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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: 19051/12

14/8/2015

In the matter between:

NGAKO THEOPHILUS RAMOROKA

PLAINTIFF

and

MOLATELA MARIAH RAMOROKA

DEFENDANT

JUDGMENT

MALI AJ

[1] The plaintiff claimed an order of divorce and an order for the division of the joint estate of the parties. In her counterclaim the defendant, apart from also claiming an order of divorce, claimed a forfeiture order. The parties were ad idem that the marriage had irretrievably broken down and the sole issue was whether or not the forfeiture order in respect of 50% of the defendant's pension benefits should be granted against the plaintiff.

[2] The parties were married to each other in community of property on 13 January 1999 at Ellisras in Limpopo. One minor child was born out of this marriage.

[3] The defendant is a professional nurse employed by the Department of Health. The plaintiff is a Taxi Driver and owns Taxi business.

[4] The parties stay together though they sleep in separate bedrooms. Both of them accuse one another for leaving the common bedroom first and the refusal of conjugal rights. According to the defendant due to the 70 kilometre distance to her workplace she rents a room near her workstation and that is the reason she had to leave the common home. The plaintiff did not challenge this version.

[5] Defendant testified that they built a house together however she contributed financially more than the plaintiff. She even went to the extent of making loans to ensure the successful building of their home. The plaintiff could not gainsay defendant's evidence.

[6] The defendant further testified that they have other assets, i.e. furniture and livestock. They had 25 cows, 10 sheep and 7 goats. The plaintiff sold the livestock without her consent and did not share the proceeds of the said sales. The plaintiff also sold their motor vehicles, Mazda 323 and Trucks without her consent and also did not share proceed of same.

[7] The defendant stated that they owned two taxis and she found out that the plaintiff changed ownership of the other taxi. The taxi was later involved in a car accident and the insurance refused to pay for the repairs of the said motor vehicle. She further testified that there is no communication between them because the plaintiff instructed her not to communicate with him accusing her of being a witch. Further that the plaintiff is calling her abusive and insulting names and has physically abused her to the extent of promising to shoot her. The defendant obtained a court order that was served upon the plaintiff.

[8] Because of the above, the defendant submitted that the plaintiff will be benefiting unduly if he gets the 50% portion of the defendant's pension benefits.

[9] Under cross examination the defendant admitted that the plaintiff paid for her tuition, accommodation and other expenses for her to qualify as a nurse. She started working in 2006 and if it was not for him paying for her nursing studies; she would be unemployed and would not have participated in Government Pension Fund. She further admitted that before 2011 at the time the plaintiff's taxi business collapsed he was taking care of the family. Furthermore that when his business collapsed she took care of the family including him. The plaintiff would out of his own choice buy himself food in small quantities and lock it in the safe and eat alone in the bedroom. He would at times eat at his parents' place.

[10] The defendant's claim for a forfeiture order is based on the provisions of **section 9(1)** of the **Divorce Act 70 of 1979** which reads as follows:

'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 rise to the breakdown therefor, 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'.

[11] The approach to be followed by a court when dealing with a claim for a forfeiture order was stated by Van Coller AJA in ***Wijker v Wijker 1993 (4) SA 720 (A) at 727D-F:***

'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 benefited. 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 the party will in relation to the other be unduly benefited if a forfeiture order is not made. Although the second determination is a value judgement, it is made by the trial Court after having considered the

facts falling within the compass of the three factors mentioned in the section. ‘

[12] In **MOODLEY v MOODLEY [2008] ZAKZHC 48 at paragraph 9**, Tshabalala JP stated as follows:

‘In exercising the discretion to order forfeiture, a court is enjoined to ask itself whether one party would be unduly benefited were such an order not be made. For the purpose of determining whether one party will be unduly benefited in relation to the other the Court is required to weigh three separate factors:

(a) The duration of the marriage.

(b) The circumstances which gave rise to the breakdown.

(c) Any substantial misconduct on the part of either of the parties.

*The discretion is restricted to a consideration of these grounds alone. No other factors may be taken into account. It has been held that is not necessary for all three factors mentioned in s 9(1) and to which the court must have regard to be alleged and proved in order to grant an order of forfeiture(see *Wijker v Wijker 1993(4) SA 720* and *Binda v Binda 1993 (2) SA 123*”.*

[13] In **MOLAPO v MOLAPO [441/10] [2013] ZAFSHC 29 (14 March 2013)** it was held that the purpose of a forfeiture order is not to punish the guilty spouse. The element of fault has been removed. It exists only in the limited extent circumscribed in section 9(1). Courts are reluctant to make forfeiture orders because the fault principle is no longer part of our law. Forfeiture orders made by trial courts were set aside in **Wijker** even though substantial misconduct was found against the appellant. Also in **ENGELBRECHT V ENGELBRECHT 1989 (1) SA 597** forfeiture order was set aside. In **SINGH V SINGH 1983(1) SA 781** a forfeiture of only 20% was ordered.

