



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable

Appeal no: A92/2024

Court a quo case no: FS/WL/RD/118/2021

In the appeal between:

RVB

APPELLANT

and

JVB

RESPONDENT

Neutral citation: *RVB v JVB* (A92/2024) [2024] ZAFSHC (19 November 2024)

Coram: Chesiwe J et Greyling-Coetzer AJ

Heard: 28 October 2024

Delivered: 19 November 2024

Summary: Section 7(3) of the Divorce Act 70 of 1979 – application of constitutional invalidity – Constitutional Court order entitles spouse in pending litigation to rely on claim of redistribution.

ORDER

1. The appeal is upheld with costs.
 2. The order of the court a quo is set aside and replaced with the following:
 - ‘1. The applicant’s application to amend her counter-claim is granted.
 2. The applicant as defendant in the main action is granted leave to amend her counter-claim as set out in her notice of amendment in terms of Rule 55A dated the 12th day of September 2023.
 3. The cost of this application shall be cost in the main action.’
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JUDGMENT

Greyling-Coetzer AJ (Chesiwe J concurring)

[1] This appeal concerns the dismissal of an application to amend a counter-claim, which amendment sought to introduce a claim for transfer of assets (a redistribution order) as contemplated in s 7(3) of the Divorce Act 70 of 1979 (Divorce Act), the core enquiry being whether the appellant was entitled to introduce such a claim.

[2] The parties married each other on 17 October 2009. They concluded an antenuptial contract in terms of which community of property, community of profit and loss and accrual sharing in any form were excluded, as contemplated in Chapter I of the Matrimonial Property Act 88 of 1984 (Matrimonial Property Act).

[3] The respondent during April 2021 instituted divorce proceedings. The appellant in opposing the divorce proceedings, delivered a counter-claim in terms of which she admitted the applicable marriage regime and claimed no relief pertaining to proprietary consequences of the marriage on the strength of the governing

matrimonial regime.

[4] During September 2023, the appellant sought to amend her counter-claim by introducing a claim for a redistribution order on the basis of s 7(3) of the Divorce Act, read with the court order declaring s 7(3)(a) of the Divorce Act inconsistent with the Constitution as granted in *GKR v Minister of Home Affairs and Others*¹ (*GKR*) on 11 May 2022.

[5] In *GKR* the court declared s 7(3)(a) of the Divorce Act inconsistent with the Constitution and invalid to the extent that the provision limits the operation of s 7(3) of the Divorce Act to marriages out of community or property entered into before the commencement of the Matrimonial Property Act. The order was referred to the Constitutional Court for confirmation.

[6] The respondent objected to the proposed amendment on the grounds that the appellant attempted to withdraw an admission; the appellant attempted to incorporate aspects into the pleadings which are not presently prevailing law; and that the appellant sought legal aid on a basis which the court was not competent to give.

[7] On 10 October 2023 the Constitutional Court in *EB v ER N.O and Others and a Similar Matter*² (*EB*) confirmed the order of invalidity as granted in *GKR*.

[8] The application to amend was heard during March 2024. In light of the confirmation of the order of invalidity in *GKR* by the Constitutional Court in *EB*, argument before the court *a quo* focused on the court order in *EB*. It is opposite to mention that the amendment was not brought during the trial proceedings but before the matter was enrolled for hearing, therefore before any evidence had been led by either party.

[9] The Court *a quo* dismissed the application to amend the counterclaim with costs on an attorney-and-client scale, immediately taxable and payable. The basis for said dismissal can succinctly be summarised as follows:

¹ *GKR v Minister of Home Affairs and Others* [2022] ZAGPPHC 311; 2022 (5) SA 478 (GP).

² *EB v ER N.O and Others and a Similar Matter* [2023] ZACC 32; 2024 (2) SA 1 (CC). This matter is often cited alternatively as *EB (born S) v ER (born B) and Others*; *KG v Minister of Home Affairs and Others* [2023] ZACC 32; 2024 (1) BCLR 16 (CC).

- (a) the Court *a quo* found that the applicable marital regime was an admitted fact and that the whole purpose of the proposed amendment is to negate the existence of the prenuptial contract, to bring in an accrual or to later make a distribution order, which will be prejudicial to the respondent;
- (b) para 5 of the order in *EB* limits the retrospective effect of para 4 of the order, therefore it has no effect on antenuptial contracts which have been concluded prior to 10 October 2023;
- (c) the claim the appellant sought to introduce is not prevailing law and will only become prevailing law in the future; and
- (d) the Constitutional Court's order in *EB* finds no application.

