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

REPORTABLE

CASE NO: 21175/2013

In the matter between:

A B Applicant

and

J B Respondent

Coram: P.A.L.Gamble J
Date of Hearing: 27 August 2018
Date of Judgment: 10 October 2018

JUDGMENT DELIVERED ON 10 OCTOBER 2018

GAMBLE, J:

INTRODUCTION

[1] The parties to this litigation, to whom I shall conveniently refer as "*the husband"* and "*the wife*", were married to each other on 27 February 1993 in terms of an antenuptial contract which made provision for the application of the accrual system. When their marriage broke down irretrievably, they separated in 2012 and on 23 December 2013 the wife issued summons against the husband for a decree of divorce and ancillary relief. At that stage the parties' children were still minors and provision was made in the particulars of claim for care and contact arrangements in respect of the children, as well as maintenance for them. In the interim the children have all attained majority and they no longer feature in this litigation.

[2] The wife's claims included personal maintenance, the provision of a motor vehicle and implementation of the terms of the antenuptial contract relating to her portion of the accrual as contemplated in Chapter 1 of the Matrimonial Property Act, 88 of 1984 ("*the MPA"*).

[3] The husband filed a plea and counterclaim on 2 April 2014 and, in the main, disputed the substance of the wife's allegations. In relation to her accrual claim, however, the husband conceded that his estate had shown a greater accrual than his wife's and he accepted that he was liable to pay to her one half of the difference between the net value of his estate and that of the wife. Given that the wife's estate is evidently of negligible value, the husband's concession essentially amounts to a division of his net estate in equal shares.

THE FIRST APPLICATION IN TERMS OF RULE 33(4)

[4] The husband is a farmer by profession and owns large tracts of farmland in the Overberg which are said to be of substantial value. In order that the parties could properly apply their minds to resolution of the accrual dispute, it was necessary for agreement to be reached on the value of the husband's estate. In reality, this meant a valuation of his farming business and, in particular, the immovable properties on which that business is conducted. Conscious of the fact that in terms of s3(1) and (2) of the MPA an order for division of the accrual can only be made upon the granting of decree of divorce[1], the parties sought to establish a mechanism to achieve this. In the result, it was agreed that, through the application of Rule 33(4), this court would be asked to establish those values at the outset.

[5] And so, in mid-2016 Fortuin J was requested by the parties to determine two discrete issues. Firstly, Her Ladyship was requested to determine whether the husband's accrual was in any manner reduced by virtue of donations allegedly made to him by his late father. Secondly, the court was asked to determine the fair market value of the two farms on which the husband conducts his farming operations – "Luipaardskloof" and "De Turon" in the Swellendam district. To this end the court heard oral evidence from experts as to the value of those farms.

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[1] "*3(1) At the dissolution of a marriage subject to the accrual system, by divorce or buy the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.*

(2) Subject to the provisions of section 8(1), a claim in terms of subsection (1) ***arises at the dissolution of the marriage*** *and the right of the spouse to share in terms of this Act in the accrual of the estate of the other spouse's during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse."* (Emphasis added)

[6] On 21 November 2016 Fortuin J handed down judgment and found that no donation as alleged had been established by the husband. Regarding the value of farms the court found that Luiperdskloof was worth R36m and De Turon R6,3m. The husband was evidently dissatisfied with the court's findings and made application for leave to appeal. When this was refused by Fortuin J the husband did not pursue the matter further by way of an application for leave to the Supreme Court of Appeal.

THE SECOND APPLICATION IN TERMS OF RULE 33(4)

[7] During 2017 the litigation seems to have meandered aimlessly as offers and counter-offers of settlement were reciprocated. Eventually on 8 May 2018 the husband approached this court for further relief in terms of Rule 33(4) seeking an order, *inter alia* -

> "*1. Directing that the issue with regards to the grant of a decree of divorce be decided separately in terms of R33(4) from the remaining issues in the matter which can stand over until the aforementioned issue has been decided….*
>
> *3. The costs of this application to be costs in the cause of the main action between the parties, unless the Respondent opposes this application, in which event, the Applicant prays that the Respondent be ordered to pay the costs thereof."*

The thinking behind that application was to procure only an order for divorce so that the date for calculation of the accrual could be fixed in time, and thereafter the

proprietary consequences and a potential maintenance order in favour of the wife could be considered in the context of such date.