[14] *In casu* the plaintiff denied that he left their bedroom, however testified that it is the defendant who left their bedroom and refuses him conjugal rights. He testified that the defendant did not stay at home and he did not know her whereabouts. Under cross examination he conceded that he knew and accepted that defendant had to stay closer to her workplace. Furthermore the fact that she works and stays more than 60 kilometres from home has contributed to the breakdown. He denied

abusing the defendant in whatsoever manner. However he could not dispute that the defendant obtained a court order against him, that was served upon him.

[15] The plaintiff further stated that his business collapsed in 2011 because both taxis were involved in accidents. He admitted that he sold the livestock to maintain himself and for his survival. He did that without the defendant's consent. He testified that he also sold firewood to survive hence he sold some of the assets of the joint estate. He could not explain the reason for not involving the defendant in the said disposal of assets. He denied ever owning a Mazda 323 and neither owning a truck. He also denied changing any car ownership without the defendant's consent.

[16] The plaintiff contradicted himself in respect of the number of livestock of the joint estate. In his evidence in chief he said that he had no cows remaining as he sold them to buy himself food. Under cross examination he was at pains to explain an offer he made to the defendant a day before the trial. The plaintiff's offer was that he was willing to give defendant 6 cows as he had 12 cows. It is surprising that within a space of 24 hours 12 cows were no longer in existence without any explanation. It is difficult not to believe that the plaintiff is concealing some of the assets of the joint estate if not all. It is highly probable that he sold other assets of the joint estate without defendant's consent and did not share the proceeds with her. I find the plaintiff not be a satisfactory witness.

[17] This marriage lasted for 16 years. For the first 7 years the plaintiff was a breadwinner because the defendant was not working. He even paid for the education of the defendant. The defendant upon completion of her studies started working and contributed to the building of the house more than the plaintiff. She also took care of the family when the plaintiff's taxi business crumbled. This is not disputed by the plaintiff. According to the plaintiff serious problems occurred when the defendant stayed closer to her workplace.

[18] Two important aspects of the duration of the marriage are that the plaintiff paid for the qualification of the defendant and maintained the family until he could not as his taxi business crumbled as confirmed by the defendant. But on the other hand he sold the assets of the joint estate, i.e. livestock without defendant's consent and

also did not share proceeds with the defendant. This is a misconduct on the part of the plaintiff.

[19] The other misconduct alleged by defendant against the plaintiff is that she abused her physically and emotionally and as a result she had to obtain a protection order. Having regard to the above I find that the plaintiff perpetuated substantial misconduct against the defendant.

[20] The first enquiry is whether the plaintiff will be benefited if an order for forfeiture is not made. The plaintiff will receive 50% of defendant's pension benefits if forfeiture is not made. That constitutes a benefit.

[21] The next enquiry involves a value judgment taking into account the three factors mentioned in section 9. In my view the scale is tipped heavily, but not entirely in the defendant's favour. Just as in Singh I believe, in the principle of ***pact sunt servanda***, the agreement to share equally between the parties. In my view the defendant's nursing career should provide for her needs and survival even after the plaintiff had shared in her pension benefits. The plaintiff contributed towards defendant's qualifying as a nurse and was maintaining the family for a period of more than 5 years; that should entitle him to salvage something from his contribution. The fact that he dissipated the assets without sharing with the defendant should reduce his rights.

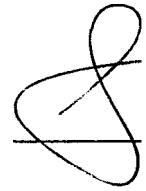
[22] In my view a fair order would be that the pension benefits due to the defendant be shared between the parties on the basis that the plaintiff gets 40% of the pension benefits and the plaintiff retains 60%

[23] With regard to the minor child and other assets the parties have agreed to a draft order.

ORDER

- [24]
1. Draft order marked "X" attached is made a court order.
 2. The plaintiff is to forfeit 10% of the Government Employee Pension

benefits belonging to the defendant. The Government Employees Pension Funds is ordered to pay 40% of the defendant's pension benefits to the plaintiff as at the date of this order.



MALI AJ

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Counsel for the Plaintiff: Adv Bergentuin
Instructed by: LEWIES & KITCHING ATTORNEYS

Counsel for the Defendant: Adv Tshabalala
Instructed by: KGWADI NGWAKO MATHABATHE INC

Date of Hearing: 5 June 2015
Date of Judgment: 14 August 2015

BEFORE THE HONOURABLE JUDGE MALI ON 4 JUNE 2015

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

CASE NUMBER: 19051/12

In the matter between:

NGAKO THEOPHILUS RAMOROKA

(Identity Number: [...])

