NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 35432/2008, 42644/2010, 40419/2010

DATE:02/09/2011

In the matter between:

B O O — PLAINTIFF

And

N N O — DEFENDANT

JUDGMENT

MAKGOBA. J

[1] This is an action for divorce instituted by the plaintiff against the defendant. The plaintiff prays for an order that the primary residence of the parties' minor children be with him and that the defendant shall forfeit the patrimonial benefits arising out of the marriage in community of property. The defendant in her counterclaim prays for an order that the primary residence of the minor children be with her and for an order of division of the joint estate.

[2] While the divorce action was still pending and on 12 July 2010 the plaintiff obtained an interim order against the defendant under case number 40419/10 to the effect that the defendant should vacate the residence situated at 723 Ilona Street Rietvleiview Country Estate Pretoria immediately and prohibiting her from entering and/or occupying the said property.

[3] On 22 July 2010 the plaintiff obtained another interim order under case number 42644/2010 against the defendant which order *inter alia* interdicted her form entering the aforesaid residence and also interdicting her from harassing, threatening and/or stalking the plaintiff directly or indirectly.

[4] The two applications have been referred to this court for oral evidence.

[5] At a pre-trial conference held on 3 August 2011 the issues in the three matters were identified and set out as follows:

1. The parties agree that the marriage has irretrievably broken down and that a final decree of divorce should be granted.

2.

2.1 The plaintiff contends that all disputes relating to the minor children have been settled in terms of the court order dated 20 May 2010.

2.2 The defendant is of the view that the court order of 20 May was only *pendente lite* the divorce action.

3. The issues still in dispute are:

3.1 The reasons for the breakdown of the marriage and whether those reasons constitute grounds for forfeiture.

3.2 Whether a forfeiture order as prayed by the plaintiff against the defendant should be granted or whether the joint estate should be divided.

3.3 The costs of the action as well as the wasted costs of the postponement of the matter on 20 May 2010 and the hearing thereof on the same date.

3.4 The applications under case numbers 40419/2010 and 42644/2010 which have been referred for hearing of oral evidence simultaneously with the divorce trial.

3.5 The reserved costs in both the above applications need to be determined by the court hearing the divorce action.

[6] The parties having agreed that the marriage has broken down irretrievably it is therefore common cause that a decree of divorce should be granted. Before me the following issues are to be decided as they appear form the pleadings:

6.1 Whether the defendant should forfeit the patrimonial benefits of the marriage as a result of

6.1.1 the defendant's involvement in an extramarital relationship with a third person;

6.1.2 the defendant deserted the plaintiff the minor children; and

6.1.3 that it will be just and equitable for the court to make an order that the patrimonial benefits of the marriage be forfeited by the defendant in favour of the plaintiff.

6.2 Whether the primary residence of the three minor children born out of the marriage should remain with the plaintiff; and

6.3 Whether the interim orders obtained under case number 40419/2010 and 42644/2010 should be confirmed for purposes of determining the costs thereof.

[7] I shall proceed to deal with the two applications whereafter I shall deal with the divorce proceedings in so far as it relates to the minor children and the joint estate of the parties.

<u>Eviction of the Defendant on 12 July 2010: Case Number 40419/2010</u>

[8] On 12 July 2010 the plaintiff obtained an interim order against the defendant and on the following terms:

8.1 That the defendant be ordered to vacate the residence situated at 723 Ilona Street, Rietvleiview Country Estate, Pretoria immediately.

8.2 That should the defendant fail to comply with the order referred to above the sheriff of this court is hereby authorised and/or mandated to take all the necessary steps to execute the order and evict the respondent from the property, and if necessary to obtain the assistance of the South African Police Services to assist him/her in this regard;

8.3 That the defendant is prohibited form entering and/or occupying the property situated at 723 Ilona Street, Rietvlei Country Estate, Pretoria.