[8] The wife opposed the application contending that no useful purpose would be served by a further separation of issues at that time. It appears that the wife held the view that there had been significant appreciation in the value of the farms in the interim, a view seemingly shared by the husband, who, however, claimed that the valuation of the farms was *res judicata.* The wife accordingly applied by way of a counter application, on 24 May 2018, for the dismissal of the husband's Rule 33(4) application while requesting a declaratory order that the determination by Fortuin J of the values of the husband's farms on 21 November 2016 was not *res judicata.* The wife further asked that "*the percentage to be applied regarding appreciation [in the values of the farms] is to be agreed between the parties. If no agreement is reached, evidence is to be adduced in this regard in the divorce trial*." She also sought permission for experts of her choice to be given access to the farms for purposes of reconsidering the valuations thereof and other related relief.

[9] This court heard both applications on 27 August 2018 and reserved judgment. The parties were invited to approach this court in the interim, while judgment was being prepared, for a decree of divorce to enable the date to be fixed for the purposes of the application of s3(2) of the MPA. Both parties were in agreement with this proposal. Given that the question regarding the interests of the parties' children was no longer a live issue in light of their majority, s6 of the Divorce

Act, 70 of 1979 ("*the Act*") did not apply and it was open to the court to grant a decree of divorce at that stage.[2]

[10] In the result, the wife attended court on 7 September 2018 and testified briefly whereafter a decree of divorce was granted by this court. All outstanding issues were held in abeyance and it was expressly stipulated in the presence of the husband's legal representatives (who attended court *ex abundante cautela*) that the wife would be entitled to adduce such further evidence as she considered admissible and relevant for purposes of determining the outstanding issues in this litigation. If relevant and necessary, this included detailed evidence regarding the breakdown of the marriage insofar as that is a factor capable of consideration by the court in determination of an order for maintenance in terms of s7(2) of the Act.

THE RES JUDICATA ARGUMENT

[11] Mr.J.W.Olivier SC, who represented the husband, submitted in argument in the response to the wife's counter application that the decision of Fortuin J had finally fixed the value of the husband's farms for the purposes of determining that component of the share in the accrual to which the wife was entitled. Further, it was said that, since these properties represented by far the bulk of the husband's estate, the issue of their fair market value was no longer open for debate or determination by the court.

[12] Mr.H.M.Raubenheimer SC, for the wife, stressed the importance of the date of divorce as being the date upon which the accrual calculation was required to

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[2] Schwartz v Schwartz 1984 (4) SA 467 (A); Levy v Levy 1991 (3) SA 614 (A).

be made. In the event that the value of an asset which had been established some time prior to that date had increased significantly, said counsel, it would not be just and equitable to grant an order because this would be to the prejudice and detriment of the wife. For that reason it was said that the order of Fortuin J had done no more

than to fix the value of the farms as at that date[3]. However, it was argued, there was nothing to preclude the wife from seeking to allege (and prove) a higher value as at the actual date of dissolution of the marriage.

[13] It should be noted that the Rule 33(4) application brought by the husband was intended to achieve finality in only one aspect (albeit a very important one) of the matrimonial proceedings: the pronouncement of a decree of divorce. The motivation for that application, as I have said, was to fix a date for the calculation of the accrual. The purpose behind the application was based on the well-established principle in our law that an order for separation of issues must be "*aimed at facilitating the convenient and expeditious disposal of litigation",* while always bearing in mind that "*even where the issues are discrete, the expeditious disposal of litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might really be dispositive of the matter."*[4]

[14] During argument, Mr. Raubenheimer SC readily accepted that a decree of divorce might be issued. After all, the parties have been separated since 2012 and they have apparently each gone their separate ways and entered into new

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[3] "*Na aanhoor van die getuienis is ek oortuig dat die waarde van die plase* ***tans*** *onderskeidelik R36 miljoen en R6,3 miljoen is.*" (Emphasis added)

[4] Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) at [3]

relationships. And with the children no longer a factor for compulsory consideration by the divorce court, all that remained really was the resolution of the "*commercial*" side of the parties' matrimonial relationship.

