RP v PP

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

MOODLEY J

2013 MAY 13–17; 2014 MAY 19–21

2016 FEBRUARY 5

CASE NO 4446/2010

Moodley J:

[1] The parties to this divorce action were married to each other on 1 July 1972. Prior to the marriage they entered into an antenuptial contract in terms of which community of property, community of profit and loss and marital power were excluded from their marriage. The antenuptial contract was duly registered on 30 June 1972. The three children born of the marriage have attained majority.

[2] The plaintiff instituted the action for divorce on 17 June 2010 on the grounds that the marriage between the parties had broken down irretrievably because of the defendant's extramarital relationships, and the parties had been living apart since November 2009. She claimed a decree of divorce, an order for maintenance in the sum of R40 000 per month, a redistribution order in terms of s 7(3) of the Divorce Act 70 of 1979 (the Divorce Act) to the effect that 50 % of the defendant's assets be transferred to her, and costs. Her claim for redistribution was premised on the grounds that she had contributed directly and indirectly to the maintenance and increase of the defendant's estate in accordance with s 7(4).

[3] In his plea and counterclaim the defendant did not resist the claim for a decree of divorce. He admitted that the marriage had irretrievably broken down, although he disputed the reason for the breakdown. He also admitted that the plaintiff required maintenance and tendered, as reasonable, maintenance in the sum of R15 000 per month until her death or remarriage. His

counterclaims in the alternative against the plaintiff related to an immovable property registered in her name, referred to as 'Farm X', and a reciprocal claim in terms of s 7(3) of the Divorce Act for a redistribution order directing the plaintiff to transfer Farm X, or such of her assets as the court deemed just, to him. During the course of the trial the defendant abandoned his alternative counterclaims in respect of Farm X and acknowledged that the ownership of the farm vested in the plaintiff. He persisted only with the reciprocal claim for redistribution in terms of s 7(3).

[4] Both parties made 'with prejudice' tenders during the hearing of this matter in 2013. When the trial recommenced in May 2014 the plaintiff withdrew her tender and the defendant filed a revised 'with prejudice' tender dated 9 May 2014,[1] which the plaintiff did not accept.

[5] The trial, which was set down for hearing for a period of five days, commenced on 13 May 2013 and was adjourned on 17 May 2013. It resumed on 19 May 2014 and concluded on 21 May 2014.

[6] It was common cause at that date that:

[6.1] The marriage relationship between the parties had irretrievably broken down and both sought a decree of divorce.

[6.2] The plaintiff is entitled to open-ended maintenance. In accordance with the order in terms of rule 43 issued on 24 August 2010, the defendant had paid her maintenance in the sum of R18 000 per month; but he increased the payment to R22 000 per month from June 2014.

[6.3] At the request of the plaintiff the defendant had purchased a sectional title unit ('Chaseford') for her, which is registered in the plaintiff's name and in which she currently resides. The defendant is servicing the mortgage bond over the property and has undertaken to settle the bond liability in full.

[6.4] The defendant was residing on Farm X with his partner and son and is servicing the bond over the property.

[6.5] The defendant was maintaining payments of the instalments and insurance premiums due on the motor vehicle used by the plaintiff and contributions to her medical aid.

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[1] Exhibit J.

[6.6] The defendant had paid R20 000 as a contribution to the plaintiff's costs and a further R100 000, on the grounds that this sum would be taken into consideration when the final order is made.

[6.7] There was no agreement, written or otherwise, between the parties regarding the division of their assets.

[7] At the end of the trial the plaintiff advised through her counsel, Advocate *Bailey SC*, that she accepted the defendant's tender only in respect of maintenance, the conditions pertaining to payment of the bond over the property she occupies, the motor vehicle in her possession and her retention on the defendant's medical aid scheme.

[8] I consequently ordered a decree of divorce on 21 May 2014 but directed that the order made pendente lite in terms of rule 43 of the Uniform Rules on 24 August 2010 would remain effective until the judgment is finalised, as a redistribution order in terms of s 7(3) of the Act and a maintenance order in terms of ss (2) are interrelated,[2] and I deemed it prudent to make an order for maintenance after an overall view of all the factors relevant to both subsections.

[9] The issues remaining for determination are:

1. The respective redistribution claims in terms of s 7(3) of the parties
2. The plaintiff's maintenance claim in terms of s 7(2).
3. The reserved costs of the rule 43 application and the divorce action.

[10] The salient factual background is set out in the summary of the defendant's evidence below.

Evidence presented during the trial

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[2] *Katz v Katz* 1989 (3) SA 1 (A) per Milne JA at 10I**:**

> **'**The two subsections [ie a redistribution order in terms of ss(3) and a maintenance order in terms of ss (2)] are, however, interrelated, because one of the matters required to be taken into account when considering the grant of a maintenance order is "an order in terms of ss (3)".'

[11] The plaintiff did not testify but called one expert witness, Mr Vincent Varoy, a chartered accountant and registered auditor, to testify on the value of the estates of the parties and, in particular, the values assigned to assets and liabilities in the defendant's estate, which were disputed by the defendant.

[12] The defendant testified and called his accountant, Dr Kevin Mitchell, to testify on the disputes between the parties in respect of the valuation of the defendant's estate.

The evidence of the expert witnesses

[13] The two points of contention between the experts were: the relationship between the liability on the overdrawn capital account in the partnership of 'XXXX t/a Farm X' and the loan account in the books of the defendant's incorporated company, and the values of the retirement annuities of the defendant. Both witnesses testified and were cross-examined at length. However, when the trial resumed on 19 May 2014, after a further rule 37 conference, the parties had resolved the contentious issues and an updated rule 37 bundle containing agreed values of the financial assets was admitted as 'Exhibit G'. I will return to those values in due course.

The evidence of the defendant

[14] The following is a summary of the defendant's testimony.

[14.1] The defendant, whose highest qualification is a doctorate from the University of Natal conferred in 1976, commenced his professional career as an academic and lectured for 17 years. In 1978 he started a neuropsychology practice while at the university and also worked at the physiology clinic treating patients with trauma of the nervous system. The defendant's professional career spanned 40 years, of which he has been in private practice for 27 years.

[14.2] He met the plaintiff in 1972, when he was 25 years old and she was 19 years old and a secretary in Johannesburg. She relocated to Pietermaritzburg at the defendant's request and worked in an art gallery and then a legal practice.

[14.3] The parties lived in a flat near the university until the defendant purchased a house with the subsidy he received from the university. After 3–4 years he obtained a further bond and purchased a farm at Eston, on which he started a commercial piggery. The defendant sold his flat, and the proceeds of that sale were invested to improve the farm. The defendant also did the major work in building and

establishing the piggery and was responsible for the entire operation and the financial records. He attended to the piggery morning and evening and worked at the university during the day. He also serviced the bond on the farm. The plaintiff was pregnant with their first child at the time and worked until about a month before the child was born. Thereafter by agreement she assisted in the piggery and did not return to work elsewhere. Her contribution was limited to minor responsibilities and she supervised the labour in his absence.

[14.4] However, the farm was not very profitable or viable, the plaintiff felt isolated and was unhappy there and the defendant was under increased pressure of work at the university. The defendant sold the farm and purchased another house near the university with the proceeds of that sale and the subsidy from the university, in which they lived with their children for about 10–12 years. During this time the defendant conducted his consulting practice from his office at the university and then at a medical centre, where his practice is still situated. The plaintiff was the primary caregiver for the children, and the defendant played a supportive role in bringing up the children.