[9] The application, having been on urgent basis was served on the defendant at 13:39 and set down for 15:00 on 12 July 2010. Given the short notice of 1 hour and 20 minutes the defendant could not file any opposing papers and the plaintiff went on to obtain the interim order unopposed. The return date of the rule nisi was 24 August 2010. Subsequent to the defendant filing her opposing affidavit the matter was postponed to 1 November 2010 and on the latter date the matter was referred for oral evidence to be heard together with the divorce action.

[10] The plaintiff testified that he instituted this proceedings after being informed by his attorney that the defendant was occupying the property situated at 723 Ilona Street, Rietvlei Country Estate, Pretoria while he was in jail. The founding affidavit in this application was deposed to by his attorney. It is evident that the plaintiff relied on hearsay evidence of his attorney and did not have personal knowledge of the defendant's alleged occupation of the property on 12 July 2010.

The defendant denies that she occupied the property on 12 July 2010 or at any time alleged by the plaintiff in his papers. On 11 July 2010 she arrived at the premises with the children and called the plaintiff on his cellphone. She went into the premises after the security guards opened for her and the children. Soon after the plaintiff came home he screamed and shouted to the children and the defendant. He assaulted the defendant and dragged her out of the house. The defendant went to Welbekend Police Station to open a charge of assault against the plaintiff, hence the plaintiff was arrested and detained as at 12 July 2010.

On 11 July 2010 upon the arrest of the plaintiff for assaulting the defendant, the defendant spent the night with her children at her sister's residence in Thokoza Gardens. She never came back to occupy the property as alleged by the plaintiff and/or his attorney in the founding affidavit.

[11] It is trite law that in order to succeed with an application for a final interdict the plaintiff should satisfy the court that: (1) he has a clear right; (2) an injury is actually committed or reasonably apprehended and (3) the absence of any other remedy available to him.

[12] On the evidence it has not been shown that the defendant had deprived the plaintiff of the possession or occupation of the property forcibly or wrongfully against his consent.

[13] Even if it were to be found that the defendant took occupation of the property (it being the matrimonial home of the parties) her conduct would not amount to an unlawful deprivation of the plaintiff of his possession of the property.

It is a fact that the parties are still married to each other in community of property. The plaintiff is not entitled to the exclusive use of the property situated at 723 Ilona Street, Rietvlei Country Estate, Pretoria.

[14] Mr Mphahlele, counsel for the defendant referred me to the case of ***Badenhorst v Badenhorst* 1964 2 SA 676 (T) at 679** where it was held that a wife has no right to seek to eject her husband from the matrimonial home merely because the property belongs to her. Because she and her husband have rights flowing from the marriage which in relation to that property put him in a category differing *toto coeli* from a stranger.

The same holds true for the husband in this case.

[16] It is legally incorrect for the plaintiff to submit that he was in an undisturbed occupation and possession of the property of the matrimonial home to the exclusion of the defendant.

Under the circumstances the plaintiff has failed to establish a clear right and consequently the interim interdict obtained by the plaintiff on 12 July 2010 should be discharged on this ground alone.

Furthermore the plaintiff has failed to establish a reasonable apprehension of harm or that the defendant has committed any harm. The interim order obtained by the plaintiff is not a competent order under the circumstances because the defendant has not unlawfully dispossessed the plaintiff bearing in mind that the defendant has never attended the matrimonial home upon the arrest of the plaintiff on 11 July 2010 but was at all times in Thokoza Gardens.

[17] In the circumstances the interim order obtained by the plaintiff on 12 July 2010 is discharged and the plaintiff is liable to pay the costs thereof, including the costs of 12 July 2010, 24 August 2010 and 1 November 2010.

<u>Interdict of the Defendant on 22 July 2010: Case Number 42644/2010</u>

[18] The plaintiff obtained a further interim order against the defendant on 22 July 2010. The application was not served on the defendant before the hearing. The order was obtained *ex parte*.

