

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 7225/2022

(1) REPORTABLE: **YES/NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **NO**

Date: 31 July 2024

JA Kok

In the matter between:

C[...], H[...] C[...]

PLAINTIFF

and

C[...], C[...]

DEFENDANT

JUDGMENT

Kok AJ

Introduction

[1] This is an opposed action for divorce and ancillary relief. The following issues are not in dispute. The parties were married out of community of property and with the exclusion of the accrual system on 17 February 2007, and the marriage still subsists. Their relationship has reached such a state of disintegration that no reasonable prospect exists for the restoration of a normal marriage relationship. One child was born from the parties' marriage. It will be in the best interests of the minor child that her primary care and residency should vest with the defendant, subject to the plaintiff's reasonable right to contact with the minor child. The defendant is currently unemployed and has been unemployed since 2012. Throughout the

duration of the marriage the plaintiff financially cared for the defendant and the minor child. In terms of a Rule 43 application the defendant was granted an order *inter alia* for spousal maintenance in the amount of R13 000.00 per month.

[2] At the start of the trial, the following issues were still in dispute: The reasons for the breakdown of the marriage; the maintenance payable in respect of the minor child; whether spousal maintenance is payable at all and if payable, the amount thereof; and the defendant's claim for a redistribution of assets in terms of section 7(3) of the Divorce Act 70 of 1979.

[3] I am indebted to counsel for their comprehensive heads of argument. Where appropriate I relied on these heads in crafting this judgment.

Facts

[4] The plaintiff and defendant testified. No other witnesses were called. As may be expected in a contested divorce, the testimony was painful to listen to. Both parties became emotional at times. Intimate details of a relationship that had broken down had to be shared in an open court. The parties obviously had differing versions of what had gone awry between them.

[5] The testimony of both parties was wide-ranging and not necessarily directly relevant to the issues in dispute between them. I do not refer to all the factual matters in contention between them in this judgment. I will relate the most pertinent facts; those facts that speak directly to the parties' respective claims.

[6] Plaintiff's counsel highlighted several discrepancies in the defendant's testimony and argued that the plaintiff's version of events should therefore be accepted in all respects, and the defendant's version rejected in all respects. I set out these discrepancies immediately below.

[7] During her testimony, apparently to justify her continuing presence at the marital home (instead of working part-time or full-time), the defendant testified that their minor child was academically struggling at school. The child's academic transcript

was then obtained from the school and entered into the court record as an exhibit. The academic transcript showed that the child had been performing very well throughout her grade 9 year in 2023.

- [8] During cross-examination, the defendant was confronted by a discovered document, a letter written by the plaintiff's attorneys dated 25 July 2022. A paragraph from this letter was read into the record: "We confirm that our instructions are that you and Mr. C[...] have reached an agreement that you will vacate the matrimonial home during December 2022. Same is acceptable to our client and we thank you for your co-operation herein". This letter was served personally on the defendant together with the summons for divorce, as is clear from the sheriff's return of service. In her affidavits pertaining to a domestic violence interdict and a Rule 43 application, the defendant made no mention of this letter and asserted in the affidavits that the plaintiff was attempting to evict the defendant and the minor child from the marital home.
- [9] The defendant did not satisfactorily explain why she withdrew the domestic violence matter against the plaintiff.
- [10] It became clear during cross-examination that the defendant had not, at the date of this hearing, taken any serious attempts at securing employment. Her curriculum vitae was primarily sent to "family connections", contained spelling errors, and did not contain all of her qualifications and work experience. I agree with plaintiff's submission that the defendant did not take reasonable steps to make her curriculum vitae as attractive as possible to potential employers. The defendant did not discover a list of potential employers who she sent her curriculum vitae to. The defendant did not approach the plaintiff for a financial contribution to complete further computer or office administration courses to improve her prospects for finding employment. The defendant in any event admitted during cross-examination that she would have to secure employment post-divorce.
- [11] In the defendant's Rule 43 affidavit, the following paragraph appears: "As stated hereinabove, the respondent is gainfully employed, but I do not know exactly

what the respondent's monthly income amounts to. I only have a list made by the respondent (in his own handwriting) of his monthly expenses which accumulates to R130,000.00 per month. I attach hereto as annexure COE2 the document". This handwritten list of expenses was explored during cross-examination and it became clear that this list was a "wish list" of how the plaintiff would have liked to live should the defendant win the lottery or come into an inheritance. I agree with the plaintiff that the defendant did not satisfactorily explain the discrepancy between the Rule 43 affidavit and her testimony during the divorce hearing.

