THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20808/2014

In the matter between:

ANDREW CHARLES BROOKSTEIN **APPELLANT**

And

JEANETTE BROOKSTEIN **RESPONDENT**

Neutral citation: *Brookstein v Brookstein* (20808/14) [2016] ZASCA 40 (24 March 2016)

Coram: Maya AP, Swain JA and Tsoka, Baartman and Kathree-Setiloane AJJA

Heard: 26 February 2016

Delivered: 24 March 2016

Summary: Arbitration Act 42 of 1965 – interpretation of 'matrimonial cause or matter incidental to such cause' in s 2 of the Act – court order incorporating settlement agreement disposed of all matrimonial issues and its natural consequences – deliberate non-disclosure of true value of accrual – delictual claim susceptible to arbitration – Matrimonial Property Act 88 of 1984 – date for determination of value of accrual – date of dissolution appropriate date, not litis contestatio.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Nicholls J sitting as court of first instance).

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

JUDGMENT

Tsoka AJA (Maya AP, Swain JA and Baartman, Kathree-Setiloane AJJA concurring)

[1] The issues for determination in this appeal are twofold. First, whether the respondent's delictual claim for damages is a 'matrimonial cause or matter incidental to such cause', as contemplated in s 2 of the Arbitration Act 42 of 1965 (the Act), and is therefore incapable of referral to arbitration. Secondly, whether the arbitrators erred in assessing the extent of an accrual in a matrimonial dispute, as at the date of the dissolution of the marriage and not at the date of litis contestatio. If so, whether this constituted an error of law resulting in the arbitrators misconceiving the whole nature of the enquiry, with the consequence that the award falls to be set aside in terms of s 33(1) of the Act.

[2] The facts giving rise to the appeal are, briefly, the following. The appellant, Mr Charles Brookstein and the respondent, Mrs Jeanette Brookstein were married out of community of property but subject to the accrual system on 14 February

1987. The ante-nuptial agreement which governed their marital regime was entered into before their wedding, on 13 February 1987. The marriage did not survive and, on 30 November 2006, the respondent instituted a divorce action in the Gauteng Local Division of the High Court, Johannesburg. She sought a decree of divorce and ancillary relief including a claim under s 3 of the Matrimonial Property Act 88 of 1984 (the MPA) for half of the accrual of the latter's estate, as her estate showed no accrual or a smaller accrual than that of the appellant.

[3] On 5 May 2008, pursuant to a settlement agreement that was made an order of court, a final decree of divorce was granted. The appellant was ordered to pay the respondent the amount of R8 007 340 in instalments, in respect of her portion of the accrual. However, two months later it became public knowledge that a listed company on the Johannesburg Stock Exchange, Esorfranki Limited, was interested in purchasing the shares and claims of the Patula Group of Companies (Patula) in which the appellant had a substantial interest. The respondent got wind of this information. As a result, in 2010, she successfully launched an ex parte application with a view to verify the information. Pursuant to the application, the sheriff attached management accounts and other documents of Patula which confirmed that, for the period before the granting of the divorce, the appellant's estate had shown a substantial accrual in excess of R167 million.

[4] On 4 February 2010, the respondent instituted a claim for delictual damages in the sum of R83,9 million on the basis that the appellant falsely or negligently represented that his shares in that company were worth only R20 712 527, when in truth the shares were worth more than R167 million. According to her, had she known the truth, she would not have settled as she did but would have settled for

more. In the alternative, she asserted that the appellant knew the true value of the shares but fraudulently or negligently failed to disclose this information thereby inducing her to settle to her detriment.

[5] The respondent obtained judgment by default against the appellant as he had failed to defend the action. For reasons irrelevant to the appeal, that judgment was thereafter rescinded by the court and the matter proceeded on an opposed basis. The trial was set down for August 2012, but it did not proceed as the parties, on the eve of the trial, entered into an arbitration agreement referring, on an urgent basis, 'the dispute in the action' to arbitration.

[6] The arbitration proceeded from 20 August 2012 to 21 November 2012 before the retired Deputy President of the Supreme Court of Appeal, Harms. The main issue for determination in the arbitration was whether the appellant had misrepresented the value of the accrual, ie, his interest in Patula. This claim was dismissed on the basis that a misrepresentation had not been established. Also at issue was the non-disclosure by the appellant of his loan account, in respect of which the respondent alleged that a dividend had been declared for the 2008 financial year, of which R7, 8 million had been credited to the appellant's account. This claim was upheld and the respondent was awarded R3,9 million with costs plus interest. Dissatisfied with these findings, the appellant, on 7 December 2012 lodged an appeal before an appeal tribunal, while the respondent cross-appealed.

