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

Case number: 56859/2021

Date of hearing: 25 January 2023

Date delivered: 21 February 2023

**REPORTABLE: NO
OF INTEREST TO OTHERS JUDGES: NO
REVISED**

In the matter between;

L [....] M [....] (born M [....] 1)

Plaintiff

And

S [....] P [....] M [....]

Defendant

JUDGMENT

SWANEPOEL J:

INTRODUCTION

[1] I daresay that most marriages start off with the two partners believing that they are in love with one another, and that they will be together forever. They promise everlasting faithfulness, and to love and support one another, while working towards a common goal. That may have been the future that the plaintiff

envisaged on her wedding day, but it was most certainly not what the defendant had in mind. It is common cause that the marriage has irretrievably broken down, and the only issue to be decided is whether defendant should forfeit the benefits arising from the application of the accrual system to the marriage.

[2] Before I provide some background to the matter, I must deal with the procedural issues before me. Plaintiff issued summons, in which she sought a decree of divorce and other ancillary relief, on 11 November 2021. The summons was served on defendant in person on 17 November 2021. Defendant delivered a notice of appearance to defend on 24 November 2021. On 25 January 2022 defendant's second set of attorneys came on record. On 5 May 2022 plaintiff filed amended particulars of claim. On 3 June 2022 plaintiff delivered a notice of bar. Defendant still did not plead, and he was therefore placed under bar. On 8 June 2022 defendant's current attorneys came on record. They became aware of the notice of bar on 15 June 2022. Nearly two months later defendant filed an application in which he sought the upliftment of the bar.

[3] The application for the upliftment of the bar was before Court on 16 November 2022. A representative of defendant's attorneys was in Court, together with the defendant, but counsel was absent at 10h00 apparently because he was running 10 minutes late. By 10h35 counsel was still not present, defendant and his attorneys' representative had disappeared, and consequently the application was dismissed in their absence.

[4] On 9 December 2022 plaintiff served a notice of set down for 25 January 2023 on defendant, and on 13 December 2022 an application was brought to rescind the dismissal of the application for the upliftment of the bar. That application has not yet been set down.

[5] When the matter came before me in the unopposed motion court defendant's counsel sought a postponement of the matter from the bar. No substantive application had been brought, and there was no explanation why a postponement was being sought, save that the application for rescission was still

pending. Counsel could also not explain why a substantive application for a postponement was not brought. The rescission application was, by 25 January 2023, still not uploaded to Caselines and I could consequently not have regard thereto.

[6] In my view, defendant has delayed the matter on a number of occasions. There was no proper application before me, and no explanation for defendant's failure to properly prosecute the matter. There was therefore nothing on which I could exercise my discretion to grant a postponement, and consequently I refused the application. I did, however, grant both parties leave to file heads of argument on the issue of forfeiture. As an aside, I must add that during an adjournment defendant and his legal team disappeared from Court without being excused, and a search of the Court building proved to be fruitless. My registrar invited defendant's team by email to file heads of argument, which both parties have done. Defendant has also filed an affidavit opposing the relief sought. Defendant is under bar, has not sought leave to file affidavits, and consequently I will not take cognisance of the defendant's affidavit.

BACKGROUND

[7] Plaintiff's evidence was placed before me by way of affidavit. The parties were married to one another on 24 April 2011. The accrual system was made applicable to their marriage by virtue of an antenuptual contract in which their respective estates were valued at nil rand. Furthermore, defendant's immovable property situated in Randparkridge was excluded from the accrual, as was plaintiff's immovable property at Cosmo City. Both parties' retirement annuities, pension and provident schemes were also excluded.

[8] Plaintiff is evidently a successful businesswoman. She has been operating a close corporation known as E[...] S[...] since 2008 ("the corporation"). Plaintiff is the sole member of the corporation, and it is her most valuable asset. Defendant has held positions with M[...] C[...] and with A[...], but has also worked for the corporation for a brief period of time from 2019 to December 2021, when he was

dismissed subsequent to a disciplinary hearing. I will deal with his employment at the corporation in more detail hereunder.

[9] I alluded to the fact that plaintiff and defendant did not exactly have the same hopes and dreams on their wedding day, which is evident from the fact that at their wedding defendant made sexual advances to plaintiff's bridesmaid, who was also her cousin.

[10] From 2011 to 2015 defendant was employed in Ermelo. The parties had the understanding that defendant would return to their Johannesburg home on the weekends. Those weekends became less frequent as time went on, and eventually plaintiff would return to Johannesburg on weekends, but not go home. On the occasions that he did go home, defendant would spend his time with his biker friends. The entire burden of maintaining the household financially fell to plaintiff, with defendant not making any contribution.

[11] During the period 2013 to 2014 defendant was involved in an extramarital relationship with a family friend, who was also married. He was also involved in relationships with two other women, and from 2016 to 2017, with a fourth person, also a family friend who was engaged to be married to another family friend.