Amendment as sought by the Appellant in the Court a quo

[10] The appellant did not seek to withdraw the admission that the parties were married out of community of property in terms of an antenuptial contract which excluded accrual sharing. This fact remains common cause between the parties. Rather, the appellant sought to introduce a claim for a redistribution order on the strength of the invalidity orders in *GKR* and *EB*.

[11] Prior to *GKR* and *EB*, a claim for redistribution of assets upon divorce was only available to a spouse who sought a decree of divorce in respect of three distinct types of marriages out of community of property, the first being a marriage out of community of property which was entered into before the commencement of the Matrimonial Property Act 88 of 1984; the second a marriage out of community of property entered into in terms of s 22(6) of the Black Administration Act 38 of 1927 as it existed immediately prior to its repeal by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988; and lastly a marriage out of community of property entered into in terms of any law applicable in a former homeland without entering into an antenuptial contract for agreement in terms of such law. This matter only concerns the first class of marriage, thus one entered into before 1 November 1984.

[12] Section 7(3) of the Divorce Act empowers a court on divorce of the above three types of marriage to direct that assets of one party to be transferred to the other if the court is satisfied that it is just to do so subject to ss 7(4), 7(5) and 7(6) of the

Divorce Act. Therefore, unless a spouse succeeds in persuading the court that it is just and equitable that said spouse be awarded some of the property of the other spouse, the other spouse will retain ownership of all the property acquired during the course of the marriage.³ The court has a wide discretion and may consider an interminable number of factors.

[13] The application of s 7(3)(a) does not change the matrimonial property regime agreed to by the parties, but provides basis for relief in certain carefully circumscribed instances to spouses who contributed directly or indirectly to the maintenance or increase of the estate of their spouses whilst married out of community of property with the exclusion of the accrual system on the date when the marriage relationship is terminated by divorce. Neither does s 7(3) provide a claim to a spouse or a judicial discretion to a divorce court to create a system of accrual that the parties themselves did not create, or to redistribute the spouse's assets in a way that seems fair.⁴ However, s 7(3) does address the unfair financial imbalance flowing from the nature of the marriage being out of community of property in circumstances where one party contributed to the other's maintenance, or to the increase of the other's estate during the subsistence of the marriage.⁵

Appellant's entitlement to introduce a redistribution claim in light of the orders in GKR and EB

[14] The order granted by the Constitutional Court in *EB*⁶ read as follows:

1. The High Court's order of constitutional invalidity is confirmed.
2. Paragraph (a) of ss 7(3) of the Divorce Act 70 of 1979 (Divorce Act) is declared inconsistent with the Constitution and invalid to the extent that it fails to include marriages concluded on or after the commencement of the Matrimonial Property Act 88 of 1984 (Matrimonial Property Act).
3. The declaration of invalidity is suspended for a period of 24 months from the date of this order to enable parliament to take steps to cure the constitutional defects identified in

³ *Gumede v The President of the Republic of South Africa and Others* [2008] ZACC 23; 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC).

⁴ R Robinson and Horsten D 'The quantification of labour of love: Reflection on the constitutionality of the discretion of a court to redistribute capital assets in terms of Section 7(3) to (6) of the South African Divorce Act' (2010) *Speculum Iuris* at 96/117.

⁵ *Ibid* at 97-98.

⁶ Footnote 2 para 150.

this judgment.

4. Pending any remedial legislation as contemplated in para 3 above, para (a) of ss7(3) of the Divorce Act is to be read as excluding the words in strike out text below:

“(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;”

5. The order in para 4 above shall not affect the legal consequences of any act done or omission or fact existing before this order was made in relation to a marriage concluded on or after 1 November 1984.

6. Pending any remedial legislation as contemplated in para 3 above . . .’ (Own underline.)

[15] Central in this appeal is the effect of para 5 of the Constitutional Court order in *EB*. In considering same, it is necessary to have regard to the Doctrine of Objective Constitutional Invalidity. This Doctrine was laid out in *Ferreira v Levin N.O. and Others; Vryenhoek and Others v Powell N.O. and Others*⁷ (*Ferreira*). The court held that finding a law to be in conflict with the Constitution ‘does not invalidate the law; it merely declares it to be invalid.’⁸ Thus, a law that has been found to be inconsistent with the Constitution ceases to have any legal consequences.

[16] Although *Ferreira* was written at a time when the interim Constitution applied, it matters not, as the underlying legal principle remains. That said, there is a marked difference in respect to the point of departure between the interim Constitution and final Constitution. In terms of the interim Constitution,⁹ an order of invalidity could be ordered to be retrospective, but if nothing was said, it would in the case of pre-constitutional legislation, operate prospectively only.

