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Sirkuleer Aan Landdroste:	JA / NEE

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Saakno:/Case number: **941/2008**
Datum verhoor:/Date heard: **3/02/2012**
Datum gelewer:/Date delivered: **24/02/2012**

In the matter between:

M S O

Applicant

and

M S O (GEB.PLANK)

Respondent

JUDGMENT

HUGHES-MADONDO AJ

- 1] In these proceedings the parties were married to each other in community of property on 17 July 1991. From the union two children were born K V O born on 20 June 1995 is and was a minor as at the time of the divorce proceedings and this application.

2] The respondent instituted divorce proceedings on 4 July 2008. These proceedings were not defended by the applicant and the divorce was finalised on 29 August 2008. The Court order made provision for the custody of the minor child and division of the joint estate:

"7. Dat die gemeenskaplike boedel verdeel word".

3] The division of the joint estate has not taken place. The applicant now seeks to amend the existing divorce order, so as to allow for the appointment of a receiver to attend to the division of the joint estate. He further seeks to amend the order to include that he obtains half of the respondent's pension interest in the Government Employees Pension Fund, as at time of the divorce. Lastly, that the respondent pay maintenance to him in the amount of R2 000.00 per month, in addition she pay his reasonable medical expenses and the like.

4] Though there is an order in this instance for division of the joint estate, in my view a divorce order where the parties are married in community of property, even without a concomitant order for division of the joint estate, has the automatic effect of dividing the joint estate. **See Keyser v Keyser 1979(4) SA 12 (T) at 15 F and Maharaj v Maharaj 2002(2) SA 648 at 649I.**

5] The applicant's notice of motion to amend the existing order was received by the respondent on 17 October 2008. On 6 September 2010 she indicated to the applicant that she had

no objections to the appointment of a receiver to attend to the division of the joint estate. This is evident from correspondence sent by the respondent's representative to the applicant's representative dated 6 September 2010 marked **annexure C** to the respondent's opposing papers.

- 6] Both counsel argued that as both parties were *ad idem* that a receiver was to be appointed, this Court need only confine itself to setting out the directives that the receiver would have to follow in order that the division of the joint estate takes place. I will address the seat the end of this judgment.
- 7] Turning to deal with the respondent's opposition set out in her papers, the respondent highlights the fact that the applicant has failed to comply with the divorce order, in that he has not maintained the minor child as he was required.
- 8] In fact she submits that she has at all times (even prior to the divorce) been responsible for the maintenance of the minor child and the household expenses. For this reason the respondent contends that the applicant is thus not entitled to claim maintenance as well as his medical and allied expenses, as he has claimed for in these proceedings.
- 9] The applicant's claim of half of the respondent's pension interest is also met with resistance. The respondent submits that the applicant is not entitled to same, as his pension payout from De Beers Pension Fund that he received whilst they were married needs to be taken into account. She contends that she did not benefit from this payout neither did she receive her half share.

10]Finally, the respondent requested that the applicant forfeit his half share of her pension interest in lieu of what he owed to the respondent, that being her half share of his pension interest and the maintenance that he ought to have paid for the minor child.

11]In terms of section 7(7)(a) of the Divorce Act 70 of 1979 (the Act) the pension interest of a party is an asset of that party and as such forms part of the joint estate. Section 7(7) (a) of the Act reads as follows:

“In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.”

12]Therefore the pension interest received by the applicant prior to the divorce would be considered as an asset received and should be taken into account when a determination of the patrimonial benefits due to each party is calculated.

13]Thus both parties pension interest has to be taken into account as forming part of the patrimonial benefits as at the date of the divorce.

14]It is thus prudent that when the joint estate of parties married in community of property is to be divided, one needs to take into account the value of their respective pension interest, as assets of the joint estate at the date of the

divorce. **See Maharaj supra**

15]Turning to deal with the issue of forfeiture, it is essential to set out the provisions of section 9(1) of the Act , which reads as follows:

“When a decree of divorce is granted on the ground of the irretrievable break-down 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.”(My emphasis).

16]From a careful reading of the aforesaid section, a Court when considering forfeiture is therefore confined to the parameters of section 9(1) of the Act.

17]Thus it is evident that forfeiture can only be considered and granted if claimed in the divorce action. Forfeiture then is claim able at the time of the divorce and not thereafter. **See Joseph v Joseph 1951(3) SA776(N)**

18]In the case of **Joseph**, the parties having been married in community of property, a decree of divorce was granted and axiomatically division of the joint estate. **See Gates v Gates 1940 N.P.D 361**. After the decree, the wife, sought to bring an action against her husband for forfeiture of benefits of the

community of property.