[19] The interim order obtained by the plaintiff is in the following terms:

(1) That the defendant is interdicted from entering the residence in 723 Ilona Street, Rietvlei Country Estate, Pretoria and not to approach such residence within a radius of 100 metres;

(2) That the defendant is interdicted from entering the workplace of the plaintiff situated at 1033 Louis Pasteur Building 374 Schoeman Street, Pretoria;

(3) That the defendant is interdicted from harassing, threatening and/or stalking the plaintiff directly or indirectly;

(4) That the defendant is interdicted from communicating with the plaintiff in any manner whatsoever other than via the parties' respective attorneys of record;

(5) That the defendant is interdicted from making use of third parties in order to circumvent the orders in (1) up to and including (3) above.

(6) That should the defendant in person, alternatively with the assistance of a party/parties contravene the provisions of the interim order, the plaintiff is entitled to approach the court on the same papers, as amplified, if necessary, for the necessary relief.

[20] The return date of the rule nisi was on 24 August 2010. The defendant had duly filed her opposing papers and the matter not being property enrolled, was postponed to 1 November 2010. On the latter date the matter was referred for oral evidence to be heard together with the divorce action.

[21] During the present trial proceedings the plaintiff has said nothing in his testimony about the alleged fear for his safety or that of the couple's minor children. Even in his founding affidavit the plaintiff has tendered no evidence relating to the factual basis for which he obtained the interim order in the first place. In her answering affidavit and testimony in the trial the defendant refuted the plaintiff's baseless allegations.

[22] Suffice to state that during argument at the trial Mr Smith SC, counsel for the plaintiff was not able to argue for the confirmation of the interim order but instead argued that the interim order be discharged but that each party should pay his or her own legal costs.

[23] I accordingly order that the interim order obtained by the plaintiff on 22 July 2010 be and is hereby discharged and that the plaintiff is liable to pay costs thereof including the costs of 24 August 2010 and 1November 2010.

<u>Divorce Proceedings</u>

[24] Both parties gave evidence during the trial and were extensively cross-examined by their respective legal representatives. Each party was in the witness box for at least three court days. It will be practically impossible to state all what was said by each party in this judgment but I shall only summarise their versions in so far as same is relevant to the issues regarding the breakdown of their marriage and the forfeiture of patrimonial benefits or division of the joint estate as well as the primary residence of their minor children.

[25] The plaintiff is presently a specialist neurosurgeon by profession whilst the defendant is a clinical psychologist. Both are in private practice.

They met in 1996 when the plaintiff was still a registrar and the defendant an intern psychologist. They married in community of property on 14 June 1997 and have three children presently aged 14 years, 12 years and 7 years. The plaintiff qualified as a neurosurgeon in 2000 and the defendant qualified as a psychologist in 1998. They stayed together in Sunnyside, Pretoria and in 1998 moved to the married quarters at Ga Rankuwa Hospital.

[26] The defendant having qualified as a psychologist in 1998 was capable of raising a deposit and the parties bought a residential property at Amandasig, Pretoria. She paid a deposit of R84 000.00 for the purchase price of the house. The plaintiff later paid back half of the

deposit to the defendant. The monthly instalment of R6 000.00 in respect of the bond on the house was paid by the plaintiff and the defendant would pay half of the amount (R3 000.00) per month to the plaintiff. The bond in respect of the Amandasig house is paid off and the value of the property is presently R1 250 000.00.

[27] The plaintiff testified that during early 2002 the defendant left the common home. This was after he had confronted her with allegations that she was conducting an extramarital love affair with another man. The defendant went to stay at her sister's place at Thokoza for three months. The parties reconciled through counselling by one Dr Lubisi who was their acquaintance.

[28] During June 2008 the plaintiff again confronted the defendant with further allegations that she was involved in an extramarital love affair with another man after he discovered pictures of the said man in her cellphone and laptop. According to the plaintiff the defendant confessed to the love affair and said the affair had started in November 2007.

[29] The parties obtained an empty stand at 723 Ilona Street, Rietvleiview Country Estate, Pretoria, during November 2004 and in 2006 a residential house was built on the said stand. Plaintiff maintains that the purchase price of the stand and the costs of the building were paid

by him without any contribution by the defendant. He said that the defendant made some contributions towards the purchase of the furniture, fittings and curtaining of this house. He said that at that time the defendant was earning an income of between R180 000.00 and R200 000.00 per month. The present value of the Rietvleiview property is R3 100 000.00.