[12] Evidently defendant showed no interest in the corporation and refused to assist plaintiff financially, until he lost his employment in 2019. Defendant received a settlement payment of R 275 000.00 from his previous employer, A[...], but refused to divulge to plaintiff what he had done with the money. It certainly did not go towards the maintenance of the home. When defendant became unemployed, plaintiff appointed him as Chief Operating Officer of the corporation at a salary of R 35 000.00 per month. Defendant was not satisfied with his salary, and demanded an increase. His salary was increased to R 44 100.00 and then to R 90 000.00 per month, simply to assuage his demands.

[13] None of defendant's income was used to support his family. He would go on weekend getaways with girlfriends, inter alia to CapeTown, and he maintained

a girlfriend in an apartment in Durban. During his employment with the corporation defendant left the marital home to live in Durban. One of plaintiff's cousins was the recipient of defendant's favours, and at one stage defendant moved into an apartment in Durban with one of the corporation's employees. Defendant's attention was not, during his employment with the corporation, solely on corporation business. He also engaged in affairs with four staff members.

[14] One can imagine the plaintiff's hurt and embarrassment with defendant's conduct. There is little doubt that a number of persons must have known of defendant's affairs, and plaintiff must have felt very belittled. However, the end of the marriage seems to have come as a result of defendant's dishonesty as an employee of the corporation rather than his myriad affairs. On 25 February 2021 defendant reported to plaintiff that one of the corporation's vehicles had been stolen in a Durban City parking lot while defendant was visiting a supplier. The vehicle was then allegedly 'recovered' by persons only known to the defendant, and plaintiff had to pay money to those persons for the recovery of the vehicle. Essentially defendant extorted money from plaintiff in exchange for the return of her vehicle.

[15] Not being satisfied with merely being unfaithful and dishonest, defendant also set up his own companies in order to try and compete with the corporation, while he was still in the corporation's employ. The result was that he was dismissed in December, which outcome defendant is still disputing in litigation.

THE LEGAL MATRIX

[16] Section 9 (1) of the Divorce Act, Act 70 of 1979 reads:

"(1) When a decree of divorce is granted on the grounds 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, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefitted."

[17] In *Wijker v Wijkar*¹ the Court had occasion to consider the correct approach to forfeiture orders. The Court said²:

"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 the trial Court after having considered the facts falling within the compass of the three factors mentioned in the section."

[18] Once it has been determined that a party will be benefitted if an order is not made, the next question is thus how the three factors of duration, substantial misconduct, and the cause of the break-down are to be weighed. In *Matyila v Matyila*³ the Court held that substantial misconduct was an essential factor, and in its absence, forfeiture could not be ordered. Kriegler J (as he was then) dealt with this question in *Klerck v Klerck* (apparently being unaware of the *Matyila* judgment) and said the following:

"Bowendien, en laastens, meen ek dat die interpretasie waarvoor Mnr Kruger betoog, geweld doen aan die woorde van die subartikel soos hulle daar staan. Dit is wel so dat die drietal faktore gekoppel word deur die koppelwoord 'en'. 'n Mens kan jou egter nie blindstaar op daardie

¹ 1993 (4) SA 720 (A)

² Per Van Coller AJA at 727

³ 1987 (3) SA 230 (YV)

koppelwoord nie. Wat die Wetgewer duidelik met sy woordkeuse aandui, is dat die Hof die drie genoemde faktore in ag moet neem. Ek weet van geen taalkundige manier om drie faktore te noem wat in een verband genoem word, anders om hulle met 'n 'en' te Koppel nie. Die Wetgewer wou juis nie die koppelwoord 'of gebruik nie omdat hy aan die Hof die opdrag wou gee om breed en wyd te kyk na die drie kategoriee faktore. Non constat egter, dat as een van hulle ontbreek, die diskresie te niet gaan. As dit die bedoeling van die Wetgewer was, dan kon daardie bedoeling baie maklik deur ander woordkeuse so uitgespel gewees het."

[19] The approach espoused by Kriegler J in *Klerck* was approved by the Appellate Division in *Wicker* (supra)⁴

[20] In summary, once the determination is made that defendant would benefit by sharing in plaintiffs estate, the three factors have to be considered individually to determine whether the benefit that would accrue to defendant would be 'undue'. The Divorce Act, 1979 intended to move away from the fault-factor in divorces, but rather to provide for a fair determination of the parties' patrimonial affairs. Nevertheless, the requirement that the benefit must be 'undue' requires one to exercise a value judgment. As Kriegler J pointed out, the three factors are very broad, and uncircumscribed, and it is left to the Court to make reach a judgment given the specific circumstances in each case.

DISCUSSION

[21] Although there is no evidence of the value of defendant's estate, and what it's accrual may be, there is no doubt that plaintiffs estate has shown growth. Therefore, if the accrual system were to be applied, defendant would benefit. The further question is whether the benefit would be undue.

