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

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO
Case no. **5306/2022**

In the matter between:

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

Plaintiff

and

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

Defendant

CORAM: **S BOONZAAIER, AJ**

HEARD ON: **12,13,15 and 27 MARCH 2024**

JUDGMENT BY: **S BOONZAAIER, AJ**

DELIVERED: **28 MARCH 2024**

INTRODUCTION:

[1] In this divorce action the only disputes are whether there should be a forfeiture order under Section 9(1) of the Divorce Act 70 of 1979 in favour of the Plaintiff and whether the Defendant would be entitled to spousal maintenance.

FACTUAL BACKGROUND:

- [2] The parties were married in community of property on 19th May 2017. The Plaintiff, a 41-year-old police officer issued summons on 25 October 2022 against the Defendant, a 41-year-old unemployed male for a decree of divorce. She also initially seeks an order for the division of the joint estate and Defendant to forfeit 50 % share of the Plaintiffs pension fund, or alternatively only to share 10 % of the Plaintiffs pension fund. The Plaintiff later amended the summons to be that Defendant to forfeit 50 % share of the Plaintiffs pension fund.
- [3] The Defendant disputes the grounds for the breakdown of the marriage as alleged and filed a counterclaim for a decree of divorce, division of the assets of the joint estate which includes 50% share in the Plaintiff's pension fund. He also seeks spousal maintenance of R 5000 (five thousand rand) per month.
- [4] The Defendant also seeks an order that each party keep the furniture in his or her possession as his or her sole exclusive property.
- [5] It is for the court to determine the reasons for the breakdown of the marriage, the division of the estate and or forfeiture, spousal maintenance and cost of the action.

UNDISPUTED FACTS:

- [6] It is common cause that the parties met in 2016 and cohabitated at the Defendant's paternal place of residence from 2017 when they got married. The Plaintiff is employed at the Family Violence and Child Protection and

Sexual Offences Unit of the Police Force hereinafter called ("SAPS") in Bultfontein. She travels regularly to nearby stations to also serve those areas.

[7] The primary residence and contact rights with regards to the minor child is not in dispute.

[8] It is common cause that the Defendant is currently unemployed and doing odd jobs.

[9] It is further uncontested that the Plaintiff is employed by SAPS since 2012 (which was indicated on the Plaintiff's Pension Certificate).

[10] The parties did not append any salary advises or any proof of salary payments. The Plaintiff was able to provide the court on request with a salary advice and an advice regarding her current value of her pension benefit.

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[11] It is also undisputed that during the Covid pandemic the Plaintiff started a business selling meat to the local community on credit. The aim of the business was to supplement the Plaintiff's salary and improve the quality of their lives. The Defendant would receive the payments when the customers came to pay at the end of the month. This business was profitable.

[12] The Plaintiff left the matrimonial home in September 2022.

PLAINTIFF:

- [13] It is the Plaintiffs case that the Defendant did not contribute to the growth of the joint estate, (particularly the Plaintiff's pension fund benefits), and that the Defendant never had a fixed income or permanent employment, he continually changed jobs. He failed and or refused to financially support the Plaintiff or the minor daughter. She maintained that she mainly contributed to the household expenses and that the Defendant failed to financially provide in their needs due to him being mostly unemployed and failing to balance their budget.
- [14] The Plaintiff alleges that the Defendant is not only currently unemployed but refuses to look for work. Their fights were sparked by her attempts to help him seek employment. When they fought, he would tell her that she is staying in his parental home and that he did not have feelings for her and he used the latter as justification for his indiscretions.
- [15] The Plaintiff maintained that the parties are married for a short period of time and lived as husband and wife for a shorter time.
- [16] The Defendant was verbally abusive and he physically, assaulted her when he slapped her on one occasion which left a bruised eye.
- [17] He showed no love and affection to the Plaintiff and continually indicated his lack of interest in the marriage.

[18] The Defendant also entered into improper relations with numerous women and committed adultery.

[19] The Defendant is able to generate an income. He has a tenant and he is also seeking to be elected as a ward councillor. They earn R 500 per month.

DEFENDANT:

[20] The Defendant on the other hand argued that Divorce law currently is based on a no fault- principle. He relied on the case of **Schwartz v Schwartz**¹ where the Appellate Division formulated the approach to be taken. It stated that regard should be had to:

“What has happened in the past, i.e. the history of the relationship up to date of the trial, and also to the present attitude of the parties to the marriage relationship as revealed by the evidence at trial.”

[21] The Defendant also accused the Plaintiff as the one who mostly is guilty of misconduct on all the prayers. The Plaintiff did not prove any of the allegations made against him.

[22] He is the one who maintained the family because the plaintiff has many debts. He insisted that he raised the child and took care of the child after hours. He attributed his failure to look for a job to the fact that he was constantly looking after the child.

