IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A107/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

...19/08/20..... **.....**

S[....] A[....] V[....] Applicant

AND

H[....] J[....] V[....] Respondent

JUDGMENT

Kollapen, J

Introduction

[1] This is judgment in an appeal against the whole of the judgment and order of Petersen AJ of the 8th December 2017. The Court a quo granted leave to appeal to this Court.

[2] The sole issue for determination in this appeal is whether the Court a quo correctly applied the discretion vested in it when it made a redistribution order in terms of Section 7(3) of the Divorce Act No 70 of 1979 ("the Act") ordering that 50% of the Appellant's assets be transferred to the Respondent.

The evidence and the factual background

[3] The parties were married on the 21st May 1977 and executed an ante nuptial contract which excluded community of property and community of profit and loss. At the time of the marriage both parties worked and the Applicant continued working until 2009 when he was medically boarded after having been diagnosed with Bipolar and Anxiety Disorder. The Respondent who had a secretarial qualification worked for the first 9 years of the marriage but then stooped working following what the Court a quo found was a joint decision of the parties and thereafter became what is described as a home executive and never returned to gainful employment.

[4] The division of labour that applied was that the Applicant was the primary breadwinner providing the finances for the common home while the Respondent took care of the home, the Applicant and the children born of the marriage. Her evidence as that she continued to care for the Applicant and supported him emotionally, physically and otherwise after he was diagnosed with Bipolar Disorder. During this time the Respondent also utilised the sum of R40 000.00, which she inherited towards the household expenses.

[5] The relationship between the parties deteriorated and may have been in part attributable to the Applicant's mental health problems resulting in the parties separating in 2013. There was agreement that the marriage relationship between them had reached the state of irretrievable breakdown.

[6] Applicant did not testify in the Court a quo on account of his poor health and by agreement between the parties an affidavit deposed to by the Applicant was submitted into evidence. The main feature of that affidavit, which was not substantially in dispute was the exposition of the parties' respective assets.

The Respondent testified in her own case. The existence of a contribution by the endeavours of the Respondent to the estate of the Applicant was not in dispute. What was in dispute and what is at the heart of this appeal is the extent of such a contribution and whether it justified the order made by the Court a quo.

[7] The Court a quo accepted the Applicant's evidence that the cash value of his estate at the time was R 10 111 885.00 and that in addition he was the registered owner of the property which had served as the matrimonial home of the parties and which was occupied by the Respondent. The Applicant listed assets to the value of some R320 000.00 which he maintains the Respondent owned and in her evidence the Respondent accepted in large measure that she owned most of those assets – she disputed some of them and the value attached to others but in the end it appeared if one has regard to the value attached to those assets that they would have amounted to close to R 300 000. 00.

[8] It does not appear from the judgment of the Court a quo that these assets, admittedly of comparative little value when compared to the assets of the Applicant, was taken into account in the relief that was granted. This is one of the criticisms the Applicant levels against the judgment appealed against. The other and more substantial attack on the judgment is that the Court a quo overvalued the contribution made by the Respondent to the maintenance and increase of the Applicants estate.

The judgment of the Court a quo

[9] In coming to its conclusion the Court took into account the contribution made by the Respondent in raising the children born of the marriage from infancy to adulthood as well as her financial contribution derived from her inheritance. In addition and after concluding that the Applicant was vested with the sole financial means while the Respondent had no means of her own, made a value judgment and ordered that the Applicant transfer 50% of his assets to the Respondent and ordered the Applicant to pay the costs of the action.

Analysis

[10] Section 7 of the Act provides as inter alia as follows:-

"7(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 [on 1 November 1984], in terms of an ante nuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or

(b) 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 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 fist-mentioned party.

(4) An order under subsection (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 the services, or the saving of expenses which would otherwise have been incurred, or in any other manner.

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

(a) the existing means and obligations of the parties…,

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

(c) any order which the court grants under section 9 of the 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."

[11] In this appeal there is no dispute that regard being had to Section 7(4) of the Act it would have been both equitable and just for the Court a quo to have made an order in terms of Section 7(3) – it is the extent of the order that Section 7(5) contemplates that has triggered this appeal.

[12] In *Bezuidenhout v Bezuidenhout 2005(2) SA 187 (SCA*), the Court in dealing with the exercise with the discretion conferred upon the trial court said that even though it was not necessary to determine whether it was a discretion in the broad sense or the narrow sense, it found the argument that the Appeal Court had an equally unfettered discretion to make a distribution order that it deemed just and equitable and to substitute the result of the exercise for the order made by the trial court an attractive proposition. This was in contrast to the stance that the Appeal Court could only interfere where there was a misdirection on the part of the Court a quo. It does appear that the discretion conferred by Section 7 is one in the wide sense if regard is had to the range of factors that the Court may validly consider in its opinion. The result is that this Court would have the same unfettered discretion as the trial court.

