

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

**CASE NO: 83552/2016
27/2/2018**

In the matter between:

L: M M L

(I.D. No.: [....])

Plaintiff

and

L: A W M K

(I.D. No.: [....])

Defendant

JUDGMENT

Matter heard on: 22 February 2018

CONSTANTINIDES AJ:

1. This is an action for divorce. The parties were married to each other in community of property on the 8th December 2012 at Ga-rankuwa. There are no children born of this marriage between the parties. It is common cause that the marriage relationship between the parties has irretrievably broken down and that there is no prospects of a reconciliation between them.
2. The Plaintiff is seeking:

- 2.1. a decree of divorce,
- 2.2. an order that the Defendant forfeit the entire patrimonial benefits arising out of the marriage in community of property in favour of the Plaintiff, including-
 - 2.2.1. the immovable property situated at [...], Gauteng, which immovable property is registered in only the name of the Plaintiff and which immovable property is totally unencumbered;
 - 2.2.2. the Plaintiff's pension interest of approximately forty years in the Government Employees Pension Fund;
 - 2.2.3. furniture and household effects which the Plaintiff purchased;
 - 2.2.4. an Isuzu bakkie which is registered in the name of the Plaintiff;
 - 2.2.5. a Toyota Corolla motor vehicle which is registered in the name of the Plaintiff;
 - 2.2.6. Plaintiff's investments;
- 2.3. An order that the Defendant pay the Plaintiff's costs of suit;
- 2.4. An order that the Plaintiff be granted such further and/or alternative relief as the above Honourable Court may deem just and equitable.
3. The Defendant has filed a Plea and Counterclaim wherein the Defendant claims:
 - 3.1. A decree of divorce;
 - 3.2. An order that the Plaintiff forfeit the entire patrimonial benefits arising out of the marriage in community of property in favour of the Defendant, including -
 - 3.2.1. the immovable property situated at [...] Gauteng;

- 3.2.2. the Defendant's pension interest in the Government Employees Pension Fund;
 - 3.2.3. the Defendant's pension interest/s in any other pension fund/s;
 - 3.2.4. the Defendant's retirement benefits or retirement annuity with any retirement annuity concluded with any institution;
 - 3.2.5. furniture and household effects which the Defendant purchased;
 - 3.2.6. all motor vehicles, trailers or any propelled vehicle registered in the name of the Defendant;
 - 3.2.7. the Defendant's investments;
 - 3.2.8. an order that the Plaintiff pay the Defendant's costs of suit on an attorney and own client scale;
 - 3.2.9. an order that the Defendant be granted such further and/or alternative relief as the honourable Court may deem just and equitable.
- 4. The Plaintiff was represented by Adv. M Fabricious. The Defendant appeared in person as her Counsel Adv. L. T. Leballo withdrew from the matter immediately before the matter was to commence. The Defendant's attorney of record had no right of appearance but assisted the Defendant throughout the proceedings.
 - 5. During evidence it was conceded that the parties have been living apart since June/July 2016.
 - 6. The Plaintiff alleged that the Defendant repeatedly accused him of wanting to kill her. Extensive evidence was led relating to the very unhappy relationship between the two parties.
 - 7. The Plaintiff was commissioned by the Government to work in Belgium from July 2015 and in terms of employee benefits his spouse would be entitled to visit him at least once or twice a year.

8. Bundle "C" (the "Documents Bundle") was admitted as Exhibit "A" . Page 17, in Exhibit " A" reflects the Plaintiff's Government Employees Pension Fund("GEPF Pension Fund"). The resignation benefit of the aforesaid pension amounts to R8 476 841.00.

9. In Bundle " B" which was admitted and marked Exhibit " B" on page 61, there is a valuation of immovable and movable assets:

9.1. Erf [...] (incomplete structure);

9.2. Movable assets- vehicles (2), the valuation certificate on page 67, states the following:

"... I/we are of the opinion that R1,260 000.00 (one million two hundred and sixty thousand Rand) is a fair and reasonable market value for this property as at 22 July 2017.

..."

