

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

CASE NO: 19579/2013

12/2/2018

Not Reportable

Not of interest to other judges

In the matter between:

S A V

Applicant

and

H J V

Respondent

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

PETERSEN AJ:

[1] This is an application for leave to appeal against the judgment and order in a divorce action granted in the following terms on 8 December 2017:

"1. A decree of divorce is granted;

2. 50% (FIFTY PERCENT) of the plaintiff's assets are to be transferred to the defendant;

3. The plaintiff is ordered to pay the costs of the action."

[2] Section 17(1) of the Superior Courts Act, Act 10 of 2013 ("the Superior Courts Act"), regulates applications for leave to appeal and provides:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[3] The test in an application for leave to appeal prior to the Superior Courts Act was whether there were reasonable prospects that another court may come to a different conclusion¹ Section 17(1) has raised the test, as Bertelsmann J, correctly pointed out in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para [6]:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cornwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'

[4] The main ground of appeal is essentially that the court erred in the following finding that *"the sole issue for determination is whether a divorce decree should be granted with no further orders or a divorce decree with a redistribution order should be granted."* In this regard the court's finding was premised on the pleadings. Counsel for the applicant indicates that she had submitted that:

"The following issues are disputed by the parties:

3.1.1 Whether the defendant made any contribution (direct/indirect) to the

¹ *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890

growth or maintenance of the plaintiff's estate;

3.1.2 The redistribution of 50% of the plaintiff's assets to the defendant; and

3.1.3 Costs"

Consequently counsel submits that *"the issue to be determined is the entitlement of the Defendant to a redistribution order and the value percentage of such entitlement, if any, and costs."* The submission equates to nothing more than semantics as this is the issue identified by the court stated otherwise.

[5] The only ground of appeal of any significance relates to the nature of a tender made by the plaintiff to the defendant; whether same constituted token maintenance or a tender of redistribution of assets. In this regard the plaintiff at the time of trial made an offer to the defendant in terms of which he offered the transfer of the matrimonial home to the defendant; a just and equitable amount of post-divorce spousal maintenance in a lump sum totaling R1 500 000-00; and maintaining the defendant on his medical aid scheme until 2022, submitting that same would constitute 26.7% of his estate. The ground is expounded upon having regard to *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) at [19]-[26]. The submission being made that our courts have rejected the English approach that parties should share their joint net assets equally, absent any contrary indication. With reference to *Kritzinger v Kritzinger* 1989 1 All SA 325 (A), it is submitted that the conduct relied upon by a claimant as a contribution must in fact have caused the alleged maintenance or increase of the other spouse's estate. That the conduct must be the immediate cause and not merely the *causa sine qua non* (but for) cause, of the alleged maintenance or increase. The court is afforded a discretion in section 7(3) of the Divorce Act 70 of 1979, which does not preclude an equal redistribution of assets, including a 50% division. In the final analysis it calls upon the court to have regard to whether the defendant directly or indirectly contributed to the estate of the plaintiff or the increase of the plaintiff's estate during the subsistence of the marriage to justify a just and equitable redistribution of assets. Section 7(4) of the Divorce Act is clear that the contribution may be direct or indirect and include the rendering of services or the saving of expenses which would otherwise have been incurred. On this score the uncontroverted evidence of the contribution of the defendant was overwhelming.

[6] To my mind nothing turns on the submission on the sanctity of contracts as a ground of appeal when regard is had to the peculiar facts of the matter.

[7] Whilst I am not persuaded that there is any merit in the grounds of appeal and the submissions advanced in support thereof, I remain mindful of the fact that in the exercise of a discretion, as in the case of section 7(3) of the Divorce Act; another could reasonably differ and come to another conclusion. It is on this basis and considering the impact of the redistribution order that I am inclined to grant leave to appeal on the merits.

[8] On the issue of costs, I am inclined to grant leave to appeal as any degree of success on that part of the applicant, may impact on the cost order.

[9] In the result, it is ordered that:

1. Leave to be appeal be granted to a full court of the Gauteng Division of the High Court.
2. Costs shall be costs in the appeal.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

For the Applicant: Adv. Cliff

Instructed by: Werner Roos and Immelman

For the Respondent: Adv. Kyriazis

Instructed by: Couzyn, Hertzog and Horak

Date heard: 02 February 2018

Date of Judgment: 12 February 2018