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

Case number: 48308/2011

In the matter between:

G[...] J[...] V[...]

PLAINTIFF

And

M[...] V[...]

DEFENDANT

JUDGMENT

NEUKIRCHER J:

1] This is a divorce action in which the parties were married to each other on 20 April 1985 in community of property and separated during August 2011¹. Action was instituted by the plaintiff² during the same month. The matter was set down for trial before me on 30 January 2023. Thus, by the time the trial proceeded, the parties had been separated for over 11 years and the two children born of the marriage had reached the age of majority.³

2] In her counterclaim the defendant seeks permanent maintenance in the amount of R7 000 per month, as well as a forfeiture of the patrimonial benefits of the marriage. In closing argument, the defendant moved an amendment to seek token

¹ S4(1) of the Divorce Act 70/1979 (the Act) creates the rebuttable presumption that a marriage has irretrievably broken down if the parties have not lived together for a continuous period of at least one year immediately prior to the date on which the divorce action was instituted.

² The husband

³ There was no evidence that either child was financially dependent on either party

maintenance of R10-00 per month and her claim for forfeiture was reduced to a partial forfeiture specifically of the parties' immovable property in Bethlehem and the defendant's pension fund⁴ from August 2011 to date. The evidence having already been tendered and there being no prejudice to the plaintiff, the amendment was granted.

3] It was common cause that the marriage had irretrievably broken down (although the reasons for the breakdown were in dispute) and that the defendant bore the onus to prove her counterclaim. This being so, there were 2 main "themes" to the evidence presented: that regarding her maintenance⁵, and the facts to prove the claim for forfeiture.

4] This being the legal position, the question is whether the defendant proved either, or both of, her claims. Although she bore the onus and duty to begin, the plaintiff testified first.

The marriage

The plaintiff

5] It is common cause that at the time they were married, the plaintiff was a captain in the South African Police Service (SAPS) and the defendant was a clerk there as well. She commenced work at SAPS on 1 June 1982 and she still works for SAPS.

6] The defendant's father was the station commander in Clarens and the parties lived in a duplex SAPS flat, next to the defendant's parents, and they both worked in Clarens.

⁴ She is a member of the Government Employees Pension Fund ref no 96231692 according to her payslip

⁵ Section 7(2) of the Act provides:

"7(2) 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, 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."

7] During their marriage, the plaintiff was eventually promoted and the parties moved several times: whilst in Clarens he was promoted and transferred to a town near Villiers where he became the station commander in 1989. Approximately a year later he was transferred back to Clarens as the station commander (the defendant's father had retired by then). The next move the plaintiff blames on the defendant – as she had physically attacked him often he became embarrassed to be at work and in town where people and colleagues could see the physical manifestation of their altercations and eventually (so he tells it) during approximately 1995 the defendant demanded that they move and he found a job in Bethlehem where he issued liquor licenses – he regarded this as a demotion. He was later promoted and at the time they parted in 2011 they were back in Bethlehem.

8] On 31 December 2000 the plaintiff was medically boarded. He blames this on the stress caused by the defendant's constant physical and emotional assaults and the humiliation he suffered as a result of them. His version is that he was subjected to her assaults – physical, verbal and emotional – throughout their marriage and that, on occasion he was compelled out of necessity to retaliate. On one such occasion he broke the defendant's tooth. On another he had to grab her hands when she attacked him with a kitchen knife and screamed that she was going to kill him. According to him, she would get intense migraines caused by her outbursts and would stay away from work.

9] Once he was boarded, he received a lump sum pension pay out of R170 000 – this was used to purchase a computer for him to design web pages, he paid off whatever debts the joint estate had and the remainder went into household living expenses.

10] But he found it very difficult to find work in Bethlehem. In 2002 he was given an opportunity to work as a long distance driver in the USA. He was away from April until October 2002 and although the defendant demanded that he extend his work overseas, his visa would not permit that. He earned \$600 - \$800 every 2 weeks (ie \$1200 to \$1400 per month) of which he would keep \$500 per month for his own living expenses. The balance was deposited into an account, he sent the defendant

the card for the account and she would then have access to these funds. On his version, he had to incur debt in order to purchase his flight ticket, and the entirety of the funds sent to defendant were to be used to pay off the debt quickly. It was only during approximately 2008 that he noticed that she had only paid the monthly instalment on the loans and the loans had accumulated and (on his version) spiralled.