[14.5] About three years after the birth of their second child, the plaintiff began assisting twice a week with secretarial work in the defendant's practice although he employed a full-time secretary. She also assisted the defendant for about two hours a day when he worked at the clinic. She was eventually 'paid' a salary by the practice as a book entry for tax benefits, but in the interim she had unrestricted access to the defendant's bank accounts, to which she was a signatory, and the funds in the accounts.

[14.6] In 1987 the defendant resigned from his position at the university and devoted himself to his professional practice as a sole practitioner. The plaintiff managed the administration of his practice with the help of an assistant. Her salary was formalised at this time and fixed, irrespective of the hours she worked, at a substantially higher rate than that of the fulltime employee. She also assisted the defendant briefly with the editing of his forensic reports. She continued in this capacity until she started her own business. An accountant was then employed to administer the practice and the defendant edited his reports himself.

[14.7] The plaintiff continued to draw a salary from the practice while running her clothing boutique. The funding to start up the boutique came from the defendant's business, although the defendant was not sure whether she may have also taken a

small bank loan. After the first two years the business ran at a loss, but the defendant continued to fund the business from his own professional income as the plaintiff accessed funds in the sum of more than R2,2 million from his accounts to keep her business afloat as she did not want her business to fail.

[14.8] As result of the manner in which the plaintiff administered and withdrew funds freely from the defendant's accounts on occasion the defendant found himself under financial constraints. One such occasion occurred when there were insufficient funds to settle the defendant's tax liability; the plaintiff decided that they should sell paintings they had received as gifts from her family to pay off the debt.

[14.9] Around 1987/1988 when the defendant went into private practice the parties decided to develop and move to a property in Howick given to the plaintiff by her mother. The property was undeveloped and valued at R45 000 when transferred to the plaintiff. The defendant sold his property in 1987 and utilised the proceeds towards the home built for their family on the Howick property. Further funds for improvements on the property were accessed through a mortgage bond in the plaintiff's name because the property was registered in her name. But the defendant provided the suretyship for her liability under the bond and serviced the bond.

[14.10] However, the property had some drawbacks. The defendant had by then also acquired horses and joined a riding club. He decided to breed sports horses to give rein to his passion for horses. He then heard about the property known as Farm X which would suit his needs. The property was purchased in the name of the plaintiff on the advice of the parties' accountant at the end of 2002 at a price of R300 000.

[14.11] The plaintiff sold the Howick property for R1 075 000 in July 2004. The proceeds of the sale were R978 221, R700 000 of which was deposited into the bond account in the name of Farm X. The parties together consulted with the architect on the design of the house built on the property. The defendant attended to obtaining water supply on the property and the re-erection of fences. The plaintiff assisted with the installation of electricity on the property. The funds for the improvements and construction of the house were obtained from the bond which the defendant serviced while the plaintiff attended to the disbursements from the bond account.

[14.12] To fund the building of the stables, which cost approximately R110 000, the defendant sold antiques which he inherited from his mother and also paid the

shortfall when the sale did not realise sufficient funds. He also personally assisted in the completion of the stables.

[14.13] By this stage the defendant had decided to breed thoroughbred racehorses. The plaintiff's contribution to this operation was some administration, and the parties together participated in the social events associated with racing horses. The defendant alone was involved in the breeding, handling and training of the horses.

[14.14] The expenditure on Farm X included the purchase of equipment and a tractor, but the defendant was uncertain of the source of the funds, stating only that the payments were in cash. Another major expense on Farm X was the conversion of a portion of the house into bed and breakfast units and the construction of additional cottages for a similar use. Although the defendant was involved in this project, once the construction was completed the plaintiff was solely responsible for the bed and breakfast operation, which terminated in 2009.

[14.15] Neither the horse breeding nor the bed and breakfast operation were highly profitable, but offered tax benefits.

[14.16] The defendant confirmed the testimony of Mr Varoy and Dr Mitchell that the activities on the farm were conducted as a partnership venture, in which the defendant had a 90 % interest and the plaintiff a 10 % interest, as reflected in the financial statements.

[14.17] The defendant admitted that he had an extramarital relationship during the period 1996–2000. The relationship lasted four years until the woman's husband found out and informed the plaintiff. The plaintiff was extremely upset and angry. The defendant was remorseful and guilt-ridden and remained committed to the plaintiff and their marriage and did not contemplate divorce. Under cross-examination he added that, had he been completely happy in his marriage, he probably would not have had an affair; he and the plaintiff had different personalities, values and needs. He also clarified later that they had differing attitudes to money (he was more frugal, while she 'abused' the bank facilities and funds available to her) and to intimacy in their personal relationship. The plaintiff was also more inclined to an active social life, while he preferred a more isolated life.

[14.18] After prolonged discussions the parties decided that the marriage would continue, but, despite their decision, the plaintiff subjected the defendant to sustained physical and verbal abuse and anger for nearly four years until the relationship achieved a measure of harmony and stability. By that time they had moved to Farm

X. But the plaintiff became suspicious of the defendant's relationship with a member of her book club with whom the defendant started riding horses from about 2001. The defendant denied that he was romantically involved with the woman at the time, but to appease the plaintiff he sold his horse and stopped riding with the woman. Despite their efforts not to get involved with each other, the defendant and the woman began a relationship in 2006 (2003 under cross- examination). The defendant admitted the affair to the plaintiff, left the matrimonial home and lived in a bed and breakfast for over a year. Attempts at reconciliation failed and in 2008/9 the parties decided that their relationship was at an end.

[14.19] Subsequently, after the defendant left Farm X, the plaintiff decided that she could not live there anymore and requested the defendant to purchase for her a home of her own. He purchased the unit in Chaseford in March 2010 in her name. The bond over Chaseford is in the name of the plaintiff but the defendant furnished the suretyship, paid the shortfall and is servicing the bond.

[14.20] The parties placed no restrictions on each other in respect of their respective occupations of the properties. The defendant resides on the farm with his partner and son.

[14.21] The parties initially considered selling Farm X, but because of the slump in the property market they decided that the defendant would keep the farm going until it could be sold. They had expressly agreed that the proceeds of the sale of the property would be shared, although they had not agreed on the shares to be allocated to each of them.

[14.22] At the age of 67, and because of certain medical conditions for which he is on medication, the defendant is unable to work the hours he previously did. He acknowledged the history between himself and the plaintiff, that they raised children together and that she was a good mother. He expressed regret for the unhappiness he had caused her and felt a responsibility to provide for her. He explained that his tender to the plaintiff reflected his emotional attachment to Farm X, and he wanted his three children to inherit the property in due course.

[14.23] Under cross-examination the defendant agreed that the proceeds from the sale of the Howick property had been injected into Farm X but disclaimed any knowledge of the financial details. He also persisted that, except for the bed and breakfast business, the plaintiff had not been involved with Farm X because she was occupied with the running of her boutique.

[15] The defendant made a good impression as a witness. He refrained from attempts to exculpate himself in respect of his adultery or adverse comments about and criticism of the plaintiff until pressed under cross-examination and re-examination. There was no reason to disbelieve or reject his evidence as false, especially in the absence of any testimony from the plaintiff herself without an explanation for her failure to testify.[3] However, given his apparent intellectual capacity, it was remarkable that he disclaimed a stricter control over the income he generated in his professional work and from his business ventures. Nevertheless, his testimony was clear in several pertinent respects and established that:

[15.1] Through the income earned during his professional career, which spanned 40 years, the defendant was the major breadwinner and financial mainstay throughout the subsistence of the marriage.

