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

CASE NO: 5674/2016

REPORTABLE: **YES/NO**

OF INTEREST TO OTHER JUDGES: **YES/NO**

REVISED

24/01/2024

In the matter between:

M[...] F[...] B[...]

PLAINTIFF

And

J[...] B[...]

DEFENDANT

JUDGMENT

NAUDE-ODENDAAL J:

[1] The Plaintiff instituted a divorce action against the Defendant on or about 23 November 2016 in terms whereof the Plaintiff claimed for a decree of divorce, an order that full parental responsibilities and rights in respect of the minor child be awarded to the parties jointly, that the minor child's primary residence be awarded to the Plaintiff subject to the Defendant's right of reasonable contact, maintenance for the minor child in the amount of R3000.00 per child per month, division of the joint estate and that the Plaintiff be awarded 50% of the Defendant's pension interest in

the Government Employees Pension Fund ("GEPF") as defined in Section 1 of the Divorce Act 70 of 1979.

[2] The Defendant instituted a counter-claim in terms whereof he claimed for a decree of divorce, an order of the maintenance of the minor child be referred to the maintenance court and an order that the Plaintiff forfeit all benefits arising of the patrimonial benefits, namely the property situated at stand No. [...] P[...] Street, Emdo Park, Polokwane and the Defendant's pension interest held by the GEPF.

[3] It is common cause between the parties that they were married to each other in community of property in Polokwane on the 28th of July 1992. There were four children born from the marriage between the parties. All the children have reached the age of majority with the last born having been born on 4 August 1999.

[4] It is further common cause between the parties that the marriage relationship between the parties has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them, although the parties disagree on the reasons for the breakdown.

[5] It is further common cause that the parties have not lived together as husband and wife since approximately April 2014 and have continued to live separate and independent lives from each other since 2014. In my view, the only issue in dispute is the division of the joint estate and possible forfeiture by the Plaintiff of the patrimonial benefits mentioned here above.

[6] The Plaintiff testified that she is employed at Nirvana Primary School in Polokwane on a contract basis and the contract is being reviewed annually. The Plaintiff has a pension fund which is administered by Old Mutual.

[7] The Plaintiff testified further that she withdrew her initial pension fund which was to the value of R1298 834.66 during 2016. She utilized the money received from her pension fund to build the house at Kwenza Moloto which she and the children (although all majors now) were occupying, to pay debts incurred during the subsistence of the marriage, to pay for the tertiary fees of the children, to buy furniture and also to buy a Mercedes Benz motor vehicle.

[8] According to the Plaintiff, the Defendant was the sole cause for the breakdown of the marriage between them as the Defendant was physically abusing her. She applied for a protection order against the Defendant and the final order was granted by the Seshego Magistrate's Court on 13 April 2012. The Plaintiff testified that the Defendant however continued to abuse her even after the granting of the final protection order against him.

[9] The Plaintiff further testified that during their marriage the Defendant would retain her bank card when she started working. This was the card linked to the account into which her salary was paid.

[10] She further testified that a pregnant woman, called B[...] M[...], moved into the matrimonial home after she left.

[11] According to the Plaintiff, both she and the Defendant were employed by the government. They agreed that the Defendant would be responsible for payment of the bond installment of the house and she would take care and cover the other household necessities. The Plaintiff also contributed to the extension of the house and took a loan in the amount of R100 000.00 (One Hundred Thousand Rand) in order to buy tiles and building material for the house. The Plaintiff specifically testified that she bought beds, a dining room suit, sofas, doors, floor tiles and kitchen utensils and crockery.

[12] The Plaintiff further testified that she and the Defendant paid for the school fees and transport fees for their children at primary and secondary school. However, she was responsible for payment of the children's tertiary education and she financed their studies through an Edu-loan. The Edu- loan repayment was deducted from her salary on a monthly basis.