11] He continued to work overseas every year between 2002 and 2009 for 6 month periods and would send back money to the defendant. The only year he did not was 2004 as his mother was very ill. In 2009 he had a back operation and began to study for his security diploma. There was no work available in Bethlehem and he began to look for work elsewhere. He found work in Alberton which necessitated the expenses of a second residence as the defendant and the children remained behind in Bethlehem. Although the defendant found him work closer to home, he decided to remain closer to his mother who was very ill at the time and who eventually passed away during July 2010. His work did not last and he decided to live in his mother's house in Pretoria North whilst trying to find a job. In the meantime, he lived off the income of whatever odd jobs he found.

12] The parties were put under debt review in 2017 and that was discharged during 2020. His contribution was R3 000 per month less the DSTV payment and the defendant's medical aid - he thus contributed approximately R2 200 per month towards the parties' debt review payments. This being said, it is very clear from the plaintiff's evidence that the defendant was in charge of the parties' finances - she held the bank cards (even his), she had access to the bank accounts and she made the payments necessary both in respect of household necessities and when the parties were in debt review.

13] He inherited 2 properties from his mother: a vacant stand in Clarens and the property in Pretoria North where he presently resides. According to him, these assets are excluded from the joint estate as his mother specifically provided in her will for their exclusion from the community property – no evidence was provided to the contrary. Other than this, he presented no evidence on his income, his expenditure, or what the assets of the joint estate are other than the previous

common home and the defendant's pension fund the latter to which he is entitled because (as he stated) they are married in community of property and she wanted the divorce. The impression created by his evidence is that, were it not for the fact that the defendant told him she wanted a divorce, the parties would have remained married although it is clear that not much of a marriage relationship existed by August 2011.

14] His evidence is that in August 2011 the defendant informed him that she wanted a divorce when the parties went to see an attorney ostensibly regarding the issue of his mother's will (which he indirectly accused the defendant of hiding from him).

15] The plaintiff's particulars of claim reveal nothing substantial in respect of the breakdown of the parties' marriage. He claims that it broke down inter alia because the defendant informed him that she wanted a divorce, that they no longer shared common interests or outlook on life, that the defendant spent all his money and that she was financially irresponsible. If one were to accept the plaintiff's evidence⁶ however a completely different picture is painted: the defendant was physically, verbally and emotionally abusive towards not just him, but his late grandmother and his late mother. She was moody, often shouted and screamed at him for minor issues, lost her temper regularly and would then attack him, scratch him and otherwise physically abuse him. On one occasion she tried to stab him with a kitchen knife. He was left defenceless to stop her as, no matter where he tried to escape to in the house, she would simply follow him and, as he put it, he was left to "*haar los om haar woede uit te woed*". He admitted to, out of necessity on the odd occasion, retaliating. This latter "version" appears for the first time in the plea to the counterclaim. This being so, it is clear that it was introduced not as a reason that the marriage broke down, but to counter the defendant's allegations of substantial misconduct against him.

16] Much of the plaintiff's evidence was spent detailing the minutiae of the defendant's violent conduct towards him. When asked in cross-examination why

⁶ My emphasis

these allegations were not made in the particulars of claim, his response was that he wanted to “*keep the divorce clean*” in order to spare the defendant. Having regard to the manner in which the plaintiff testified and his concerted efforts to place the defendant in a bad light in every possible way, even as regards her meticulous handling of the parties’ finances, I cannot but look askance at this response. It is very clear that the plaintiff still harbours great ill-will towards the defendant – 11 years later, he still resents the fact that she was the one who wanted to initiate the divorce proceedings.

17] His efforts to present himself as the victim in the parties’ relationship and blameless in the breakdown of the marriage are viewed with circumspection.

The defendant

18] The defendant has, throughout the duration of this marriage, worked for the SAPS and to date still works there. During her 41 years of employment, she has accumulated a pension interest which today is valued at approximately R2,9 million. In 2011, that pension interest was valued at approximately R860 000.