[13] In the process of determining the starting point of the exercise in redistribution the Court also accepted the position taken in *Beaumont v Beaumont 1987(1) SA 967 (A)* that the starting point of the exercise was not an equal distribution but rather a clean slate. It quoted with approval the following dicta from Beaumont:-

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

[14] In dealing with what it described as the traditional role of housewife, mother and homemaker it cautioned that that role should not be undervalued because it was not measurable in terms of money. However the Court was critical of the Court a quo's stance in splitting the proceeds of the marriage on a 50/50 basis on account of the wife being a "dedicated housewife, mother and housemaker" and the view of the Court a quo that it would be unacceptable "to place greater value on the contribution of the breadwinner than that of the homemaker".

[15] Thus what emerges is that while the Court sought not to undervalue the role of the homemaker, it took the view that such a role could not be equated with that of the breadwinner. While this Court is bound by the dicta in Bezuidenhout it does appear that it may have the effect of endorsing a hierarchy in the role of breadwinner as opposed to homemaker in the maintenance and increase of the breadwinner's estate and that may well result in a measure of unfairness and may well undermine the determination of a just distribution.

[16] Certainly in the context of the facts of this matter, the Respondent had been gainfully employed for about 9 years and ceased working as a result of the joint decision taken by the Applicant and herself. Is the effect of that decision that she is automatically relegated to a secondary contributor even in the absence of a proper quantification of her own contributions. In addition, the estate of the Applicant grew as a result of good investments he was able to make over time from income he was able to earn without interruption because the Respondent was taking care of the household as well as his needs and those of the family. The role of the Respondent in supporting the Applicant after he was diagnosed with Bipolar disorder from 2009 until 2013 when they separated is again an invaluable one not capable of monetary quantification but must then in the scheme of things remain a secondary role.

[17] Under those circumstances the Court a quo did not make the distinction that it was required to make between the respective roles of the Applicant and the Respondent and erred in valuing their contributions equally. In addition its failure to take into account the assets of the Respondent in the distribution, even though their value is low in comparison with those of the Applicant,

would also constitute a misdirection on its part justifying the interference of this Court.

[18] To that extent it is clear however that even if those contributions are required to be placed at different points of the scale they should not in my view be separated by a large margin for the reasons I have given. In the exercise of the value judgment that is required I would firstly take into consideration the assets that the Respondent is possessed of to the value of R 300 000.00 the fact that some of the investments made by Appellant were sourced from the pay-out he received when he was medically boarded. In *Buttner v Buttner 2006(3) SA 23 (SCA)* it was emphasised that the Courts enjoys a wide discretion as to the form of the redistribution and in the exercise of that discretion I would order that the Applicant transfer 40% of his assets as determined by the Court a quo to the Respondent .

Costs

[19] I can find no reason to interfere with the exercise of the trial court's discretion in awarding costs in favour of the Respondent. The offer made by the Applicant in those proceedings was considerably lower than what that Court determined justifying the Respondent in proceeding to have the matter proceed to finality.

[20] In so far as the costs of appeal are concerned my view is that while the Applicant has achieved a measure of success it is hardly what I would describe as substantial. The question of costs always remains within the discretion of the Court which is a discretion that must be judicially exercised, and I would order that each party bear their won costs of the appeal.

I accordingly make the following order:-

a) The appeal is upheld and the order of the Court a quo is set aside and replaced with the following order :

1. A decree of divorce is granted.

2. 40% of the Plaintiff's assets are to be transferred to the Defendant.

3. The Plaintiff is ordered to pay the costs of the action.

b) The parties are to bear their own costs in respect of the appeal.

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NJ KOLLAPEN

JUDGE OF THE HIGH COURT, PRETORIA

I concur.

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C LAMOUNT

JUDGE OF THE HIGH COURT, PRETORIA

I concur.

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TAN MAKHUBELE

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Applicant:	Adv I Vermaak-Hay
	Adv S Cliff
Instructed by:	Werner Roos Immelman
Respondent:	Adv G Kyriazia
Instructed by:	JDB Incorporated
DATE OF HEARING:	**19 AUGUST 2020**
DATE OF JUDGMENT:	**19 AUGUST 2020**