- [12] The plaintiff is the owner of three immovable properties, which was referred to during the trial as the Wierda Glen, Tulip Park and Quimi's Crescent properties. The plaintiff purchased and paid off in full the Wierda Glen property before he met the defendant in July 2003. The defendant and the minor child currently resides in the Tulip Park property. The plaintiff bought the Quimi's Crescent property during early 2021 shortly after the Tulip Park property was paid off.
- [13] The plaintiff testified as follows in relation to the Quimi's Crescent property. There is no equity in this property. The property was purchased for R3 000 000 and due to damage caused by water pipes in the cement roof an estate agent informed him the house will sell for approximately R2 400 000. No evidence was led by a building contractor as to the costs of repairs. No evidence was led to the current probable selling price of the property, but for the plaintiff's say-so. The bond instalment on the Quimi's Crescent property is approximately R29 000 per month.
- [14] During the trial, the plaintiff tendered that he will take full responsibility for all direct expenses of the minor child. He also tendered that he would provide accommodation to the minor child in the Tulip Park property, where the defendant can also reside considering that she is the primary caregiver of the minor child, until December 2026 when the child finishes her high school year. The child will reach the age of majority during April 2026.

[15] The plaintiff testified that he needed to take his own washing to a laundromat since approximately 2015 because the defendant refused to do his washing. The plaintiff also testified that the defendant has never packed a work lunch for him, and only cooked a meal about twice a week. The plaintiff testified that his room was also never cleaned by the defendant and was left as is. The plaintiff testified that he would come home late afternoon to an uncleaned house or his uncleaned bedroom.

[16] The Defendant testified that she is 51 years of age and has been unemployed since 2012. During 2012 she was only employed for a short period of time (8 months), earning a very small salary of approximately R10 000 before deductions. She met the plaintiff in July 2003 and they got engaged shortly thereafter. During their engagement the defendant had resided with the plaintiff. Following their engagement the parties had discussed their financial future and intention to start a family. The defendant testified that it was discussed and subsequently agreed that in view of her age, the plaintiff should resign from her employment to focus on her pregnancy and for her to take care of the parties' household. The defendant further testified that the plaintiff did not impose a time limit by when she should return to employment. The defendant resigned from her employment prior to getting married whereafter the plaintiff proceeded to take care of the defendant financially. The plaintiff continued to maintain and pay for all of the defendant's financial needs. Their minor child was born on 7 April 2008. After the birth of the minor child, and up until the institution of the divorce proceedings by the plaintiff in July 2022, the plaintiff continued to pay for all of the defendant's and minor child's financial needs.

[17] The Defendant testified that she currently has no source of income, save for the monthly maintenance payable by the plaintiff in accordance with the Rule 43 order which was granted in her favour. The defendant confirmed that she receives *ad hoc* financial assistance from her brother and sister, but that such financial assistance was by no means assured or sustainable as neither her brother nor sister holds any obligation to continue with such financial contributions. The defendant

as well as the minor child remains totally financially reliant on the plaintiff for their day-to-day survival and maintenance needs.

- [18] The defendant further testified that she, together with the minor child, were instructed by the plaintiff to vacate the matrimonial home by the end of December 2022, but was unable to do so, as neither she nor the minor child had any other means to secure alternative accommodation or to start a "new" life. Subsequent to the Rule 43 proceedings and the order granted, the defendant and the minor child vacated the erstwhile matrimonial home and are currently residing at the plaintiff's Tulip Park property. This accommodation, however, remains temporary pending the finalisation of the divorce proceedings.
- [19] The defendant presented the court with an exposition of her and the minor child's prospective monthly expenses which amounts to R42 905. The defendant conceded that this exposition was premised upon her prospective financial responsibilities once the decree of divorce is granted and that she and the minor child was forced to vacate her current residence. As such, provision for *inter alia* future rental was made.
- [20] The defendant suffers from various medical conditions which include having undergone three neck operations to remove tumours during 2022, as well as having suffered a stroke in January 2023. The defendant confirmed that these medical conditions do not significantly impact her day-to-day functionality.
- [21] Although the defendant was previously employed within an IT department until 2006, she testified that the skills, training and experience which she had obtained then were mainly "on-the-job training" and specifically assigned to the applicable systems used by her employer at that time. These skills and training have since become redundant, outdated and of little to no use in order to secure employment within the current labour market. The defendant testified that she has no tertiary education or discernible skills with which she might be able to re-enter the labour market.

