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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 1629/2022

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **YES**

DATE

SIGNATURE

In the matter between:

M[...] C[...] N[...]

Plaintiff

and

G[...] M[...] L[...] N[...] (Born M[...])

Defendant

JUDGMENT

NEUKIRCHER J:

1] This is an opposed divorce action where, at the time the matter was allocated to me, the following issues were to be determined:

- a) the payment of maintenance for the parties' 19-year-old dependant daughter;
- b) her paternity;

c) whether or not the defendant was entitled to forfeiture of the patrimonial benefits, especially:

(i) the plaintiffs half share in the immovable property;

(ii) the plaintiff's pension fund.

2] In the pre-trial held on 11 November 2022 the following was stipulated:

“8.1 Maintenance of the (major) child. The plaintiff makes an offer of a lump sum in the amount of R100 000-00 towards the maintenance of the (major) child.”

3] The parties confirmed that this tender could be made an order of court. Thus, this issue was no longer in dispute and with it the issue of paternity.¹

THE FACTS

4] It is common cause that:

a) the parties were married to each other on 13 March 2000 in community of property - this marriage still subsists;

b) the parties' daughter was born on 17 March 2005. She is still dependant and resides with the defendant;

c) the parties' son unfortunately passed away when he was 3 years old;

d) the defendant moved out of the shared bedroom after the birth of their daughter in 2006 and never returned;

e) the plaintiff left the common home during 2021 and the parties have not resided as husband and wife since then;

¹ Which was not an issue on the pleadings in any event

- f) they purchased the common home in Atteridgeville in 2001 and it was financed as follows:
- (i) the plaintiff paid the deposit and transfer fees of R150 000-00;
 - (ii) the defendant obtained a mortgage bond of R110 000-00 from First National Bank and the monthly repayment of R1 800-00 was deducted from her salary - the mortgage is now paid up.
- g) the defendant is employed at the Department of Basic Education as a Senior Administration Clerk since 6 June 1996 and her pension benefit at age 60² is R10 699-00 monthly and her lump sum gratuity is R473 184-00³.
- h) for the larger part of their 24-year marriage, the plaintiff has not been employed and, according to him he is at present unemployed. For brief and sporadic periods during the marriage, he managed to earn an income as follows:
- (i) via an award in respect of a RAF claim at some stage prior to the purchase of the common home⁴;
 - (ii) he was the Chairperson of the Social Club⁵ and has access to those funds through loans;
 - (iii) he was the director of MC and GML Ngomane Trading and Projects CC (the CC) with registration number 2008/032629/23. The CC was registered on 18 February 2008.

² Which is the age of retirement

³ I was not provided with the total value of the pension interest value calculation as at the date of divorce, but the resignation benefit as at 1 April 2022 was R1 564 397-00

⁴ The amount was never disclosed and the plaintiff denied that those funds had been utilised towards the purchase of the property

⁵ There are 2 – one in Atteridgeville and one in Soshanguve

5] According to the plaintiff, the CC received, at best, two tenders: one for a project at Kalafong Hospital and one for paving. The defendant's version that this CC did not make much money must be accepted as, despite being in a position to do so, the plaintiff provided no cogent version regarding the income of the CC. It also does not appear that he generates any income through the CC at all - his version is, after all, that he is unemployed.

6] Furthermore, bearing in mind that the CC was only registered in 2008, and there is an absolute dearth of information regarding the source and extent of plaintiff's income prior to this, it leads to the inevitable question of whether the defendant's version regarding the plaintiff's actual source of income is correct on a balance of probabilities: according to the defendant, the plaintiff's source of income was derived from *"illegal and/or criminal activities such as the dealing of drugs inter alia from the matrimonial home."*

7] One must bear in mind that plaintiff contributed (on his version) R150 000-00 towards the deposit and transfer of the common home in 2001. He testified that the source of this money was "savings" from his Social Club activities but failed to elaborate further.

8] His evidence was also that he purchased 90% of the furniture for the home. Again, this leads to the inevitable question: with what funds?

9] It appeared to be common cause that plaintiff also paid the (then) minor child's tuition fees until ± 2020 and again it raises the question: with what funds? No information was placed before me.

10] Plaintiff testified that he lives with his parents and he is being supported by the parties' 19-year-old daughter. Yet it is common cause that she is dependent on the financial support from the defendant and so the question is - how does the plaintiff presently support himself especially as in his evidence he denied that he has a source of income from the Social Club.

11] It is very clear that the marriage relationship has broken down. In fact, on the totality of evidence presented it did not breakdown in 2021⁶ but, in all likelihood broke down either before, or shortly after, the defendant moved out of the parties' bedroom in 2006⁷. Thus, although the marriage on the surface appears to have endured for 24 years, it was in reality quite short - only 6 years.

12] According to the plaintiff the marriage broke down because:

- a) there is no meaningful communication between the parties;
- b) defendant has deprived him of his conjugal rights;
- c) defendant has shown a lack of commitment towards the marriage relationship;
- d) parties are unable to resolve their marital conflicts;
- e) the defendant committed infidelity and the plaintiff finds it irreconcilable to continue with the marriage relationship.

