



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG NORTH, PRETORIA)

In the matter between:

2010/10/2010
CASE NO: 2784/2006

JOHANNA WILSON

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES ☒ NO

(2) OF INTEREST TO OTHER JUDGES: ☒ NO

(3) REVISED.

Plaintiff

and

ABRAM OUPA WILSON 2010-10-28

DATE


SIGNATURE

Defendant

J U D G M E N T

MAKGOKA, J:

[1] The central question in this divorce action is whether a party to a marriage in community of property can be ordered to forfeit an asset she/he has brought into the joint estate. The answer should, in my view be in the negative. The essence and nature of the twin concepts of marriage in community of property and forfeiture of benefits arising from such marriage is this: a party can only benefit from an asset brought into the estate by the other party, not from his own: *a fortiori* such a party cannot be ordered to forfeit her/his own asset. This is the primary basis on which I conclude in this judgment that forfeiture should not be ordered.

[2] On 19 June 1989 the parties were married to each other in community of property. There are no children born of the marriage but the plaintiff has a major child born on 15 October 1983 from another relationship.

[3] The plaintiff seeks an order of forfeiture of benefits while the defendant seeks an order that the joint estate be divided equally and an order that half of the plaintiff's pension be paid to himself. The parties agreed that the marriage relationship has broken down irretrievably and that the marriage should be dissolved.

THE PLEADINGS.

[4] In her particulars of claim the plaintiff alleged the following grounds for forfeiture: (a) the defendant assaulted her on numerous occasions; (b) the parties had not lived as man and wife for approximately 3 months; (c) the defendant failed or neglected to make any contribution to the joint estate over the past 10 years and was unemployed; (d) the plaintiff maintained the defendant financially while the defendant verbally abused the plaintiff and threatened her life; (e) the defendant engaged in numerous extra-marital affairs and entertained other women in the common home in the absence of the plaintiff.

[5] In his plea the defendant generally denied these allegations, and specifically joined issue with the allegation that he did not work during the marriage and that he did not contribute to the accumulation of the joint estate. He however, conceded that at times he was retrenched, but alleged that he was gainfully employed on a contractual basis on a number of occasions, and that he used his resources to maintain the common home.

[6] In his counter-claim the defendant alleged that the marriage relationship broke down because the plaintiff misled him into believing that he was the biological father of the child born on 15 October 1983; that he married the plaintiff as a result of this misrepresentation, and that when he discovered the truth in 2005, the relationship became strained.

COMMON CAUSE ISSUES.

[7] It is common cause that after their marriage, the parties moved into a property situated at erf 1219 Atteridgeville, also known as 17 Maleka Street, Atteridgeville (the property), which was owned by the defendant's father (who died shortly afterwards). On 23 July 1992, the property was registered in the names of the parties and it has been the common home of the parties since then.

[8] It is also common cause that after the property was registered in the names of the parties it was renovated and that as at February 2009 the property was valued at R580 000.00 (see the relevant valuation certificate admitted into evidence).

[9] Finally it is common cause that the plaintiff is a registered nursing sister who has been continuously employed since 1985 and built up a pension fund. She is presently a member of the Government Employees Pension Fund (GEPF).

THE EVIDENCE.

[10] Only the parties testified and, save for a few matters to be referred to later, not much turns on the evidence. Resolution of the dispute between the parties depends mainly on the facts which are common cause and the applicable law.

[11] The plaintiff testified about the marriage's history, the management of finances, the defendant's assaults upon her, the defendant's erratic employment history, the renovations to the house, which she carried out with her own resources, with no meaningful contribution from the defendant, and the defendant's abuse of alcohol.

[12] In his evidence, the defendant denied most of the plaintiff's evidence, although he conceded that he was not always employed which, he said was not due to any fault on his part. He also conceded that he assaulted the plaintiff. It emerged that he was convicted for assaulting the plaintiff and was sentenced to 15 months imprisonment of which he served 4 months.

[13] It is not necessary to evaluate the evidence in detail. The following conclusions and findings will suffice. The plaintiff testified in a forthright manner. There are no inherent improbabilities or material contradictions in her evidence. She was steadfast in cross-examination and did not deviate from her evidence in any material respect. I was impressed by the manner in which she spontaneously answered questions. She maintained her composure despite testifying in English, which is not her mother-tongue. There is no reason to doubt any of her evidence material to the issues.

[14] The same cannot be said of the defendant. His evidence was sketchy. He was shifty and evasive and was unable to answer simple, direct questions. He also sought to shift blame to others and contradicted a version put by his counsel in cross-examination. Most importantly admitted that he assaulted the plaintiff and that he was convicted and sentenced to imprisonment for 15 months.

FACTUAL FINDINGS.