[15] It was clear too that consideration of the wife's entitlement to maintenance under s7(2) of the Act would be influenced by the extent of her share of the accrual: it is possible that the investment of a sizeable capital sum flowing from the accrual determination might take care of her maintenance needs, if not completely, then certainly in part. But the accrual could only be calculated once the divorce order had been granted and so, for the avoidance of an interminable game of snakes and ladders, it made eminent sense to fix that date sooner rather than later.

[16] The effect of Mr. Raubenheimer SC's concession was that the husband's application for a separation of issues became moot, save for the question of costs. However, correspondence between the parties' lawyers revealed that there was a dispute as to the effect of Fortuin J's order and that this dispute could usefully be resolved by the court considering a declaratory order in the terms sought by the wife in her counter application. In my view the dispute raised in the wife's application is of such a nature that it may be usefully resolved in accordance with the established principles applicable to declaratory relief.[5]

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[5] African Bank Ltd v Weiner and Others [2003[4 All SA 50 (C) at [33]

[17] A plea of *res judicata* will ordinarily be raised by a party in defence to an unsustainable claim by the other side and is often taken by way of a special plea. In *Bertram* [6] the court explained that –

> "*The meaning of the rule is that the authority of res judicata induces a presumption that the judgment upon any claim submitted to a competent court is correct, and this presumption being juris et de jure, excluded every proof to the contrary. The presumption is founded upon public policy which requires that litigation should not be endless and upon the requirements of good faith which, as was said by Gaius (Dig.50.17.57), does not permit of the same thing being demanded more than once."*

[18] In *Bafokeng Tribe*[7], Friedman JP, relying on earlier appellate authority[8] gave the following useful summary of the approach to be applied.

> "*From the foregoing analysis I find that the essentials of the exceptio res judicata are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (ex petendi causa),(3) with respect to the same subject-matter, or thing (de eadem re). Requirements (2) and (3) are not immutable requirements of res judicata. The subject-matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same. However, where there is a likelihood of a litigant being denied access to*

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[6] Bertram v Wood 10 SC 177 at 180

[7] Bafokeng Tribe v Impala Platinum Ltd 1999 (3) SA 517 (B)

[8] Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk 1995 (1) SA 653 (SCA)

the courts in a second action, and to prevent injustice, it is necessary that the said essentials of the threefold test be applied. Conversely, in order to ensure overall fairness, (2) and (3) above may be relaxed. A court must have regard to the object of the exceptio res judicata that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions. This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties. The doctrine of issue estoppel has the following requirements: (a) where a court in a final judgment on a cause has determined an issue involved in the cause of action in a certain way, (b) if the same issue is again involved, and the right to reclaim depends on that issue, the determination in (a) may be advanced as an estoppel in a later action between the same parties, even if the later action is founded on a dissimilar cause of action. Issue estoppel is a rule of res judicata that is distinguished from the Roman-Dutch law exception in that in issue estoppel the requirement that the same subject-matter or thing must be claimed in the subsequent action is not required."

[19] In *National Sorghum*[9], Olivier JA articulated the position as follows.