[15.2] In addition to his financial contribution to the establishment of the piggery and the horse breeding operations, the defendant was personally involved in setting up and running the operations; the stables on Farm X were his personal undertaking and funded partially through the sale of inherited assets.

[15.3] The defendant is currently fully responsible for the upkeep of Farm X and is servicing the bond on the property, on which he is residing with his partner and the elder son of the parties. The defendant desires to live out his days on the property.

[15.4] The purchase of and improvements on Farm X were partially funded by a portion of the proceeds of the sale of the Howick property. The remaining costs were borne by the defendant, as the income from his practice was utilised to defray the

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[3] In *MB v DB* 2013 (6) SA 86 (KZD) in para [40] Lopes J quotes Lord Lowry in *R v Commissioners of Inland Revenue; Ex parte TC Coombs & Co* [1991] 2 AC 283 ([1991] 3 All ER 623) at 300:

> 'In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified.'

Although Lopes J found this statement appropriate to circumstances where the defendant failed to testify and to make full disclosure in respect of his financial affairs, the statement is of equal application to the failure of the plaintiff to testify.

withdrawals from the access bond over the farm, which was, according to Dr Mitchell, 'utilised like a cheque account'.

[15.5] The business operations on Farm X were conducted in the name of a partnership: XXXX t/a Farm X. The plaintiff held a 10 % owner's interest and the defendant 90 %, as reflected in the financial statements of the partnership.

[15.6] The financial statements of the partnership reflect as a financial liability a substantial loan from XXXX Inc, the defendant's practice.

[15.7] The plaintiff's financial contribution to the household ended when she left work just before the eldest child was born. Thereafter she became the primary caregiver of the children and was a good and caring mother. But the plaintiff also contributed to the defendant's practice, both part-time and full-time, through her secretarial services and administration. Albeit to a lesser extent when compared to the responsibilities assumed and contribution made by the defendant, the plaintiff assisted in the piggery (while caring for the children), horse breeding operations and the establishment of services on Farm X.

[15.8] The parties made joint decisions about their homes and business enterprises. Farm X was purchased in the plaintiff's name on the advice of their accountant.

[15.9] The plaintiff had full control over the parties' finances and attended to the financial administration of the defendant's business operations.

[15.10] The plaintiff established her own business, the XXXX boutique, mainly with funds from the defendant's accounts. Financial statements for Farm X record as an asset an interest-free loan with no fixed repayment date in the sum of R426 999 to XXXX [Boutique] CC. The defendant continued to fund the ailing business until it was shut down, and his estate sustained a loss in excess of R2 million consequent to the failure of the business. The plaintiff also established and ran the bed and breakfast business on Farm X, which showed a measure of profit. The business was terminated in 2009.

[15.11] When the plaintiff was given the Howick property by her mother, it was vacant, unimproved land valued at R45 000. The improvements on the property, including the house in which the [. . .] family lived, were funded from the proceeds of the sale of the defendant's house and a mortgage bond which he serviced.

[15.12] The plaintiff sold the Howick property for R1 075 000 in July 2004, which realised approximately R978 000. The balance to discharge the existing bond was approximately R18 000. There is no information as to what happened to the balance

of approximately R278 000 after R700 000 was paid into the Farm X access bond account.

[15.13] The four paintings which were sold for R285 000 to pay the defendant's tax liability, at the plaintiff's suggestion, were anniversary gifts to both parties from the plaintiff's parents.

[15.14] The plaintiff does not find living on a farm conducive to her wellbeing: she was unhappy on the Eston farm with the piggery and on Farm X and requested the plaintiff to purchase another home for her. She is currently living in a sectional-title unit referred to as the Chaseford property. The mortgage bond over the unit is serviced by the defendant.

[15.15] The plaintiff has since the separation of the parties in November 2009 not assisted in or performed any services for the defendant's businesses.

[15.16] The defendant has had two extramarital relationships during the course of the marriage, which contributed to the breakdown of the marital relationship.

Redistribution: The law and legal principles

[16] Section 7 of the Divorce Act provides:

'**Division of assets and maintenance of parties**

(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

(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, 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

(b) . . .

may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that 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 first-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 services, or the saving of expenses which would have otherwise have been incurred, or in any other manner.

(5) In the determination of the assets or 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 donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;

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

[17] There are several seminal cases which have clarified the legal principles in accordance with which a claim for redistribution in terms of s 7(3) should be determined by the courts. The principles restated briefly are:

[17.1] The court must be satisfied on the facts that the claimant spouse has contributed to the maintenance or increase of the estate of the other during the subsistence of the marriage, and by reason of such contribution it would be just and equitable to make such redistribution order.[4]

[17.2] The contribution of a spouse may be direct or indirect and may consist in services, including services rendered at home and in a business venture, saving of expenses through such services which obviates the employment of someone to render the service, or may be a financial contribution.[5]

[17.3] Where there are competing claims, each claim must be assessed separately on its own merits, unless the claim and counterclaim are so inextricably linked that a globular approach is appropriate.[6]

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[4] *Katz v Katz* per Milne JA at 15B–E:

> 'Before the Court can make an order in terms of ss (3) it must be established *(a)* that the party seeking such an order has made a contribution; *(b)* that such a contribution has increased or maintained the other party's estate; and *(c)* that it would be just and equitable to make such an order because of *(a)* and *(b)*. It does not follow that the manner in which the Court is to arrive at what is just and equitable is limited to what has been contributed. In the first place this is not what the section says. In the second place this Court in *Beaumont's* case *supra* has held quite clearly that this is not what the section means. It is quite clear from the judgment of Botha JA that factors other than purely monetary ones may properly be taken into account.'

[5] In *Beaumont v Beaumont* 1987 (1) SA 967 (A) per Botha JA at 997F it was held that the plain meaning of the words in ss (4) was so wide that—

> 'they embrace the performance by the wife of her ordinary duties of "looking after the home" and "caring for the family"; by doing that, she is assuredly rendering services and saving expenses which must necessarily contribute indirectly to the maintenance or increase of the husband's estate'.

Kriegler J in the court a quo in *Beaumont* took into account the services which the wife had rendered to the husband in his business and home. See also *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 88C—'some positive act by means of which one spouse puts something into the maintenance or increase of the estate of the other spouse—whether by money or property, labour or skill'.

[6] *Kritzinger* at 78I–79D:

> 'Where, as here, a claim in convention invoking the provisions of ss (3) is answered by a claim in reconvention also relying on such provisions the claims are, in law, separate claims. Claims in reconvention, while almost always adjudicated upon together, are, in

[17.4] The court ought to take an overall view and make a just order in terms of ss (2) and/or (3), bearing in mind the existing means, obligations and needs of the parties and all other relevant factors.[7]

[17.5] The granting of redistribution is discretionary, and the courts are vested with a very wide discretion to ensure that a just order is made,[8] as circumstances in each claim for redistribution may be widely divergent. Further, s 7(5)*(d)* authorises consideration of 'any other factor which should in the opinion of the court be taken into account'.

[17.6] The courts should avoid 'guidelines' or 'starting points' when determining redistribution.[9] The English approach that the parties should share their joint net assets equally, absent any contrary indication, has been rejected by our courts.[10]

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fact, separate actions. Not only is this historically so—see, for example, the remarks of Cloete J in *Brunette and Others v Stanford* (1859) 3 Searle 221 at 225 and 226, and Lansdown J in *Fielding v Sociedade Industrial de Oleos Limitada* 1935 NPD 540 at 548—but it is plain from the provisions of Rule 22(4) of the Uniform Rules, that the Court may, in certain circumstances, direct that the claim in convention be proceeded with before the claim in reconvention. Even if the actions proceed at the same time, the fact that one party has counterclaimed cannot deprive the other of the right to have his or her claim separately considered. There may, possibly, be cases where the facts relevant to both claims are so inextricably interrelated that a globular approach is the only possible one, but, save in such circumstances, the claims must, at least initially, be considered separately.'

