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

CASE NO: HCA30/2023

CASE NO: LP/MAH/RC192/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

12 August 2024

In the matter between:

T[...] M[...] P[...]

Appellant

And

L[...] M[...] M[...]

Respondent

JUDGEMENT

GAISA AJ

INTRODUCTION

[1] This is an appeal against the judgment of the Regional Court for the Regional Division of Limpopo held at Mahwelereng, which granted a decree of divorce and ordered an equal division of the joint estate between the parties. The appellant (defendant in the court *a quo*) appeals against the order for equal division, seeking instead an order for forfeiture of benefits against the respondent (plaintiff in the court *a quo*).

[2] The parties were married to each other in community of property on 23 October 2014. Their marriage has irretrievably broken down, and both parties seek a decree of divorce. The main issue in dispute is whether the respondent should forfeit her share of the joint estate.

BACKGROUND

[3] The appellant and respondent were married for approximately 8.5 years at the time of divorce. The evidence reveals that both parties entered the marriage without full disclosure - the appellant concealed his erectile dysfunction issues, while the respondent did not disclose her inability to conceive. These sexual incompatibility and fertility issues appear to be the main causes of discord in the marriage.

[4] The respondent instituted divorce proceedings, seeking dissolution of the marriage and equal division of the joint estate. The appellant counterclaimed for forfeiture of benefits, arguing that the respondent:

- 4.1. Did not contribute to the acquisition, maintenance and upkeep of joint assets;
- 4.2. Entered the marriage concealing that she could not conceive;
- 4.3. Denied him conjugal rights and departed from the joint household;

4.4. Was responsible for the breakdown of the marriage;

4.5. Never contributed financially to the marriage and regarded the appellant as a financial resource;

4.6. Left the common home to pursue illicit affairs.

[5] The respondent opposed the forfeiture claim, contending that:

5.6.1. She was supportive of the appellant despite his sexual performance issues;

5.6.2. She moved out to protect her mental health after the appellant locked her out;

5.6.3. She did not deny conjugal rights, but the appellant had erectile dysfunction;

5.6.4. She was unaware she was infertile;

5.6.5. She contributed financially when employed and brought assets into the marriage;

5.6.6. She performed household duties and supported the appellant's business endeavours.

LEGAL FRAMEWORK

[6] Section 9(1) of the Divorce Act¹ empowers a court to order forfeiture of benefits when granting a decree of divorce:

¹ 70 of 1979

"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."

[7] The seminal case of **Wijker v Wijker**² elucidated the approach to be adopted by courts when considering forfeiture claims:

"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 that party will in relation to the other be unduly benefited if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial court after having considered the facts falling within the compass of the three factors mentioned in the section."

[8] The Wijker judgment *supra* further clarified that the factors in section 9(1) need not be considered cumulatively - the presence of anyone may be sufficient for a forfeiture order. However, the onus rests on the party seeking forfeiture to prove the nature and extent of the benefit to enable the court to determine whether it would be undue.

² 1993 (4) SA 720 (A) at para 19

[9] It is also well-established that a forfeiture order should not be used simply to achieve a redistribution of assets or to balance unequal contributions. In **Bezuidenhout v Bezuidenhout**³ the court held:

"I find myself in agreement with the thesis that the traditional role of housewife, mother and homemaker should not be undervalued because it is not measurable in terms of money."

ANALYSIS

[10] Applying these principles to the present case, I make the following findings:

10.1. Duration of the marriage:

10.1.1. The parties were married for approximately 8.5 years. This is not an insignificant period, though also not a particularly long marriage. In **Klerck v Klerck**⁴, the court noted that the longer the duration of the marriage, the less likely a forfeiture order would be justified, as both parties would have contributed to the joint estate over time.

10.1.2. While 8.5 years is not a short marriage, it is also not of such duration as to preclude a forfeiture order if other factors warrant it.

10.2. Circumstances of breakdown:

10.2.1. Both parties contributed to the breakdown through dishonesty at the outset of the marriage - the appellant concealing his erectile issues

³ 2005 (2) SA 187 (SCA),

⁴ 1991 (1) SA 265 (W) at 265J and 269G-H

and the respondent concealing her infertility. Their sexual incompatibility and lack of children appear to be the main causes of discord.