¹ 1984(4) SA 467(A)

[23] He denied that the duration of the marriage was short-lived. It was later conceded that the marriage did not last for long, but it is not short enough to unduly benefit the Defendant. He also denied that he was living with another women and her kids, a fact which was conveyed to the Plaintiff by the minor child.

[24] She has a drinking problem and abuses alcohol frequently during the week. Defendant insisted that he takes care of the child and that the Plaintiff would get so drunk that she was constantly late for work and would on occasion have to be fetched by colleagues at work. He stated however that there were no disciplinary steps taken against her.

[25] It was argued that the fact that the Defendant was in and out of work is not a refusal to work. The business was run from the family home and Plaintiff never paid rent for herself or the business. That was the contribution to the household.

[26] It was submitted in argument that the Defendant is willing to abandon spousal maintenance, should the court find that it is not due, in light of the fact that the Defendant can still find alternatives to survive and find employment

THE EVIDENCE:

[27] the Plaintiff testified the marriage was harmonious until 2018 when the Defendant started cheating on her and swearing at her and telling her that she was a whore sleeping with all the townships men.

- [28] She mainly supported the family from her salary. She also took the initiative to start a business during the beginning of Covid 2020 to try to further improve their financial position. Whenever the Plaintiff asked the Defendant about him seeking employment he was not interested. The Defendant assisted her in this business, because he was home most of the time, he received the payments at the end of the month. She however realised when she did the reconciliation of the books that the business is lucrative but it does not show a profit. There is always shortages and she had to pay from her own salary whenever it was time to restock. Defendant conceded that he once used some of the money to fill his fuel tank to visit family.
- [29] The Plaintiff testified that the Defendant never paid school fees and after care for the minor child as well as the household expenses regarding clothing and food. The Defendant was not involved in the daughter's upbringing.
- [30] The Defendant indicated that as she was working during the day 8am to 4pm shifts, the minor child was at school and after hours, she was being taking care of by the next-door neighbour. Only if she was working out of town, she would knockoff late. She stated that she would from time to time hang out with friends and that they would consume alcohol, but not to the extent that she gets drunk. During these times she always let the Defendant know of her whereabouts.

- [31] Once when the Plaintiff went home to fetch something from the house during working hours early in the morning. She found the neighbour's daughter in the sitting room and the Defendant was in the kitchen. When she entered the bedroom, she noticed that the bed was untidy. When she confronted him about her presence, he told her that they grew up together. From Plaintiffs own perception it seems that this lady was visiting whenever Plaintiff was not home.
- [32] During their marriage she would on several occasions see him in the streets with female companions. Once she drove past him with an unmarked Police vehicle.
- [33] The Defendant never told her that he did not obtain his matric certificate. When she testified it was clear that it was a disappointment for her.
- [34] The Plaintiff testified that she borrowed R 60 000 and paid R50,000.00 to purchase a motor vehicle, the silver Bantam bakkie in Bloemfontein. Because she was at work the Defendant travelled to Bloemfontein signed the papers and the vehicle was with her knowledge registered in his name. Defendant on the other hand conveyed to the court that his late brother gave the money for the Bantam bakkie to him to enable him to purchase the vehicle.
- [35] The Plaintiff denied the accusations that she the excessively abuse of alcohol caused the irretrievable breakdown in the relationship.

[36] The Defendant only testified under cross examination about the assault, which Defendant denies. The Plaintiff explained that at the time she did not file any charge against the Defendant because she was ashamed to involve her colleagues in her private matters.

CLAIM FOR FORFEITURE:

[37] Section 9(1) of the Divorce Act reads as follows:

“(1) When a decree of divorce is granted on the ground of 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.”

[38] The section confers a discretion on the Court which is to be exercised with regard to the three factors enumerated in the section.² The party alleging that his/her spouse would acquire an undue benefit bears the onus of proving the nature and extent of the alleged benefit which is to be forfeited.

[39] It was held in **Wijker v Wijker**³ that the Court should first determine whether or not the party against whom the order is sought will in fact benefit if the order is not made. The Supreme Court of Appeal considered the question whether proof of “substantial misconduct” on the part of either of the parties was an essential requirement for a forfeiture order. The question was

² L v L (3146/2015) [2017] ZAECPHC 9 (2 February 2017)

³ 1993(4) SA 720 (A)

answered in the negative. It was held that the subject-matter of s 9(1) made it abundantly clear that the legislature never intended the three factors mentioned in the section to be considered cumulatively.