See also comments of Van Heerden JA in *Buttner v Buttner* 2006 (3) SA 23 (SCA) ([2006] 1 All SA 429) para [24].

7 *Katz* at 10I–11A:

'What is more, it is clear that in the *Beaumont* case *supra* at 992E–F read with the passage cited above this Court decided that the Legislature intended the Court to be able to take

". . . an overall view, from the outset, of how justice could best be achieved between the parties in the light of possible orders under either ss (2) or ss (3) or both subsections, in relation to the means and obligations, and the needs of the parties, and all the other relevant factors".'

8 *Beaumont* at 991E–H.

9 Id at 990D–991H.

10 *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) ([2004] 4 All SA 487) per Brand JA paras [19]–[26].

The known and unequal contributions of the parties are relevant and cannot be disregarded.[11]

[17.7] No limits are placed on the form and mechanics of the redistribution,[12] nor is a meticulous mathematical calculation required,[13] nor should there be an attempt to quantify the weight to be accorded to every relevant factor.

[17.8] The 'clean break' redistribution is desirable but frequently not practical because the resources are not available to achieve such a settlement.[14]

[17.9] Misconduct of the parties may be taken into account in determining the equities of a s 7(3) redistribution if the conduct is such that it would be inequitable to disregard it. Where there is no conspicuous disparity between the conduct of the parties, no fault will be apportioned. But where the misconduct of one party is 'gross and prolonged' it may constitute a relevant factor, but it should not be unduly emphasised. A failure on the part of a party to furnish available information relevant to a determination required of the court may constitute misconduct.[15]

The claims for redistribution

[18] In *Beaumont*, Botha JA held[16] that:

> 'It is certainly a very prominent and important feature of ss 7(4) that ultimately, when once the factual requirements of ss (3) and (4) are satisfied, the

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[11] Id para [20]:

> '(O)ur courts are not entitled as a matter of course to "divide the joint net assets of the parties equally, regardless of their respective known and unequal contributions" (*per* Milne JA in *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) at 77F–G).'

[12] In *Beaumont* at 989G–H Botha JA agreed with Kriegler J (the court *a quo* at 175F) that 'there are no express or implied limits to the mechanics of the redistribution'.

[13] *Bezuidenhout* para [20].

[14] *Beaumont* 993D–E: '(T)he constraints imposed by the facts (the financial position of the parties, their respective means, obligations and needs, and other relevant factors) will not allow justice to be done between the parties by effecting a final termination of the financial dependence of the one on the other.'

[15] *Beaumont* at 993I–995D; *Kritzinger* at 80–83; and *Buttner* paras [30]–[35].

[16] *Beaumont* at 988J–989A.

> determination of whether a redistribution order is to be made at all is entrusted by the Legislature to the wholly unfettered discretionary judgment of the Court as to whether it would be equitable and just to do so.'

[19] That the factual requirements of s 7(3) are satisfied is common cause.

[20] The plaintiff's claim for 50 % of the defendant's estate is premised on her contribution to the increase and maintenance of his estate in her role as primary caregiver of the children while he was establishing his professional practice, the secretarial and administrative services she rendered in his practice, her management of the finances of the defendant and the various financial enterprises the parties established during the course of their marriage, and the services she rendered to the enterprises, which included a piggery, horse breeding, and a bed and breakfast business. She also made a direct financial contribution because the proceeds of the sale of the property given to her by her mother were paid into the bond which provided the funds for the purchase and development of Farm X. Further, the parties effectively conducted their affairs akin to a partnership and made joint decisions in respect of their homes and businesses. Finally, as pointed out by Ms *Bailey*, the defendant confirmed that he had acknowledged, in para 21.5 of his affidavit in the rule 43 application, that in the event of a dissolution of the marriage a capital payment would be due to the plaintiff.

[21] From the summary of the defendant's testimony, it is clear that while the defendant confirmed the contribution by the plaintiff and that they made joint decisions about their properties and businesses, he also drew attention to the limited nature of her contribution of services to the administration of his practice, the piggery and the establishment and operation of the horse breeding business, and her financial contribution to the properties which were registered in her name.

[22] I remain mindful that—

> 'it is a prerequisite to a successful claim under the sub-section(4) that, on a balance of probabilities, the conduct relied upon by a claimant as a contribution in fact caused the alleged maintenance or increase of the other spouse's estate. The

> conduct must be the *causa causans*, and not merely the *causa sine qua non*, of the alleged maintenance or increase.'[17]

But I am satisfied even on the defendant's version, that the plaintiff has satisfied the factual requirements of ss (4).

[23] The defendant's claim for a redistribution order directing the plaintiff to transfer Farm X, or such other component of her assets as deemed just, is premised on the fact that he contributed to the maintenance and increase of the plaintiff's estate by the contribution of his time, effort and funds, in particular his funding of the acquisition, improvement and maintenance of Farm X, of which the plaintiff is the registered owner, and by saving her expenses which she would otherwise have incurred.

[24] It is common cause that the defendant generated the income which was utilised to improve the plaintiff's Howick property and the payments into the access bond over Farm X utilised to purchase and improve the property. He also assisted her in funding the failed boutique business. Therefore, although the estate of the defendant exceeds that of the plaintiff, given the uncontroverted testimony of the defendant, the undisputed facts in respect of his contribution to the increase and maintenance of the estate of the plaintiff and the manner in which the parties conducted their affairs during the subsistence of their marriage, the defendant has established that his claim for redistribution is well-founded and the factual requirements of s 7(4) satisfied.

[25] I am also satisfied that it is just and equitable to order redistribution in this matter. Further the facts relevant to both claims are so closely interrelated that a 'globular' approach to redistribution is appropriate.

[26] However, there are three related issues which expedience dictates should be dealt with prior to the determination of an appropriate redistribution order, viz the effect of clause 6 of the antenuptial contract, the misconduct of the defendant and the date at which the estates of the parties ought to be valued for the purposes of redistribution.

Clause 6 of the antenuptial contract

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[17] Defendant's heads of argument at p 7 para 4.9; *Kritzinger* at 87–89.

[27] Ms *Bailey* contended that because the parties had agreed to the exclusion of the plaintiff's assets from any community in clause 6 of the antenuptial contract concluded by them, the estate of the plaintiff, including her immovable property, viz Farm X, was not susceptible to redistribution. Therefore, only the estate of the defendant could be redistributed, and the plaintiff sought an order for payment of the sum of R2 914 162, being 50 % of the value of the defendant's estate as computed by the plaintiff. Mr *Hunt SC*, who represented the defendant, responded that the clause 6 was a standard clause in antenuptial contracts concluded prior to the promulgation of the Matrimonial Property Act 88 of 1984, which introduced the accrual system and did not have the effect contended for by the plaintiff.

[28] The relevant portions of the antenuptial contract read:

> 'And these Appearers did declare, that whereas a marriage hath been agreed upon, and is intended to be forthwith had and solemnized between the said [PP] and [PP] they have contracted and agreed, as by these presents they do contract and agree, each with the other, as follows to wit:—
> *First* . . . .
> *Sixth*—That the said [PP] shall have and continue to hold, possess, and enjoy the *sole exclusive and uncontrolled administration and alienation* of all the property and effects which she is now possessed of, and entitled to, and of all other property which she may hereafter acquire during the subsistence of the said marriage *without the interference, control or assistance of the said and every marital power* which the said [PP] shall or may have, or be entitled to acquire by virtue of the said marriage, shall be and *the same* is hereby excluded from all the property estate and effects of the said [PP] as fully and absolutely as if the said intended marriage had not taken place.' [My emphasis.]

