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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO: 4387/2017P

In the matter between:

H K ~~EVANS~~E[....]
Plaintiff

and

S ~~EVANS~~E[....]
Defendant

ORDER

The order that I make is as follows:

(a) There will be a decree of divorce.

(b) The counterclaim for a share of the accrual in the plaintiff's estate is dismissed.

(c) The plaintiff is ordered to pay to the defendant, without set-off, the sum of R20 000 per month by way of maintenance, with effect from 30 June 2019, on or before the last day of each month, together with all her medical, dental, ophthalmic, orthodontic, hospital, prescribed medicine and surgical expenses

incurred, which are not covered by her medical aid. Such expenses are to be paid by him to the defendant within ten days of written proof thereof having been supplied to him.

(d) The costs reserved in the rule 43 application will be costs in the cause.

(e) The plaintiff is ordered to pay the costs of the action, including those in reconvention.

JUDGMENT

Delivered on: 03 June 2019

Ploos van Amstel J

[1] This is an action for a divorce and other relief. The husband, who is the plaintiff, seeks a decree of divorce, forfeiture of the benefits of the marriage and costs. The wife agrees that there should be a divorce, and in addition claims her share of the accrual in her husband's estate, maintenance and costs. There are no children born of the marriage. I shall refer to the parties as Mr and Mrs ~~Evans~~E[....] where it is convenient to do so.

[2] The parties were married to each other on 4 January 2008 in Pietermaritzburg, out of community of property and subject to the accrual system. They both testified that for a number of years the marriage was a happy one, in spite of the age difference of some 20 years. They travelled a lot, Mr ~~Evans~~E[....] worked in a number of different countries as an engineer, and Mrs ~~Evans~~E[....] accompanied him wherever he went.

[3] They were living in Abu Dhabi when they accompanied friends to a church service. This resulted in a fundamental change in their lives. They were both baptised and became committed Christians.

[4] Mrs ~~Evans~~E[....] unfortunately later contracted cancer, and complications arose as a result of the radiation therapy. This eventually resulted in the removal of her bladder.

[5] The parties returned to South Africa and settled in East London, where Mr ~~Evans~~E[....] found employment. They both suffered setbacks as far as their health was concerned, and after some time Mr ~~Evans~~E[....] lost his employment there.

[6] They moved to Pietermaritzburg in 2015, into a property at Montrose, owned by Mr ~~Evans~~E[....]' family trust. Their relationship started to deteriorate. Mr ~~Evans~~E[....] embraced his faith with enthusiasm and conviction, while his wife's faith slowly slipped away. She said this was partly due to the fact that her husband had become obsessed with his religion and became overbearing in this regard. She found some of his convictions and suspicions weird, relating to the ominous presence of fluoride in toothpaste, the activities of the so-called Illuminati, and the fact that the Queen of England sometimes changed her shape into that of a reptile. She freely admitted in her evidence that she sometimes mocked him about this.

[7] Mrs ~~Evans~~E[....] also felt oppressed by her husband's insistence that they, together with their domestic servant and gardener, participate every morning in the reading of the Bible and prayer. She said he sometimes subjected her to endless discussions about religion, and she referred to it as 'Bible punching'.

[8] All of this led to regular conflict between the parties, with harsh words exchanged. Mrs ~~Evans~~E[....]'s health deteriorated and she developed a variety of medical problems, which led to her being hospitalised from time to time. This included a life threatening auto immune disease. Mr ~~Evans~~E[....] had his own medical problems, relating not only to degeneration of his knees and hips, but also to depression and anxiety.

[9] Both parties testified about conduct of which the other party was guilty. One of these related to an incident in Montrose when Mr ~~Evans~~E[....] pushed his wife from behind, pinned her to a cupboard and physically ejected her from the house. Another related to him moving his wife to an upstairs apartment in the house, sometimes locking the interleading door and refusing her access to their pets. His complaints related to her mocking him and his religion and excluding him from her circle of friends.