- [22] The defendant proceeded to testify that throughout the parties' marriage she was required to take care of the household and the minor child whilst the plaintiff was left to pursue his career and to work very long hours.
- [23] The defendant conceded that although she had offered to cook for and wash the plaintiff's clothing, the plaintiff had elected not to utilise the defendant for his personal washing and cooking needs. The plaintiff instead proceeded to have his washing done separately from that of the defendant and minor child at a local laundromat. So too, did the plaintiff elect to buy his own food during work hours.
- [24] The defendant testified that despite the parties having not lived as husband and wife for approximately 13 years and the parties not having shared a marital bed for approximately 11 years, their financial agreement nonetheless remained throughout, i.e. the plaintiff having accepted responsibility for fully maintaining and paying all of the defendant's and minor child's financial and maintenance needs. She testified that subsequent to the plaintiff engaging in an extramarital affair and the institution of the current divorce proceedings, the plaintiff had unilaterally resiled from his previous obligations and undertakings, claiming that he was no longer able to afford to maintain the defendant and minor child.

Plaintiff's submissions

- [25] The plaintiff made the following submissions.
- [26] When the income and earning capacity of the plaintiff is considered, objectively the plaintiff is not a wealthy man. He earns an average limited income. The lifestyle of the parties during their marriage cannot be described as a high standard of living.
- [27] The testimony provided by the defendant did not move beyond the scope of what one would have expected in a traditional marriage. A redistribution claim in terms of section 7(3) of the Divorce Act is an extraordinary claim where the claimant spouse requests the court to exercise a discretion in

awarding a certain portion of the estate of the other spouse to the claimant spouse.

- [28] A section 7(3) claim is extraordinary, as *EB (Born S) v ER (born B) and others; KG v Minister of Home Affairs and others* [2023] ZACC 32 does not nullify the existence of the parties' marital regime of out of community of property with the express exclusion of accrual. The defendant is essentially seeking an order from this court that the written agreement entered between her and the plaintiff prior to their marriage, should not be enforced. A section 7(3) claim is an extraordinary remedy, especially seen in light of the fact that the defendant had the benefit of electing the accrual system to apply to their marriage relationship, which benefit was not enjoyed by spouses married prior to 1984. The defendant failed to provide any evidence as to why the antenuptial agreement was entered into, and what their intention was at the time.
- [29] The defendant is seeking an order that this court must decline to enforce the written agreement entered between her and the plaintiff, thereby not applying the principle of *pacta sunt servanda*, a well-established principle meaning that agreements should be kept. In terms of *Brisley v Drotsky* 2002 (4) SA 1 (SCA), *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) and *Barkhuizen v Napier* 2007 (5) SA 323 (CC), courts should exercise restraint when considering to decline to enforce an agreement.
- [30] The defendant failed to provide evidence as to how she, during the marriage, contributed towards the maintenance and growth of the plaintiff's estate. The defendant failed to show how any of her contributions at the marital home contributed towards enabling the plaintiff to purchase his properties; how any of her contributions at the house enabled the plaintiff to earn a higher income or save expenses; and how any of her contributions at the house reduced the expenses of the plaintiff. The only common cause fact between the parties, is that the defendant took care of the minor child.

However, the plaintiff made it clear that full-time care as provided by the defendant was not necessary and not agreed upon.

- [31] The defendant provided no evidence as to how she is supporting the minor child and how she has supported her in the past: What a typical week for the minor child looks like, and how the defendant is assisting her requiring her full-time attention; what lunchboxes is being packed for the minor child, if any; what homework is being done on what days; how the defendant is assisting the minor child after school with which homework; school tasks which might require certain assistance from the defendant; social events; special events which require the defendant to be available to the minor child full-time; and the minor child's current weekly schedule at school.

- [32] The evidence shows that by refusing to seek gainful employment as soon as the minor child turned two years old, and by refusing to adequately maintain the household, the defendant did not contribute towards the plaintiff saving certain expenses. The defendant caused the estate of the plaintiff to decline.

- [33] Plaintiff's counsel referred me to *Beaumont v Beaumont* 1987 (1) SA 967 (A) and *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) for guidance on how section 7(3) should be applied and argued that these precedents indicated that in the present matter a section 7(3) distribution should not be made. A section 7(3) claim is not merely for the asking. The claimant spouse must have made a substantial contribution during the subsistence of the marriage. Section 7(4) of the Divorce Act is peremptory in considering a section 7(3) claim.

- [34] The plaintiff argued that there is no objective primary fact evidence to support the cause of action of the defendant's claim for lifelong spousal maintenance.

- [35] The defendant did not provide a report from an industrial psychologist to support her claim for lifelong spousal maintenance. During the trial proceedings she admitted that she needs to work. The defendant did not

provide a report from her treating physicians stating that she cannot work following her operations in 2022. There was nothing placed before court insofar as the defendant's health precluding her from re-joining the employment market.

[36] The plaintiff's current monthly income is approximately R56 000. The plaintiff is incapable of maintaining the defendant. The current monthly bond instalment of the plaintiff is approximately R29 000, which is already more than half of the plaintiff's income. To that amount must be added the minor child's necessary expenses which the plaintiff has tendered.