[13] The Plaintiff called a second witness, M[...] B[...]. M[...] B[...] testified that she is the daughter of the Plaintiff and the Defendant. She testified that she does not know who paid for her primary school fees but she knows her mother paid for her secondary school fees. She further testified that she studied at Rostec College where she was registered for a course in boiler making, she however did not finish the course and after a year registered at Polokwane School for Fashion and Design.

[14] Miss. B[...] testified that the Plaintiff paid for her studies at first, but she later approached the Seshego Maintenance Court and applied for maintenance against her father, the Defendant. The Seshego Maintenance Court ordered the Defendant to pay an amount of R900.00 towards her studies. At some stage the Defendant defaulted on paying the maintenance whereafter she obtained a garnishee order from the maintenance court.

[15] The Defendant testified that he was employed by the South African Police Services. The Plaintiff was employed by the Department of Education and resigned. She was also a member of the Government Employees Pension Fund.

[16] According to the Defendant, the Plaintiff was involved in extra-marital affairs with several men. He told the court that she was approached and proposed to by another man in the bank whereafter they exchanged numbers. According to the Defendant, the Plaintiff also left home over weekends under false pretext that she is attending school workshops, whilst she only qualified to do primary school

workshops and not the workshops she said she attended to.

[17] According to the Defendant, the Plaintiff did not contribute towards any of the bond payments of the immovable property situated at No. [...] P[...] Street, Emdo Park, and the property still had an outstanding bond, which he was responsible for paying. She also never utilized her pension fund to contribute anything towards their joint estate. She used the pension fund to buy a car and finish her house situated at Kwena Moloto.

[18] The Defendant testified that has been staying with another woman and they have a child together, who is now 8 years old.

[19] The Defendant testified that he prays that the Plaintiff forfeit 50% of his pension interest held by the GEPIF and 50% of the immovable property situated at No [...]. P[...] Street, Emdo Park, Polokwane.

[20] Under cross-examination, the Defendant however could not tell the court what the man in the bank said to the Plaintiff, nor what his name was. In addition, the Defendant could only mention the single man or incident in the bank but could not give any evidence in respect of who these several men were who he alleged the Plaintiff had extra-marital affairs with.

[21] **Section 9(1) of the Divorce Act, 70 of 1979** stipulates as follows:-

"(1) 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 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 benefited."

[22] Entitlement to a portion of pension interest of one party against the other is governed by **Sections 7(7) and 7(8) of the Divorce Act**, which prescribe:

"7(a) 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.

(b) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce –

(i) was paid over or awarded to another party; or

(ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund –

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that -

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in

respect of that member;

(ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification."

[23] From the above, it is clear that in the determination of the patrimonial benefits the pension interest is deemed to form part of the joint estate. It is therefore, the party seeking forfeiture thereof, that must prove that the other party is not entitled to the portion of the pension interest. In the present matter, the Defendant therefore bore the onus to prove that the Plaintiff had to forfeit her entitlement to a portion of his pension interest.

[24] When a claim for forfeiture is considered, the court must have regard to three factors, namely, 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. These factors must not be considered cumulatively and the presence of any one of them would entitle a court to grant an order for forfeiture. (See **Botha v Botha 2006 (4) SA 144 (SCA)** and also **Wijker v Wijker 1993 (4) SA 720 (A)** at 729E-F.)

[25] The parties had been married since 1992 and on paper have been married for over 33 years, however their marriage in reality only lasted to 2014 (22 years), after which they lived separate and independent lives.

[26] If I were to consider the duration of the marriage, it is common cause that the parties have lived separate lives since 2014. However, in **Matyila v Matyila**

1987 (3) SA 230 (W) at page 236B-C, the Court stated the following:

"the meaning of the words 'duration of the marriage' as appearing in Section 9(1) aforesaid is clear. It means no more or less than the period during which the marriage has, from the legal point of view, subsisted, namely from the date of marriage to the date of divorce or at the very least, to the date of the divorce proceedings. This is in accordance with the primary rule of interpretation that the words should be understood in their ordinary meaning."

