OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE NORTH WEST HIGH COURT
MAHIKENG

DIV 179/2016

In the matter between:

S S **Applicant**

and

W S **Respondent**

CIVIL MATTER

DATE OF HEARING : 30 MARCH 2017
DATE OF JUDGMENT : 22 JUNE 2017
FOR THE APPLICANT : Mr WESSELS
FOR THE RESPONDENT : Adv ZWIEGELAAR

JUDGMENT

KGOELE J:

1. This is an opposed application for an order in terms whereof the respondent is directed to furnish full particulars of the value of his estate in terms of the provision of section 7 of the Matrimonial Property Act 88 of 1984 (**the Matrimonial Property Act)** within ten(10) days of the granting of such an order. In addition, the applicant prays for an order that in the event the respondent fails to do as ordered, she should be authorised to apply on the same papers, suitably amplified, for an order striking out the respondent's defence to the Divorce action with costs.

2. The facts that gave rise to this application are briefly the following: The applicant and the respondent are embroiled in a Divorce action which was instituted in 2016. They were married out of community of property on the 11th of March 2006 with accrual system in terms of the Matrimonial Property Act. The applicant is employed as a Beautician whilst the respondent is a General Manager at […].

3. The applicant being the wife instituted the Divorce action and claimed in her particulars of claim a decree of divorce, rehabilitative spousal maintenance, a claim to 50% of the respondent's pension fund in calculating the accrual, payment of half the difference between the applicant and the respondent's estate in terms of the accrual and also costs of suit.

4. The respondent filed a plea and a counterclaim to the particulars of claim of the applicant and only claimed a decree of divorce, a claim that the applicant should forfeit the matrimonial benefits arising from the marriage and any right to share in the accrual of the estate of the respondent in favour of him, together with costs of suits.

5. The applicant served and filed a notice in terms of section 7 of the Matrimonial Property Act on the 5th of October 2016. It is common cause that he respondent has failed to answer to this notice. Furthermore, correspondence were also addressed to the respondent in addition to this notice and with a warning that if no answer to this notice is received as requested, an application to compel shall be considered.

6. Despite these requests, the respondent refused to disclose and or discover his liabilities, hence this application.

7. The applicant in her application provides the following reasons for making this application:
   - To enable her attorney to advise her with regards to further the process of preparing for trial or possible settling of the matter;
   - To enable her attorney to advise her with regards to amending her pleadings in due time, especially where it is found that the respondent had deliberately dissipated his assets to manipulate accrual calculation;
   - To ensure that the respondent does not commit fraud or cancel any assets from the applicant ;
   - To advise the applicant on the possible implementation of section 8 of the Matrimonial Property Act.

8. The applicant also alleges that it has come to her attention that the respondent might be deliberately dissipating his assets by *inter alia* possibly moving them currently abroad where his brother resides and who recently after his resignation apparently visited the respondent.

9. Relying on the Supreme Court of Appeal case of **Brookstein V Brookstein (20808/14) (2016) ZASCA 40** delivered on **24**

March 2016, the respondent raised a preliminary point and argued that the application by the applicant is premature and has to be dismissed for this reason alone with costs. The following cases were also relied on:

Reeder v Sofline Limited and Another 2001(2) SA 844 (WV);

JW v CW 2012 (2) SA 521 (NCK).

10. The respondent's Counsel submitted that it is clear that section 3 of the Matrimonial Property Act provides that the right to share in the accrual system commence upon dissolution of the marriage by death or Divorce. Further that section 4(1)(a) thereof clearly states that the accrual is determine by the amount which the estates exceeds its commencement value on dissolution of the marriage.

11. It is the contention of the respondent's Counsel that section 3(1) and 4(1) (a) provides that the operative moment is the date of the dissolution of the marriage.

12. The respondent's Counsel lastly submitted that section 7 of the Matrimonial Property Act also provides that the particulars of the value of the estate of one spouse may only be requested when necessary, and further that, at this time and especially on the 5 of October 2016 when this application was served, same was not necessary.

13. Section 7 of the Matrimonial Property Act deals with the obligation to furnish particulars of the value of an estate and provides:

> "When it is necessary to determine the accrual of the estate of a spouse or a deceased spouse, that spouse or the executor of the estate of the deceased spouse, as the case may be, shall within a reasonable time of the request of the other spouse or the executor

of the estate of the other spouse as the case may be, furnish full particulars of the value of that estate" [**my Emphasis added**.]