19] According to the defendant, the problems in the marriage started shortly after their honeymoon when the plaintiff began to assault her. He would hit her and punch her so much so that she would have bruises on her face, neck and arms. Because of the stress she would have terrible migraines and would be unable to work. On occasion, after these assaults the plaintiff would simply lock her in the house to prevent her from going to work. This abuse started to subside when the plaintiff went overseas to work.

20] According to her, the plaintiff was selfish and put his needs and wants first, would spend money on himself over his family, would buy himself computers and computer parts, cigarettes, coke and beer; he was an absent father and took no interest in the children⁷; he was fiscally irresponsible and he failed to contribute 50% to the running of the common home; he failed to maintain her and the children

⁷ His evidence was that neither child talked to him and he blamed that on the defendant

properly⁸; he failed to contribute 50% towards the accumulated debts or to the payments that had to be made when the parties were in debt review. On her own version he was not the breadwinner. She also testified that he used his pension payment of R170 000 for his own selfish desires.

21] Unsurprisingly, the defendant denies the plaintiff's version – she denies she assaulted him but admits she would defend herself by scratching him and grabbing him between the legs; she denies that there was an agreement to utilise all the overseas funds to pay off the loan regarding the flight costs, but admits she did pay the monthly instalments and used the remainder for household necessities.

22] On the defendant's version, the common home was purchased by both parties and registered in both their names. Her mother gave her R17 000 to pay the deposit – the plaintiff's version is that defendant's mother gave them the money to upgrade the flat on their property which was rented out and the defendant pocketed all that money. According to him, the transfer fees were included in the bond amount.

23] The flat was originally occupied by the defendant's mother and after her passing, the parties' son lives there and he pays the defendant R3 000 per month which the bond statement clearly shows is paid directly into the bond account. What is also clear is that the bond has been substantially reduced from an amount of over R400 000 in 2019 to R160 000 at date hereof. This appears to be thanks to the defendant efforts in paying, not just the monthly bond instalment, but the extra R3 000.

24] According to the defendant, it is the constant assaults that led to the breakdown of the marriage relationship. It is however clear from her evidence that this was not the only factor that led to the breakdown of the marriage relationship, although it appears to have been the major contributing factor.

The joint estate

⁸ All of which were pleaded in her counterclaim

25] Unfortunately, not much evidence was led on this issue. One can only assume that it is because the main assets in dispute were the common home and the defendant's pension fund.

26] During cross-examination of defendant it was revealed that she also has an Old Mutual annuity, but other than that she pays an amount of R2 082-32 (in August 2018), which is deducted from her salary, nothing more is known about this policy. Whilst the plaintiff blames the defendant for not disclosing the details hereof, he also has an obligation to put information before this court. In fact, save for the pension fund details, both parties are guilty of failing to put updated figures before me:

a) the last salary advice of defendant is 31 August 2018 and her expenditure was drafted for purposes of the debt review in 2017 - I was given no information as to plaintiff's income or expenses;

b) the valuation of the immovable property for R1,1 million is dated 2018 and other than vague allegations that its worth more than that, the plaintiff has made no effort to prove otherwise;

c) I have no value of the Old Mutual annuity nor of any other asset of the joint estate.

d) I don't know what the updated liabilities of the joint estate are either. As the parties were released from debt review in 2020, those figures are no longer relevant, but no new figures were provided.

27] What is also clear is that, once the joint estate was put under debt review, it fell to the defendant to pay the monthly instalments of R6 215-99. This she did religiously. Other than the plaintiff's contribution of R2 200 per month, it is quite clear that he abdicated all responsibility and participation in the process. It is very clear that it was through the hard work and sacrifices made by the defendant that the parties emerged from the process as quickly as they did.

28] It is also noteworthy that the plaintiff failed to present evidence, other than that above, on his contributions towards the maintenance and support of the family and the common home prior to this. Whilst it is so that he is not required to prove an equal contribution, he must at least demonstrate some form of support.

Maintenance

29] All of this has an impact on the defendant's claims for maintenance and forfeiture. Given the provisions of section 7(2) of the Act, the first question to be answered by a court is whether maintenance will be needed⁹. The defendant's argument is that if forfeiture is not granted and a division of the joint estate follows, her finances and financial security will be severely impacted and she may need maintenance in the future. Hence she wants to keep that door open and requires nominal maintenance of R10 per month.

