

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

Case No: **063415/2023**

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

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: ~~YES~~/NO

DATE: 21 February 2024

SIGNATURE

In the matter between:

A[...] M[...]

Plaintiff

and

J[...] S[...] M[...]

Defendant

JUDGMENT

Mazibuko AJ

1. In a divorce action, the plaintiff sought an order for a decree of divorce, forfeiture of the defendant's matrimonial benefits in terms of the marriage being in community of property in favour of her, with specific reference to the defendant's 50% share in the immovable property situated in Saulsville Pretoria. Further, the division of the joint estate, including the division of the defendant's pension funds held at Government Employees Pension Fund (GEPF) and that the plaintiff be

entitled to 50% thereof. The defendant is to pay spousal maintenance towards the plaintiff in the amount of R8000 per month, which is to escalate annually on the date the divorce order was granted in accordance with the consumer price index until her death or remarriage.

2. The issue for determination is whether, if the order for forfeiture is not made, the defendant will be unduly benefited in relation to the plaintiff. Also, whether the plaintiff is entitled to spousal maintenance until her death or remarriage.

3. The onus is on the party seeking forfeiture to demonstrate that in the event an order of forfeiture is not granted, the party against whom the order is sought will, in relation to the other, be unduly benefited.

4. The parties were married in community of property on 8 April 2002. Two sons were born of the marriage. They are both majors in that one is above 25 years of age. The younger one has reached the age of 18 years. However, he is still at school and resides with the plaintiff. For the past five years, the defendant has been making R8000 payments towards spousal maintenance, which the plaintiff uses to care for the household's financial needs. The defendant is employed and paid the immovable property until it was paid up. The plaintiff also works piece jobs.

5. The plaintiff averred that the parties lost their mutual love and respect for one another. There is no communication between them, and the defendant had an extra-marital affair.

6. She testified that the defendant had extramarital affairs. In November 2009, she found the defendant with another woman in their matrimonial home. The defendant left the matrimonial home on that day.

7. It was argued on behalf of the plaintiff that the defendant needed to forfeit the matrimonial benefits to the immovable property due to the circumstances leading to the marriage breakdown and his misconduct towards the plaintiff.

8. Section 9(1) of the Divorce Act¹, (the Divorce Act) provides: "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."

9. The parties lived together as husband and wife from April 2002 until November 2009. Since then, the defendant has left the matrimonial home. The plaintiff only issued the divorce summons in June 2023.

10. In *Matjila v Matyila*², the court stated: "*The meaning of the words 'duration of the marriage' as appearing in s9(1) aforesaid is clear. It means no more nor less than the period during which the marriage has, from the legal point of view, subsisted, namely from the date of marriage to the date of divorce or, at the very least, to the date of the institution of divorce proceedings. This is in accordance with the primary rule of interpretation that words should be understood in their ordinary meaning.*"

11. The court considers the parties' marriage relationship to have lasted for about seven and a half years before their separation in November 2009. The period they have not been living as husband and wife is relatively double the time they lived together. Considering that the defendant solely paid for the immovable property until it was paid up. For the past five years, he has been paying R8000 towards the spousal maintenance, which the plaintiff uses to take care of the household's financial needs as she resides with their dependent child, who is still at school. The duration of the marriage does not support the forfeiture claim lodged by the plaintiff.

12. The plaintiff averred in her particulars of claim that the marriage relationship existing between the parties has irretrievably broken down and that no reasonable prospect exists for the continuation of a normal marriage relationship between the

¹ 70 of 1979

² 1987(3)SA 230(W) at 236 B-C

parties. She listed the grounds leading to the irretrievable breakdown of the marriage as loss of their mutual love and respect for one another, no communication between them, and the defendant having an extra-marital affair.

13. When considering whether proof of substantial misconduct was an essential requirement for a forfeiture order, the court in *Wijker v Wijker*³ held: *"It is obvious from*

the wording of the section that the first step is to determine whether or not the party against whom the order is sought will, in fact, be benefitted. That will be purely be a factual issue. Once that has been established, the trial court must determine, having regard to the factors mentioned in the section, whether or not that party will, in relation to the other, be unduly benefitted if a forfeiture order is not made. Although the second determination is a value judgement, it is made by that court after having considered the facts for falling within the campus of the three factors mentioned in the section."

14. I have considered the duration of the marriage. The circumstances that led to the breakdown of the marriage, the defendant's misconduct of having an extra-marital affair, and the contribution of the parties towards the joint estate. Also, the monthly spousal maintenance in the amount of R8000 paid by the defendant, as well as the 50% of the defendant's pension funds claim made by the plaintiff, correctly so, in my view.

15. The court views the defendant's misconduct relied upon by the plaintiff as not substantial misconduct for the forfeiture of patrimonial benefits. However, a conduct that led to the breakdown of their marriage relationship. The plaintiff testified that the defendant left the matrimonial home on the day the plaintiff found him and the other woman in the marital home. She only issued the divorce summons in June 2023, fourteen years later. I am not satisfied that if the forfeiture order is not made, the defendant will unduly be benefitted in relation to the plaintiff. In fact, the opposite is correct.

³ 1993(4) SA 720(A) at 727 D-F

16. The plaintiff also seeks an order that the defendant pays her spousal maintenance until she dies or remarries.

17. Section 7(2) of the Divorce Act provides: *"In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur."*

18. The plaintiff was born in 1977. She works piece jobs. On paper, the parties have been married for over twenty-one years, seven years living together as husband and wife, and about fourteen years not living as such. The defendant had an extramarital affair. No other factors were presented to the court, including the parties' existing and prospective means, their financial needs or obligations, and their standard of living before the divorce action. I find no justification for granting an order to pay the plaintiff's spousal maintenance until her death or until she remarries.

19. Regarding the child's maintenance, no mention is made about the maintenance of the dependent child. There is no prayer explicitly dealing with his maintenance, though he can approach the maintenance court by himself if he elects to do so. The plaintiff testified that she uses the money paid to her for household needs, which is how the dependent child is maintained. In my respectful view, there is a need for an order explicitly dealing with the child's maintenance since he is still at school and living with the plaintiff.

20. For these reasons, the following order is made;

Order:

1. The marriage relationship between the parties is dissolved.
2. The decree of divorce is granted.
3. The claim for forfeiture of the defendant's benefits with specific reference to the defendant's interest in the property situated at 88 Matamela Street, Saulsville, Pretoria, is refused.
4. The division of the joint estate is granted.
5. The defendant will pay R4000 per month towards the dependent school-going child, J[...] M[...] M[...], born on 12 May 2003, until he is self-supporting.
6. The plaintiff is to provide the defendant with the banking details of the dependent child.
7. The defendant will pay R4000 per month towards the plaintiff's spousal maintenance for 12 (twelve) months until the end of January 2025.
8. The plaintiff will be entitled to 50% of the defendant's pension funds held at the Government employees' pension fund (GEPF) number 9[...].
9. No order as to costs.

N. Mazibuko

Acting Judge of the High Court, Gauteng Division, Pretoria

This judgment is digitally submitted by emailing it to the parties.

Counsel for the Plaintiff:

Mr H. Hansen

Instructed by	Hansen Inc. Attorneys
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Counsel for Respondents:	No appearance
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Instructed by:	
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Date of hearing:	19 February 2024
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Judgment delivered on	21 February 2024
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