[29] In interpreting the clause, as an antenuptial contract is interpreted in the same way as any other contract,[18] the following excerpt from the judgment of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[19] proved useful:

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[18] *Cradock v Estate Cradock* 1949 (3) SA 1120 (N).

[19] 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18 [footnotes omitted].

> 'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[30] Clause 6 must therefore be construed within the context of the antenuptial contract as a whole, the prevailing law relating to proprietary consequences of the marriage when the marriage took place, the intention of the parties in concluding the antenuptial contract and the purpose for which the provisions of clause 6 were included in the contract.

[31] At the time when the parties married, there were two main matrimonial property systems in South Africa: marriage in community of property with marital power, and marriage out of community of property with the exclusion of community of profit and loss and marital power.

[32] The primary matrimonial property system which automatically applied to a civil marriage was that of community of property with marital power.[20] The general rule, subject to a few exceptions, was that a joint estate was created upon marriage by the merging of all the

[20] Voet, 23.2.91. Universal community is the normal matrimonial proprietary regime.

assets and liabilities of the parties, and any assets or liabilities acquired during the marriage also became part of the joint estate for the duration of the marriage. In consequence of this universal community of property, ownership in the assets and liabilities vested in the parties jointly in undivided and indivisible half-shares until the dissolution of the marriage. A further consequence of the marriage was that the husband acquired marital power, which gave him the authority to deal with the joint estate, while the wife effectively acquired the legal status of a minor who had to be assisted by a parent or guardian in the administration of his/her estate and in any act bearing legal consequences.

[33] This proprietary regime of the marriage could however be varied to one of out of community if the parties concluded an antenuptial contract in which they expressed their intention to marry out of community, and agreed to exclude community of property and profit and loss from the marriage. However, as such exclusion did not exclude the husband's marital power over his wife, which would have eroded the very objective of the parties maintaining two separate estates and prevented the wife from administering her own estate, clauses specifically excluding such marital power were incorporated in antenuptial contracts so that the wife would be invested with the necessary legal status to acquire and deal with her own property.

[34] Therefore, the provisions in the antenuptial contract entered into by the parties are standard to the antenuptial contracts executed prior to the commencement of the Matrimonial Property Act 88 of 1984 and the introduction of the accrual system. The condition contained in clause 6 merely stipulates that the plaintiff may administer and alienate any property she owned at the time of the marriage or acquires at any time during the subsistence of the marriage independent of and without the assistance of the defendant, and excludes any marital power which the defendant may have acquired over the plaintiff's estate, by virtue of the marriage between the parties, had they not concluded the antenuptial contract. The provisions of clause 6 in effect protected the plaintiff from acquiring, on marriage, the status of a minor as she would not have been able inter alia to enter into contracts, purchase property or alienate her assets without the consent of her husband had the marital power not been excluded.

[35] But there is nothing in this clause to suggest, even remotely, as contended by Ms *Bailey*, that the clause precludes the plaintiff's estate from redistribution in terms of s 7(3) or being taken into consideration in the determination of the competing redistribution claims. The

objective of s 7(3) is to ensure, at the end of a marriage out of community of property, a just and equitable distribution of assets acquired by parties who, despite the terms of the antenuptial contract which governed their marriage, built up individual estates from pooled resources and/or with the contribution of the other party.[21] To achieve such equitable distribution, recourse must be had to the existing means, obligations and assets held by each party, and any other factor considered relevant by the court ordering redistribution,[22] although respective claims for redistribution in the event of conflicting claims under s 7(3) must each be considered separately on its merits, unless the facts relevant to such claims are so closely interrelated that a 'globular' approach is appropriate.[23] To commence such consideration by excluding an asset in the estate of the plaintiff will therefore, in my view, constitute a misdirection and lead to inequity.

[36] I am also unable to find merit in Ms *Bailey*'s submission that immovable property is not susceptible to a redistribution order by virtue of the Alienation of Land Act 68 of 1981, as that Act does not preclude the court from ordering the redistribution of immovable assets. To the contrary, redistribution of assets by way of registration of transfer of immovable property in compliance with the Alienation of Land Act regularly occurs pursuant to settlement agreements between the parties to a divorce action, awards by receivers appointed in matrimonial disputes and orders of court. Ms *Bailey*'s reliance on the case of *De Ujfalussy v De Ujfalussy*[24] as authority for this proposition is without merit. In *De Ujfalussy* the transfer of the immovable property, pursuant to 'a consent paper' being made an order of court in a marital dispute, was hindered by a misconception of one of the parties as to the causa for registration, which did not comply with the formalities prescribed by the Act. It was not prohibited by the legislation.

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[21] *Beaumont* at 987H–I:

> 'What the measure was designed to remedy is trenchantly demonstrated by the facts of the present case: the inequity which could flow from the failure of the law to recognise a right of a spouse upon divorce to claim an adjustment of a disparity between the respective assets of the spouses which is incommensurate with their respective contributions during the subsistence of the marriage to the maintenance or increase of the estate of the one or the other.'

[22] Section 7(5) of the Divorce Act.

[23] *Kritzinger* at 79 B–G; Buttner para 24.

[24] 1989 (3) SA 18 (A).

[37] It appears appropriate to note at this stage that the antenuptial contract is also inconsistent with any accrual sharing or, by implication, excludes accrual sharing between the prospective spouses.[25]

Misconduct

[38] In *Beaumont* Botha JA was in favour of a conservative approach towards the weight to be accorded to the misconduct of a party in relation to the breakdown of the marriage; misconduct should not be overemphasised, but should be given weight in circumstances where it would be inequitable to disregard it.[26] In *Kritzinger,* Milne JA disapproved of the weight accorded to the appellant's 'misconduct' by the court a quo. The learned Judge analysed in some detail the impact of the appellant's success on the sexual relationship of the parties and concluded that the conduct of the appellant, a strong and successful businesswoman, in having an extramarital affair was not promiscuous or brazen, but that both parties were the victims of prevailing social attitudes.[27] In *Buttner,* Van Heerden JA expressed the view that the misconduct of one or both the parties should only influence the outcome of the case where it would be unjust to disregard it.[28] The courts have also recognised that in a 'normal marriage' both parties would have contributed to the breakdown of the marriage.

[39] Ms *Bailey* submitted that the defendant's misconduct was not restricted to his adultery, but his failure to make full disclosure of available facts, particularly in relation to his financial situation, was also an element of his misconduct. She contended that as he had caused the breakdown of the marriage through his misconduct, he should not continue to reap benefits.

[40] Mr *Hunt* conceded that the defendant's first affair severely damaged the parties' marriage relationship. Not only did it cause intense anger and unhappiness for about four years, but the marriage relationship was not restored to its former level of intimacy. It was under these circumstances that the defendant reluctantly became embroiled in the second affair which ended the marriage. However, Mr *Hunt* argued, the defendant was not solely to blame for the breakdown of the marriage. The defendant's testimony revealed the differing personality traits

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[25] *Bezuidenhout* at 190A.

[26] *Beaumont* at 994.

[27] *Kritzinger* at 80–83.