[30] The defendant stayed hardly five months in this property and left the common home on 10 July 2008. It is common cause that since this date the parties never reconciled and the plaintiff instituted the divorce action on 25 July 2008. After the departure of the defendant the plaintiff during 2008 allowed one Esther to stay with him and the children in the house. The plaintiff admits that he fell in love with Esther early in 2009 and they stayed together as husband and wife in the house.

[31] The defendant's version is that she supported the plaintiff for four years while he was still studying as a registrar in the neurosurgery department at Ga Rankuwa Hospital. She raised money and contributed towards the purchase of the house at Amandasig as well as the purchase of the contents thereof. That she also contributed towards the building of the house at Rietvleiview and the purchase of the contents thereof. That her contribution in their marriage was not only financial but also in the form of emotional support. She stated that when the plaintiff qualified and became a successful neurosurgeon he

worked long hours and that she single handedly looked after the children.

[32] According to the defendant their marital problems started early in the marriage and came to a head in 2002. She states that the plaintiff was obsessively jealous and overly controlling and always accused her of having extramarital love affairs. Early in 2002 the plaintiff exploded and threatened to kill her. She left the common home with her children and moved back after they had consulted a psychologist, Dr Lubisi.

[33] The defendant testified further that on 10 July 2008 after being subjected to emotional and physical abuse by the plaintiff she left the marital home. At the time she was contemplating suicide and did not want the applicant to know her whereabouts. She eventually arrived in East London where she was admitted at St Marks Clinic on 14 July 2008 until 23 July 2008 after being diagnosed with a major depression disorder of approximately four months duration occasioned by stress related to her marital problems. A medical report by Dr Schaffer to this effect was handed in as an exhibit at the trial.

[34] On 24 July 2008 she went back to the matrimonial home and discovered that the plaintiff was cohabiting with Esther in the matrimonial home at Rietvlei Country Estate, Pretoria. She was served with divorce summons on 25 July 2008.

[35] From the totality of the evidence presented at the trial, the details of which may not appear in my summary of the evidence above, I make the following findings:

35.1 That the defendant was indeed involved in an extramarital love affair with one Stephen Nembulu and that the plaintiff discovered this affair during 2008;

35.2 That the plaintiff was involved in an extramarital love affair with one Esther and the defendant discovered this affair also in 2008;

35.3 That both parties are equally guilty of conducting adulterous relationships outside their marriage and that such relationships have led to the irretrievable breakdown of their marriage.

35.4 That each party has contributed (even if not equally) towards the building of their joint estate in the form of the property at Amandasig and Rietvleiview and the contents thereof.

[36] The question as to whether there should be an order for forfeiture of the patrimonial benefit or division of the joint estate is dealt with later hereunder.

<u>The Issue Relating to the Minor Children</u>

[37] Prior to the parties' marriage on 14 June 1997, a minor son, O was born on 7 June 1997. During the course of the marriage two children were born namely E, a boy, born on 5 February 1999 and O, a girl, born on 4 April 2004. At present the children are 14 years, 12 years and 7 years respectively.

[38] The divorce summons was issued and served together with a rule 43 application on the defendant on 25 July 2008. The defendant opposed the divorce action but not the rule 43 application and on 2 September 2008 and by agreement between the parties a draft order was made an order of court between the parties and on the following terms:

(1) All three minor children would reside with the plaintiff *pendente lite*;

(2) The plaintiff would maintain the children fully without any contribution from the defendant;

(3) The defendant would have rights of reasonable contact to the minor children which *inter alia* included every alternate weekend from Friday evening at 19:00 until Sunday at 16:00, removal of the children twice per week for a period of two hours on each occasion, every alternate short and long school holiday with the

rotation of the Christmas holiday and that the matter be referred to the Family Advocate for investigation and the bringing out of a report containing recommendations with regard to the primary residence of the children and the contact rights to be enjoyed by the non resident parent.