19]The court in **Joseph's** case, relied on the *dicta* of **Nortje v Nortje 6 S.C.9 at page 11**, where in the earlier proceedings an order for equal division of the joint estate had been granted, it was held that one could not now obtain a judgment for forfeiture as the latter would be in direct conflict with the previous judgment.

20]I am of the judgment that the present case is akin to that of **Nortje** and **Joseph**. As there has already been an order for division of the joint estate the granting of a forfeiture order would be in conflict with that initial order granted on 29 August 2008.

21]The respondent in these proceedings, would have by right, been entitled to an order of forfeiture had she pursued same during the divorce proceedings. I say so as in her initial divorce papers she set out grounds for forfeiture.

22]In this matter however, the grounds that the respondent provides, at this stage, for forfeiture, in my view do not fall within the realm of section 9(1) of the Act.

23]To my mind the respondent has not shown that *having regard to the duration of the marriage, the circumstances which gave rise to the breakdown of the marriage and any substantial misconduct on the part of the, applicant in this case*, the applicant would be unduly benefiting if forfeiture was not granted.

24]One need always bear in mind that forfeiture is not awarded

to a party in divorce proceedings *ipso iure* it is regulated by statute.

25] Lastly, as regards the applicant's claims for maintenance and payment of medical and allied expenses from the respondent, the applicant in my view has not set out, at all, grounds that I might consider to substantiate these claims.

26] In any event these are now academic as Mr. Janse van Vuuren for the applicant concedes that he would not be entitled same, as if one sought a variation of the previous order to include these claims, one would have to show that 1. the previous order is ambiguous; or 2. through some mistake the true intention of the court was not expressed and/or 3. where through an oversight by the court it omitted to include it in the previous order. None of the aforesaid is applicable in this case.

27] Therefore there is no basis for this Court to entertain the applicant's claim for maintenance and his claim for medical expenses. The aforesaid claims are therefore dismissed.

28] In the result, a degree of divorce and division of the joint estate having been granted on 29 August 2008, I duly grant the following order to be inserted follow paragraph 7:

A. "7.1 In the premises it is appropriate to appoint a receiver to assess the value of the joint estate, with the powers set out below, to ensure a division of the joint estate take place;

- a) That a receiver within two weeks of the date of this order is hereby appointed to determine the value of the joint estate taking into account the liabilities and the assets as at the date of the divorce.

7.2 That the receiver shall have the following power:

- a) to demand from the parties a true and proper account of each of their assets and liabilities;
- b) to value or have valued all assets, movable and immovable, belonging to the parties (other than the personal clothing of the parties), if necessary by taking possession of such assets;
- c) to determine the liabilities of the parties;
- d) to obtain appraisals for the purposes of determining the value of any assets;
- e) to interrogate the parties or either of them as he may, in his discretion, deem necessary;
- f) to apply to this Court for further directions in the event that he is not satisfied with the information furnished to him by either of the parties or in the case of any difficulty arising;
- g) to compel the parties or either of them to attend on his offices on reasonable notice, in writing, in order to submit to interrogation;
- h) to rule on any objection and either allow or disallow such objection, either in whole or in part, in which event his decision shall be sent to the parties and will become final and binding upon them should they not approach the Court for relief within fourteen days of the receiver's final decision;
- i) to hear representations of the parties, if he deems it

- necessary to do so;
- j) to prepare a final account of the joint estate and to determine the quantum of payment to each party.
- 7.3 directing the parties to allow the receiver and/or any person appointed thereto by him, entry to premises for the purpose of carrying out a valuation/appraisal of any movable or immovable.
- 7.4 directing the receiver, when he prepares the final account, to send a copy to both parties who shall thereafter have the right to object to the account within fourteen days of the date of receiving it, in which event the receiver shall forthwith upon receipt of the objection send a copy to the other party, who may send to the receiver representations thereon within a further period of fourteen days;
- 7.5 an Order directing that in the event of no objection being made to the receiver's final account within the aforesaid time limits, the account will become final and binding on the parties;
- 7.6 that the pension interest of both parties be assessed as an assets of the joint estate as at the date of the divorce;
- 7.7 that the costs of the receiver be borne by the joint estate."

B.Further, that the applicant's claim for maintenance and payment

of medical and allied expenses is dismissed.

C. Finally, each party is ordered to pay their own cost in respect of this application

W HUGHES-MADONDO

ACTING JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

costs of such proceedings

Obo Applicant: Mr. D H Janse Van

Vuuren of the Legal Aid Board

Obo Respondent: Mr. M. Fletcher of Fletcher's

Attorneys