

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO
Case no: 2220/2021

In the matter between:

N[...] E[...] M[...] (BORN M[...])
(ID NO: 690[...])

Plaintiff

And

R[...] L[...] D[...] M[...]
(ID NO: 670[...])

Defendant

CORAM: MTHIMUNYE AJ

HEARD ON: 31 OCTOBER, 1 and 3 NOVEMBER 2023

DELIVERED ON: 02 FEBRUARY 2024

[1] In this divorce action, the Plaintiff prays for an order in the following terms:

- (a) A decree of divorce;
- (b) Division of the joint estate, save for prayer (c) below.

(c) The defendant to forfeit his right to 50% of the plaintiff's pension benefit held at the Government Employees Pension Fund (GEPF).

[2] It is apposite to state herein that during the trial, when evidence was led to the effect that the defendant was not a member of any pension fund, the plaintiff brought an application to amend its particulars of claim more particularly the prayers. Save for the manner and the timing in which the application was brought, the defendant did not in essence oppose the application and after I considered the submissions, I granted it. In essence, the initial prayers for the plaintiff to share 50% of the defendant's pension benefit were deleted as they would have no practical effect and were replaced with the prayers reflected in para [1] above.

[3] The plaintiff prays for the defendant to forfeit his 50% of the plaintiff's pension benefit on the basis that at some point during the subsistence of the marriage, the defendant withdrew his own pension fund interests of about R500 000.00 and never shared it with the Plaintiff or contribute to the joint estate. Further, that the defendant had extra-marital affairs from which two children were born. The defendant, though agreeing on the decree of divorce, opposes the application for forfeiture on the basis that when he received his pension fund, he spent all of it on the joint estate and although he admits to the affairs, he alleged that the plaintiff also had two affairs during the subsistence of the marriage.

[4] The parties were married to each other in community of property on 31 May 1996. Marriage in community of property entitles the parties to 50% of the joint estate on the dissolution of marriage. The only exception to this principle is section 9 of the Divorce Act and which enables the court to grant forfeiture when the court is satisfied that the party against whom it is sought, will benefit unduly if it is granted.

[5] The plaintiff testified that in 2003 they bought a site and started building their marital home, in which they moved in 2005. They took a bond of R350 000.00 to

pay for the finishes. In July 2007 they took a second bond of R220 000.00. They used that money to buy a taxi for the Defendant and a Land Rover car for the Plaintiff. In 2009, they traded the Land Rover in for a Dodge. Between 2005 until the end of 2010 the Defendant was paying the bond, whilst the Plaintiff took care of other responsibilities groceries, clothes for the family and paid for the funeral policies. At that time, she was earning R4000.00 a month.

[6] She stated that in 2009 the defendant resigned from his employment and in 2010 declared that he no longer had money and the plaintiff then took over the payment of the bond, medical aid, house insurance, ADT insurance, school fees for the two children as well as their school fees up to this day. The defendant started a taxi business which was not doing very well and at times, she also helped him out with money for petrol and other business needs.

[7] She further testified that in 2020, she found out that the defendant had an extra-marital girl child who was at that stage 17 years old. The child's mother had died and she had no place to stay and was staying with friends. The plaintiff went to meet the child and ended up taking her in. She treated her child like her own and she stayed with them until she finished matric.

[8] During cross-examination, Counsel for the defendant referred the plaintiff to her own bank statements where some transfers from the defendant were depicted and it became clear that post his resignation from work, the defendant contributed from time to time when he was able to. The plaintiff admitted that at times the defendant would even contribute the children's school fees, even though it was not consistent. She further stated that the first 14 years of their marriage was a bliss up until 2010 when the defendant was no longer employed.

[9] The Defendant testified that he bought the stand where the house was built with his own money which he made by buying and selling cars. The two bonds were then taken to finish off the house. When he resigned from his job in April 2009, he got a pension pay out of R453 000.00 and the plaintiff knew about this because

he gave her the documents from work. With that money, he said he bought the plaintiff a Land Rover and a Golf 4 for himself and new furniture. He disputed that the Land Rover was bought in 2007 with the second bond and said the bond money was used to finish off the house. What was left of his pension, he used to pay the bond by transferring the money directly from his account to the bond account until the money was finished in 2011 at which point the Plaintiff took over. He also paid for rates and taxes.

