

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 10864/15

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

DATE **02/08/2024**

SIGNATURE

In the matter between:

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

Plaintiff

and

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

Defendant

JUDGMENT

MNGQIBISA-THUSI, J

[1] On 19 February 2015, the plaintiff instituted divorce proceedings in which he seeks a divorce decree and an order for the forfeiture of patrimonial benefits against the defendant, including the following items:

- 1.1 immovable property situated at 6[...] R[...] Street, Hospital View, Tembisa, Gauteng Province;
- 1.2 household furniture;

1.3 a Renault Sandero bearing registration number B[...] R[...] G[]; and

1.4 a Volkswagen Velocity, bearing registration number W[...] 7[...] G[].

[2] At the start of the proceedings the plaintiff partially abandoned his forfeiture claim in relation to household contents.

[3] The parties were married in community of property on 12 February 2007. The marriage still subsists. Out of the marriage one minor child was born.

[4] The defendant has filed a plea and a counter-claim in which she opposes the claim for a forfeiture order in favour of the plaintiff. Further, the defendant prays for a division of the joint estate, an order for an endorsement to be noted of 50% of the plaintiff's pension interest in favour of the defendant, and an order for the plaintiff to pay the defendant's medical bills or retain her on his medical aid, post-divorce.

[5] There is no dispute that:

5.1 the marriage between the parties has irretrievably broken down;

5.2 the parties share equal rights in terms of parental rights and responsibilities regarding guardianship of the minor child;

5.3 the defendant be awarded primary care and permanent residency of the minor child;

5.4 the plaintiff be awarded contact rights as recommended by the Family Advocate, Advocate Peter Kwena Phokobye, as set out in paragraph 11 of the report of Ms Betty Tlou Matidza, a Family Counsellor within the office of the Family Advocate, Pretoria; and

5.5 the plaintiff left the marital home to live with his brother during 2015.

[6] The issues to be determined in these proceedings are the following:

- 6.1 whether, if the order for forfeiture of patrimonial benefits is not awarded, the defendant will be unduly benefited;
- 6.2 whether the defendant should be kept on the plaintiff's medical scheme once the decree of divorce is granted; and
- 6.3 the maintenance of the minor child.

[7] Section 9(1) of the Divorce Act, 70 of 1979 (the Divorce Act) 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 break-down thereof, and any substantial misconduct on the part of either of the parties, it is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefitted.”

[8] In terms of section 9 of the Divorce Act, in considering whether to grant a forfeiture order, the court has to consider the following factors:

- 8.1 the duration of the marriage;
- 8.2 the circumstances giving rise to the breakdown of the marriage; and
- 8.3 any substantial misconduct on the part of either of the parties and that undue benefit may accrue to the one party in relation to the other if the order is not granted.

[9] In *Wijker v Wijker* 1993 (4) SA 720 (A) at 727E, the court said the following of section 9 of the Divorce Act:

“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 Court after having considered the facts falling within the compass of the three factors mentioned in the section.”

[10] In *Matyila v Matyila* 1987(3) SA 230 (W) at 236 B-C, said the following:

“The meaning of the words ‘duration of the marriage’ as appearing in s9(1) aforesaid is clear. It means no more nor 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 institution of divorce proceedings. This is in accordance with the primary rule of interpretation that words should be understood in their ordinary meaning.”

[11] In considering the plaintiff’s forfeiture claim, account will be taken not only of the respective contributions made at the commencement of a marriage, but also of the contributions made to the joint estate during the marriage as a result of a party’s “*industry or thrift*”. (See ***Smith v Smith* 1937 WLD 126**). The contributions made by each party to the marriage will be taken into account in the determination of whether or not the defendant will benefit from the marriage.

[12] The plaintiff bears the onus of showing that should a forfeiture of benefits not be made against the defendant, the defendant would be unduly benefited.

[13] At the hearing of this matter the plaintiff and the defendant both gave evidence.

[14] The plaintiff's evidence is as follows. He and the defendant were married on 12 February 2007. In 2011, he bought the house situate at 6[...] R[...] Street, Hospital View, Tembisa, in which the defendant and the minor child are still staying after he moved out of the marital home in 2014. According to the plaintiff, he moved out of the marital home after he and the defendant had a disagreement.

[15] The plaintiff further testified that during 2013 the defendant had started sleeping out or coming home late and drinking alcohol and was having extra-marital affairs. The plaintiff alluded to an incident where the defendant came home in the early hours of the morning and was attacked by intruders whom he shot at. Further that in one incident when the defendant came home the following day and they had an argument, after suggesting that that they get divorced, the defendant got angry and threatened him with a knife. He testified that the defendant further burnt all his clothes and as a result of the fire, a part of one of their vehicles got burnt and the defendant refused to repair the damage.

[16] Further, the plaintiff testified that although the defendant was employed, she refused to contribute to the household expenses and that in 2012 the defendant had received a lump sum payment of R17, 615.60 as a result of an arbitration award and had used the money to renovate her parental home. Furthermore, that although he had paid for the defendant's studies, on getting employment, the defendant had refused to contribute to the household expenses.