[39] The divorce action was enrolled initially for 20 May 2010. On this date the parties concluded a settlement agreement, which settlement agreement was included as an order of court. Save for the settlement agreement being incorporated as an order of court, the divorce action was postponed *sine die* and once again enrolled for hearing on 8 August 2011.

[40] In terms of the settlement agreement entered into between the parties, the issues in dispute with regard to the minor children was settled, the relevant terms of the settlement agreement being *inter alia* the following:

(1) Both parents shall have parental responsibilities and rights over the said minor children;

(2) The primary place of care and residence of the minor children shall be with the plaintiff.

(3) The defendant shall have rights of reasonable contact to the minor children which shall include the rights to have the children with her for alternative weekends and for purposes of definition, a weekend shall commence on Friday after school and end on Monday morning when school commences and to give effect hereto, the defendant shall collect the children at school on Friday and return them to school on a Monday morning;

(4) The defendant shall have the right to have the minor children with her for alternate short school holidays and one half of the long school holidays on the understanding the December/January school holidays shall be divided in such a fashion that the children will spend alternate Christmas' and New Years with alternative parents;

(5) The defendant shall be entitled to have the children with her for alternate long weekends and have the right to telephonic contact at all reasonable times;

(6) The plaintiff shall be responsible for all the maintenance requirements of the minor children, save that the defendant shall ensure that the minor children are placed on a comprehensive medical aid scheme at her cost and she will be responsible for paying all medical expenses reasonably incurred

for and on behalf of the minor children not covered by the said medical aid.

[41] Ever since the defendant left the common home on 10 July 2008 the three minor children have resided with the plaintiff and he has exercised care and primary residence over them, except that O, the eldest child, returned to the defendant on 26 November 2010 and is presently residing with the defendant.

[42] I have already alluded to the minutes of the pre-trial conference held by the parties' legal representatives on 3 August 2011 in paragraph [5] above. It is significant to note that the issue relating to the primary residence of the minor children was never canvassed or noted in the minutes.

However, at the commencement of the trial counsel for the defendant raised a further issue that he contended had to be decided by the court. According to counsel the settlement agreement concluded between the parties and incorporated as an order of court on 20 May 2010 was not a final order but simply an order *pendente lite* pending the finalisation of the divorce action. According to him the issue pertaining to the primary residence of the minor children and the non resident parent's contact rights to them was an issue which still had to be determined by the court.

[43] There is absolutely no merit in counsel's contention.

On perusing the said court order which was handed in at the trial as "exhibit B" it is clear that the said order constitutes a final order in respect of the primary residence of the minor children. More so that together with "exhibit B" a letter from the defendant's attorneys was handed to the court which letter is dated 14 May 2010. The following paragraph is found in the letter:

> "*1. Our client no longer contends for the primary residence of the children. Your client can have the primary residence, subject to reasonable access of our client. The reasonable access may be agreed upon by the parties.*"

[44] In any event during cross-examination the defendant conceded that the order of 20 May 2010 was indeed a "final" order and that same disposed of the dispute pertaining to the minor children. The defendant specifically confirmed that the order was "final" to the court as well in reaction to a question put to her by the court.

I therefor make a finding that the issue relating to the primary residence of the minor children was disposed of by virtue of the court order of 20 May 2010.

[45] It is trite law that the issue relating to the primary residence and contact rights of the minor children is never final in the sense that it cannot be varied when circumstances permit. It is not cast in stone.

To a certain extent the situation has changed in the sense that the eldest child, O, has since 26 November 2010 returned to the defendant and he is presently residing with the defendant. A situation has developed where the three children are staying separately, two are staying with the plaintiff and one is staying with the defendant.