[37] Plaintiff's counsel referred me to *Pillay v Pillay* 2004 (4) SA 81 (SE), *Kroon v Kroon* 1986 (4) SA 616 (E), and *Pommerel v Pommerel* 1990 (1) SA 998 (E) as authority for the submission that little or no maintenance should be awarded to the defendant.

[38] Having regard to *Stellenbosch Farmer's Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) and the credibility of the two witnesses, their reliability and the probabilities, the plaintiff's version of his income, the reason for the breakdown of the marriage and the agreement between the parties regarding the defendant's employment must be accepted. The defendant contradicted herself, was untruthful about the minor child's academic performance, was untruthful in her Rule 43 application in relation to the plaintiff's handwritten list of expenses, and was untruthful in her domestic violence application, asserting that the plaintiff would evict her while the attorney's letter of 25 July 2022 personally served on her by the sheriff refutes this assertion.

[39] On the other hand, the plaintiff was candid, open and honest with the court. He accepted his responsibility for past mistakes that he had made. Cross-examination did not damage his evidence.

[40] The defendant testified that the plaintiff's affair was, for her, the reason for

the breakdown of the marriage relationship. Both the plaintiff and defendant admitted that they have, since the minor child was approximately two years old, not been sharing a marital bed. The plaintiff described their relationship as being one of roommates or brother and sister. (I may add here that the defendant in her testimony referred to their relationship as one of best friends.)

[41] On the other hand, the plaintiff's version of the breakdown is that the marital relationship had broken down at the time when the parties started to sleep in separate bedrooms. The extra-marital relationship which the plaintiff presently has was therefore not the cause for the breakdown of the marriage, but rather a symptom of a marriage relationship which has already broken down.

[42] The plaintiff testified that it was always the agreement between him and the defendant that the defendant would stay at home full-time with the minor child until she was two years old, and then the defendant would return to full-time employment. The defendant denies this.

[43] The plaintiff testified that most of the fighting between him and the defendant was about the defendant not seeking employment, contrary to their marital agreement.

Defendant's submissions

[44] The defendant made the following submissions.

[45] The Plaintiff admitted that he had taken care of all of the defendant's and minor child's financial needs during the course of their marriage relationship, which included the plaintiff having paid a monthly cash amount of R19 000 to the plaintiff, which he has subsequently unilaterally reduced to R13 000, but now claims to be financially incapable of continuing to do so.

- [46] In the plaintiff's particulars of claim, only two grounds for the irretrievable breakdown of the parties' marriage are pleaded: that the parties are no longer able to communicate with each other and that the parties have lost their love towards each other. No contentions were raised with regard to the parties ostensibly having been separated or not living as husband and wife for approximately 13 years. Neither was it asserted in his pleadings that the defendant's alleged obligation or refusal to find employment was as a contributing factor to the plaintiff suing for divorce. The plaintiff for the first time during his testimony advanced a version that the agreement reached between the parties was limited thereto that he would only be liable to take care of the defendant's and the minor child's financial needs up to the minor child reaching the age of two years old.
- [47] It is impermissible to plead a particular issue and then seek to pursue another at the trial - *Minister of Agriculture and Land Affairs and Another v De Klerk and Others* [2014] 1 All SA 158 (SCA) at para 39; *Gusha v Road Accident Fund* 2012 (2) SA 371 (SCA) at para 7; *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107G-H and *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.
- [48] "The pleadings should clarify the general nature of the pleader's case. They are meant to mark out the parameters of the case sought to be advanced and define the issues between the litigants. In that regard, it is a basic principle that a pleading should be so framed as to enable the other party to fairly and reasonably know the case they are called upon to meet". - *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (225/2016) [2017] ZASCA 77 at paras 28-29.
- [49] "For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the Court

to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings... The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference that the parties have chosen and specified in the pleadings". - *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W).

- [50] The plaintiff failed to plead any additional reasons, save for the lack of communication and loss of love between the parties, causing the irretrievable breakdown of the parties' marriage. The plaintiff failed to plead any notion of the agreement pertaining to the plaintiff's maintenance obligations being limited to the minor child having reached the age of two years old. Defendant's counsel raised an objection during the trial to this "new" version during the plaintiff's examination in chief, but I dismissed the objection. In his written heads defendant's counsel contended that the plaintiff should be prohibited from relying of these newly formed contentions which were not contained in the pleadings.
- [51] The plaintiff testified that he is employed as a manager and that his employment entails very long working hours. The plaintiff admitted that throughout the parties' marriage he was required to work long hours and that "he was almost never home". The plaintiff conceded that the defendant's contribution to the household and more specifically her contribution towards raising the minor child was neither without merit, nor could it be stated that her contributions are worthless. The plaintiff stated that the defendant's contributions toward raising their minor child were "extremely valuable".
- [52] The defendant made various submissions in relation to the factors listed in section 7(2) of the Divorce Act (spousal maintenance). I list these submissions below.
- [53] It is common cause that the defendant is unemployed and does not own assets of any tangible value. In contrast hereto, the plaintiff is the only party to the marriage who earns a salary and who has existing financial means. The plaintiff's means include three immovable properties, two of which remain unencumbered and free

