



**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 1070/2014

In the matter between:

T M

PLAINTIFF

and

N M

DEFENDANT

JUDGMENT

MOKGOHLOA DJP

1. These are divorce proceedings. The parties have lived together as husband and wife. They are now on the verge of parting ways. Both of them agree, albeit on different grounds, that their marriage has irretrievably broken down.

2. The parties were married to each other in community of property in Giyane on 3 April 1981. The marriage still subsists. Four children were born of the marriage, which children are all majors. There is no written agreement devolving the patrimonial benefits.
3. In here particulars of claim, the plaintiff claimed a decree of divorce, division of the joint estate, half of the defendant's pension fund, maintenance for herself and the defendant retains her as beneficiary in his medical aid, and costs of suit. During the trial, the plaintiff abandoned a claim on the defendant's pension fund, maintenance and medical aid.
4. The defendant on the other hand, alleged in his counter claim that:
 - 4.1 during 1984 the plaintiff admitted to having committed adultery which resulted in the birth of one of the children;
 - 4.2 the plaintiff on numerous occasions falsely accused the defendant of physical abuse and threatened to summon family members and/or the police in order to humiliate and damage the defendant's good name and reputation in the community;
 - 4.3 since 1987 the plaintiff would absent herself from the parties' common home at Chavani village over weekend and failed to inform the defendant of her whereabouts;
 - 4.4 the plaintiff on numerous occasions falsely accused the defendant of having extra marital relationships. This was done in front of the children in order to humiliate the defendant and caused a gradual deterioration in the relationship between the defendant and the children;
 - 4.5 the plaintiff locked the defendant out of the parties' common home at Chavani village resulting in the defendant having to find alternative place to sleep;

4.6 the defendant was prompted to approach his employer for subsidised housing and consequently purchased the immovable property at [...] T. street, Louis Trichardt;

4.7 the plaintiff never visited, resided or contributed towards the purchase of the Louis Trichardt house.

These allegations serve as justification for the defendant's prayer of forfeiture of the benefits arising out of the marriage in community of property and in particular the house at Louis Trichardt. The plaintiff denies the defendant's allegations.

Evidence

5. Both parties testified without calling witnesses. The defendant stated that he was employed as a magistrate but has since retired. He reiterated the allegations contained in his counter claim regarding the plaintiff's conduct during the marriage. According to him, he was forced to leave the plaintiff at the Chavani home and purchased the Louis Trichardt house during 2000 or 2001. A bond of R330 000.00 was registered over this property.

6. At some stage, he was informed by the chief in Chavani that their house at Chavani was left unattended or abandoned and has become a haven for criminals. He proceeded to Chavani where he found that valuable furniture had been removed and the house was vandalised. He was not financially able to maintain both properties.

7. During August 2013 he approached a certain Abdul also known as Oupa. They had a discussion on the Louis Trichardt house and agreed that Oupa would settle the bond on the Louis Trichardt house and the defendant would occupy that house for fourteen or sixteen months without paying rent. He did not know Oupa's surname. According to the defendant, Oupa passed away during April 2016. He does not know what happened to the house and does not know the value of the house at present.

8. The defendant conceded that the plaintiff renovated the Chavani house and contributed towards the financial needs of the children. He further conceded that the plaintiff was the primary caregiver of the children and that he was an absent father. The defendant is currently cohabiting with another woman in the Chavani house.
9. The plaintiff stated that during 1980 she was employed as a teacher and that defendant was a clerk in Malamulele Magistrates Court. He was busy with his law degree in Zululand University. He finished his studies in 1981 the same year their first child was born. They were residing in Malamulele township. At some stage the defendant was promoted and appointed as a magistrate. During 1982 the plaintiff fell pregnant again. The defendant was angry and insisted that she abort the child. The plaintiff and the doctors refused. He started to abuse her physically and verbally. The third child was born on 7 April 1983. The same year that she fell pregnant with their fourth child. The abuse continued and he denied paternity of the fourth child. He started to accuse the plaintiff of being unfaithful to him and stated that his own uncle was the father of their fourth child.
10. The defendant had numerous girlfriends and even informed the plaintiff about one of them being Pakkie. At some point the plaintiff met with Pakkie who confirmed her relationship with the defendant but informed the plaintiff that she did not intent to marry him.
11. During 1986 the family moved from Malamulele and relocated to Chavani village. They started building a house in Chavani together. The defendant was always absent and came home on weekends until he left permanently. The plaintiff stated that the defendant abused her physically and verbally in the presence of the children and her colleagues. He told her that she was ugly and short. He denied her conjugal rights. He ultimately left her in the village and moved to the township where he bought the Louis Trichardt house.
12. In 2004 the plaintiff lost sight of one of eyes and in 2008 she turned totally blind. She underwent four operations and regained sight in one of her eyes. This led to her being declared medically unfit to work with effect from 31 December 2009. She received her pension funds

which she utilised to renovate the Chavani house, invested some and paid off the tertiary fees of one of the children. She then bought a motor vehicle for herself.