[10] They separated in January 2017 and both of them say there is no prospect of a reconciliation. Mrs ~~Evans~~E[....] testified that she could not believe it when her husband said he wanted a divorce. Although they had many problems she never thought the marriage would end in divorce.

[11] Be that as it may, their relationship has now deteriorated to the point that divorce is inevitable. I do not consider that fault or misconduct on the part of either party was present to the extent that it should be relevant to the issue of maintenance. Counsel for the plaintiff fairly conceded this, and also did not pursue the claim for forfeiture of the benefits of the marriage.

[12] I do want to emphasise that where there is a difference between the evidence of the two parties I prefer the evidence of Mrs ~~Evans~~E[....]. She was disarmingly honest and made concessions with regard to her own conduct and gave credit to her husband where it was due. He, on the other hand, seemed to me to try to paint himself in the best possible light and downplay his financial position. He claimed to have a life-threatening medical condition, as a result of which he cannot work. When pressed he said the condition related to depression and anxiety. He omitted to disclose an investment in Gibraltar. He said he did not mention this as he uses this money to visit his family. The omission was therefore intentional. There may be some merit in counsel's submission that there was no point in trying to hide the investment, as his wife knew about it. Her response was that he probably hoped that she had forgotten about it.

[13] As far as the patrimonial consequences of the marriage are concerned I deal firstly with Mrs ~~Evans~~E[....]' claim for a share of the accrual in her husband's estate. The antenuptial contract provides that community of property and community of profit and loss would be excluded. It also provides that the provisions of Chapter 1 of the Matrimonial Property Act[1] (the Act) would apply to the intended marriage. This Chapter deals with the accrual system, in ss 2 to 10 of the Act. The relevant part of s 3(1) provides that at the dissolution of a marriage subject to the accrual system by divorce, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, acquires a claim against the other spouse for an amount equal to half of the difference between the accrual of their respective estates.

[1] 88 of 1984.

[14] Section 4(1)(a) provides that the accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.

[15] Section 6 deals with the proof of the commencement value of his estate. It provides, in effect, that a declaration in the antenuptial contract of such net value serves as prima facie proof thereof.[2]

[16] The antenuptial contract between the parties records that for the purposes of s 6 of the Act the net values of their estates at the commencement of the intended marriage would be, in the case of each of them, the sum of R500 000, consisting of personal belongings.

[17] The stipulation relating to the sum of R500 000 in the case of each of them, was plainly not a reflection of the real values. The net value of Mr ~~Evans~~E[....]'s estate was much more than this, while the net value of Mrs ~~Evans~~E[....]'s estate was much less. She testified that it was her husband who suggested that this amount be reflected in the antenuptial contract, because, as he put it, he did not want her to walk away with nothing if the marriage failed. She agreed to his suggestion.

[18] Counsel for Mrs ~~Evans~~E[....] submitted that the parties were bound to the amounts stated in the antenuptial contract as the commencement value of their estates, and that it was not permissible to prove a different value. He relied on the judgment of Combrinck J in *Olivier v Olivier,*[3] who held that the provision in s 6(3) regarding prima facie proof did not apply to the parties to the antenuptial contract inter se, and was only applicable as against third parties. He reasoned that a declaration by the spouses in their antenuptial contract of the commencement value of their respective estates was conclusive proof of their agreement regarding such values and could only be attacked on the recognised grounds of misrepresentation, duress, undue influence, rectification and so forth. He said this was the position at

[2] See *Olivier v Olivier* 1998 (1) SA 550 (D) and *Thomas v Thomas* [1999] 3 All SA 192 (NC), where the inept wording of s 6 was discussed, and it was held that the words 'contemplated in subsection (1)', had been inserted in subsection (3) *per incuriam*.
[3] *Olivier v Olivier* 1998 (1) SA 550 (D) at 555C-D.

common law and he could think of no reason why the Legislature would have intended to alter the common law by s 6(3). [4]

[19] There seems to me, with respect, to be a fault in this reasoning. Combrinck J approached the matter on the basis that a declaration in the antenuptial contract as to the commencement value is conclusive proof of an agreement as to that value, and that to allow parties to prove a different value, without invoking one of the recognised remedies, would be to change the common law. This approach seems to be based on a misunderstanding of the purpose of the declaration, which is not to state an agreed value, but rather the value which each spouse puts on his or her estate, and which they agree will serve as prima facie proof thereof. In other words, the reason why, at the dissolution of the marriage, they are free to prove a different value is that this is what they had agreed.