of any mortgage bonds. Save for the defendant's and minor child's current occupation of the Tulip Park property, this property otherwise remains unencumbered. This property could potentially be sold, and the proceeds utilised to maintain the defendant and minor child. In the alternative, the defendant and minor child could continue to remain in occupation of the Tulip Park property, and such accommodation could then form a means of maintenance.

- [54] The defendant is currently unemployed and has been unemployed prior to getting married to the plaintiff in 2007. The defendant's unemployment was only interrupted for a short period in 2012, when she was employed for a period of approximately eight months, during which time she did not gain any tangible work experience or marketable skills. The defendant has very little, if any, prospects of finding suitable employment in the immediate future.
- [55] It has also been held that older, unqualified women who have been married for a long time have generally been likely to be more sympathetically treated by courts. *Peyke v Peyke* 1955 (3) SA 80 (C); *Croes v Croes* 1960 (4) SA 211 (C); *Swart v Swart* 1980 (4) SA 364 (O); *Levin v Levin* 1984 (2) SA 298; *Beaumont v Beaumont* 1985 (4) SA 171 (W).
- [56] The defendant accepts the responsibility of having to find employment, but it is highly unlikely given her advanced age, lack of experience and extensive absence from the labour market, that she would be able to find suitable employment from which she could earn a sufficient salary to maintain herself and contribute towards the maintenance expenses of the minor child.
- [57] The defendant testified that, save for the *ad hoc* contributions received from her siblings, she is totally reliant upon the plaintiff, and has been totally reliant upon the plaintiff throughout their marriage. It further follows logically, and as demonstrated by the defendant's budget, that she would have to re-establish not only herself in the labour market, but also be required to start a new household from scratch. These tasks are impossible to achieve without this court ordering the plaintiff to make a substantial financial contribution towards the defendant.

- [58] It is common cause that the parties have remained married since 17 February 2007 (thus approximately 14 years). It is also common cause that during the subsistence of the parties' marriage a *status quo* was vested whereby the plaintiff took care of all the defendant's and the minor child's financial needs.
- [59] It is generally recognised that a spouse cannot be expected to maintain the same standard of living as that which prevailed during their marriage - *Crouse v Crouse* 1954 (2) SA 642 (O); *Hossack v Hossack* 1956 (3) SA 1598 (W); *Lincesso v Lincesso* 1966 (1) SA 747 (W). The needs of both parties should be balanced, and the available income distributed equitably - *Pommerrel v Pommerrel* 1990 (1) SA 998 (E). It appears that the contention of the plaintiff is that his assets should be protected while the defendant must be cast out and fend for herself.
- [60] As a divorce is no longer based on matrimonial fault, post-divorce maintenance is similarly no longer considered as a penalty for a party's misconduct. Nonetheless, the conduct of a party contributes to create an overall picture of the circumstances which prevailed during the parties' marriage and what had caused the eventual breakdown of the parties' marriage. These considerations of justice, fairness and equity can still be taken into consideration when claiming maintenance and a redistribution of assets. The plaintiff admitted to having an extramarital affair but denies that this caused the parties' marriage to break down. In contrast thereto the defendant pleaded this as one of the root causes for such breakdown.
- [61] Although a redistribution order is one of the factors a court must consider in deciding whether to award maintenance, a court is not obliged to take a maintenance award into consideration when considering making a redistribution order - *Beaumont v Beaumont* 1987 (1) SA 967 (A) 987.
- [62] As to the section 7(3) claim, defendant's counsel referenced *KRG v Minister of Home Affairs and Others* 2022 (5) SA 478 (GP) and *EB (Born S) v ER (born B) and*

others; KG v Minister of Home Affairs and others [2023] ZACC 32 and pointed out that neither court imposed any additional or stricter grounds which must be proven for a redistribution claim. Section 7(3) read with (4), (5) and (6) prescribe the requirements which must be met, with the ultimate test being whether the claimant spouse has made a direct or indirect contribution towards the maintenance or increase of the other spouse's estate. The court must be satisfied that the person who seeks the redistribution order has contributed directly or indirectly to the maintenance or increase of the estate of the other party, by the rendering of services or the saving of expenses. Counsel submitted that in contemplating a redistribution order, the court must make a value judgment of the worth of each party's contribution and to translate that worth into money; and in granting or refusing the request for redistribution the court is afforded a wide judicial discretion.