"***The exceptio rei judicatae vel litis finitae***

[2] The requirements for a successful reliance on the exception were, and still are: idem actor, idem reus, eadem res and *eadem causa petendi. This*

[9] National Sorghum Breweries (Pty) Limited t/a Vivo African Breweries v International Liquor Distributors (Pty) Limited 2001 (2) SA 232 (SCA)

means that the exceptio can be raised by a defendant in a later suit against a plaintiff who is 'demanding the same thing on the same ground'… or which comes to the same thing, 'on the same cause for the same relief'…or which also comes to the same thing, whether the 'same issue' had been adjudicated upon." (Authorities omitted)

[20] In this matter the wife's cause of action is a composite one. She has sought a decree of divorce in terms of s4 of the Act. She has also asked to be maintained by the husband in terms of s7(2) of the Act and has, further, asked for the implementation of the provisions of Chapter 1 of MPA and to be paid what is due to her thereunder. The wife has been granted a decree of divorce and it is common cause that she is entitled to payment by the husband of a capital amount yet to be determined by the court. For the rest the wife's claims remain in dispute and she is obliged to prosecute them in due course.

[21] On the basis of the pleadings as they currently stand, I conclude that when the trial in this matter is resumed the court will be asked by the wife to determine at least the following issues.

21.1 What was the net value of the husband's estate on 7 September 2018?

21.2 What was the net value of the wife's estate on 7 September 2018?

21.3 What is the difference between the aforesaid net values?

21.4 Assuming that the husband's estate as at 7 September 2018 was larger than the wife's, what is the amount that the wife is entitled to by way of her half share of such difference?

21.5 How should the husband be ordered to meet his obligation to pay such half share to the wife?

21.6 What are the wife's current reasonable maintenance requirements?

21.7 What income is available to the wife to meet such maintenance requirements?

21.8 Is the wife entitled, in the circumstances, to be further[10] maintained by the husband?

21.9 If so, in what amount and for how long?

21.10 What costs order (if any) should be made in the divorce action?

[22] It is correct, as Mr. Olivier SC submitted, that the order of Fortuin J was final and cannot be set aside by the court hearing the divorce trial. And, it is similarly correct that the order of Fortuin J was appealable in accordance with the established principles.[11] But the purpose of the hearing before Her Ladyship, aside from deciding

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[10] It is common cause that the husband has been complying with an interim maintenance order issued in terms of Rule 43 and will continue to do so until this matter is finally resolved.

[11] David Hersch Organisation (Pty) Ltd and Another v ABSA Insurance Brokers (Pty) Ltd 1998 (4) SA 783 (T) at 787D.

the donation issue was, as the court set out in the judgment, to establish the value of the respective farms for purposes of calculating the wife's accrual.[12]

[23] It is common cause that the accrual falls to be calculated as at the date of divorce, 7 September 2018: that is the date which is relevant for the valuation of the parties' respective assets and not 21 November 2016. Unless the value of the farms has remained unchanged since 21 November 2016, it would serve no purpose to have regard to the value of the husband's other assets and liabilities (such as farming implements, livestock, debtors, creditors, bank balances and shareholdings) in September 2018 together with an outdated value of the principal assets of 2 years ago. One would simply not be comparing like with like and not doing justice to the parties or applying the statute as it is intended to be. In saying so, I do not exclude the possibility that the farms may have dropped in value and that the wife's contentions of an increase may redound to her detriment. If that is the case, then so be it – she must take the rough with the smooth.

[24] The order of Fortuin J has not directly addressed any of the issues set out in [21] above. At best for the husband it may be said that that Her Ladyship's order touches upon the issue raised in [21.1], but then only to the extent that a determination has been made of the value of certain defined assets in the husband's estate as at 21 November 2016. Accordingly, when the matter continues the wife will not be claiming "*the same thing on the same ground"* nor will she be asking for the "*same issue*" to be adjudicated upon. The litigation between these parties is far from finished and in the circumstances I conclude that the husband is not permitted to rely

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[12] "*19.2 Die waarde van die onderskeie eiendomme ten einde die aanwas te bepaal."*

on the *exceptio rei judicatae vel litis finitae* and that the wife is entitled to the relief sought in her counter application.