[15] Weighing the evidence of the parties, I have no hesitation in preferring the evidence of the plaintiff to that of the defendant. Accordingly, I find that the plaintiff renovated the property on her own; that the defendant was, during the relevant period, erratically employed; that the defendant lost jobs because of lack of application and a care-free attitude; and that the plaintiff was the effective breadwinner in the household. I also find that the defendant started to assault the plaintiff in 2005 after he discovered that the plaintiff had been receiving maintenance for her son from the latter's biological father. This is consistent with the probabilities.

APPLICABLE LAW

[16] In the light of these findings, I must now determine whether an order of forfeiture should be granted in favour of the plaintiff against the defendant. In this regard section 9 of the Divorce Act 70 of 1979 ('the Act') provides that:

"When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the Court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the Court, having regard to the duration of the marriage, the circumstances which gave rise to

the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

[17] The nature and essence of community of property is described in *The South African Law of Husband and Wife* HR Hahlo 5 ed at 157-8 as follows:

"Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of the financial contributions, hold equal shares."

[18] The head-note in *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) reads in part as follows:

"Joint ownership of another's property is a right which each of the spouses acquires on concluding a marriage in community of property. Unless the parties (either before or during the marriage) make precisely equal contributions the one that contributed less shall on dissolution of the marriage be benefited above the other if forfeiture is not ordered. This is the inevitable consequence of the parties matrimonial regime. The Legislature (in section 9 of the Divorce Act 70 of 1979) does not give the greater contributor the opportunity to complain about this. He can only complain if the benefit was undue..."

[19] In *Wijker v Wijker* 1993 (4) SA 720 (A) the proper approach was stated in determining whether an order of forfeiture should be made. It was held that the court should first determine whether or not the party against whom the order of forfeiture is

sought will in fact be benefited if the order is not made. Once it is determined that that party will benefit, the next enquiry is whether such benefit will be an undue one.

[20] In *Engelbrecht* (supra) the Full Court emphasised that a party who seeks a forfeiture order must first establish what the nature and extent of the benefit was. Unless that is proved, the court cannot decide if the benefit was undue or not. Only if the nature and ambit of the benefit is proved is it necessary to look to the three factors which may be brought into consideration in deciding on the inequity thereof.

[21] The trial court in *Engelbrecht* was satisfied that, if forfeiture order was not made, the defendant would be unduly benefited in comparison to the plaintiff. The plaintiff (respondent on appeal) and the defendant (appellant) were married in community of property in 1980. The plaintiff brought into the joint estate an erf which he bought for R3000 in 1975. He used the proceeds of a life policy on the life of his first wife to pay for it. He took a bond of R14000 and built a house on the erf. The parties thereafter married. There was no proof of what the house was worth when summons was issued. On appeal the Full Court found that the respondent had not proved the nature and extent of the appellant's benefit at the dissolution of the marriage; *a fortiori* he had not proved that such benefit was undue, in the circumstances.

[22] The facts in *Engelbrecht* are similar to the facts of present case. The value of the property at the date of the marriage and at the date of dissolution has not been established. In *Engelbrecht* the value at dissolution of the marriage was not proved whereas in the present case no value was proved as at the commencement of the

marriage. The plaintiff has only proved the value of the house when the divorce proceedings were instituted. She has not proved what the house was worth when the parties entered into the marriage. The plaintiff has therefore not proved the extent of the defendant's benefit on the dissolution of the marriage.

[23] Having failed to prove that, it follows that the plaintiff has not proved that any benefit receivable by the defendant would be undue. Accordingly, I cannot conclude that the defendant would be unduly benefitted if forfeiture was not ordered and I cannot, therefore, grant the plaintiffs claim for forfeiture.

[24] If this conclusion is wrong, I am in any event not persuaded that forfeiture should be ordered if the factors mentioned in section 9(1) of the Act are taken into account.

Duration of the marriage

[25] The marriage was of a fairly long duration, lasting for approximately 17 years, (when summons was issued).

Factors that led to the break-down of the marriage

[26] A marriage relationship seldom breaks down as a result of the conduct of only one spouse. The parties' marriage is no different. In this regard I accept the defendant's version that during 2005 he found out that the plaintiff was receiving maintenance for her son from the latter's biological father. While he may have known about the boy's paternity he did not know about the maintenance. Not only

was the plaintiff receiving maintenance from her ex-boyfriend, but she kept it a secret from him.

[27] From the evidence, it appears that that was the turning point in the breakdown of the marriage. Until then, the parties' marriage was a "normal" one with its own challenges. However, from 2005 violence crept into the marriage. The defendant started assaulting the plaintiff and this resulted in the plaintiff and her son obtaining protection orders in January and December 2005, respectively.

[28] To summarise: I find that the marriage broke down during 2005 as a result of the assault by the defendant on the plaintiff. Despite the erratic employment history of the defendant, there is no suggestion that that factor induced the plaintiff to end the marriage. It was only when the relationship turned violent that the plaintiff commenced divorce proceedings.