[40] The only evidence regarding her assets submitted by the Plaintiff was her employee benefit certificate from GEPP Pension Fund dated 13/03/2014 indicating that the total pensionable service is 11 years 7 months. The total cash value of her normal retirement benefit at date of the statement amounted to R533 705. Her resignation benefit reserve value amounted to R553 292. As is evident from the Plaintiff's updated salary advice submitted during the hearing, the Plaintiff receives a pensionable salary of R 234 852 per year, a net salary in the amount of R19.571 per month. There is no evidence as to the value of the car or any evidence disclosing the value of any movable property. Although reference is made by the parties in their pleadings of two motor vehicles and immovable property, the Defendant denied having any other car than the silver Bantam bakkie, he did not indicate any other movable or immovable assets or any liabilities.

[41] As was held in **Wijker v Wijker**, supra the determination of the fact whether the spouse will be benefitted relates to a purely factual issue. Due to the Defendant's failure to present any evidence as to his employment or the quantum of any salary or monies he received as remuneration it is impossible to determine whether he earned any salary. Hence, I must accept that he cannot prove that he earned anything.

[42] In **Herman R Hahlo**⁴ describes community of property as follows:

“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 parties, irrespective of the value of their financial contributions, hold equal shares.”

[43] Co-ownership of the property, movable as well as immovable is a consequence of the marriage in community of property. Unless the parties make precisely the same contribution to the joint estate, whether prior to the marriage or during the subsistence of the marriage, the one who has contributed less at the termination of the marriage will necessarily be benefitted unless an order of forfeiture is made. That is the inevitable consequence of their marital regime. The Act does not afford the spouse who has made the greater contribution an opportunity to bewail himself thereof. He may only complain about an *undue* benefit. Unless it is proved what the nature and extent of the benefit was the Court cannot determine whether the benefit was undue or not. Only when the nature and extent of the benefit has been proved by the Plaintiff, does it become necessary for the Court to consider the factors which determine whether the benefit is undue or not.⁵

[44] In the present instance the alleged undue benefit which the Plaintiff contends for is limited to her pension benefit.

DURATION OF THE MARRIAGE:

⁴ The South African Law of Husband and Wife, 5th Edition at 157-8

⁵ Engelbrecht v Engelbrecht 1989 (1) SA 597 (C) at 601 F - H

[45] The relationship between the parties commenced in 2016 and they were married in 2017. Even though the Plaintiff avers in the particulars of claim that the marriage lasted happily for a mere year. On the Defendant's version the parties lived together for at least five (5) years. The Defendant provided a home for the parties for the first five (5) years whereafter the Plaintiff relocated to another property. The Defendant started working on the 1st December 2012 and was able to sustain her employment and income for the past sixteen (11) plus years. Since 2017 the Defendant has made no contribution to her and their daughter's maintenance.

SUBSTANTIAL MISCONDUCT:

[46] The substantial misconduct alleged by the Plaintiff is that the Defendant had several extra marital affairs and assaulted her on one occasion. She did not lay a charge because she did not want her colleagues at work to get involved in her family violence matter. As indicated above, she conceded that she suspected the Defendant of having many "extra marital" relationships, with ladies from the counsel where he sought to be elected.

[47] Defendant denied being unfaithful to the Plaintiff and testified that she is the one having extra marital affairs although he could not mention specific incidences. She drank frequently with her colleagues during the week and weekends after hours and came home drunk. The Plaintiff however testified to several specific instances where the Defendant seemed to be unfaithful.

[48] The evidence clearly reveals that the Defendant on one occasion assaulted the Plaintiff, when he slapped her with his open hands which left her with a bruised eye. The Defendant denies that his behaviour had contributed to the breakdown of the marriage. The Plaintiff testified as to the event that gave rise to her finally leaving the common home. She gave a detailed and truthful account of what happened and testified that she only left the common home after due consideration. She loved the Defendant and tried to salvage the marriage but she only realised it is not going to work after he told her that he doesn't love her.

THE CIRCUMSTANCES WHICH GAVE RISE TO THE BREAKDOWN OF THE MARRIAGE:

[49] The Plaintiff testified that the Defendant neglected his duties and that he had never supported her and the minor child financially. He verbally and physically abused her.

[50] Notwithstanding the introduction into our law of the "*no fault*" principle in divorce matters, a party's misconduct may be taken into account in considering, in terms of Section 9(1) of the Act, the circumstances which gave rise to the breakdown of the marriage. The fact that substantial misconduct has been included as a third factor does not exclude a consideration of misconduct as a circumstance which gave rise to the breakdown of the marriage. Substantial misconduct may include conduct which has nothing to do with the breakdown of a marriage and may for that and other reasons have

been included as a separate factor. Too much importance should, however, not be attached to misconduct which is not of a serious nature.⁶

[51] The Plaintiff testified that the parties started experiencing difficulties in their relationship in 2018 when the Defendant became aggressive whenever she addressed him to will to seek employment. The Defendant did not dispute the Plaintiff's contention and elaborated that the problems in their relationship then and thereafter were largely on account of the Plaintiff's excessive abuse of alcohol. The Defendant testified that her colleagues at the Police Station, once informed her that the Defendant were spotted in the streets with female companions. She was however aware of this situation notwithstanding the information received from her colleagues.