[25] I should point out that the question of issue estoppel referred to by Friedman JP in ***Bafokeng***, was not raised in argument by either counsel and it would not be correct in the circumstances to determine the case on that basis. That having been said, it does not appear to me that the result would be any different if that defence had been raised,

COSTS

[26] The result of this round of litigation is anything but satisfactory for the parties. They might have thought that their divorce trial would have been resolved within the 5 years that have elapsed since the initiation thereof. Had they acted promptly after the order of Fortuin J was handed down they would have most likely long since been divorced with all the necessary ancillary relief granted. Why this did not happen is not something which this court can determine on the affidavits and it is preferable that any such determination stands over for the trial court. That court can assess why it took the parties so long to procure a final order of divorce and it is that court, too, which will be best suited to establish whether the wife's counter application was indeed based on sound facts or just optimistic speculation. In the result the costs associated with both the husband's application under Rule 33(4) and the wife's counter application will stand over for later determination.

FURTHER RELIEF SOUGHT IN THE COUNTER APPLICATION.

[27] In addition to asking for a declaratory order, in the counter application the wife asked for access to be afforded to her experts to the farms for purposes of further valuations. I did not understand Mr. Olivier SC to contend that this should not take place in the event that the *res judicata* point failed. The counter application also asked for an anti-dissipatory interdict to issue against the husband in light of allegations that he was considering selling up and emigrating to Australia. Such an application fortuitously served before this court in the Third Division on 31 May 2018 when an agreed order was taken incorporating the husband's undertaking, pending the hearing of his Rule 33(4) application on 27 August 2018, to give the wife notice of the receipt by him of any offers to purchase either of the farms. Once again I did not understand counsel to intend to limit that undertaking to the hearing on that date and, given that there is to be further litigation in this matter, it makes sense for the undertaking to be further binding on the husband in terms of a court order.

[28] Finally, it is most desirable that the outstanding issues between these parties be resolved as speedily as possible. In the circumstances the Registrar will be directed to afford the parties priority on the Trial Roll in accordance with the prevailing protocols in this Division. To the extent that there may be the necessity for further proceedings in terms of Rule 37(8), the parties are at liberty to arrange with this Court's registrar for such conferences to be held in chambers on dates suitable to the parties and the court.

IN THE RESULT THE FOLLOWING ORDER IS MADE:

A. It is declared that any proven appreciation in the values of the farms "Luipaardskloof" and "De Turon" in the district of

Swellendam (hereinafter referred to as "*the farms*") between 21 November 2016 and 7 September 2018 is not *res judicata;*

B. The percentage to be applied regarding any such proven appreciation is to be agreed upon between the parties, failing which evidence is to be adduced in this regard at the continuation of the divorce trial between them;

C. The applicant (the defendant in the main action) is ordered to grant any experts acting on behalf of the respondent (the plaintiff in the main action) reasonable access to the farms to establish the appreciation, if any, in the value of the farms and the percentage applicable to such increase to enable the court to calculate the accrual due in terms of Chapter 1 of the Matrimonial Property Act, 88 of 1984, as at 7 September 2018.

D. The applicant's undertaking furnished to the respondent in May 2018 to forward any offers to purchase the farms to her attorneys, at maritza@mblh.co.za , at least five days prior to acceptance thereof by him, is made an order of court until the final determination of the trial in this matter.

E. No order is made on the applicant's application for an order in terms of Rule 33(4) dated 7 May 2018, save that the costs thereof are reserved for determination by the trial court.

F. The costs of the respondent's counter application dated 24 May 2018 are reserved for determination by the trial court.

G. The Registrar of this Court is directed to afford the parties priority in relation to the set down of the further proceedings in this matter in accordance with the current protocols in operation in this Division.

H. The parties are authorised to request the Registrar to enroll any pre-trial procedures in terms of Rule 37(8) before Mr. Justice Gamble, such proceedings to be dealt with by the Judge in chambers in consultation with the parties' legal representatives.

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GAMBLE, J