14. I fully agree with the respondent's Counsel that this issue that has given rise to various dissenting decision in our Courts was finally laid to rest in the case of **Brookstein** by the Supreme Court of Appeal in 2016. The following remarks from this case sums it all.

"[18] However. In *JA v DA*[7] Sutherland J correctly pointed out at para 11 that the views of Brassey AJ were obiter and disagreed with the view that the date of the close of pleadings is the date upon which to determine the content and value of the estates. In his view, that date was irrelevant for this exercise and the date of dissolution was the only relevant date upon which to calculate the respective estates. Because the event of litis contestation was purely procedural, it had no bearing on the definition of or identification of any alleged right which was the subject of litigation, nor had it any bearing on the determination when, by operating of law, or upon any given facts any right comes into being. Sutherland J then stated the following at para 17:

"When, as in this case a claim is based on the existence of a right and the claim is for a performance measured by value it is not possible to calculate that value at a moment prior to the coming into existence of the right".

"[19] The view of Sutherland J that the time when the right comes into existence is determinative of the calculation of the value of that right is undoubtedly jurisprudentially correct. I do not agree with the view expressed in *Le Roux v Le Roux*[8] which was followed in *KS v MS*[9] that this conclusion will result in a piecemeal adjudication of issues resulting in further litigation between the parties. This view was based upon the proposition that a litigant would have to engage in two distinct actions. The first would be for a divorce and the second for an order in terms of s3 of the MPA. I agree, however, with the view of Sutherland J that it would not be inappropriate to sue for both a divorce and an order pursuant to s 3 of the MPA in a single action,

in which the accrual orders is made dependent upon the grant of a divorce.

'[20] The other problems averted to by Brassey AJ and Sutherland J which may result from this determination of the date upon which the accrual must be calculated, cannot obscure what is the clear meaning of the act. As stated in **Natal Joint Municipal Pension Fund v Endumeni Municipality**:[10]

"Judges must be alert to and guard against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regards to a statute or statutory instrument is to cross the divide between interpretation and legislature..."

"Consequently, MB v NB and DB as well as KS v MS which held that the date for determination of accrual is at *litis contestation* rather than at the dissolution for marriage were wrongly decided."

15. It must be pointed out that at the time the applicant drafted the plea in the Divorce action the pleadings in this matter were not yet closed and the matter not yet set down for hearing. What is of significance is that the applicability and or the forfeiture of the accrual system had been placed in dispute in the pleadings of the Divorce action. I fully agree with the respondent's Counsel that the particulars of the value of the estate of one of the spouses had not yet become necessary at the time the application was made including at the present moment. The submission that there are factors which should persuade the Court to grant the application at this moment does not assist the applicant as the reasons as advance in the previous paragraph 7 of this judgment to substantiate this argument do not have merit .Who knows, it might well be that at the end of the Divorce action, depending on its outcome, it might not be necessary that a disclosure be made. Section 9 of the Matrimonial Property

Act deals with forfeiture of the right to accrual, either wholly or in part.

16. Section 8(1) of the Matrimonial Property Act grants the Court the power to on the application of a spouse whose marriage is subject to the accrual system and who satisfies it that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will be seriously prejudiced by the conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provision of Chapter 11 of Matrimonial Property Act or on such other basis as the Court may deem just.

17. The provision of section 3 read with 8(1) are clear and unambiguous. The date of determination of the accrual is brought forward if the circumstances as provided in section 8(1) present themselves, instead of at the dissolution of a marriage. Furthermore, in terms of section 4 the net value of the accrual of the estate of spouses is determined at the dissolution of the marriage. The contention by the applicant that the respondent might dissipate his money abroad is not only speculation but is with no supporting factual averments. Not only has the applicant not made out a case in this regard but there was no application made by her in terms of section 8(1) in her founding affidavit for the immediate division of the accrual as contemplated therein.

18. The analysis of this preliminary point alone is in my view and as correctly submitted by the respondent's Counsel is capable of dismissing the whole of the applicant's application. Consequently the following order is made:

18.1 The applicant's application is dismissed with cost on an ordinary scale for the reason that it is premature.

A.M.KGOELE

JUDGE OF THE HIGH COURT

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