[46] The eldest child, O, gave evidence in court. In response to questions by the court he indicated that he is happy to stay with his mother and that he is not willing to return to the plaintiff. He, however, expressed his wish to be with his siblings. The court is satisfied and inclined to respect this child's preference in the light of the decision in ***McCall v McCall*** **1994 3 SA 201 (CPD) at 207** where it was said:

> "*If the Court is satisfied that the child has the necessary intellectual and emotional maturity to give his expression of a preference, a genuine and accurate reflection of his feelings towards the relationship with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to his expressed preference.*"

[47] On the question of siblings staying separately as a result of the divorce of their parents, the learned authors **Hoffman and Pincus**: *The Law of Custody* 1989 at page 38 have this to say:

> "*It is traumatic enough for children to be exposed to the divorce of their parents. The process of change is often a painful experience and involves the repositioning of individuals and the redefinition of role relationships. To separate children from each other as a result of the divorce of their parents would merely add fuel to the fire and further complicate matters. It would also add to the burden the children have to carry and fragment their sense of security and stability. It would deny them free access to their siblings, the emotional support they might ordinarily require, and would alienate them from their family. It would also undermine their trust in others, their perception of their future, and their ability to commit themselves in a meaningful way to the other.*"

[48] Suffice to say that this court being the upper guardian of all minor children, everything possible has to be done in recognition of the best interest of the minor children.

Irrespective of the existing court order regarding the primary residence of the minor children *in casu* it shall be in the interests of the minor children that this issue be referred to the Family Advocate for investigation and the bringing out of a report containing recommendations with regard to the primary residence of the three children and the contact rights to be enjoyed by the non resident parent. My order in this regard will follow at the end of this judgment.

[49] One disturbing and in fact unfortunate issue arose during the trial when paternity of the eldest child, O, aged 14 years, was put in dispute. The plaintiff avers that he is not the biological father of this child.

He testified that in late 2008 he got a call from one of the defendant's friends informing him that he is not the biological father of O. During September 2008 he took Og for a paternity test and the result showed that he is not the biological father of the child. He kept this information as well as the paternity test report to himself until on 21 November 2010 when he wrote a letter to the defendant to inform her of the paternity tests results. He invited the defendant for a discussion but there is no indication as to her response.

[50] In an effort to resolve the paternity issue the plaintiff called Dr Carolyn Wendy Ann Tsilimigras to testify on the pathology report which was handed in. She testified that DNA samples were taken from the plaintiff and the child, O, and given to her for analysis. The defendant's samples were not taken and analyzed by her. She

analyzed and compared the DNA samples obtained from the above individuals and pursuant thereto her results were set out in her report dated 31 October 2008. The results showed that the plaintiff is excluded from being the biological father of O.

[51] Save for saying that she received and analyzed the DNA samples Dr Tsilimigras said she was not present when blood samples were drawn from the individuals. She could not say out of own person knowledge as to who drew the blood samples, sealed them and dispatched them to her laboratory for analysis. In other words she could not testify on the chain of events from when the blood samples were drawn up to when she received same. No other witness was called to testify on this aspect. This then leaves an open question as to what process was followed in drawing blood samples, identification of same as that of the individuals drawn from and the sealing and dispatch thereof.

[52] The question now arises as to whether the results arrived at the analysis of the blood/DNA samples can be regarded as conclusive proof of the paternity of the child.

Counsel for the defendant argued that the results of paternity test as contained in the report handed in by Dr Tsilimigras be rejected. He referred the court to a decided case of ***Old Mutual Fire & General Insurance Co of Rhodesia (PVT) Ltd v Smith NO*** **1977 4 SA 161 (R)** where it was held that as there was no evidence as to identification of the subject and no direct evidence as to who took the samples or as to how it had been taken, that the court was unable to say that there was any balance of probabilities in plaintiff's favour.

[53] I am inclined to agree with counsel's submission in this regard. In my view the evidence of Dr Tsilimigras and the pathology report handed in cannot be conclusive proof in favour of the plaintiff. The details of the process of taking of the samples ought to be properly proved in each case. See ***S v L*** **1992 3 SA 713 (ECD)**.

[54] The conduct of the plaintiff with regard to the disputed paternity of O is astonishing. He took the child for paternity test without the involvement of the defendant who is the mother of the child.

As early as October/November 2008 he was in possession of the blood test results. He kept this to himself. Two years later during November 2010 was then that he wrote a letter to the defendant raising the paternity issue.