- [63] The parties reached an agreement that the defendant should resign from her employment (even before marriage) and that pursuant to the parties getting married, the defendant should remain at home taking care of the household and the children who would have been born from their marriage. In return, the plaintiff would be able to continue his long working hours and could earn more, premised upon the incentivised remuneration that he testified about.
- [64] If the household duties as well as the duties pertaining to the rearing of the parties' minor child had fallen on the shoulders of the plaintiff, while the defendant was unavailable to do so, it follows logically that the plaintiff would have been incapable of working in the manner and times which he did.
- [65] It was therefore favourable and to the advantage of the plaintiff, that the defendant was there to attend to both the household as well as the raising of the minor child, irrespective of the plaintiff later electing to do his own washing and cooking, as these services remained on offer to him.
- [66] By the plaintiff's admission, the defendant's contribution especially towards the minor child, cannot be understated nor should it be undervalued.

[67] The parties had entered into an agreement whereby the plaintiff had undertaken to financially take care of the defendant, and once born, the parties' minor child. The plaintiff then, as an afterthought to the defendant's amended counterclaim (when the section 7(3) claim was introduced) and without having advanced such contention in the pleadings, raised a dispute as to the exact period for which this undertaking had to have been adhered to. Irrespective of the plaintiff's contentions, his actions speak to the contrary as despite the birth of the parties' child, her having reached the age of two years-old as well as the defendant not seeking employment, the plaintiff continued to provide for the defendant's and the minor child's financial needs. The plaintiff caused the defendant to resign from her erstwhile employment under the promise of being financially secured, and she also left the labour market to raise their minor child. Only when the financial shoe started to pinch, the plaintiff attempted to resile on his obligations - thus asking the court that the defendant must be ordered to leave the marriage without any form of spousal maintenance or redistribution of assets.

Analysis

[68] To my mind, keeping *Stellenbosch Farmer's Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) in mind, and accepting the plaintiff's contentions that the defendant's testimony was in important respects untruthful, this is a matter where the probabilities still to some extent outweigh the plaintiff's version. Had it been a determinative reason for the breakdown of the marriage that the defendant did not go back to work when the minor child was approximately two years old, this assertion would have been explicitly pleaded. The plaintiff's version also begs the question why he did not institute divorce proceedings when it became clear to him that the defendant would not be seeking employment.

[69] Even if I accept the plaintiff's version that he had wanted the defendant to return to work and the reason for many of their disagreements during their marriage was her recalcitrance to return to work, I am not convinced that this factor has a significant impact on the order I should grant. The evidence taken as a whole paints a picture of a marriage where for the largest part of the marriage the defendant fulfilled the

role of childminder and housekeeper while the plaintiff fulfilled the role of sole breadwinner.

[70] Parties to an unhappy marriage remain in such a marriage for a variety of reasons. The plaintiff testified that for him the marriage had already irretrievably broken down by the time that his child was two years old. Yet he stayed. For all the years that he chose to stay, the defendant looked after his minor child without pay. Soon after he found salvation in a new relationship, he instituted divorce proceedings. By that time the parties had been married for a significant period. In dissolving this marriage and determining the patrimonial consequences, a just and equitable remedy must be crafted - sections 7(2), (3) and (4) of the Divorce Act all contain the qualifiers "just" and/or "equitable". I cannot pretend that the marriage only existed for two years. Whether the parties lived together as if they were brother and sister or roommates or best friends, it was still a marriage where both parties relied on each other to some extent. Irrespective of the reasons and emotions that may have motivated them, they chose to stay married from 2007 onwards. The decision to become married has legal consequences. The decision to remain married year after year has legal consequences. The plaintiff's decision to divorce from the defendant has legal consequences.

[71] After the Constitutional Court's judgment in *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* 2024 (2) SA 1 (CC), a section 7(3) redistribution of assets order now applies to all civil marriages concluded out of community of property with the exclusion of the accrual system, irrespective of the date when the marriage was concluded.