[28] *Buttner* para 31.

of the parties, which created discord in their relationship. Nevertheless, the defendant still suffers pangs of guilt. Except for the affairs, he has been generous and well-intentioned and has continued to respect the plaintiff and take care of her material needs. Therefore, his extramarital misconduct should not play a significant role in any redistribution ordered.

[41] The assessment of the factors relevant to misconduct must be conducted with an awareness of prevailing social *mores* and attitudes. Unfortunate as it may be, extramarital affairs, instead of an observance of marriage vows, particularly faithfulness to one's spouse, are prevalent, irrespective of the age of the parties or the duration of their marriage. As a consequence the disapproval and stigma once attached to adultery has diminished, and extramarital affairs no longer receive the censure they used to.[29] Nevertheless, this relaxed attitude towards infidelity ought not unduly diminish the significance of such misconduct in the exercise of a court's discretion in determining an equitable redistribution. The effect of the betrayal on an aggrieved party who has remained committed to her/his marriage remains a

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[29] In *DE v RH* 2015 (5) SA 83 (CC) Mogoeng CJ (Cameron J concurring) stated**:**

> '[68] The essence of marriage and what it takes to sustain it were captured by the Bundesgerichtshof as follows:
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> > "(M)arriage is a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties. Its essence, however, consists in the readiness, founded in morals, of the parties to the marriage to create and to maintain it."

Madlanga J in a unanimous judgment of the court stated further:

> '[1] Undertakings of fidelity . . . are no guarantee that adultery will not take place in marriage. In fact, adultery is probably fractionally younger than the institution of marriage.'

The court noted that over time there has been a softening of attitudes towards adultery, but that the present day attitude does not detract from the fact that adultery entails a significant and severe intrusion of a third party into a person's most intimate relationship without their consent (para 61).

> 'Nevertheless, this potential infringement of dignity must be weighed against the infringement of the fundamental rights of the adulterous spouse and the third party to privacy, freedom of association and freedom and security of the person. These rights demand protection from state intervention in the intimate choices of, and relationships between, people. This must be viewed in light of current trends and attitudes towards adultery, both nationally and internationally [which demonstrate] a repugnance towards state interference in the intimate personal affairs of individuals.' (Paragraph 62.)

relevant factor, and the general rule that each case must be evaluated on its own set of facts applies.

[42] The marriage of the parties endured 37 years until their separation in 2009. As the plaintiff did not testify the only evidence about the relationship between the parties was offered by the defendant. I cannot quibble with Mr *Hunt*'s submissions that he did not express any criticism of the plaintiff or downplay his affairs by laying the blame for his straying on her. Instead, relying on his professional expertise, the defendant sought to ascribe their incompatibility to their disparate upbringing. He also drew attention to the inequality in their professional qualifications when he testified that he was attracted to his first extramarital partner through their interaction at a conference.

[43] However, despite accusations of the plaintiff's profligate spending, there is no evidence that the defendant tried to rein her in, and it is evident from the defendant's testimony that the plaintiff was devastated when his first affair was exposed. But the defendant's evidence that he remained committed to his marriage is sustained by the plaintiff's decision to remain in the marriage and his persistence, despite a stormy period of four years during which the plaintiff exacted penance from him through physical and emotional abuse. However, as the plaintiff chose to save her marriage by forgiving the defendant, it would be unfair to ascribe undue weight to the defendant's conduct up to this stage.

[44] Mr *Hunt* sought to diminish the subsequent defendant's misconduct in entering into the second affair. But I am not persuaded that the defendant did in fact respect the plaintiff or care enough to spare her the further humiliation of embarking on an affair with a member of her book club during the course of their marriage, which had just attained a measure of harmony. Although passion is seldom fettered by common sense and selflessness, having experienced the bitter consequences of his first affair, one would have expected the defendant to be more circumspect and honest with the plaintiff. His second affair undoubtedly ended the marriage, leaving the plaintiff the proverbial 'woman scorned', whose anger and pain has been fanned by the litigation and the fact that the defendant lives on Farm X with his partner.

[45] The defendant has, to an extent, redeemed himself by ensuring that the plaintiff has material comforts and the security of a home, and has increased the maintenance paid to her without an amended order of court, pending finalisation of this judgment.

[46] I am of the view that, while the misconduct of the defendant may not be termed 'gross', his two affairs, which spanned some 10 years until his separation from the plaintiff, may indeed be considered 'prolonged', and were undoubtedly the major cause of the breakdown of the marriage. Despite the current attitude of society and our courts, his misconduct cannot be ignored in the determination of the redistribution to be ordered.

[47] Insofar as the defendant's alleged failure to place before the court available information is concerned, there are no facts to sustain this argument. Full disclosure was made by the commencement of the trial, although values remained in dispute and were only resolved in May 2014. Consequently I am not persuaded that misconduct can be ascribed to the defendant as contended.

The date at which the estates of the parties should be valued

[48] The parties were again unable to reach agreement on this issue, with the plaintiff contending for the date of divorce and the defendant, the date of litis contestatio.

[49] Ms *Bailey* submitted that a court can only decide whether it should exercise its discretion to make a redistribution order and what order it should make 'pursuant to the leading of evidence and a factual enquiry into the circumstances of the case' and that the courts have always decided such matters on the facts that existed at trial. Further, the court in making an order in terms of rule 7(3) must have regard to the net asset value of the respective parties estates at the date of trial and subsequent order.

[50] In response Mr *Hunt* pointed out that there are four seminal cases which have considered and clarified the implications and application of s 7(3) of the Divorce Act.[30] But little guidance is to be found in reported cases dealing with s 7(3) as to 'precisely what estate of the "target" party, composed and valued as at what time, the court is entitled to distribute under that section'. Having submitted that it is clear law that litis contestatio occurs at close of pleadings, and has the effect of freezing the plaintiff's rights as at that moment,[31] Mr *Hunt*

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[30] *Beaumont*; *Kritzinger*; *Bezuidenhout*; and *Buttner*.

[31] *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) per Holmes JA at 608. See also *Natal Joint Municipal Pension Fund* supra paras 14–15 in which Wallis JA reaffirms what Holmes JA said.

advanced the argument that the reasoning of Brassey AJ in *MB v NB* [32] in respect of the valuation of the parties' estates in an accrual claim in terms of s 3(1) of the Matrimonial Property Act 88 of 1984[33] may properly be applied to a claim for redistribution. The conclusions reached by Brassey J have been approved in this division in respect of accrual claims.[34]

[51] While recognising that the s 7(3) remedy is different from an accrual claim, Mr *Hunt* submitted further that both claims share the following important characteristics which persuaded the aforesaid courts to reach the conclusion that the value of an accrual should be determined as at date of litis contestatio:

[51.1] The rights in the claim only become perfected, vested and exigible when the court makes the divorce order. But, procedurally, the effect of litis contestatio is that it is the moment at which the dispute between the parties crystallises and can be presented to the court for decision.

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[32] 2010 (3) SA 220 (GSJ) paras 40–41:

'[40] The decision establishes the moment at which the contingent right becomes perfected and, in consequence, the spouses become invested with legally enforceable entitlements. This is, as the learned judge makes clear, at the moment when the divorce court makes the applicable order. What the decision does not do is establish the moment by reference to which the respective estates of the parties must be assessed. This problem is one of procedure, not substance, and owes its origin to the fact that litigation takes time to complete. On this matter the established principle is that the operative moment is *litis contestatio*, for that is the moment when the dispute crystallises and can be presented to the court for decision. . . .

[41] Since *litis contestatio* is the lodestar for the applicable decision, transactions after this moment are irrelevant and should be left out of account. . . .'