[22] I am aware of the fact that the marriage (on the face of it) lasted some 12 years. However, in truth, the marriage relationship lasted for but a short while.

⁴ At 729 D; See also: *Binda v Binda* 1993 (2) SA 123 ON)

Defendant was soon living as if he were a bachelor. He was only home for brief and intermittent periods. He did not contribute to the common home financially, emotionally, or in any other manner. Defendant already relocated to Durban while he was working for the corporation.

[23] Given the above history, there can also be no doubt that defendant is guilty of misconduct in his marriage. I take note of the admonition by Kriegler J in *Klerck (supra)*, that the Legislature specifically limited the misconduct enquiry to conduct which is substantial. In my view defendant's conduct was shockingly egregious. Although I realise that problems in marriages are seldom the fault of only one person, it seems to me that the ultimate factor that caused the breakdown of the marriage was defendant's attempt to fraudulently extort money from the corporation, and his attempt to hijack the business. Defendant's conduct was not only shocking, but it also endured for most of the marriage.

[24] Finally, it strikes me to be exceedingly unfair that defendant, having shown no regard for his role as husband and father, and having made no contribution of any kind to the common home, neither financially nor emotionally, should benefit from plaintiff's work. Consequently, I am of the view that the claim for forfeiture should succeed.

[25] Plaintiff has provided a draft order which I shall incorporate in this judgment.

(26) I make the following order:

[25.1] The draft order attached hereto as Annexure "A" is made an order of Court.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

COUNSEL FOR PLAINTIFF: Adv. S Liebenberg

ATTORNEY FOR PLAINTIFF: Kgokong Nameng Tumagole Inc

ATTORNEYS FOR DEFENDANT: Mngqingo Attorneys Inc

DATE HEARD: 25 January 2023

DATE OF JUDGMENT: 21 February 2023

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

On this 25th day of January 2023

Before the Honourable Justice Swanepoel

Case number: 26859/2021

In the matter between:

L [....] M [....] (born M [....] 1)

Plaintiff

Identity number [....]

And

S [....] P [....] M [....]

Defendant

ORDER

HAVING READ THE PAPERS, HAVING HEARD COUNSEL, AND

HAVING CONSIDERED THE MATTER, IT IS ORDERED:

1. A decree of divorce is granted.
2. The defendant forfeits the patrimonial benefits of the accrual system in total, including the plaintiff's members' interest in 8473 I[...] H[...] CC t/a E[...] S[...], registration number: B[...].
3. The parties shall retain full parental rights and responsibilities in respect of **O [....]** **M [....]** , a girl born on the 5th of January 2015 ("O[...]") including the parental responsibilities and rights:
 - 3.1 To act as her guardians.
 - 3.2 To care for her.
 - 3.3 To have contact with her.
 - 3.4 ^{*}To contribute towards her maintenance needs
4. O [...] 's primary residence shall vest with the plaintiff
5. The defendant's parental responsibilities and rights of contact shall be subject to O [...] 's views and wishes, and her scholastic, extramural, sporting, cultural, social, religious and the like activities, and shall include:
 - 5.1 During school term, having her alternate weekends, when the defendant shall collect her from the plaintiff's home on Friday at 17:00 and return her to the plaintiff's home by 17:00 on Sunday.
 - 5.2 Having her alternate short school vacation, subject to the Easter holiday rotating between the parties annually.
 - 5.3 Having her one half of each long school vacation, subject to the period over Christmas and New Year rotating between the parties

annually.

5.4 Having O [...] on alternate public holidays which do not form part of school vacations.

5.5 Having O [...] with him on his birthday and on Father's Day, subject to O [...] spending the plaintiff's birthday and Mother's Day with the plaintiff.

5.6 Spending reasonable time with O [...] on her birthday, subject to her views and wishes.

6. Each of the parties shall have reasonable telephonic and electronic contact with O [...] whilst she is in the care of the other party.

7. The defendant is ordered to contribute towards O [...] 's maintenance needs, until she becomes self-supporting, as follows:

7.1 By payment to the plaintiff of the amount of R5 000.00 per month, the first payment to be made on the first day of the calendar month following the granting of this order, and monthly thereafter on or before the first day of each month.

7.2 The amount referred to in 7.1 shall increase annually on the anniversary of the date of divorce by a rate equal to the Consumer Price Index for the preceding 12 months, as published by Statistics South Africa or its successor.

7.3 By payment of 50% of all of O [...] 's educational costs, including fees, levies and debentures at a private school, both primary and secondary schools, and at tertiary institutions, prescribed school uniforms, school outings, prescribed books, stationery and electronic equipment, extramural activities including the necessary kit and equipment, sports clothes, tutorial and extra lessons, and costs of residence in respect of tertiary education.

8. The defendant is ordered to pay the costs of the action.

BY ORDER

For the plaintiff:

Adv Sarita Liebenberg (082 901 2765 / sarita@sarita.co.za)

Instructed by:

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