Any substantial misconduct on the part of either party.

[29] I have already found that the defendant assaulted the plaintiff. That constitutes substantial misconduct on the part of the defendant. Domestic violence, in particular against women, strikes at the foundation and premise of a non-sexist and democratic order. It is a repulsive phenomenon which has no place in a society founded on the values of freedom, dignity, honour and security.

[30] That I have found substantial misconduct on the part of the defendant, does not on its own, justify a forfeiture order. See *Engelbrecht* (supra) at 602J – 603A.

ANALYSIS AND CONCLUSION.

[31] It must be remembered that when the parties entered into the marriage, the defendant brought into the estate an immovable property with improvements in the form of a house. The plaintiff brought nothing, but effected renovations to the property. In my view there can be no better illustration of "universal partnership" referred to by the learned author Hahlo, cited in paragraph 17 above.

[32] Even if it is assumed that the value of the renovations equals or exceeds the value of the property pre- renovations, it is a consequence of the parties' marriage in community of property. From the fact that the defendant did not contribute towards the renovation of the property, it does not necessarily follow that he will be unduly benefited.

[33] Furthermore, whatever benefit that might accrue to the defendant, must be considered having regard to the factors mentioned in section 9. I have already alluded to the fairly long duration of the marriage. The defendant's gross misconduct (in assaulting the plaintiff) can certainly not be ignored, but it must be assessed with all the other circumstances. One must also bear in mind that the final breakdown came as a result of the defendant discovering that the plaintiff was receiving maintenance for her son from an ex-boyfriend. The plaintiff's conduct in this regard, (of receiving maintenance for her son behind the defendant's back) can also not be ignored. I therefore come to the conclusion that an order for forfeiture is not appropriate in the circumstances.

DEFENDANT'S COUNTER-CLAIM

[34] I turn now to consider the defendant's counter-claim in respect of the plaintiff's pension interest. Section 7 (a) of the Act provides that the pension interest of a party shall be deemed to be part of her/his assets in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled.

[35] Section 8 of the Act provides as follows:

"(8) Notwithstanding the provisions of any other law or the rules of any pension fund

—

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that —

- (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to the other party when any pension benefits accrue in respect of that member

iii

(b)

[36] It is clear from the wording of the section that the court has a discretion in considering an order in terms of section 8(a). Obviously such a discretion must be exercised judiciously, taking into consideration relevant factors. Whereas in considering forfeiture, considerations of fairness should not come into play (the court being confined to the three factors mentioned in section 9) such considerations would in my view, apply in considering an order under section 8.

[37] I take into account that the plaintiff has been in continuous employment for the past 25 years during which she probably built up a fairly modest pension interest. On the other hand, the defendant, due to his erratic employment history, has built no such interest.

[38] In considering what is fair and just, in the circumstances of the case, I conclude that no order should be made in terms of section 8(a) of the Act. In other words, the defendant is not entitled to any part of the plaintiff's pension.

SUMMARY

[39] To sum up: the plaintiff's claim for forfeiture of the benefits arising from the marriage, and the defendant's counter-claim for an order in terms of section 8(a) of the Act should both be dismissed.

COSTS

[40] Finally, the issue of costs. The award of costs in a divorce action is governed by section 10 of the Act, which provides:

"In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between them."

[41] The parties have each been partially successful in their respective claims. There is therefore no party who has been substantially successful over the other. I consider however, that on 21 May 2010 the plaintiff made a written tender of settlement, which was disclosed to the court at the commencement of the trial as a "*with prejudice*" tender. The defendant did not accept such tender.

[42] Having been unable to prove no more than the plaintiff had offered, the defendant should be ordered to pay the costs occasioned from the date of the tender.

[43] There are also costs occasioned and reserved on 18 April 2008. On that occasion the defendant was not ready to proceed and the trial had to be postponed at his instance. There is no reason why the defendant should not be ordered to pay those costs.

ORDER

[44] Having regard to all the factors in this matter, I make the following order:

1. A decree of divorce is granted;
2. The joint estate of the parties shall be divided in equal shares;
3. The defendant's counter-claim for an order in terms of section 8 (a) of the Divorce Act 70 of 1979 in respect of the plaintiff's pension interest is dismissed;

4. The defendant is ordered to pay the costs of the action from 21 May 2010 to the date of trial, as well as the costs reserved on 18 April 2010.


 T M MAKGOKA
 JUDGE OF THE HIGH COURT

DATE HEARD	2 JUNE 2010
JUDGMENT DELIVERED	28 OCTOBER 2010
FOR THE PLAINTIFF	ADV R. FERREIRA
INSTRUCTED BY	CHARL LOCHNER ATTORNEYS, CAPITAL PARK, PRETORIA.
FOR THE DEFENDANT	ADV MG LEDWABA
INSTRUCTED BY	MOLEFE ATTORNEYS, PRETORIA.