Family Law Service, Division B. Matrimonial Property,I General Background, B.1 Introduction.

concerned here with statutory interpretation and the primary rule of interpretation still requires one to initially consider the wording of the instrument sought to be interpreted in its contextual setting[4].Thirdly, and most importantly, in the application of section 7(3) over the decades the courts, and particularly the Supreme Court of Appeal (and its predecessor), have stressed time and again that the court applying section 7(3) enjoys a very wide discretion to order what is just and equitable and that it is not constrained by any point of departure or end result.[5]

[23] In Beaumont[6] Botha JA stressed that the court must commence with a "clean slate" and in so doing must ensure that the exercise of its discretion is "unfettered by any starting point", while in Jordaan[7] Traverso J pertinently referred to the distinction which falls to be drawn between a claim involving the application of the accrual system and the determination of a section 7(3) claim. In the circumstances, the trial court was required to apply the section of the Act without any preconceived ideas of what should or should not be, the only criterion being that the order must be just and equitable.

FACTORS CONSIDERED BY THE TRIAL COURT IN MAKING THE REDISTRIBUTION ORDER

[24] It is clear from her judgment that the regional magistrate fully understood how she was required to approach the granting of an order under section

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[4] Bothma-Batho Transport (Edms) Bpk v S.Bothma & Seun Transport (Edms) Bpk 2014(2) SA 494 (SCA) at para's 11 &12.

[5] See for example Beaumont,supra, Bezuidenhout v Bezuidenhout 2005(2) SA 187 (SCA) at 197 B-E; Buttner v Buttner 2006(3) SA 23 (SCA) at 33B-F; Kirkland v Kirkland 2006(6) SA 144 (C) at 163 A-H.

[6] 998 F-G

[7] Jordaan v Jordaan 2001(3) SA 288 (C) at para 22

7 (3). Her judgment reflects a thorough consideration of the applicable legal principles and the relevant case law, including the appellate decisions to which I have already referred. The judgment also reflects consideration of the facts which in the regional magistrate's view constituted material contributions by the wife to the estate of the husband for purpose of her property redistribution claim.[8] And, having found that there were such contributions, the judgment goes on to assess the application of the *"just and equitable"* principle. The judgment also covers the evidence of the experts and conclusions are arrived at regarding the extent of each party's estate at the time of the granting of the divorce order. In light of the fact that there was only a minor dispute on appeal rearding the extent of the CGT payable by the husband on realization of certain of his assets , it is not necessary to consider this aspect of the judgment either. In summary, I agree with the submission by Mr van Embden that the regional magistrate's overall assessment of the case was impeccable.

[25] As I have already said there was no issue on appeal regarding the wife's contribution to the growth of the husband's estate. Mr Myburgh S.C.'s argument really turned on two points – firstly, the extent of her contribution and secondly, the fact that the wife had been compensated for her contribution during the course of the marriage. Such compensation was said to have been made up by a salary which was paid to her for her services while the parties ran the Pasadena, San Antonio and Mohawk Spurs, as well as the fact that her ownership of the Acapulco Spur was attributable to a sizeable donation from the husband.

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[8] In light of the fact that the husband did not assert a claim for redistribution of property under sec 7(3), it was not necessary to consider his contributions to her estate.

[26] In considering what one party's contribution is to the estate of the other for purposes of a section 7(3) redistribution order the court does not approach the matter utilizing fine intellectual callipers so as to effectively reconstruct a set of accounts between the parties. Often the contribution of a spouse may be immeasurable in monetary terms, particularly where there has been a saving of expenses through the conduct of that spouse, where, for example, that spouse has worked in a family business, or where the contribution has been as a home-maker.[9] After all, the essence of such a redistribution order is to justice between the divorcing spouses and an approach that requires calculation of the contribution with an undue degree of exactitude may render that exercise incapable of proper implementation.

[27] From the outset the wife participated in the running of the husband's businesses without hesitation. One sees, I believe, a person who literally rolled up sleeves and pitched in with all the resources she could muster. Children were reared in carry-cots at the restaurants until the parties could afford proper day care and the parties worked long hours with little sleep to make the businesses the successes they became. When the parties relocated to Cape Town and the Acapulco Spur was acquired things changed. Initially, the wife ran the business with the assistance of her husband (who, for example, purchased meat products and prepared them in the kitchen) as well as the further help of an initial equity partner in the business who was, at all times the minority shareholder. Later the husband left the wife to her own devices and she was assisted further by her subsequent business partner, also a minority shareholder.

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[9] Beaumont at 996H-997H; Bezuidenhout at 198G

[28] When the husband retired at the age of 53 his involvement in the Acapulco Spur was significantly curtailed and it is common cause that the wife became the main provider in the family. In evidence before the regional magistrate the husband said on more than one occasion that he regarded their marital relationship as a *"partnership"* or a *"50/50 operation*". This attitude manifested itself in a number of ways at a domestic level. When running the Acapulco Spur the wife carried 50% of the household expenses, school fees and medical costs. But her contribution was not limited to household necessaries. If the parties went out to dinner the wife was required to chip in and contribute her half share. And, when the husband invited the wife to join him on a luxury cruise overseas she was similarly required to pay her own passage. Ultimately, one is left with the very clear impression that the husband set about installing his wife in a productive business which would cater for the family's needs and which she, as a person more than 12 years his junior, would manage while he enjoyed early retirement.

[29] To be sure, there were contributions and donations from the husband to the wife during the subsistence of the marriage, the most substantial of these being the sum of R80 000 upon the sale of the Kimberley business which he called her *"profit share"* as a *"reward for her hard work in his business*"and a loan of R250 000 which she repaid at market-related rates together with a further capital amount in the same sum. While the husband did not pursue his own claim for a redistribution of property on the strength of these contributions, they were directly relevant under section 7(4) and also under the rubric *"any other factor"* which section 7 (5) contemplates.

[30] The regional magistrate was alive to all of the aforementioned factors (and a number of others which were equally relevant) in coming to her decision in the matter. She correctly applied the law and there is no substance in the submission by counsel for the appellant that she erred by failing to approach the matter from a point of departure predicated on a quasi-accrual marriage. Further, I am unable to find in the circumstances that the magistrate exercised the wide discretion accorded to her under section 7 (3) incorrectly or improperly. In the absence of any misdirection on the law or a material finding of fact, and there being no striking disparity between the order of the trial court and an order which this court considers just and equitable , the room for interference on appeal is very limited indeed.[10]

CONCLUSION

[31] In the circumstances, I would dismiss the appeal with costs.

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GAMBLE, J

I agree, and it is so ordered.

[10] Beaumont 1002 B-E

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ERASMUS, J