9.3. On page 71 of Exhibit "B" there is a valuation of the total of all movable assets which comprises an Izuzu D/cab 2005, a Toyota Corolla 2003, and the total of all the movable assets amounts to R144 400.00.

9.4. In bundle "C", in the documents bundle, on page 66, it is evident that the immovable property is registered in the name of the Plaintiff and the registration date is on the 27th June 2003 which is well before the marriage took place.

9.5. According to the Plaintiff the Defendant made no contribution to the building of the immovable property. There was an agreement that she was going to pay for the finishes, yet she failed to do so.

9.6. However the Defendant countered the Plaintiff's aforesaid allegation and stated that they built the house *"together"*.

9.7. The Defendant stated that she made payments for bricks and

cement for the house however she conceded that the receipts in regard to payments were in the name of the Plaintiff. The Defendant could not produce any proof that she had made payments.

- 9.8. Furthermore, the Defendant stated that she always bought the groceries and paid for the gardener and the domestic helper in the house.
- 9.9. The Defendant stated that she had no assets whatsoever and she also indicated when asked whether she had any bank statements to provide proof that she had made payment or contributions towards the immovable property, her response was that she paid "*in cash*" as she was purchasing the bricks and cement from "*an Indian gentleman*".
- 9.10. The Defendant stated that she had contributed "*more than R500 000.00 towards the building of the house*". However she could not provide any form of documentary proof in this regard.
- 9.11. The Defendant confirmed that the Plaintiff paid for the roof of the immovable property.
- 9.12. She stated that she bought clothing for both her girls and for the daughter of the Plaintiff. She confirmed that the mother of the Plaintiff's daughter was paying for her schooling despite having stated earlier that she had been paying for the aforesaid child's schooling.
10. The Defendant stated that the Plaintiff refused to eat her food as he was afraid that she was going to "*kill him*". The Defendant denied ever having accused the Plaintiff of wanting to kill her. She stated that is "*untrue*".
11. In cross-examination, the Defendant stated that she did not accumulate any assets due to the fact that she was looking after her mother, her children and her brother until such time as he had secured a job. Thereafter, her two sisters assisted in helping maintain her mother as she could no longer afford to do so.

12. The Defendant conceded that the Plaintiff can retain the motor vehicles referred to in prayers 2.4 and 2.5 of the Particulars of Claim.
13. In regard to the Plaintiff's Government Pension Fund the Defendant stated in evidence that a quarter of the pension should be allocated to her. The Defendant alleges that she bought groceries and spent approximately R6000.00, R7000.00 or R8000.00 a month on groceries, some of which went to the Plaintiff's daughter in Atteridgeville. The Defendant has not provided any form of documentary proof relating to any payments that she has made in this regard.
14. The Defendant stated that she paid for the Plaintiff's son's school fees for two years but provided no proof in this regard.
15. According to Plaintiff's counsel the Defendant did not discover any documents in this matter.
16. She stated that she did cook "*sometimes*" and she did perform her "*wifely duties*". The Defendant alleged that the Plaintiff failed to support her in the August 2016 election process.
17. She did not want to move to Belgium and live with the Plaintiff. The Plaintiff allegedly refused to support her career.
18. Both the Plaintiff and the Defendant could not explain why they chose to be married in community of property. Despite questions put to both parties, the Defendant said that she did not want to be married in community of property but due to the fact that the date of marriage was moved "*forward*" by the Plaintiff, this is why they got married in community of property. The Plaintiff did not afford any explanation as to why they were married in community of property and stated that he only found out after he was married that he had been married in community of property.