[72] *EB* must be read in context when considering how section 7(3) should now be applied. All legislation must be interpreted and applied through the prism of the Constitution. The Constitution is a transformative document, *inter alia* committed to the achievement of substantive gender equality. The mischief that section 7(3) aims to address must now be identified in the light of constitutional considerations such as substantive gender equality. The mischief that section 7(3) was originally aimed at, was to allow a marriage party to claim a redistribution of assets where

that party concluded their marriage during a time when the accrual system was not available in South African family law. Section 7(3) in its original form did not allow for a redistribution of assets when the parties concluded their marriage during a time when the accrual system was available, and the parties still "chose" to exclude the accrual system from their marital dispensation. An antenuptial contract is not an ordinary commercial agreement (*EB* para 83). Contractual freedom and *pacta sunt servanda* should not be as decisive in this setting. In many instances women enter marriages as the poorer and less financially independent partner and the parties' "equal bargaining power" is therefore a myth (compare *EB* para 122).

- [73] In some instances of a section 7(3) claim, contractual freedom may to some extent remain relevant. *EB* para 133 held that in terms of section 7(5)(d) of the Divorce Act, a court considering a redistribution claim can take into account "any other factor which should in the opinion of the court be taken into account". In the Constitutional Court's view, "the fact that the parties concluded an antenuptial contract excluding the accrual regime *could* be taken into account. The weight this factor should receive would depend on the circumstances" (my emphasis).
- [74] Section 7(3) must now be interpreted and applied against the following backdrop. Section 7(3) must address the hardship which a spouse may face on the dissolution of their marriage (*EB* para 42). Where the accrual system is excluded, it disproportionately burdens women and disproportionately benefit men (*EB* para 127). Domestic work is devalued, and it is often women who are burdened with domestic work (*EB* para 122). The exploitation of women's care and domestic labour leads to the direct structural advantage of men (*EB* para 123).
- [75] In a traditional marriage, the male partner earns an income by doing paid work while the female partner performs unpaid domestic work - she runs the household and cares for the children. By earning an income, the male partner is able to financially maintain his female partner and children, and to maintain or acquire assets. But for his female partner's contribution he would have had to perform these domestic duties, leaving less time to work and advance in his paid career, or

he would have to employ someone to clean his house and make his food, leaving him with less income. This is precisely the scenario sketched in section 7(4) of the Divorce Act: "[T]he party... 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 otherwise have been incurred".

- [76] The then Appellate Division sketched the same picture in *Beaumont v Beaumont* 1987 (1) SA 967 (A) 996C-D: "Typically... it is the husband who, out of his income, provides his wife and family with support and in return, the wife's primary duty is to perform her traditional role as wife and mother by managing the household and looking after the children of the marriage". *Beaumont* 997F-H held that the ordinary meaning of section 7(4) includes the ordinary householding and childcare duties; performing these duties by necessity contributes indirectly to the maintenance or increase of the husband's estate.
- [77] It follows that I disagree with plaintiff's submissions that a section 7(3) claim is an extraordinary remedy. I agree with the plaintiff that the defendant's evidence set out her contribution as that of what is to be expected in a traditional marriage. As held in *Beaumont*, that is all that is required. It is not required that the claimant spouse must have made a contribution in excess of her ordinary duties in a traditional marriage. But for the defendant's contribution, the plaintiff would have had to employ a childminder and housekeeper to allow him to keep to his long work hours. In his testimony the plaintiff expressed his gratitude towards the defendant for looking after his child, "the love of his life".
- [78] *EB* qualifies *Brisley v Drotsky* and the *Barkhuizen/Napier* judgments of the Supreme Court of Appeal and the Constitutional Court. In the context of a section 7(3) claim, contractual freedom does not reign supreme. That the parties concluded an antenuptial agreement excluding accrual is at best one factor to be considered. The overriding aim of section 7(3) is to equitably address the plight of the stay-at-home spouse after divorce and to prevent gender inequality. If contractual freedom is to be given primacy in a section 7(3) claim, it will nullify the

remedial purpose of this section. I do not regard the defendant's failure to provide any evidence as to why the accrual regime was excluded from their marriage as fatal to her section 7(3) claim.

[79] When the parties married, the plaintiff owned one immovable property. By the time that he instituted divorce proceedings, the plaintiff owned two unencumbered immovable properties and had bought a third property. I do not follow the plaintiff's argument that the defendant caused the estate of the plaintiff to decline.

[80] Section 7(5) of the Divorce Act contains a list of factors that a court must take into account in determining which assets are to be transferred. Not all of the listed factors apply to all marriages. In the present matter the following factors apply: any direct or indirect contribution made by the claimant party to the maintenance or increase of the estate of the other party; the existing means and obligations of the parties; and any other factor which should in the opinion of the court be taken into account.

[81] It is so that the plaintiff is a man of limited means. His monthly income decreased substantially over the last couple of years, and he overextended himself when he bought his third property. It is unsustainable to service a monthly bond that consumes more than half of his salary. Both parties will have to accept that their living standard will decrease post-divorce and may decrease significantly.