[20] It may well be asked what the purpose of such a declaration is if it is not binding. Its practical value seems obvious. At the dissolution of the marriage, which may be many years later, a spouse may rely on the prima facie commencement value stated in the antenuptial contract, without having to prove it. If a party contends that the prima facie value is incorrect then such party bears the onus to prove the real value.

[21] *Olivier* was discussed in two subsequent cases and not followed. In *Thomas v Thomas*[5] Buys J analysed s 6 in some detail and concluded that the provision in s 6(3) regarding prima facie proof of the net value of the estate applies to the spouses and to third parties. He also concluded that s 6 does not contemplate agreed values, but provides for the commencement value that each spouse elects to put on his or her estate, and which will constitute prima facie proof thereof. As an aside, it seems to me, with respect, that Buys J erred in suggesting that the legislature expressly amended the common law by the provision in s 6(3). If the declared commencement values in the antenuptial contract were not binding and merely prima facie proof thereof, then there was no need to amend the common law. As I pointed out earlier, the reason why it is permissible to prove that the declared prima facie value is

[4] At 555D-I.
[5] *Thomas v Thomas* [1999] 3 All SA 192 (NC)

incorrect, is that the antenuptial contract allows this. There is no conflict with the common law.

[22] The second case was *TN v NN & others,*[6] in which Binns-Ward J agreed with Buys J[7] that when the parties to a marriage declare the values of their respective estates at the commencement of the union for the purposes of the accrual system they are not reaching agreement on such values, but merely fixing and recording a value that both of them accept will stand as prima facie proof thereof. He added[8] that the respective net values at the commencement and dissolution of the marriage are matters of objective fact, not matters to be determined by agreement. He said it is not open to the parties by means of a declaration to invent the objectively determinable facts by declaring or stating fictitious values. The way in which they are entitled by agreement to alter the ordinary operation of the accrual system is by excluding or including specified types of assets that ordinarily would be included or excluded in terms of the statute for the purpose of determining the respective accruals; not by misrepresenting or misstating the objectively determinable commencement values.

[23] What however seems clear is that the declared commencement value does not have to be the real value. If an incorrect commencement value is declared in the antenuptial contract, it provides prima facie proof thereof, but it will be accepted as the real value for purposes of the accrual if both spouses elect to let it stand. This is the position inter se, but will not prevent a third party in appropriate circumstances from challenging the declared value.

[24] I am bound by the decision in *Olivier*, unless I am satisfied that it is clearly wrong. For the reasons stated above I am of that view, and I respectfully decline to follow it.

[25] It follows in my view that the plaintiff was entitled to lead evidence in order to show that the prima facie commencement value of his estate in the antenuptial contract was incorrect.

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[6] *TN v NN & others* 2018 (4) SA 316 (WCC).
[7] *Thomas v Thomas* above.
[8] Para 15.

[26] It was not disputed that if regard is had to the actual commencement value of Mr ~~Evans~~E[....]' estate, which was not challenged, there was no accrual in his estate. In those circumstances Mrs ~~Evans~~E[....]' claim for a share of the accrual cannot succeed.

[27] This brings me to the claim for maintenance. The plaintiff made an open tender in court to pay a sum of R13 000 per month, which was not accepted. The defendant persisted in her claim for R20 000 per month, together with her medical expenses which are not covered by her medical aid.

[28] Mrs ~~Evans~~E[....] currently lives in accommodation known as Jan Richter Centre. She said this is intended for people who fit in somewhere between being homeless and being unable to afford something better. Her accommodation consists of one bedroom, communal bathrooms and a hall where occupants have their meals. When asked in cross-examination why she wanted R20 000 per month when her actual monthly expenses are less than that, she said she needed to get out of the 'slum' where she lives.