THE LAW:

19. In terms of section 9 of the Divorce Act 70 of 1979 ("the Divorce Act"), the Court has the discretion when granting a divorce on the grounds of the irretrievable break-down 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 benefitted.¹

20. While the Court has a wide discretion in that it may order forfeiture in respect of the whole or part only of the benefits, it is not empowered to award a "*portion of an errant husband's separate estate*" to his wife for example merely because this might seem equitable in the circumstances. Nor may a forfeiture order be granted simply to balance the fact that one of the spouses or partners has made a greater contribution than the other to the joint estate. The forfeiture order relates only to the benefits of the marriage - in other words those that arise upon marriage. The precise nature of these benefits depends on the particular matrimonial regime.²
21. A spouse or partner cannot be made to forfeit those assets that he/she actually brought into the joint estate.³ The extent of the contributions of the respective spouses or partners will be determined on the facts. Therefore, the Defendants counterclaim that the Plaintiff forfeit his own property is unsustainable in our law.
22. In **Singh** ⁴ for sample the Court determined that the Defendant's contribution which included "*keeping house*" and "*looking after the children*", should be assessed at 20% of the joint estate.
23. In exercising the discretion to order forfeiture, the Court is enjoined to ask itself whether one party would be unduly benefitted were such an order not made. In answering this question the Court should take into account factors such as the following:
 - "(i) *the duration of the marriage or civil union;*
 - (ii) *the circumstances that gave rise to the break-down of the marriage or civil union; and*

¹ Family Law Service -Schafer Butterworths Divorce/issue 57 pg. 26 D9 Forfeiture of benefits

² Ibid **Pgs.** 26-27

³ **JW v SW** 2011 **1 SA 545 (GNP)**

⁴ 983 1 SA 787 at 788H.

(iii) any substantial misconduct on the part of either of the parties and the fact that undue benefit may accrue to the one party in relation to the other if an order of forfeiture is not granted.”⁵

24. The discretion is restricted to a consideration of these grounds alone, no other factors may be taken into account.
25. As far as specified factors are concerned, this discretion is in keeping with the movement away from the idea that dissolution of the marriage (and now, also of a civil union) is based on the principal of fault, and hence, misconduct of one of the parties. Care must be taken not to elevate misconduct to a consideration higher than the basic requirement of undue benefit.⁶
26. The Plaintiff in examination in chief stated that he did not want the Defendant to share in his hard earned pension funds and that he would much rather have a clean break principle and just pay her an amount of money instead of her sharing in his pension fund. An open tender was made in Court in the amount of R100 000.00 and that the Defendant be entitled to retain the assets set out in prayer 2.3 of the Particulars of Claim.
27. Having heard substantial arguments it is evident that this indeed is a marriage of short duration. The parties have been living apart since July 2016. Therefore effectively the parties have lived together for approximately 3% years. Both parties were very unhappy in this marriage from the outset.
28. The circumstances that gave rise to the breakdown of the marriage appear to be due to the fact that both parties were abusive to each other both emotionally and verbally.
29. According to the Defendant the Plaintiff refused to support her career. The Plaintiff alleges that the Defendant was not willing to go and stay with him in Belgium.

⁵ Ibid Family law service Pg. 27

30. I have taken note of the Plaintiff's open tender.
31. I make the following order:
1. A decree of divorce is granted;
 2. The Defendant is to forfeit all the patrimonial benefits arising out of the marriage in community of property including -
 21. the immovable property situated at [...], Gauteng which is registered in the name of the Plaintiff;
 22. the Plaintiff's pension interest in the Government Employees Pension Fund;
 23. the Plaintiff's pension interest/s in any other pension fund/s;
 24. an Isuzu bakkie which is registered in the name of the Plaintiff;
 25. a Toyota Corolla motor vehicle which is registered in the name of the Plaintiff;
 26. all the Plaintiff's investments;
 27. That Plaintiff is to make payment to the Defendant the amount of R100 000.00 (one hundred thousand rand) within 30 days from the granting of the decree of divorce, which payment is to be made into a bank account of the Defendant;
 28. The Defendant is to take the furniture and household effects which the Plaintiff purchased;
 29. Each party are to pay their own costs.

H CONSTANTINIDES

Acting Judge of High Court

Gauteng Division

Pretoria

⁶ Ibid Pg. 28

27th February 2018

Attorneys for the Plaintiff: Shapiro & Ledwaba Incorporated

Counsel for the Plaintiff: Adv. M Fabricious

**Attorneys for the First and
Defendant:** Mkhonto & Ngwenya Incorporated

**Counsel/Attorney for the
Defendants:** Defendant in person