[17] The position has been reversed in terms of the final Constitution. The current position is that the Constitution assumes the full retrospective effect of constitutional

⁷ *Ferreira v Levin N.O. and Others; Vryenhoek and Others v Powell N.O. and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) paras 25-30.

⁸ *Ibid* para 27.

⁹ Section 98(6) of the Interim Constitution reads as follows: ‘Unless the Constitutional Court in the interest of justice and good governance orders otherwise, and save to the extent that it is so ordered, the declaration of invalidity of a law or a provision thereof –

(a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity;

(b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.’

invalidity and empowers the court declaring the invalidation to limit its retrospective effect. Section 172(1) of the Constitution provides as follows:

- ‘(1) When deciding a constitutional matter within its power, a court –
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make an order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any condition, to allow the competent authority to correct the defect.’

[18] This specific provision was necessary, as a statute enacted before the inception of the Constitution when found to be inconsistent, and invalid by reason of its inconsistency, such inconsistency will date back to the inception of the Constitution. In limiting retrospectivity, the disruptive effects of the retrospectivity is balanced against the need to grant effective relief to an applicant and others in a similar situation.¹⁰ Considering the Constitutional Court order in *EB*, it is manifest that the order suspended the effect of invalidity for 24 months, expressly provided immediate interim relief and limited the retrospective effect of the invalidity.

[19] Proper interpretation of an order of court entails considering the legal context within which the words in the order were used, together with the whole of the judgment that informed such an order.¹¹ The reasons for ordering suspension or limiting retrospectivity could be bound up in the reasoning of the judgment.¹²

[20] A court’s discretion to suspend the effect of an order of invalidity or to limit retrospectivity entails the exercise of a wide power and can be utilised for several reasons, provided that it is just and equitable to do so.

Acting in terms of Section 172(1)(b) and (1)(b)(ii)

[21] Paragraph 3 of the Constitutional court order in *EB* suspends the declaration of invalidity. The court further granted just and equitable relief to cater for the period

¹⁰ *Britton v Minister of Justice and Correctional Services and Others* [2024] ZASCA 148 para 23.

¹¹ *Cross Border Road Transport Agency v Central African Road Service (Pty) Ltd and Another* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) para 22.

¹² *Ibid* para 25.

pending the 24-months' suspension by ordering that set out in para 4, thereby providing for immediate relief as from the date of the Constitutional Court order.¹³

[22] As from 10 October 2023, s 7(3) of the Divorce Act should be read to say:

'(3) A court granting a decree of divorce in respect of a marriage out of community of property– (a) entered into, 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 ... may, subject to the provisions of subsection (4), (5) and (6), on application by one of the parties to the marriage, in the absence of an 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 . . . '

[23] Therefore s 7(3) of the Divorce Act shall find application in all divorce proceedings in respect of marriages out of community of property in terms of which an antenuptial contract excludes community of property, community profit and loss and accrual sharing in any form. Aforesaid can conveniently be described as the immediate prospective application that the declaration of invalidity would have.

Acting in terms of Section 172(1)(b)(i)

[24] The Constitutional Court in *EB* then proceeded to limit the retrospective effect of the declaration of invalidity by ordering per paragraph 5 that the order in paragraph 4 (immediate prospective application) shall not affect the legal consequences of any act done or omission or fact existing before this order was made in relation to a marriage concluded on or after 1 November 1984.

[25] The court *a quo* reasoned that the immediate prospective application is limited to antenuptial contracts to be concluded post 10 October 2023 and had no effect on an antenuptial contract which had already been concluded. It appears that the court *a quo* found the wording 'shall not affect the legal consequences of any act done or omission or fact existing before this order was made' to relate to the existence of an antenuptial contract and the legal consequences thereof. In doing so, the court *a quo* lost sight thereof that the antenuptial contract and the ordinary legal consequences thereof, remains intact as dealt with earlier in this judgment.

[26] Properly construed, para 5 of the Constitutional Court order limits the

¹³ Such date being 10 October 2023.

retrospective application of the invalidity to matters where a final decree of divorce had already been granted, alternatively where the marriage has terminated through the death of a spouse. The immediate prospective application cannot found a basis to undo that which had been done at the termination of the marriage either by death or by divorce before the date of the order. If the Constitutional Court wanted to exclude pending matters from its order of prospectivity, it would have done so in explicit terms and reasons.

[27] The constitutional challenge in *GKR* and *EB* related to pending divorce proceedings in respect of a marriage concluded in terms of an antenuptial contract excluding the accrual, which marriage was concluded after November 1984, but obviously before the Constitutional Court order was granted. The very basis of the constitutional challenge was the differentiation found in s 7(3) of the Divorce Act in respect of the date of marriage.