[7] On 5 October 2013, the appeal proceeded before the appeal tribunal comprising retired Judges of Appeal, President Howie and Streicher JA, and Mr Van der Linde SC. On 15 October 2013 they upheld the respondent's cross-appeal

and dismissed the appellant's appeal. The appellant was ordered to pay the respondent the amount of R35 739 287 with interest, less the maintenance payable or paid to her in terms of the divorce order. The appeal tribunal agreed with the finding of the arbitrator that misrepresentation had not been established but found that non-disclosure, in circumstances where the appellant had a duty to disclose, had been established. The appeal tribunal also held that as the action was for pure economic loss, the requirements for factual and legal causation, for purposes of delict had been proved. It also found that the non-disclosure was deliberate and intended to induce the respondent into agreeing to an accrued value of the appellant's estate that was materially understated. The appeal tribunal was satisfied that all the other elements of a delictual damages claim for pure economic loss had been established. Accordingly, it awarded to the respondent damages, being the difference between the true value of the accrual and the amount she agreed to in terms of the settlement agreement.

[8] In December 2013 the appellant launched an application in the court a quo (Nicholls J) against the appeal award. The appellant's two principal arguments in the court a quo as set out above were the following. First, the dispute referred to arbitration was incidental to the matrimonial cause and was accordingly prohibited for referral to arbitration in terms of s 2 of the Act. Secondly, the appeal tribunal misconceived the nature of the enquiry by assessing the accrual as at the date of divorce rather than at litis contestatio, which had the effect that the calculation of the value of the accrual was incorrect. This resulted in an irregularity that rendered the entire enquiry procedurally unfair.

[9] Dealing with the first issue, the court a quo held that the words any 'matrimonial cause or a matter incidental to such cause' in s 2 of the Act must be interpreted to mean any live matrimonial cause either pending, or in the process of being instituted. Once the settlement agreement was made an order of court on 5 May 2008 the matrimonial cause and all matters incidental thereto, including the claim for half of the accrual, were no longer alive. The matrimonial cause had come to its natural conclusion. It also held that whilst the duty to disclose the accrual was a statutory duty arising from s 7 of the MPA, the delictual claim was for payment of damages suffered as a result of fraudulent or negligent misrepresentation alternatively, non-disclosure with regard to the true amount of the accrual. This was incidental to a delictual cause and not incidental to a matrimonial cause. Regarding the second point, the court held that as the claim arises on dissolution of the marriage, the assessment of the value of the accrual must take place at that date. The court went on to hold that even if it could be said that the assessment date was incorrect, this did not result in the appeal tribunal misconceiving the enquiry. It simply meant that it had erred in law which was not reviewable in terms of the Act. The court a quo accordingly dismissed the application with costs. This appeal is with its leave.

[10] Counsel for the appellant submitted that, on the pleadings, the real issue for determination was the accrual of the appellant's estate. He asserted that the appeal tribunal's frequent use of the words 'accrual', 'the accrual system', 'the Act and its provisions' and the fact that the delict was committed in the context of an accrual had as a consequence that the action, in essence, was a 'matrimonial cause or matter incidental to such cause'. The referral to arbitration was therefore incompetent and void ab initio. Respondent's counsel on the other hand, submitted

that the issue referred to arbitration was a delictual claim which was neither a 'matrimonial cause nor matter incidental to such cause' although its genesis lay in the accrual of the appellant's estate.

[11] It is necessary for the determination of the first issue to examine the legal consequences of a settlement agreement being made an order of court. At the stage when the respondent instituted the delictual action against the appellant, the parties' marriage had been dissolved in terms of the court order which incorporated their settlement agreement. The effect of the settlement agreement being made an order of court 'is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata (literally, "a matter judged"). It changes the terms of a settlement agreement to an enforceable court order….'[1]

[12] After the order was granted, there was no longer any matrimonial cause to speak of. Neither was there anything incidental to such cause, as all of the matrimonial issues were disposed of when the court granted the order incorporating the settlement agreement. Consequently, there cannot be any issue still outstanding relating to the marriage. The inevitable result is that the marriage and all its natural consequences came to an end, and anything relating thereto, such as proprietary consequences, became res judicata. That being so, the delictual

[1] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC) para 31.

claim that was referred to arbitration cannot be said to be incidental to any matrimonial cause.