[27] In applying **Matyila supra** to the facts of the present matter, the parties were therefore married for approximately 33 years. The marriage should therefore, in my view, be considered as having had a long duration.

[28] In considering the grounds and circumstances that gave rise to the break-down of the marriage, the Defendant pleaded as follows:-

"3.1 The Plaintiff is involved in extra-marital affairs with numerous men unknown to the Defendant;

3.2 The Plaintiff would leave the parties common home for weekend[s] under false pretext that she is attending school workshop[s];

3.3 The Plaintiff abused the Defendant emotionally, mentally, psychologically and financially;

3.4 The Plaintiff is argumentative, belittling, bully and [a] control freak;

3.5 The Plaintiff shows very little or no interest in the parties

marriage relationship;

3.6 The Defendant has lost all love, affection and respect for the Plaintiff and does not wish to continue with the marriage relationship with the Plaintiff."

[29] While the pleadings contained allegations of extra marital affairs from both sides, not much evidence was led on this issue by the Defendant, apart from the sketchy details given by the Defendant. It was however clear from the evidence of the Defendant, himself, that he was indeed the one who was involved in an extra-marital affair as he told the Court that he is staying with a woman by the name of B[...] M[...] and that a minor child who was at the time of the hearing of this matter, already eight years old, was born out of wedlock.

[30] The Plaintiff, in contradiction to what was pleaded by the Defendant, testified that the circumstances that led to the break-down of the marriage relationship is amongst other factors, the physical abuse by the Defendant. The Plaintiff even obtained a final protection order and ultimately left because of the continuous physical abuse by the Defendant. The protection order was admitted as evidence in court.

[31] From the evidence by the Defendant it seemed as if he, in addition, wanted to rely on the fact that the Plaintiff withdrew her pension fund interest held at GEPP during 2016 and did not utilize any of the said pension fund for the benefit of the communal household or matrimonial home. This was however not pleaded by the Defendant in his Plea or Counter-Claim.

[32] In my view, the Defendant did not manage to prove that the Plaintiff was the cause that gave rise to the break-down of the marriage. In addition, in my view, the Defendant did not prove any substantial misconduct on the part of

the Plaintiff. In the result the Defendant's claim for forfeiture must fail.

[33] This brings me to the claim for maintenance. All the children have reached the age of majority and as far as I could derive from the evidence of Miss. M[...] B[...], have become independent. There is therefore no need to deal with the issue of maintenance in respect of the children.

[34] In respect of maintenance between the parties - neither party claimed any maintenance for themselves from the other party and therefore also this issue is not dealt with herein.

[35] The only issue remaining is the issue of costs. Section 10 of the Divorce Act stipulates that a court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.

[36] In the present matter, having regard to the means of the parties, their conduct in so far as it may be relevant, as well as bearing in mind that the parties have been separated since 2014, I deem it appropriate that each party should be ordered to pay his/her own costs.

[37] In the result, the following order is made:-

1. A decree of divorce;
2. Division of the joint estate calculated as at date of divorce.
3. The Plaintiff is awarded 50% of the Defendant's pension fund interest

in the Government Employees Pension Fund as defined in Section 1 of the Divorce Act, 70 of 1979.

4. The Government Employees Pension Fund is directed to endorse its records to reflect the Plaintiffs entitlement pending payment or transfer to the Plaintiff of the Plaintiff's allocated portion of the pension interest in terms of the provisions of Section 370(4) of the Pension Funds Act, 24 of 1956.

5. Each party to pay his/her own costs.

M. NAUDE-ODENDAAL
JUDGE OF THE LIMPOPO DIVISION
OF THE HIGH COURT,
POLOKWANE

APPEARANCES:

HEARD ON: 09 NOVEMBER 2023

JUDGMENT DELIVERED ON: 24 JANUARY 2024

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