10.2.2. Where both parties have contributed to the breakdown of the marriage, this will generally militate against a forfeiture order.⁵

10.2.3. The mutual fault, in this case, weighs against granting forfeiture.

10.3. Substantial misconduct:

10.3.1. While both parties engaged in some misconduct, neither party's conduct rises to the level of "*substantial misconduct*" as contemplated in the Act.

10.3.2. The respondent's departure from the marital home and the appellant's changing of locks were both inappropriate responses to the marital difficulties but do not constitute substantial misconduct.

10.3.3. The Court's discretion in terms of s 9(1) should be exercised judicially with due regard to all the relevant factors mentioned in the section.

10.3.4. The conduct of both parties in this case, while contributing to the breakdown, does not appear to be of such a nature as to justify forfeiture on this ground alone. In my view the magistrate cannot be faulted in this regard.

10.4. The benefit to respondent:

⁵ Wjker *supra* read together with Beaumont v Beaumont 1987 (1) SA 967 (A) paras 10 - 13

10.4.1. The respondent would benefit from an equal division of the joint estate, as she did not contribute equally in financial terms. However, her non-financial contributions as a homemaker must also be considered.

10.4.2. The concept of a contribution must be interpreted to include both monetary and non-monetary contributions, as envisaged in **Beaumont v Beaumont**.⁶

10.4.3. In **Engelbrecht v Engelbrecht**⁷, the court held:

"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 forfeiture is not ordered."

10.4.4. The court emphasised that the purpose of a forfeiture order is not to punish the spouse against whom the order is made. Instead, it is to ensure that the division of property is fair and just, particularly in protecting a vulnerable spouse from being unfairly disadvantaged because of the marriage. The court highlighted that the focus should be on achieving equity rather than on retribution.

10.4.5. An equal division would benefit the respondent, but this alone is not sufficient to justify forfeiture.

10.5. Whether the benefit would be undue:

10.5.1. Considering all factors, I am not satisfied that the respondent's benefit from an equal division would be undue. She made non-financial

⁶ 1987 (1) SA 967 (A) paras 10 - 13

⁷ 1989 (1) SA 597 (C) at 601F-G

contributions to the marriage, brought some assets into the joint estate, contributed financially when employed, and supported the appellant's business endeavours. The relatively short duration of the marriage and the mutual fault in its breakdown also weighs against finding the benefit undue.

10.5.2. In **Buttner v Buttner**⁸ the court emphasised:

[25] As indicated above, the evidence of both parties clearly indicated that, throughout their marriage lasting some 27 years, the parties always pooled their income and regarded the assets acquired through their joint efforts as being joint assets. While the appellant was the family's principal breadwinner and made by far the greater financial contribution to the assets acquired by the parties, there is nothing to indicate that either party regarded the contributions made by the respondent, primarily as housewife and mother, as being any less valuable than those made by the appellant, nor that the respondent's contributions were any less instrumental than those of appellant in the acquisition of assets by the parties. Their evidence that they considered themselves to be 'partners' brings this into sharp focus. It is evident that the division of labour between the parties was a conscious choice made by both of them. In my view, in these circumstances, fairness demands that effect be given, on divorce, to the principle of equal sharing which the parties consciously applied throughout their married life."

10.5.3. From **Buttner**, the extract above is focused more on fairness and recognising non-financial contributions in this specific case.

⁸ 2006 (3) SA 23 (SCA) at para 21

10.5.4. The appellant has not discharged the onus of proving that the respondent would be unduly benefited if forfeiture is not ordered. While the respondent may benefit financially from an equal division, this benefit is not undue in the circumstances of this case.

10.5.5. The traditional role of a housewife and homemaker should not be undervalued simply because it cannot be quantified in monetary terms. The respondent's contributions in this regard must be given due weight.

10.5.6. In **Beaumont**, the court articulated that discretion should be exercised judiciously and only in cases where it is necessary to prevent unjust enrichment rather than to create an equal distribution of wealth between the divorcing parties. This principle has been reaffirmed in subsequent case law, emphasising a cautious approach.⁹

10.5.7. This principle is particularly relevant here, where the appellant appears to be seeking forfeiture primarily to achieve a more favourable division of assets rather than to prevent unjust enrichment.

10.5.8. Furthermore, it is important to consider the broader policy implications of forfeiture orders in divorce cases. As noted in the case of **Wijker**, the Appellate Division (now the Supreme Court of Appeal) clarified that the consideration of fault or misconduct is not a prerequisite for a forfeiture order.