13. On 7 April 2012, the children hosted a birthday party for her at Chavani. The defendant was invited. It was at this party when the defendant told the plaintiff to take her children and move out of the house because he wanted to move in the Chavani house with his beautiful new wife and children.
14. On 17 December 2012 she went on religious tour to Israel. Upon her return, she decided not to return to Chavani home and instituted these proceedings in January 2013.
15. In the light of these facts, I must now determine whether an order of forfeiture should be granted in favour of the defendant against the plaintiff. In this regard section 9 of the Divorce Act¹ provides:

“ 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 breakdown 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 benefited.”

16. In Engelbrecht v Engelbrecht² the court stated:

“Joint ownership of another party’s property is a right which each of the spouses acquires on concluding a marriage in community of property. Unless the parties (either before or during the marriage) make precisely equal contributions the one that contributed less shall on dissolution of the marriage be benefited above the other if

¹ 70 of 1979

² 1989 (1) SA 597 (A) Headnote

forfeiture is not ordered. This is the inevitable consequence of the parties' matrimonial property regime. The Legislature (in s 9 of the Divorce Act 70 of 1979) does not give the greater contributor the opportunity to complain about this. He can only complain if the benefit was undue."

17. In *Wijker v Wijker*³ the court stated that:

"the proper approach in determining whether an order of forfeiture should be made is to first determine whether or not the party against whom the order of forfeiture is sought will in fact be benefited if the order is not made. Once it is determined that the party will in fact be benefited, the next enquiry is whether such benefit will be an undue one."

18. The court in *Engelbrecht* stated that a party who seeks a forfeiture order must establish what nature and extent of the benefit was. Unless that is proved, the court cannot decide if the benefit was undue or not. Only if the nature and ambit of the benefit is proved is it necessary to look to the three factors which may be brought into consideration in deciding on the inequity thereof.
19. In *casu*, the value of the Louis Trichardt house at the time the summons were issued and at dissolution of the marriage is not proved. The defendant only stated the value of the house when the house was bought during 2000 or 2001. I find that he had not proved the nature and extent of the plaintiff's benefits at the dissolution of the marriage; a fortiori he had not proved that such benefit was undue in the circumstances.
20. The defendant argued further that the plaintiff should forfeit the Louis Trichardt house because she did not make any contributions towards the acquisition thereof.

³ 1993 (4) SA 720 (A)

21. It has to be noted that in a marriage in community of property, all the properties acquired and all that the parties acquired and accumulated during the subsistence of the marriage forms the joint estate of the parties. Furthermore, when dealing with a marriage in community of property the parties have agreed before the marriage that they would share in the proceeds of the marriage equally. To determine whether one spouse will benefit if the forfeiture order is not granted the court must determine the respective contributions by the spouses to the joint estate. As to what constitute a contribution towards the joint estate is a question of fact. In *Gates v Gates*⁴ the court held that the services of the wife in managing the joint estate and caring for the children constitutes a contribution and should be taken into account.
22. In *casu*, the plaintiff testified that she worked as a teacher throughout their marriage until she was declared medically unfit to work on 31 December 2009. She gave the defendant her salary cheque for the first 18 years of their marriage until 1999 when the department of education started to deposit their salaries into their bank accounts. Both the plaintiff and the defendant built the house in Chavani where they resided since 1990. The defendant was always away from home and only visited them on weekends until 2004 when he stopped visiting. She was left alone to maintain the house and provided for her and the children's needs.
23. She was declared medically unfit to work due to her loosing sight of one of her eyes. She took part of her pension fund monies to renovate the Chavani house and paid the debt owing on one of the children's tertiary education. She bought herself a motor vehicle so that it can be easy for her to attend the eye specialists in Gauteng.
24. It is clear from the plaintiff's evidence which is not disputed by the defendant, that she contributed towards the joint estate. Whilst the defendant went on and acquired the house in Louis Trichardt, the plaintiff remained in Chavani. She maintained the Chavani house and took care of the children. I therefore find that she is entitled to her equal share in the joint estate which includes her share in the Louis Trichardt house.