[33] '3 **Accrual system**

(1) At the dissolution of a marriage subject to the accrual system, by divorce or by 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.'

[34] *MB v DB* 2013 (6) SA 86 (KZD), and *Schmitz v Schmitz* KZD 14396/2010.

[51.2] Mala fide dissipation of the estate of the target party during the delays of litigation and the delaying of litigation by the claimant party in order to profit from growth subsequent to litis contestatio is discouraged.

[51.3] A fixed, procedurally ascertained and consistent reference point is established.

[51.4] At an equitable level, it reflects that by litis contestatio the underlying partnership between the parties to a marriage has reached its end.

He concluded that nothing in s 7 of the Divorce Act runs counter to the aforegoing submissions, but are in fact consistent with the fact that the estate which the court redistributes on divorce is the estate to which the claimant party contributed during the subsistence of the marriage. Section 7 is founded on the fair recognition of the joint effort put into the marital relationship by both spouses, and should not apply to an estate to which the claimant spouse has made no contribution whatsoever.

[52] He therefore contended that the date of assessment of the composition and value of the estate available for redistribution in terms of s 7(3) is the date of litis contestatio. As accrual claims are like s 7(3) claims directed at achieving economic equity between the parties, a consistency between the principles applied to each claim will be achieved. Mr *Hunt* proposed that it be accepted that litis contestatio was reached by the end of November 2010.[35]

[53] In *Beaumont* the gross value of the appellant's assets was agreed upon by the parties after the conclusion of the evidence in the case;[36] the respondent's assets were negligible. In *Kritzinger*, Milne JA accepted that the values which were available to the trial court, viz the values as at the commencement of the divorce trial, were the relevant values, although Berman J in the court a quo noted that the values furnished to him, albeit meticulously presented, were out of date, and proceeded to assess the current values based on the values furnished.[37]

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[35] It was not disputed that litis contestatio occurred at the end of November 2010. The defendant filed his plea to the amended claim in convention and his replication in reconvention on 16 November 2010.

[36] *Beaumont* at 984F.

[37] *Kritzinger v Kritzinger* 1987 (4) SA 85 (C) per Berman J at 96B–C:

> 'Plaintiff's assets—as recorded in the Rule 37 minute—amount in all to approximately R1 076 000, whilst her liabilities amount to something of the order of R386 000; her nett worth is thus in the region of R690 000. (I have employed round figures; I see no useful

[54] Generally, in applications for redistribution the parties agree on the values to be assigned to the assets either at the pre-trial stage or after the evidence is heard, and the values accepted are as at the time of the trial.[38] Reported judgments in the main are therefore judgments on appeal in which the legal principles relevant to the implementation of s 7(3) have been restated and/or developed, and the issue of the date at which the estates of the parties should be valued for the purposes of redistribution has not received much attention.

[55] However, in *Katz*[39] Milne JA accepted the trial court's finding in respect of the value of the net assets of the appellant at the date of conclusion of the trial, and, in rejecting the submission on behalf of the appellant that the parties' assets should be determined as at date of separation, stated:

> 'In my view it is quite clear that the Court, in making an order in terms of s 7(3), is required to have regard, so far as that is practicable, to the assets and liabilities of the parties as at the date of the order. Subsection (2), which deals with the payment of maintenance, requires the Court to have regard to ". . . the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations . . .". Subsection (3), which deals with a redistribution order, requires the Court to consider the provisions of ss (4), (5) and (6) before making an order in terms of ss (3). Subsection (5) expressly refers in subpara *(a)* to "the existing means and obligations of the parties". There is nothing to indicate that the Legislature had in mind any date other than the date of the Court's order and, indeed, if the original contention of the appellant were to succeed, it could give rise to highly anomalous consequences.'

[56] That decision remains binding on this court. The word 'existing' in ss 7(2) and 7(5) stipulates that the 'present or current' assets and liabilities of the parties at the date of the

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purpose being served by a meticulously prepared and apparently precise calculation of the values to be placed on the parties' assets or of the extent of their liabilities, for the values and extent are certainly no longer exactly what they were in late August 1986, when the minute was prepared.)'

[38] *Archer v Archer* 1989 (2) SA 885 (E) at 891A.

[39] *Katz* at 6G–I.

order are to be considered by the court when making an order for maintenance and/or redistribution. By the inclusion of the qualification, 'so far as that is practicable', Milne JA has acknowledged that the date of the order may not always be the appropriate date 'to have regard to the existing assets and liabilities of the parties'. The appropriate date, in the absence of agreement between the parties, is nevertheless constrained to the time of the trial.

[57] The crucial distinction between an order of accrual and a redistribution order is stated succinctly by Ploos van Amstel J in *MM and Others v JM*:[40]

> '[12] There is, however, a fundamental difference between a redistribution order in terms of s 7(3) of the Divorce Act and an accrual claim in terms of s 3 of the MPA. In the case of an accrual claim the court is not required to make an assessment of what it deems to be "just". It is required to determine, on the evidence before it, the amount equal to half of the difference between the accrual of the respective estates of the spouses. It is a factual enquiry. . . .'

Therefore, although the determination of both an accrual claim and a redistribution application have as their objective an equitable order, the accrual is determined by precise mathematical calculations, whereas a redistribution order is determined by a court through the exercise of its unfettered discretion and a consideration of 'the existing means and obligations of the parties'. In the absence of agreement on the values of a party's estate the court will exercise its discretion to assign a value to the assets and liabilities of the parties 'so far as that is practicable, as at the date of the order' or after the hearing of evidence on the salient issue. To fix the date of valuation far in advance of the trial will therefore undermine the court's discretion and run counter to the provisions of s 7(3), which, in my view, renders the fixing of the valuation of the estates at litis contestatio inappropriate.

[58] I am also not persuaded that the failure to establish a fixed, procedurally ascertained and consistent reference point for the valuation of an estate in a redistribution claim is prejudicial to a fair assessment of the respective contributions of the parties to the estate of the other. It is not unusual for the parties to separate, and the contribution of a party to the estate of the other to cease, prior to the finalisation of the divorce. The unfettered discretion of the court will ensure that all the relevant factors, including any proven mala fide dissipation of assets or

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[40] *MM and Others v JM* 2014 (4) SA 384 (KZP) ([2014] ZAKZPHC 15).

deliberate delay in the finalisation of the proceedings or the date when the contribution by one of the parties to the increase or maintenance of the estate of the other party ceased, will be considered and accorded due weight, thereby dispelling the potential for the prejudice of the parties. Further, as held by Brand JA in *Bezuidenhout*: [41]

> 'As a matter of law, s 7 (3) does not require a causal link between the claimant's contribution and every asset in the estate of the other spouse.'

Recognition must therefore be accorded to the fact that, although the contribution of a party, direct or indirect, may have ceased, the beneficial consequences thereof do not necessarily terminate with the contribution.

[59] Therefore, in my view, the appropriate date for the valuation of an estate for the purposes of redistribution ought to be determined in accordance with the comments of Milne JA supra, with due consideration to the relevant facts of the matter and the course of its litigation, and not at litis contestatio.

Factors relevant to the redistribution claims

[60] The onus is on the parties to place all factors of relevance to the adjudication of the competing redistribution claims before the court. As a result of her failure to testify, the plaintiff has not availed herself of the opportunity to inform the court of her version of her marriage, the cause of its breakdown, the impact on her and what she personally considers of significance to the redistribution claim.