[13] Although the failure to disclose the true value of the accrual arose in the context of the accrual regime which existed between the parties, it was, accordingly, unavoidable that the pleadings and the tribunal would refer to the accrual system and the Act. That, however, does not detract from the true cause of action that was referred to arbitration which was rooted in delict. The respondent's contention and argument that the delictual claim, is therefore a matter 'incidental to matrimonial cause' is unsustainable and offends the clear and unambiguous language of s 2 of the Act.

[14] The appellant's reliance on *Taylor v Kurstag NO*[2] was misplaced. In that matter, the referral of custody of the children, maintenance and proprietary consequence of a pending marriage to an ad hoc Beth Din (Jewish Ecclesiastical Court) for determination 'according to arbitration laws of the Republic' was held impermissible. Correctly so, as the matrimonial cause was still alive including the issues of custody, maintenance and the proprietary consequences of such marriage. The appellant's reliance on *Pitt v Pitt*[3] was similarly misplaced. In that matter, the applicant sought an order enforcing the terms of a settlement agreement which regulated the proprietary consequences of their divorce.

[2] *Taylor v Kurstag NO & others* 2005 (1) SA 362 (W).
[3] *Pitt v Pitt* 1991 (3) SA 863 (D).

[15] I turn to the issue as to when the value of an accrual should be determined, ie, whether the value of the accrual should be determined at the close of pleadings, or at the dissolution of the marriage, either by death or by divorce.

[16] The provisions of the MPA are clear and unambiguous. In terms of s 3 thereof, a spouse acquires a right to claim an accrual at the 'dissolution of a marriage'. An exception arises in terms of s 8 of the MPA. In terms of this section, a spouse is entitled to approach the court for immediate division of the accrual, where his or her right to share in it at dissolution of the marriage 'will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse'. It is only then that the date for determination of an accrual is brought forward, instead of at 'dissolution of the marriage'. Furthermore, in terms of s 4 of the MPA the net value of the accrual of the estate of a spouse is determined at the dissolution of the marriage.

[17] This issue has given rise to dissenting decisions in two lines of cases in the high court. The one view is that the correct date upon which the accrual must be determined is at the stage of litis contestatio, whereas the other view is that this must be calculated at the date of dissolution of the marriage. In *MB v NB*[4] Brassey AJ held that although s 3 establishes the moment at which the contingent right possessed by a spouse becomes perfected ie, at the dissolution of the marriage, it does not establish the moment by reference to which the respective estates of the parties must be assessed. The learned acting judge was of the view that the problem was one of procedure, not substance, and owed its origin to the fact that litigation takes time to complete. In his view, the established principle was that the operative moment was litis contestatio, for that was the moment when the dispute

[4] *MB v NB* 2009 ZAGPJHC 76; 2010 (3) SA 220 (GSJ).

crystallises and can be presented to court for decision. The view in *MB v NB* was followed in *MB v DB*[5] and *KS v MS*.[6]

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

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

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

[5]*MB v DB* [2013] ZAKZDHC 33; 2013 (6) SA 86 (KZD).
[6]*KS v MS* [2015] ZAKZDHC 43; 2016 (1) SA (64) (KZD).
[7]*JA v DA* 2014 (6) SA 233 (GJ).
[8]*Le Roux v Le Roux* (2010) JOL 26003 (NCK).
[9]Para 23.

terms of s 3 of the MPA. I agree, however, with the view of Sutherland J that it would not be inappropriate to sue for both a divorce and an order pursuant to s 3 of the MPA in a single action, in which the accrual order is made dependent upon the grant of a divorce order.

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

'Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or 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. . .'

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

[21] In argument counsel for the appellant was constrained to concede that, jurisprudentially, the passage of Sutherland J quoted above in *JA v DA* was correct. The tribunal accordingly made no error in calculating the accrual as at the date of the divorce order. In the result, I find that the date at which the accrual of the value of a spouse married in terms of the MPA is to be determined is the date of dissolution of the marriage either by death or divorce.

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[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13*;* 2012 (4) SA 593 (SCA) para 18.

[22] It was common cause that paragraph 87 of the appeal tribunal award contains an error, which has to be referred back to the tribunal for correction as the court a quo ordered. I agree.

[23] It is ordered that:

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

M Tsoka
Acting Judge of Appeal

APPEARANCES:

For Appellant:	JG Wasserman SC (with him C Woodrow) Instructed by: Thomson Wilks Inc.; Johannesburg Webbers Attorneys, Bloemfontein
For Respondent:	H Epstein SC (with him M Smit) Instructed by: David C Feldman Attorneys, Johannesburg Lovius Block Attorneys, Bloemfontein