When the divorce summons was issued and served on the defendant on 25 July 2008 he already knew of the paternity tests results. In his particulars of claim in the summons he put an allegation that the defendant is involved in an extramarital love affair with a third person.

He did not put in a crucial allegation that as a result of the extramarital affair with a third person a child was born.

[55] An inescapable inference can be drawn that this issue of paternity of O was raised and used as an after thought and as a weapon to fight for the forfeiture of benefits arising out of the marriage in community of property.

I accordingly reject the paternity test report and make a finding that the plaintiff has failed to prove on a balance of probabilities that he is not a biological father of O.

[56] The trial in this divorce action was protracted. It took seven court days of leading evidence and cross-examination of the parties until the matter was finally argued on the eighth day. Much court time was spent unnecessarily debating as to whether the settlement agreement of 20 May 2010 was final or interim in nature. The wasted time occasioned by the defendant's argument with regard to the status of the settlement agreement and an after thought denial of paternity of one child by the plaintiff are factors that should be taken into account by this court when making an order as to the costs of the divorce action.

Forfeiture of Patrimonial Benefits

[57] It has long been accepted that when parties enter into a marriage in community of property one joint estate will be formed. As such, entering into a marriage in community of property is a risk each spouse takes. The spouses will, on the date the joint estate is created, become joint owners of all the assets brought into the estate and will also share each other's liabilities.

It has been stated that:

> "*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.*"

H R Hahlo: *The South African Law of Husband and Wife* 5th Edition at p 157-8

[58] On divorce the court is empowered to order forfeiture of all or only some of the patrimonial benefits derived from the marriage. The courts do not have the power to order forfeiture merely because this might seem equitable.

> "*While the court has a wide discretion in that it may order forfeiture in relation to the whole or part only of the benefits, it is not empowered to award a 'portion of an errant husband's*

separate estate' to his wife, for example, merely because this might seem equitable in the circumstances. Nor may a forfeiture order be granted simply to balance the fact that one of the spouses or partners has made a greater contribution than the other to the joint estate. The forfeiture order relates only to the benefits of the marriage … The precise nature of these benefits depends on the particular matrimonial regime."

See **Schäfer: Family Law Service:** Issue 54 October 2010, 26-27.

[59] Counsel for the plaintiff in this case laid great emphasis on the contributions each party made into the joint estate. He submitted that the respective contributions of the parties to the joint estate is an important factor in arriving at an equitable judgment which would be fair to both parties and based on the *boni mores* of society in the light of what society generally would consider to be fair, given the contributions made by each of the parties to the joint estate.

[60] I do not agree with the above submission by counsel. Counsel seems to rely on the "size of contributions" and the "fairness" to the parties. The court is not called upon to decide what is fair and equitable in the circumstances, but rather to decide whether or not the party against whom forfeiture is sought would be unduly benefited if such an order is

not granted. The fairness principle was rejected by the Supreme Court of Appeal in ***Wijker v Wijker* 1993 4 SA 720 (A) 731**…

[61] Section 9 of the Divorce Act 70 of 1977 reads as follows:

> "*9.* ***Forfeiture of patrimonial benefits of marriage***
>
> *(1) 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 break-down thereof and any substantial misconduct on the part of either of the parties, it is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefitted.*" (My underlining)

[62] Section 9(1) quoted above has been the subject matter of many reported cases. Counsel for the plaintiff has referred me to the following:

Khoza v Khoza 1982 3 SA 462 (T);

Singh v Singh 1983 1 SA 781 (C);

Klerck v Klerck 1991 1 SA 265 (W);

Binda v Binda 1993 2 SA 123 (W);

Botha v Botha 2006 4 SA 144 (SCA)

I took the liberty to study the cases referred to and of importance I will deal with the case of ***Klerck v Klerck*** **(*supra*)**. In this case KRIEGLER J decided that all factors mentioned in section 9(1) need not be present, for example misconduct on the part of the parties. At page 267G-H he stated that the principal factor to be considered by the court is if one party will be unduly benefitted if forfeiture is not granted. Whether one party will be unduly benefited at the expense of another is a value judgment to be made by the court. The learned judge further went on to state that in determining whether the one party will be unduly benefitted at the expense of the other party, the three factors referred to in section 9(1) should be considered individually or collectively in coming to a decision.