[10] He also confirmed that from time to time he would transfer money to the plaintiff as depicted on the plaintiff's bank statements. The plaintiff conceded to this. He also stated that since he was running a taxi business, some of the monies he would give to the plaintiff in cash. This was also not disputed by the plaintiff. He admitted that his contribution was not consistent but would contribute each time he was able to.

[11] The defendant further testified that the biggest problem was that the Plaintiff would take money from the household to the church and that she had extra-marital affairs, first with a soldier and thereafter with the pastor of the church which is what contributed to the irretrievable breakdown of the marriage and the reason why the defendant ended up leaving the church. He said the plaintiff even bought a car for the pastor, after which the pastor ordained her without the defendant. The plaintiff denied these allegations vehemently and clarified that the only monies she took to the church were offerings and tithes which they had agreed to do as a family.

[12] The defendant stated that at some point during the subsistence of the marriage, the plaintiff threw boiling water at him. When this was put to the plaintiff during her cross-examination, she said it was in self-defence. The defendant subsequently left the marital home in November 2021. It also came out that the Defendant was also paying for the family's medical aid before the Plaintiff took over in 2010. It was also argued on behalf of the defendant that since the plaintiff only got to know about the child she ended up taking in only in 2020 when she was 17 years old and the mother had died, she could not claim that the

Defendant's affair with her mother was the cause to the breakdown of the marriage.

[13] Both parties agree that the marriage has irretrievably broken and that they both seek a decree of divorce. What is in dispute and what this court is called upon to determine is whether or not the defendant should forfeit the pension benefits of the plaintiff as prayed for by the plaintiff.

[14] Despite the plaintiff's contention in her papers that the defendant never contributed to the joint estate post 2011 when she took over the bond, medical aid and other household expenses, both oral and documentary evidence before this court rebutted this averment. In the face of this rebuttal, to which the plaintiff conceded, the plaintiff changed her argument to that, although the defendant was contributing when he could, he was not consistent and she contributed more. It was also undisputed that prior to the defendant resigning from work, he took care of most of the household and children expenses including medical aid from the institution of the marriage until 2011 when the plaintiff took over. All these, pointed to one fact that the Defendant had contributed to the joint estate and continued to do so in accordance with his means after he resigned from work.

[15] The Plaintiff seeks an order directing the Defendant to forfeit his 50% share of the Plaintiff's pension in terms of section 9 of the Divorce Act as stated above.

Section 9(1) of the Divorce Act provides:

"9(1) When a decree of divorce is granted on the ground of the irretrievable break-down 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, is satisfied that, if the order of forfeiture is not made, the one party will, in relation to the other be unduly benefited."

[16] The entitlement to 50% of a spouse's pension benefit is governed by **section 7(7) of the Divorce Act** which provides as follows:

"7(a) In the determination of the patrimonial benefits to which parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets."

[17] The onus to prove that the party against whom forfeiture is sought will be unduly benefited rests on the party who seeks it. In **Engelbrecht v Engelbrecht**¹, the court held that:

"the court has a discretion when granting a divorce on the grounds of irretrievably breakdown of the marriage or civil union to order that the patrimonial benefits of the marriage or civil union be forfeited by one party in favour of the other. The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited. The court has a wide discretion, and it may order forfeiture in respect of the whole or part only of the benefits".

[18] In **Wijker v Wijker**² the court held that factors listed in Section 9(1) of the Divorce Act need to be considered cumulatively. The presence of any one of them is sufficient for the court to make an order for forfeiture. In other words, the party claiming forfeiture does not have to prove the present of all three factors in Section 9(1). For purposes of clarity, these factors are the duration of the marriage, the circumstances that gave rise to the irretrievable breakdown of the marriage and any substantial misconduct on the part of the person against whom forfeiture is sought. The court will grant forfeiture if it is satisfied that the party against whom it is sought will be unduly benefitted i.e. if the conduct of the guilty party is gross that it would be unjust to let the said spouse get away with marriage spoils.