[29] Mr ~~Evans~~E[....] is 63 years old and lives in Underberg, in a large, comfortable house which is owned by his family trust. It was previously a lodge, and he renovated it to its current condition. He is a qualified engineer but no longer works. He says he is unable to work due to the medical condition to which I have referred. He claims that he cannot afford more than R13 000 per month.

[30] On his own evidence Mr ~~Evans~~E[....] has in the last few years visited the Caribbean, Wales and India. He acquired a BMW sports car in 2017, which he has since sold. He currently drives a 2012 model Mercedes Benz. As I have mentioned, he intentionally omitted to disclose an investment in Gibraltar. To this I should add that in the rule 43 application he said he funded his monthly shortfall from capital and a loan from the bank. In cross-examination he claimed the reference to capital was an error. The current net value of his estate is, on his disclosed figures, just over R3 million. Mrs ~~Evans~~E[....]' estate is worth less than R200 000.

[31] In determining what maintenance should be awarded to Mrs ~~Evans~~E[....] I do not think a strict mathematical calculation is appropriate. She lives in circumstances

which, compared to those of her husband, may be said to be an affront to her dignity. Her health has been seriously compromised and some of her medical expenses are not recoverable from her medical aid. The amount that I intend to award is intended to help her with her monthly expenses, including her medical expenses which are not covered by her medical aid, and hopefully assist her in finding more suitable accommodation. Her medical aid contributions are already included in her list of expenses, which is why I do not provide for them separately.

[32] It is not open to the plaintiff to protest that he cannot afford to pay the maintenance that I intend to award. Apart from his current income, he has a substantial estate. If he does not have the cash flow to pay the maintenance then he must get the trust to pay his loan account to him. He and his attorney are the only trustees of the trust and it is within his power to get access to his loan account.

[33] There are already contempt proceedings pending, arising out of a failure by Mr ~~Evans~~E[....] to pay the full amount of the pendente lite maintenance. His defence is set-off of what he claims Mr ~~Evans~~E[....] owed him. To avoid this kind of situation I intend to order that the maintenance is payable without set-off of any kind.

[34] As far as costs are concerned counsel for the plaintiff submitted that there should be no order for costs. The claim for forfeiture of the benefits of the marriage was in my view not only frivolous, but created the expectation with the defendant that there was some accrual which her husband wanted her to forfeit. As it turned out, there was none. She was successful in her claim for maintenance, which was the main focus of the trial. I intend to award her the costs of the action. The only costs that were reserved in the rule 43 application were those reserved by Potgieter AJ. I intend to order them to be costs in the cause. I should add that the parties were in agreement that the plaintiff had paid to the defendant the contribution of R30 000 towards her costs which he was ordered to do in the rule 43 application.

[35] The order that I make is as follows:

(a) There will be a decree of divorce.
(b) The counterclaim for a share of the accrual in the plaintiff's estate is dismissed.

(c) The plaintiff is ordered to pay to the defendant, without set-off, the sum of R20 000 per month by way of maintenance, with effect from 30 June 2019, on or before the last day of each month, together with all her medical, dental, ophthalmic, orthodontic, hospital, prescribed medicine and surgical expenses incurred, which are not covered by her medical aid. Such expenses are to be paid by him to the defendant within ten days of written proof thereof having been supplied to him.

(d) The costs reserved in the rule 43 application will be costs in the cause.

(e) The plaintiff is ordered to pay the costs of the action, including those in reconvention.

Ploos van Amstel J

Appearances:

For the Plaintiff	:	HA De Beer SC
Instructed by	:	Patrick Lander Attorneys
	:	C/o Tatham Wilkes Inc.
	:	Pietermaritzburg
For the Defendant	:	P C Blomkamp SC
Instructed by	:	WHA Compton Attorneys
	:	Pietermaritzburg
Date Judgment Reserved	:	28 May 2019
Date of Judgment	:	03 June 2019