[61] I do not intend to restate the relevant portions of the defendant's testimony which are set out in [14] supra. Other relevant factors are:

[61.1] The plaintiff has not contributed to the upkeep or maintenance of Farm X after she moved into Chaseford in 2010. In her rule 43 application she confirmed that she was unemployed. It was only about May 2014 that she began earning a salary of R5000 per month. She is currently receiving maintenance in the sum of R22 000 per month. She has accepted the tender of the defendant in respect of the maintenance of R22 000 per month, the unencumbered ownership of the motor

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[41] *Bezuidenhout* para [35].

vehicle in her possession, her retention on the defendant's medical aid and the payment of the mortgage bond over Chaseford.

[61.2] The defendant has complied with the order of court granted on 28 August 2010 in respect of maintenance pendente lite and continues to do so as at date hereof. He is still in practice. He resides on and maintains the farm, and services the bond over it.

[61.3] The trial which was set down for hearing for a period of five days commenced on 13 May 2013. It was adjourned on 17 May 2013, resumed on 19 May 2014 and was concluded on 21 May 2014, on which date the decree of divorce was ordered. There was therefore a significant intervening period of 4,5 years from date of separation to date of divorce and subsequently to date of this judgment.

The financial value of the parties' respective estates

[62] Counsel for each of the parties submitted in their respective heads of argument a calculation of the values of the estates of the parties as at May 2013 based on the agreed valuations and exhibits G, H and I, for which I am indebted to them.

[63] According to the calculations on behalf of the plaintiff, the net asset value of the estate of the plaintiff was R2 574 690 and that of the defendant was R5 828 324. The difference in the values is R2 574 690. On that computation the plaintiff's claim for a 50 % redistribution equates to R1 626 817. Consequent to my conclusions in [34]–[36] supra, I have ignored the further submissions based on the plaintiff's argument that assets are not susceptible to redistribution.

[64] Mr *Hunt* submitted that a globular approach to redistribution in the matter is warranted. He contended that given the unequal contributions of the party and other relevant factors the plaintiff should not receive more than 30 % of the parties combined net worth. His suggested ratio is therefore 70:30 in favour of the defendant. According to his calculation, including the loan from XXXX Incorporated, the defendant's net asset value as at May 2013 was R2 743 924 and that of the plaintiff was R2 691 000. (I have ignored the figures postulated at litis contestatio.) The combined net asset value of estates of the parties as at May 3013 was R5 434 924, 30 % of which equates to R1 630 477. On this calculation the plaintiff would have to pay the defendant an adjustment to the value of R1 060 523 from the value in her possession at that date. On his further mathematical calculations *vis a vis* the tender made by

the defendant in respect of the immovable properties (the farm and Chaseford), the motor vehicle and the cash payment, the value by which the estate of the plaintiff would benefit exceeds in monetary value the 30 % ratio suggested as the plaintiff's appropriate share.[42]

The redistribution

[65] As already held earlier in this judgment, a globular approach to redistribution is appropriate.

[66] Although the plaintiff claims 50 % of the defendant's estate, it is apparent on a consideration of the available evidence, both verbal and documentary, that her claim is not sustainable. Without in any way undervaluing her contribution as housewife and mother, and with due cognisance of her contribution to the business enterprises undertaken by the parties, including the defendant's practice and on the farms, it is clear that the defendant through his professional income provided the financial crutch throughout the subsistence of the marriage. This is a natural consequence of his professional qualifications. Nevertheless, given the duration of the marriage, her age and her commitment to her marriage, she is entitled to commensurate financial security and material comfort.

[67] The equities of this matter also demand that both parties should have a home. The plaintiff lives in a secure gated estate of her choice with a value of approximately R1,8 million. I am satisfied that the defendant should be allowed to remain on Farm X which has become his home, into which he has invested both effort and money, and to which he has an emotional attachment.

[68] Adopting the 'globular' approach, I have holistically considered all the aforegoing pertinent factors, including the means and obligations of the parties. I am of the view that the tender by the defendant largely addresses the conclusions I have reached in respect of a just and equitable redistribution order.

Costs

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[42] Defendant's heads of argument paras 12.1.3 and 12.2

[69] The plaintiff seeks costs of the suit while the defendant submits that each party ought to bear his/her own costs.

[70] In her rule 43(6) application dated 29 August 2012, in which she sought a contribution to costs, the plaintiff alleged that her costs to date of trial were estimated at R267 846,75. Provision for her legal fees was set at R500 000 as at May 2013. The defendant has paid R120 000 as contribution to the plaintiff's costs.

[71] The order for redistribution that follows is largely in accordance with the 'with prejudice' tender made by the defendant dated 9 May 2014. Although the parties agreed on the values to be attributed to their estates when the trial resumed on 19 May 2014, the plaintiff did not accept the tender and persisted with her claim on the premise that her assets were not subject to redistribution. At the completion of the trial on 21 May 2014 she indicated her acceptance of the tender only in respect of maintenance, the Chaseford property, the motor vehicle and the medical aid.

[72] Consequently, I am of the view that the defendant should bear the costs of the litigation, including reserved costs, until the date of service of his tender dated 9 May 2014 and that his contribution to costs in the sum R120 000 should be deducted therefrom. Each party should bear his /her costs incurred thereafter.

[73] **Order**

1 The defendant is directed to pay maintenance to the plaintiff in the sum of R22 000 per month. The maintenance shall increase on 31 January 2017 and thereafter on 31 January of each succeeding year, at a rate in accordance with the prevailing Consumer Price Index.
2 The defendant is directed to transfer unencumbered and exclusive ownership in the Mercedes-Benz vehicle, model A180CDI, in the possession of the plaintiff, within 30 days of the date of this order.
3 The defendant shall retain the plaintiff on his current medical aid policy and pay the premiums for her membership and any increases in the premium as they fall due. The plaintiff shall be liable for medical expenses not covered by the policy.

4 The defendant is directed to pay the sum of R500 000 to the plaintiff within 60 days of the date of this order.

5 The plaintiff shall transfer her ownership in the immovable property described as Portion . . . of Hilton No . . . (the farm) to the defendant. Simultaneously with registration of such transfer, a security bond shall be registered over the farm to secure the defendant's obligations to the plaintiff as set out in clause 6 of this order. The plaintiff shall simultaneously be released from liability, alternatively be substituted by the defendant as the debtor, in respect of the mortgage bond currently registered over the farm. All costs in connection with the aforesaid transactions and registrations shall be borne by the defendant. The plaintiff shall sign all requisite documentation upon presentation to her by the defendant's nominated conveyancer.

6 The defendant shall pay the monthly instalments on the bond over the sectional title unit described as Unit . . . of Erf . . . Chaseford, due to the mortgagee, Standard Bank, on due date. The defendant shall settle the bond and all amounts owing to the mortgagee within 5 years of date of this order. The plaintiff shall not increase the amount owing in respect of the mortgage bond over Unit . . . Chaseford, or otherwise draw down upon any access facility available on the bond, until the defendant has settled his obligations in respect of the bond in full.

7 Each party shall retain the movables currently in his/her possession as that party's sole and exclusive property.

8 The defendant shall pay the party and party costs of the plaintiff, taxed or agreed, to date of service of the defendant's tender dated 9 May 2014. The defendant's payment of R120 000 as contribution to the plaintiff's costs shall be deducted from such costs.

9 Each party shall be liable for his/her legal costs incurred thereafter.

Plaintiff's Attorneys: *Gerhard Botha Attorneys*, Johannesburg; *Carter and Associates*, Pietermaritzburg.

Defendant's Attorneys: *ER Browne Incorporated*, Pietermaritzburg.