30] The problem with this argument is that it was presented during closing argument. There was no evidence led regarding the defendant's present income or expenses, how she would be financially affected by an order of division versus one of forfeiture, or that she has any health (or other) issues that would affect her in future.

31] In **Lincesso v Lincesso**¹⁰ the court stated:

"I have been asked, in the event of my declining to come to the plaintiff's assistance, at least to order a token payment. The reason for this is that, if at a later stage the plaintiff can make out a case for maintenance, she will in the absence of some order from this Court be unable to press her claim: see Ford v Ford, 1965 (1) SA 264 (D) at p. 265, and authorities there cited. If, however, some order is made then at a later stage a variation can be sought for good cause shown. Such an order was made in the Ford case, supra. It has also been done in many unreported cases. I am not sure that this has always been justified. If the sole basis for so doing arises from the omission of the Legislature to allow initial applications to be made subsequent to the date of the decree of divorce, then it seems to me that such a course is not

⁹ Portinho v Portinho 1981 (2) SA 595 (T)

¹⁰ 1966 SA 747 (W) at 750 B-D

justified. For then in every case where the Court is not satisfied that the plaintiff's claim is justified it would nevertheless grant an order for a token payment. I would feel that this would be an abuse of the judicial function.

I can however imagine that in some instances the Court will be justified in granting a token payment because that is all that in the circumstances is justifiable and not merely because of an altruistic motive to circumvent the omissions of the Legislature: see e.g. Ford's case, supra.

But no argument has been advanced and I can think of none why in this case there should be an order for such a payment.”

32] Following on this, Von Dijkhorst J in **Portinho**¹¹ stated:

“In my view the test to be applied is whether or not on the probabilities maintenance is or will be needed. If the answer is positive the considerations set out in section 7(2) came into play. If on the probabilities it is not shown that maintenance is or will be needed no award thereof (whatever its size) can be made. A token award where no maintenance is needed is therefore not envisaged on the Act.”¹²

33] The defendant has not adduced any proof that on the probabilities she will require maintenance in future and therefore this claim is dismissed.

Forfeiture

34] It is trite that upon divorce where parties are married in community of property, the joint estate is divided. Where a party does not want an order that the joint estate be divided, he/she must ask for an order of forfeiture. In this regard, Section 9 of the Act provides the following:

“9 (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

¹¹ At 597H

¹² See also *Buttner v Buttner* 2006 (3) SA 23 (SCA) at par [36]- [37]

rise to the break-down 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 benefitted.

(2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.”

35] Thus, Section 9(1) of the Act postulates 2 questions: a) will the plaintiff receive a benefit and b) if so, is this benefit is undue.¹³ When deciding whether or not the benefit is undue, 3 factors alone¹⁴ are considered: (a) the duration of the marriage; (b) the circumstances that gave rise to the breakdown of the marriage, (c) any substantial conduct on the part of either of the parties.

36] In **Wijker**, the SCA made it clear that the Legislature never intended the 3 above factors to be considered cumulatively and the approach to be followed was the following¹⁵:

“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 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 judgment, it is made by a trial Court after having considered the facts falling within the compass of the three factors mentioned in the section.”

(emphasis provided)

37] It is also important to note that, although a court has a wide discretion when considering whether to grant forfeiture or not, considerations of fairness and equity

¹³ *Wijker* (supra); *KT v MR* 2017 (1) SA 97 (GP)

¹⁴ *Botha v Botha* 2006 (4) SA 144 (SCA)

¹⁵ At 727 E-F

are not relevant¹⁶, nor can it be granted because one spouse's contribution was greater than the other's¹⁷.

38] It is clear from the evidence that defendant's claim for forfeiture is based on 4 grounds: a) that the plaintiff did not contribute at all towards her pension fund especially since 2011, b) that the plaintiff did not contribute 50% towards the payment of the debts or expenses of the joint estate or common home or the children, c) the conduct of the plaintiff that led to the breakdown of the marriage and d) the plaintiff's substantial misconduct.