[11] In this case, both parties entered the marriage with some degree of non-disclosure regarding issues that fundamentally affected their relationship. To grant forfeiture against one party in these circumstances would be to penalise them for a mutual failing unfairly.

⁹ *Beaumont supra* at 997H-998A.

[12] The appellant's argument that the respondent regarded him as a "*financial resource*" is not supported by the evidence. The respondent contributed financially to the household when employed and brought assets into the marriage. She also supported the appellant's business endeavours and performed household duties. These actions are inconsistent with someone merely seeking to exploit their spouse financially.

[13] Regarding the allegation that the respondent left the common home to pursue illicit affairs, there is insufficient evidence to support this claim. The respondent's testimony that she left to protect her mental health after being locked out by the appellant is credible and consistent with the overall picture of a deteriorating marriage marked by sexual incompatibility and communication breakdowns.

[14] It is also noteworthy that the appellant did not institute divorce proceedings himself when he felt the respondent was making him a "*financial resource*." Instead, he waited until the respondent filed for divorce. This suggests that he was content to continue the marriage despite the alleged financial imbalance, which undermines his argument for forfeiture on these grounds.

[15] The court *a quo* correctly considered the totality of the evidence in reaching its decision. Where there are two irreconcilable versions, the technique generally employed by courts in resolving factual disputes of this nature was conveniently summarised by the SCA as follows in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others**:¹⁰

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities."

[16] Applying this approach, the evidence of the respondent appears more credible and reliable overall. Her account of the marriage's breakdown due to sexual

¹⁰ 2003 (1) SA 11 (SCA) at para [5]

incompatibility and communication issues is consistent with the known facts and more probable than the appellant's allegations of financial exploitation and infidelity.

[17] It is also important to consider the potential impact of a forfeiture order on the respondent. As noted in **Moodley v Moodley**:¹¹

"[10] The concept of "benefits" is properly explained by Schreiner J (as he then was) in the decision of *Smith v Smith* by stating:

"What the defendant forfeits is not his share of the common property, but only the pecuniary benefit that he would otherwise have derived from the marriage . . . It is really an order for division plus an order that the defendant is not to share in any excess that the plaintiff may have contributed over the contributions of the defendant."

[18] In this case, a forfeiture order would deprive the respondent of her share in assets accumulated over 8.5 years of marriage, during which she made both financial and non-financial contributions. Given the circumstances of the marriage's breakdown, this would be an unduly harsh outcome.

CONCLUSION

[19] Considering the above analysis, I find that the appellant has not made a case for the forfeiture of benefits against the respondent. The evidence does not support a finding that the respondent would be unduly benefited by an equal division of the joint estate, considering the duration of the marriage, the circumstances of its breakdown, and the contributions of both parties.

[20] The principle that non-financial contributions to a marriage, including homemaking and emotional support, have intrinsic value that should not be discounted

¹¹ (7241/2002) [2008] ZAKZHC 48 (14 July 2008). See also *Smith v Smith* 1937 WLD 126 at 127-8

merely because they cannot be easily quantified in monetary terms. Forfeiture orders should not be used as a punitive measure or to rectify perceived imbalances in financial contributions but rather to prevent unjust enrichment in appropriate cases.

[21] Furthermore, this case highlights the importance of honesty and full disclosure between spouses, particularly regarding issues that may fundamentally affect the marriage, such as sexual dysfunction or infertility. While such non-disclosure may contribute to the breakdown of a marriage, it does not necessarily justify a forfeiture order in the absence of other compelling factors.

[22] The court's role in divorce proceedings is not to apportion blame or punish perceived wrongdoing but to ensure a just and equitable distribution of the marital estate. In this case, an equal division of the joint estate best achieves this goal, recognising the contributions of both parties to the marriage, both financial and non-financial.

ORDER

[23] Considering the above:

1. The appeal is dismissed.
2. The order of the Regional Court granting a divorce decree and ordering an equal division of the joint estate is confirmed.
3. Each party is to pay their own costs of the appeal.

GAISA AJ

**ACTING JUDGE: HIGH COURT
POLOKWANE: LIMPOPO DIVISION**

I concur

NAUDE-ODENDAAL J
JUDGE OF THE HIGH COURT
POLOKWANE: LIMPOPO DIVISION

APPEARANCES

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