This decision was followed in ***Binda v Binda*** **(*supra*)** and ***Botha v Botha*** **(*supra*)**.

[63] In the present case I take into consideration the fact that the parties' marriage was substantially of a long duration (11 years) and during this period the parties brought up the joint estate together, each of the

parties making own contributions to build up the estate. I do not take into consideration the defendant's "desertion" of the common home on 10 July 2008 as a factor leading to the breakdown of the marriage. By the time she left the common home the marriage had already broken down due to the marital problems she endured some years earlier. With regard to extramarital love affairs I have already made a finding that the parties are equally guilty.

[64] It may be so that the plaintiff might have contributed more in terms of money but this is not the test. The defendant too made her own contribution over and above the money she might have spent on building the joint estate. She looked after the children when they needed being looked after, kept the house, helped built it in the first place and contributed some uncertain sums of money at various times towards food. Her emotional support of her husband and children cannot be quantified in terms of money bearing in mind that she met and married the plaintiff while he was still a registrar. She stood by him and gave him moral support until he qualified and became a successful neurosurgeon.

[65] In ***Bezuidenhout v Bezuidenhout*** **2005 2 SA 187 (SCA) 198** it was decided that the traditional role of a housewife, mother and homemaker should not be undervalued because it is not measurable in terms of money. That obviously the defendant's contribution as mother and homemaker must be afforded due weight.

[66] A discretion is clearly conferred upon the court in terms of section 9(1) whether or not to order forfeiture of the patrimonial benefits of the marriage. That discretion may be exercised in favour of either of the spouses and may relate to the whole or only a portion of the patrimonial benefits. Moreover, the court is enjoined to have regard to various factors specified in the said section, in the exercise of that discretion in order to determine whether one party will in relation to the other be unduly benefited if the order for forfeiture is not made.

See ***Khoza v Khoza* 1982 3 SA 462 (TPD) 465F-G**

[67] In exercising my discretion in this matter and given the circumstances of this case I make a finding that an order for forfeiture of patrimonial benefits is not appropriate in this case. The appropriate order will be that of division of the joint estate.

Costs

[68] The issue of costs is in the discretion of court. Section 10 of the Divorce Act 70 of 1979 provides that:

> "*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 the parties."

This plainly gives the court a wide discretion on the issue of costs in this matter. Once again the conduct of the parties must be taken into account. I have already in paragraph [56] of this judgment expressed my displeasure in the manner in which the trial proceedings were protracted by unnecessary argument in this matter. This will have an effect on the costs order as I have indicated earlier.

The costs of this action will therefore be apportioned equally between the parties.

<u>Orders</u>

[69] The following orders are made in respects of all matters and/or issues before court:

1. A decree of divorce is granted.

2. There shall be division of the joint estate.

3. The *status quo* in respect of the primary residence of the minor children as per court order dated 20 May 2010 shall remain.

4. It is further ordered that the issue of the primary residence of the children and contact rights to be enjoyed by the non resident parent be and is hereby referred to the Family Advocate for investigation and the bringing out of a report containing recommendations with regard to the primary residence of the three minor children and the contacts rights of the non resident parent.

5. The interim order of 12 July 2010 issued under case number 40419/2010 is set aside and the applicant is ordered to pay the costs thereof, such costs to include the costs of 12 July 2010, 24 August 2010 and 1 November 2010.

6. The interim order of 22 July 2010 issued under case number 42644/2010 is set aside and the applicant is ordered to pay the costs thereof such costs to include the costs of 24 August 2010 and 1 November 2010.

7. Each party shall pay his or her own costs of the divorce action.

E M MAKGOBA

JUDGE OF THE NORTH GAUTENG HIGH COURT

35432/2008/sg

Heard on: 8, 10, 11, 12, 17, 18, 19 & 22 August 2011

For the Plaintiff: Adv D A Smith SC

Instructed by: Schoeman & Associates, Pretoria