¹ 1989 (1) SA 597 (C)

² 1983(4)SA 720 (A) at 727 D-F

[19] The parties had been married to each other for 25 years when the defendant left the marital home. Since the inception of the marriage in 1996, he took care of the family and contributed to the joint estate more than equally for approximately 15 years. At the onset, he bought and sold cars and used that money to buy building material. He paid for the bond, insurance, rates and taxes and medical aid for the whole family. Throughout this period, the plaintiff, who was only earning R4 000.00 per month, was only buying food and clothes for the children. At some stage, he bought cars for the plaintiff. After he resigned, the roles changed and the plaintiff was in the lead financially for 10 years until the defendant left the marital home. With regards to the circumstances that gave rise to the breakdown of the marriage, the plaintiff cited that the defendant withdrew his pension and did not contribute to the joint estate. It was unrebutted evidence that after his resignation in 2009, he continued to pay the bond until the plaintiff took over in 2011. Again, under cross-examination the plaintiff conceded.

[20] The plaintiff's second basis to seek forfeiture is the defendant's adultery. This in my view, is based on an old forfeiture rule in terms of common law, that the person who caused the marriage to be irretrievably broken down cannot share or benefit in the joint estate. In **Swart v Swart**³, the court held that adultery and desertion might, in certain instances, merely be the symptoms and not the cause of a marriage breakdown and that the conduct of the parties cannot be considered to be blameworthy. In **Wijker** (supra), it was held that adultery may support the allegation that the marriage has broken down, but it is not necessarily 'substantial misconduct' for purposes of a forfeiture order. In **Engelbrecht v Engelbrecht** (supra), the Constitutional Court held that it could never have been the intention of the legislature that the wife, who had for 20 years assisted her husband faithfully should, because of her adultery, forfeit the benefits of the marriage in community of property. This confirms that a finding of a substantial misconduct does not on its own, justify forfeiture. In my view, the plaintiff failed to make a case for forfeiture and as such her prayer in this regard has to be rejected.

³ 1980 (4) SA 364 (O)

[21] It also bears to mention that the defendant impressed me as a candid witness and I found his evidence credible and reliable. Not even once did he contradict himself or appear to be unsure about his evidence. The plaintiff on the other hand, though candid, tended to exaggerate her evidence. She made a number of averments which, when the contrary was put to her, conceded to the truthfulness of the defendant's version. As an example, first she said the defendant never spent his pension on the joint estate and she did not know what he did with the money. During cross-examination she conceded that the defendant used the pension money to buy the two cars and to pay for the bond between 2009 (post resignation) to 2011 when she finally took over. The second example was when she said post 2009, the defendant never contributed to the children's school fees and maintenance. When shown the transfers from the defendant into her bank account, she conceded and sought to change her version to be that the defendant's contribution was not consistent.

[22] I now turn to deal with the issue of costs. The granting and refusal of costs by the courts is governed by two principles: first that unless expressly otherwise enacted, costs fall within the discretion of the court and secondly that generally, costs follow the results i.e. they are awarded in favour of the successful litigant. Section 10 of the Divorce Act however provides that in a divorce action, a court is not bound to make an order for costs in favour of a successful party, but 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, which may even be that costs be apportioned between the parties.

Consequently, I make the following **Order**:

1. The decree of divorce is granted and the marriage is dissolved.
2. Division of the joint estate in terms of marriage in community of property including the plaintiff's pension benefits.

3. Each party to pay his / her own costs.

D.P. MTHIMUNYE

Appearances:

For the Plaintiff : Adv G Steenkamp

Instructed by O J Van Schalkwyk Attorneys
Bloemfontein

For the Respondent : Adv T Mogwera

Instructed by Fixane Attorneys
Bloemfontein