39] The first question to be answered is whether plaintiff would be unduly benefitted were forfeiture not be granted:

39.1 the house

a) the answer to this is no - the property was purchased by both parties and the bond registered in both their names. It is common cause that defendant's mother gave them R17 000 which benefitted this property - the purpose of this is in dispute but in the long run it is neither here nor there the plaintiff's evidence that defendant's mother asked him to repay the R17 000 which he did out of his inheritance was never disputed;

b) when the parties were in debt review it is common cause that the plaintiff paid an amount of R2200 towards the debts of the joint estate of which the bond payment formed part. This even though the defendant's view is that the plaintiff's contribution was not 50%, the point is he did contribute. There was also no evidence before me that he could have contributed more as he earned well. At present he contributes ± R1600 per month and the rental of R3000 per month from their son all contributed towards the reduction of the outstanding bond from R415 000 in 2018 to ± R150 000 now;

¹⁶ Wjker supra; Rousalis v Rouailis 1980 (3) SA 446 (C) at 450 D-E

¹⁷ Engelbrecht v Engelbrecht 1989 (1) SA 597 (C) at 601

c) thus the plaintiff continued contributing in my view put pay to any argument that he would be unduly benefitted were this court to refuse the forfeiture in regards of the house.

39.2 the pension fund

a) it was not disputed that since 2011, the value of defendant's pension interest grew by ± R2 million;

b) it is also common cause that plaintiff made no contribution towards the defendant's pension fund;

c) I am of the view that plaintiff will be benefitted in regards of the defendant's pension fund. The question is whether this benefit is undue.

40] In considering the 3 factors set out in section 9, the following is pertinent:

a) this marriage is one of 38 years to date. Even in 2011, the marriage was one of 26 years. However, it appears that the plaintiff was working overseas for at least 6 months per year from 2002 until 2009 and after that he lived in Alberton and Pretoria North until the divorce proceedings were initiated by him in 2011. Taking this into account, the marriage was effectively one of 17 years. The parties have thus spent more than half of their married life apart, which is a factor in the breakdown of the marriage.

b) As to the reasons for the breakdown of the marriage, in my view, each parties' version must be viewed holistically. Each accused the other of assaults, and on this issue I cannot find one version more probable than the other. On this issue, I find that the versions are evenly matched. Although the defendant argued that her evidence had the "*ring of truth*", I cannot make that finding. Neither party impressed me, but the plaintiff was less impressive than the defendant. There were no documents, for example affidavits in relation to criminal charges regarding the assaults, no doctors' reports nor were any other corroborating witnesses called.

Thus, on this, as a factor in the breakdown of the marriage, the versions are evenly matched.

c) Given that the defendant testified that the reason for the breakdown of the marriage was the plaintiff's physical assaults on her, the balance of the allegations in the counterclaim cannot be seen as "substantial misconduct" and, at best, would appear to explain a general breakdown in the marriage relationship.

41] However, it is in respect of the general reasons for the breakdown of the parties' marriage that I find that the defendant has proven a claim for partial forfeiture: on her evidence, as a result of the frequent assaults, the fact that the plaintiff was an absent father and husband and played very little role in the family¹⁸, the fact that the plaintiff was financially selfish, all contributed to the breakdown of the marriage relationship.

42] Taking in account that the parties have effectively lived separate lives for more than half of their marriage, and that on the balance of probabilities the plaintiff's conduct as stated in paragraph 41 supra led to the breakdown of the marriage relationship, I find that the plaintiff will be unduly benefitted were an order for forfeiture of the defendant's pension benefits not to be ordered. However, as the defendant has amended her counterclaim to ask for a partial forfeiture from August 2011 to date, that order will be granted.

Costs

43] The plaintiff has submitted that irrespective of the outcome of the matter, each party should pay their own costs. As each party has achieved a measure of success, I find that this order is appropriate.

Order

44] The order that is made is the following:

1. A decree of divorce is granted.

¹⁸ On his own version his children do not speak to him

2. The plaintiff is ordered to forfeit the benefits of the defendant's pension interest in her pension fund held with the Government Employees Pension Fund.
3. Other than the order set out in paragraph 2 supra, the joint estate shall be divided.

B NEUKIRCHER
JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 February 2023.

Appearances:

For the Plaintiff : Advocate JG Van Der Westhuizen

Instructed by : Theuns Hurter Attorneys

For the Defendant : Advocate MDJ Steenkamp

Instructed by : Sarel Venter Inc

Heard on : 30 & 31 January 2023