Plaintiff

And

MOLATELO MARIAH RAMOROKA (Née MOSHABI)

Defendant

(Identity Number: [...])

DRAFT ORDER

After hearing counsel for the parties, it is ordered that:

1. This order may only be uplifted once the original marriage certificate is filed;
2. A decree of divorce is granted;
3. Pertaining to the minor child:
 - 3.1. Both Parties retain full parental rights and responsibilities with regard to The care and guardianship of the minor child as contemplated in sections 18(2)(a), 18(2)(c) and 18(30) of the Children's Act, 38 of 2005;
 - 3.2. The primary care and residency of the minor child is awarded to the Defendant;
 - 3.3. The Parties shall comply with the requirements as set out in sections 6(5) and 10 of the Children's Act, 38 of 2005, given the age, maturity and stage of development of the minor child by informing the minor child of the decisions taken which will significantly affect him;
4. Specific parental rights and responsibilities pertaining to contact with the minor child, as contemplated in section 18(2) of the Children's Act, 38 of 2005, will be exercised as follows:
 - 4.1. Plaintiff will have the right to have the minor child with him:
 - 4.1.1. Every alternative weekend, as from 17:00 on the Friday until 15:00 on the Sunday;
 - 4.1.2. Every alternative long weekend from 17:00 on the day preceding the first day of the long weekend until 15:00 of the last day of the long weekend;
 - 4.1.3. Every alternative public holiday, not part of a long weekend as described in paragraph 4.1.2 above and subject to paragraph 4.8 below;
 - 4.1.4. Every alternative short school holiday and every alternative long school holiday, July and December holidays will be shared or rotated between the parties and Christmas and Easter alternated between the parties;
 - 4.1.5. On Father's day, from 08:00 to 17:00 regardless of such a day constituting part of a contact day, weekend or holiday of

Defendant and he same would apply in Defendant's favour on Mother's day;

4.1.6. On Plaintiffs birthday and the birthday of the minor child for a maximum of 3 (three) hours in case of this day not constituting part of Plaintiffs contact with the minor child. Same would apply in favour of Defendant in case of the minor child's birthday constituting part of Plaintiffs contact period;

4.2. Plaintiff will have reasonable incidental contact with the minor child with regards to academic, sport, religious, social and cultural activities;

4.3. Plaintiff has the right to reasonable telephonic and electronic contact with the minor child, provided that same be exercised between reasonable hours;

4.4. Neither party may take the minor child out of the borders of the Republic of South Africa without the express written consent of the other party;

4.5. Each party undertake to inform the other party promptly of any change of address, telephone or cell phone numbers;

4.6. The exercise of the rights set out in this paragraph shall be subject to the minor child's social, school, sport, religious and cultural activities and shall be exercised in such a manner that it shall not unreasonably impede on these activities;

4.7. Should the exercise of contact as prescribed in this clause be impossible or impractical for either one of the Parties or the minor child, same would be rearranged between the parties with prior and reasonable notice from the party who finds the arrangement impractical or impossible to the other party and the minor child and the consent of the latter party will not be unreasonably withheld;

5. Maintenance of the minor child:

5.1. Plaintiff will pay monthly maintenance for the minor child in the amount of R 300.00 (three hundred rand) per month, said amount to be paid into the bank account of Defendant provided to Plaintiff, said payment to be made on the last day of each and every consecutive month, the first payment to be made on the first such date following the

divorce proceedings;

- 5.2. The monthly amount specified in paragraph 5.1 above is subject to an annual escalation in accordance with the Consumer Price Index (CPIX) said escalation to be applied and take effect on the anniversary date of the first payment in terms of this order, annually;
- 5.3. Defendant will register the minor child as a dependant on her medical aid scheme, alternatively, if the minor child is an existing dependant on Plaintiff's medical aid scheme, the status quo will prevail, alternatively and only in case of none of the Parties being registered on a medical aid scheme, the Parties will be equally responsible for the medical care and expenses of the minor child;
- 5.4. Defendant will pay the minor child's school fees;
- 5.5. Plaintiff will pay the minor child's school clothes and necessary clothes and items for extramural activities, provided that Defendant presents Plaintiff with a receipt for said expenses at the end of the month in which said expenses were incurred and Plaintiff shall pay these expenses so proved on the same day as the maintenance payment as specified above. Any considerable expense described in this clause is to be discussed with Plaintiff before incurred by Defendant.
6. An independent liquidator is to be appointed by the Law Society to determine the division of the communal estate;
7. Each party is to pay his or her own costs.

(signed)
REGISTRAR