[82] The defendant has been unemployed for a significant period of time. She does not have a tertiary education and limited post-matric qualifications. She has not been actively seeking employment but accepts that she will have to find employment post-divorce. The minor child is not young anymore, at school for the largest part of the day, doing very well academically and does not require the defendant's permanent presence, so the defendant can at the very least seek out half-day employment. I accept the defendant's submission that it may take some time for the defendant to secure employment.

- [83] In terms of the Rule 43 court order, the plaintiff has been obliged to pay R13000 spousal maintenance per month to the defendant since August 2023. No evidence was led during the trial that the plaintiff had not been fulfilling this duty.
- [84] In terms of the cited authorities, spousal maintenance is usually not awarded where at least some of the following factors are present: The woman is young or reasonably young, she is well qualified; she has no children or no young children; she has worked throughout her married life and/or is working at the time she applies for maintenance; she is in good health; and the marriage was not of long duration. The defendant is not young but has a significant number of years left before reaching retirement age. She is not well-qualified. The minor child does not require her permanent presence. She has not been in remunerated employment for almost the entire marriage. No evidence was led that her health condition will impact on her employment prospects. The marriage lasted a considerable number of years. The defendant has accepted that she will have to seek employment post-divorce.
- [85] As held in *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA) para 14, the accommodation requirements of one spouse may in an appropriate case form part of that spouse's reasonable maintenance needs, to ensure that the maintenance award is just as required in section 7(2) of the Divorce Act. I accept the defendant's submission that she will require financial assistance to establish a home for her and the minor child. As I read section 7(2) of the Divorce Act, a redistribution order may to some extent also address the maintenance needs of the claimant spouse - else section 7(2) would not have included in the list of factors to consider a section 7(3) redistribution order.
- [86] The minor child has reached an age where she should be allowed to express her own views and preferences as to how often and on which basis she would like to have contact with the plaintiff.

[87] Both parties were to some extent successful if regard is had to their respective claims and the court order below. A cost order would therefore not be appropriate.

ORDER

In the result, the following order is granted:

1. A decree of divorce.
2. The transfer in ownership of the 3[...] T[...] Park, Eldoraigue property and all furniture, household effects and appliances in the Tulip Park property to the defendant.
3. Payment of maintenance to the defendant in the amount of R10 000.00 per month, until and including August 2025, on/or before the first day of every month by way of debit order or electronic transfer into such bank account as the defendant may nominate from time to time.
4. The plaintiff shall retain the defendant, at his cost, until and including August 2025, as a dependent on his current medical scheme or a scheme with analogous benefits and shall pay the monthly premiums and any escalations timeously and on due date. The defendant shall be responsible for the payment of any further medical costs not covered by the plaintiff's medical aid.
5. Parental rights and responsibilities relating to the minor child are awarded to the plaintiff and the defendant, which parental rights and responsibilities will include the primary care, the decision making in respect of the day-to-day care, medical care, school attendance and extra-mural attendance of the minor child, and guardianship.
6. The primary care and primary place of residence of the minor child is awarded to the defendant, subject to the plaintiff's reasonable contact with the minor child, in accordance with the minor child's wishes as to how this contact should be exercised.

7. The plaintiff is ordered to make the following contributions towards the maintenance of the child born from the parties' marriage, until the child is self-sufficient:

7.1 Payment of maintenance in the amount of R6 000.00 per month, on/or before the first day of every month by way of debit order or electronic transfer into such bank account as the defendant may nominate from time to time. The maintenance amount payable shall be increased annually on the anniversary date of the divorce order by the consumer price index percentage.

7.2 The plaintiff shall retain the child, at his cost, as a dependent on his current medical scheme or a scheme with analogous benefits and shall pay the monthly premiums and any escalations timeously and on due date.

7.3 The plaintiff shall bear the costs of all reasonable expenditure in respect of medical, dental, surgical, hospital, orthodontic and ophthalmological treatment needed by the child and not covered by the medical aid scheme, including but not limited to sums payable to a physiotherapist, occupational therapist, speech therapist, psychiatrist, psychologist and chiropractor, the costs of medication and the provision, where necessary, of spectacles and contact lenses.

7.4 The plaintiff shall effect payment of the child's reasonable education-related expenses, including but not limited to all school fees, school expenses such as uniforms, stationary, equipment, school trips, extra-curricular and sporting activities, post-school or tertiary education fees and related post-school or tertiary expenses such as transport, books, clothing, and equipment.

8. No order as to costs.

JA Kok
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the plaintiff:	L van der Westhuizen
Instructed by:	Hills Incorporated
For the defendant:	JA van Wyk
Instructed by:	Van Zyl's & Roos Incorporated
Dates of the hearing:	27 & 28 February; 1 March 2024
Date of judgment:	31 July 2024