[52] It is common cause that the relationship between the parties endured from 2017 until the Plaintiff left the common home. It seems that for most of that time the marriage was characterised by conflict. The fact that the marriage, on the Plaintiff's version endured for approximately five (5) years appears to be a factor militating for an order for forfeiture being granted.

[53] Taking all of this into consideration, my view is that the Plaintiff provided evidence pertaining to the alleged undue benefit that will befall the Defendant in the event that forfeiture is not ordered. The evidence pertaining to the quantum of the estate the Plaintiff and Defendant have built up and that was placed before the Court is limited. It is obvious that the Plaintiff considers her

⁶ Beaumont v Beaumont 1987 (1) SA 967 (A) at 994 D - E

employment at the Police in Bultfontein as crucial to support herself and her child. She was employed for the whole duration of the marriage. It is her evidence that she has acquired the motor vehicle and furniture and household goods during this period. The Defendant's evidence that his late brother bought him the car without any evidence is clearly unreliable and obviously false.

SPOUSAL MAINTENANCE:

[54] A marriage create a reciprocal duty of support between spouses. This duty terminates upon death or divorce. Our law does not provide for a right to spousal maintenance when parties divorce⁷. Spousal maintenance is a creature of statute.

[55] Section 7(2) of the Divorce Act⁸ stipulates that: "... 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 5 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 Strauss v Strauss 1974(3) SA 79(A)

⁸ Act 70 of 1979

[56] In **EH v SH**⁹, the court held that:

‘the person claiming maintenance must establish a need to be supported. If no such need is established, it would not be “just” as required by this section for a maintenance order to be issued’.

[57] In **Van Wyk v van Wyk**¹⁰, the court stated that a proper application of the Section 7(2) of the Divorce Act involves a balanced assessment of maintenance needs and ability to pay and that the starting point was the existing and prospective means of the defendant and her earning capacity, because, if she has the ability to support herself, she is not entitled to maintenance from the Plaintiff.

[58] From the language of the enabling provision, it is clear that awarding postdivorce spousal maintenance is purely discretionary. This discretion of the court should be exercised judicially according to established rules of law and practice and in making a determination of maintenance, consideration of justice must prevail. The factors that a court will take into account when awarding maintenance are not exhaustive and the court has a very wide discretion whether or not to grant a maintenance, the amount payable and the duration of the maintenance.

[59] If the circumstances permit, our courts will generally attempt to achieve a “clean break” between the parties. The Defendant is currently unemployed. He has existing means to support himself. From his own testimony he is doing “piece

⁹ 2012(4) SA164(SCA) at para 13.

¹⁰ [2005] JOL17228(SE)

jobs” The Plaintiff has been in steady employment earning a nett income stated above. In this matter, a clean break is possible.

[60] The Plaintiff did not indicate what his needs are or how the amount of R 5000 was calculated to be his needs for spousal maintenance.

[61] In **K v K**¹¹, it was found that the parties "means" would include property such as a matrimonial home that can be used to generate income.

[62] The Plaintiff submits that in the event the court orders maintenance, the Defendant's prospective means be taken into consideration. The

[63] When dealing with the parties' financial needs and obligations, the court in **K v K**¹² stated that this factor means how much money each party needs for their day-to-day living, and how much of the income or resources of each has to be spent for some obligatory purpose.

CONCLUSION:

[64] The defendant did not make a favourable impression in the witness box. He was evasive and uncertain about when certain incidents took place. Although he testified that the Plaintiff was an absent mother and that she left the minor child most of the time with him he was adamant that she had problem with alcohol abuse but he could not explain why he is satisfied that she be awarded the primary care of the minor child.

¹¹ 1986(4) SA616(E).

¹² Ibid

[65] What is required of the court is to consider the three issues set out in s 9(1) of the Act in broad terms and to then make a value judgement whether the Defendant would be unduly benefitted if a forfeiture order is not made. An undue benefit, is one which is disturbingly unfair. On a careful consideration of all the facts I came to the conclusion that the Defendant would unduly benefit from the Plaintiffs pension fund if the forfeiture is not made an order of court.

[66] The Defendant is also not entitled to any spousal maintenance.

ORDER:

[67] As a result I make the following order:

1. A Decree of Divorce.
2. Division of the joint estate.
3. The Defendant to forfeit the 50 % share in the Plaintiff's Pension Fund.
4. Each party to pay their own costs.

S BOONZAAIER, AJ

On behalf of the Plaintiff:
Instructed by:

Adv. MOTSELEBANE
MHLOKONYA ATTORNEYS

On behalf of the Defendant:
Instructed by:

Adv. S MOTLOUNG
KGANG ATTORNEYS