13] According to the defendant, the marriage broke down as:

- a) the plaintiff consumed excessive amounts of alcohol and took drugs;
- b) plaintiff was involved in illegal activities and, in particular dealt in drugs from the home. She testified that when doing his washing one day she found a packet containing a white substance and a straw. According to plaintiff, he "was framed". This, of course is not a denial of this particular piece of evidence;

⁶ Section 4(2)(a) of the Divorce Act 70 of 1979 states: "*Subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action...*"

⁷ Which plaintiff admits in paragraph 7.2 of his particulars of claim: "*The Parties have been sleeping in separate bedrooms since approximately 2006*"

- c) he failed to support the family;
- d) he was physically, verbally and emotionally abusive – this plaintiff denied. On his version he left the home “*to avoid being a perpetrator of what is now called GBV and to avoid violence in the house*”.

14] Importantly, plaintiff admitted:

- a) locking defendant out of the house – on his version because she arrived home late after a social occasion;
- b) abandoned the home from time to time because it was better than being provoked into a fight;
- c) that defendant would try to make extra income by selling Atchar through the Social Club, and Tupperware; and
- d) that he reported the defendant to the police for allegedly taking the minor child to a shebeen, which defendant denied.

15] All-in-all the plaintiff and his version did not impress me. It was clear that his versions regarding his income were not truthful. Defendant, on the other hand, made a favourable impression. Where required, her version was supported by the documentary evidence and it is clear that throughout the marriage, she has been the stable stalwart, the support for the parties' child and importantly the breadwinner – even trying to generate a little extra income to make up for the lack of financial support from the plaintiff. In any event, and on his own version, even should plaintiff have made a financial contribution at some stage, that completely dried up during COVID.

16] The question now is whether forfeiture of defendant's pension benefits should be granted in her favour?

17] Section 9(1) of the Divorce Act states:

“When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage, including a Muslim 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 benefitted”.

18] In **Klerck v Klerck**⁸ the court held that in order to answer the question whether one party would be unduly benefitted if an order of forfeiture was not made, regard should be had to the duration of the marriage, the circumstances in which it broke up and, if present, substantial misconduct of the part of one or both parties. Importantly, not only was substantial misconduct not required for a finding that a benefit is undue, but the 3 above-mentioned factors did not have to be considered cumulatively⁹.

19] Furthermore, in **Beaumont v Beaumont**¹⁰ the court assessed a party's misconduct as a relevant factor vis-à-vis an order made in terms of s7(2) and 7(3) of the Divorce Act 70 of 1979 (the Act) and this assessment is equally relevant as a factor under s9(1)¹¹.

20] In casu, it is without question that the plaintiff will be “benefitted” in the event that forfeiture of defendant's pension interest is not granted and the issue is whether this benefit is “undue”. In **KT v MR**¹² the court explained that “undue” meant “unwarranted or inappropriate because excessive or disproportionate.”

⁸ 1991 (1) SA 265 (W) at 269 D-G

⁹ *Wijker v Wijker* 1993 (4) SA 720 (A)

¹⁰ 1987 (1) SA 967 (A) at 994 D-E

¹¹ Per *Wijker*

¹² 2017 (1) SA 97 (GP)

21] Here, plaintiff is adamant he is entitled to half of the value of the joint estate simply by virtue of the fact that the parties are married in community of property. Whilst this is legally correct, in my view he will be unduly benefitted were the forfeiture order in respect of defendant's pension benefit not be granted, and for the following reasons:

- a) whilst on paper the marriage lasted 24 years, in reality it lasted for 6 years;
- b) the plaintiff simply failed to support his family properly and in the past 4 years completely;
- c) the defendant has clearly, throughout the marriage not only been the breadwinner but has gone above and beyond to earn whatever small extra income she can to support her family;

22] The plaintiff's evidence outlined in paragraphs 13(b), 13(d), 13(c), 14(a) and 14(b) supra, in my view also establishes, on a balance of probabilities, the substantial misconduct element envisaged in s9(1) of the Act.

23] I emphasize that, as fairness or equity play no part in the determination of forfeiture, the sole factors taken into account were those set out s9(1).

24] As both parties were equally successful there will be no order as to costs.

ORDER

25] Given all the above, the order is the following:

1. A decree of divorce shall issue.
2. By agreement, the plaintiff shall contribute an amount of R100 000-00 to the maintenance of the parties' major child.
3. Save as set out in paragraph 4 below, the joint estate shall be divided.

4. The plaintiff is ordered to forfeit in its entirety his portion of the defendant's pension interest held in the Government Employees Pension Fund No 9[...].
5. There is no order as to costs.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 June 2024.

For the plaintiff	:	Adv Nethavhani
Instructed by	:	Twala TRR Attorneys
For the defendant	:	Madungandaba ML Attorneys
Instructed by	:	Adv A Coetsee
Matter heard on	:	14, 15 and 16 May 2024
Judgment date	:	7 June 2024