⁴ 1940 NPD 361

25. However, the buck does not stop here, consideration has to be taken to the factors stated in section 9 (1) of the Divorce Act which are: the duration of the marriage, factors that led to the breakdown of the marriage, and substantial misconduct on the part of either of the parties.

Duration of the marriage

26. The marriage between the parties was of a fairly long duration of approximately 23 years when they separated in 2004. The important aspect is that they both contributed to the joint estate. When the defendant left, the plaintiff remained with the children maintaining and taking care of them. She maintained and renovated the Chavani house.

Factors that led to the breakdown of the marriage

27. Generally a marriage relationship seldom breaks down as a result of the conduct of one spouse. The parties' marriage is no exception. In this regard I accept the plaintiff's version that she was in an abusive relationship where she was belittled, assaulted and disrespected. The defendant disserved her and the children. I find that it is the defendant's conduct that led to the breakdown of the marriage.

Substantial misconduct

28. The defendant alleges that the plaintiff committed adultery which resulted in the birth of one of their children. This, according to the defendant, occurred during 1984. He further alleged that the plaintiff absented herself from the common home without informing him of her whereabouts. He however did not inform his or her family about this. He decided to leave the family home without discussing this with his or her family. The plaintiff denied having committed such adultery and I believe her version. She impressed me as a candid witness whose evidence was

credible and reliable. I can therefore not find that there is or was any substantial misconduct on her part that would warrant the granting of a forfeiture order against her.

29. In the circumstances, I come to a conclusion that if an order of forfeiture is made, the plaintiff will, in relation to the defendant, be unduly prejudiced and thus matrimonially disadvantaged. On the facts it is my considered view that the defendant has not made out a case to justify his prayer that the plaintiff should forfeit the patrimonial benefits arising out of the marriage. I would, therefore, exercise my discretion to withhold making such an order.
30. In conclusion, I am satisfied that the marriage relationship between the parties has broken down irretrievably and that there exists no reasonable prospects of restoring it to a normal marriage relationship. Therefore, I am inclined to decree an order of divorce. I do so primarily on the version of the plaintiff. The defendant's plea, counter claim and testimony stand dismissed to the extent of their inconsistency with the plaintiff's plea and testimony.
31. As regards the division of the joint estate, the parties agreed during argument that if division of the estate is granted, then a liquidator be appointed to assist in this regard. The parties further suggested that Mr Makgaleng be appointed as such.
32. In the result the following shall issue:

Order

1. The decree of divorce is granted.
2. The joint estate shall be divided.
3. Mr MM Makgaleng of Makgoba, Kgomo Makgaleng Attorneys is appointed as the Receiver and Liquidator in the joint estate of the plaintiff and the defendant, with full power to:
 - a. realise the whole of the joint estate in accordance with the duties and powers conferred a Receiver and Liquidator and to be exempted from furnishing security for the proper performance of his duties as Liquidator;
 - b. receive, liquidate and distribute the assets in the joint estate according to the law with full powers to divide/distribute the joint estate;
 - c. institute legal proceedings against any person for the delivery to him/her of any assets, deed of document which vests in the estate, in whatever Court it shall be appropriate to bring such proceedings;
 - d. instruct and appoint attorneys and/or counsel to institute proceedings on her/his behalf for the purpose of obtaining delivery of any assets alleged to vest in the joint estate and to claim such alternative relief as the circumstances may require;
 - e. sell and dispose of any assets of whatever nature, movable or immovable, corporeal or incorporeal of whatever nature that comprise the joint estate either by private treaty, public auction tender or such manner as he may deem fit under such terms or conditions as he may deem fit;

- f. sign and execute documents, deeds or any other papers that may be necessary to effect transfer of any of the assets or properties in the joint estate to whoever may acquire same from the receiver and liquidator.
- 4. Defendant to pay plaintiff costs of suit.

MOKGOHLOA DJP

REPRESENTATIONS

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| 1. For the Plaintiff | : Ms M.C De Klerk |
| Instructed by | : DDKK Attorneys Inc |
| 2. Counsel for the defendant | : Mr M.A Letaba |
| Instructed by | : Mabuh Letaba Inc Attorneys |
| 3. Date of hearing | : 3 May 2017 |
| 4. Date handed down | : 19 June 2017 |