[28] While there are sound reasons of policy not to make an order of invalidity applicable to cases that have been determined under an invalid law, the same is not ordinarily so in respect of pending cases where parties' patrimonial consequences had yet to be determined.

[29] It was held in *GKR*¹⁴ that s 7(3) of the Divorce Act provides a power to be exercised by the court at the time of divorce. It is only at the time of divorce that Section 7(3) of the Divorce Act is triggered. Although the conclusion of an antenuptial contract regulates the legal consequences in respect of the parties' respective estates vis-à-vis third parties during the subsistence of the marriage, the exercising of the parties' rights pertaining to the division of their assets is deferred until the dissolution of the marriage.

[30] In *GKR* the applicant contended that it was critical that an order made by the court provides for the order to apply to the applicant's pending divorce action, as well as other similarly placed spouses where divorce proceedings are still pending.¹⁵ The state respondents' stating that full retrospective force, will cause considerable uncertainty in respect of divorce orders that have already been granted.¹⁶ In reply, on behalf of the applicant, it was submitted that it would be just and equitable to limit the

¹⁴ Footnote 1 para 31.

¹⁵ Ibid para 63.

¹⁶ Ibid para 64.

retrospectivity so that it does not affect divorce proceedings that have been finalised.¹⁷

[31] The court in *GKR*¹⁸ held that as in *Gumede v President of the Republic of South Africa*¹⁹ it was necessary to emphasize that nothing in the order the court was intendant on making would affect marriages out of community of property with the exclusion of the accrual system concluded after 1 November 1984, that have been terminated either by death or by divorce before the date of this order.

[32] The court in *GKR*²⁰ then proceeded in para 3 of the order to give effect thereto by stating

‘In terms of Section 172(1)(b) of the Constitution, the orders in paragraphs 1 and 2 of this order shall not affect the legal consequences of any act done or omission or fact existing in relation to a marriage out of community of property with the exclusion of the accrual system concluded after 1 November 1984, before this order was made.’

[33] In *EB*²¹ the Constitutional Court expressly held that it would be appropriate to suspend the declaration of invalidity for 24 months with an interim severance of the offending differentiation in s 7(3)(a) so as to grant immediate effective relief. There is simply no room to conclude that the Constitutional Court granted relief only to the parties before it and sought to exclude similarly placed spouses.

[34] The Constitutional Court in *EB* confirmed the constitutional invalidity, including a suspension of the invalidity,²² yet phrased para 5 of its order in an identical fashion, thereby confirming the rationale behind same and aligned itself with the court in *GKR*.

[35] Paragraph 5 of the Constitutional court order in *EB* properly construed does not limit the application of para 4 of the Constitutional Court order in *EB* to pending divorce proceedings. Paragraph 5 of the Constitutional court order in *EB* only limits the retrospective application to marriages which have already been terminated by means of either death or divorce, prior to the date of 10 October 2023.

[36] It is necessary to comment on the appealability of the order. Although the

¹⁷ Ibid para 64.

¹⁸ Ibid para 68.

¹⁹ *Gumede v President of the Republic of South Africa* [2008] ZACC 23; 2009 (3) SA 152.

²⁰ Footnote 1 para 71.

²¹ Footnote 2 para 147.

²² which was not aligned with the order in *GKR*

order of the court *a quo* refusing the amendment might, at face value, not be definitive in a general sense, it is final in effect relating to the entitlement of the appellant to introduce a claim for redistribution. The order of the court *a quo* was misdirected in its enquiry and the order cannot remain extant. In addition, neither party raised the appealability of the order as an issue in dispute between the parties, calling for determination.

[37] As regards the costs of the application for amendment, these are usually born by the applicant seeking the amendment. However considering that the matter relates to matrimonial proceedings still pending, it would be appropriate to order the cost of the application for the amendment to be cost in the main action. Regarding the cost of appeal, the general principle that costs are to follow the event, is justified.

[38] For the reasons set out above, the appeal should succeed. Consequently, the following order is made:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced with the following:
 - '1. The applicant's application to amend her counter-claim is granted.
 2. The applicant as defendant in the main action is granted leave to amend her counter-claim as set out in her notice of amendment in terms of Rule 55A dated the 12th day of September 2023.
 3. The cost of this application shall be cost in the main action.'


GREYLING-COETZER AJ

I concur and it is so ordered


CHESUWE J

Appearances:

For the Appellant:

Adv. SJ Reinders

Instructed by:

Podbieski Inc
c/o Honey Attorneys

For the Respondent:

Adv. CM Oberholzer

Instructed by:

ABK Attorneys
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