[17] In support of his claim for a forfeiture order, the plaintiff further alleges that the defendant had attempted to burn the VW and in 2011 the house after they had disagreements. Further that in 2011 the defendant had bumped the Renault against a wall and has refused to repair the damage.

[18] It is the plaintiff's contention that the defendant married him for financial gain. The plaintiff further contends that the defendant did not contribute towards the growth of the joint estate. It was argued on behalf of the plaintiff that the defendant has substantially misconducted herself during the marriage, leading to the irretrievable break-down of the marriage and that, should a forfeiture of benefits order not be granted, the defendant would be unduly benefited.

[19] The defendant's evidence is that during the marriage the plaintiff physically assaulted her on numerous occasions or threatened to kick her out of the marital home. She also testified that the plaintiff abused her emotionally and denied her conjugal rights. She further testified that during the marriage the plaintiff had several extra marital affairs. The defendant further testified that she had contracted a chronic disease after being infected by the plaintiff and as a result was receiving or using chronic medication.

[20] In her evidence the defendant admitted that she had burnt the plaintiff's clothes which resulted in the VW/Renault being partially burnt as it was parked near the clothing line. She explained that she burnt the plaintiff's clothes due to the fact that the plaintiff was harassing her seeking a divorce and on that particular day the plaintiff had threatened her with a fire-arm. She denied having had any extra-marital affairs as the plaintiff was the only man she has had sexual relations with.

[21] With regard to her contribution towards the household expenses, plaintiff testified that it was agreed between the parties that the plaintiff would pay the bond of the house and she would be responsible for buying groceries and paying the municipal rates and taxes, electricity and buying clothes for the minor child. The plaintiff further testified that she was solely responsible for the cooking, cleaning of the house and caring for the minor child. She denied using her arbitration award proceeds towards renovating her parental home and asserted that the proceeds were used for the benefit of the family.

[22] The defendant appeared to be honest and truthful when giving evidence and there is no reason to doubt her assertion that she did contribute to the household expenses even though her earnings were far less than those of the plaintiff. There is therefore nothing to gainsay the defendant's evidence about her contribution to the household expenses.

[23] In exercising its discretion whether or not to grant an order for the forfeiture of the patrimonial benefits of a marriage in community of property, the court has to take

into account the duration of the marriage, circumstances leading to the breakdown of the marriage and any substantial misconduct on the part of either of the parties.

[24] Even though the plaintiff left the marital home in 2015, the effective duration of the marriage is approximately 12 years. I consider the period of the marriage to be long under the circumstances.

[25] The parties have conflicting views on the reasons for the breakdown of the marriage. Both parties have levelled accusations of extra marital affairs. According to the plaintiff's evidence, the marriage broke down because the defendant did not contribute to the upkeep of the household, the growth of the family income and the growth of the household. Further, the plaintiff testified that the defendant used to come back home from work in the early hours of the morning and was involved in extra-marital affairs during the marriage, one of which he alleges plaintiff admitted.

[26] The marriage between the parties appears to have been rocky from the start, with violence perpetrated from both sides, either against the physical body of one of the spouses or the assets of the joint estate.

[27] During the marriage both parties were employed. According to the plaintiff's evidence, he was responsible for the payment of the bond instalments for the family's home and was also responsible for the household expenses and the two motor vehicles owned by the family. The plaintiff further asserts that the defendant did not contribute to the upkeep of the household. However, the defendant asserts that she used her salary for household necessities and disputes the plaintiff's assertion that she made no contribution to the household expenses.

[28] I assessing the evidence before me, I am satisfied that the plaintiff has not shown sufficient case that the defendant was involved in extramarital affairs during the marriage or that she did not contribute to the growth of the joint estate. I am convinced that both parties have contributed, in one way or the other, to the upkeep and growth of the joint estate even though not at the same level. Inasmuch as the plaintiff was in a better financial position than the defendant and invariably

contributed more, the defendant contributed not only financially but also in kind by maintaining the household and doing the house chores.

[29] As alluded to above, I found the defendant to have been an honest and truthful witness and accept her evidence that the monies from the arbitration award were used for the benefit of the joint estate. The plaintiff has not substantiated his claim that the arbitration proceeds were used to renovate the defendant's parental home.

[30] Further, I am satisfied that both parties have in one way or the other misconducted themselves during the marriage. Under the circumstances, I am not convinced that the defendant ought to be denied the patrimonial benefits of the marriage, including sharing the plaintiff's pension benefits< or that she would be unduly benefited if a forfeiture order is not granted.

[31] With regard to whether an order should be granted instructing the plaintiff to keep the defendant on his medical aid after the divorce is granted, I am of the view that for the sake of a clean break, and in light of the fact that the State has made provision for chronic medical care in the state hospitals in the event of a person being unable to procure for himself or herself, that this claim ought to be refused. I am satisfied that the defendant will not be deprived of medical care if an order is not made instructing the plaintiff to maintain her as a dependant in his medical aid.

[32] With regard to the maintenance of the minor child, the defendant's evidence, not disputed by the plaintiff, is that there is an existing maintenance order. Should either party wish to vary that order he or she can approach the maintenance court. I am therefore of the view that no order is necessary with regard to the issue of maintenance as raised by the plaintiff.

[33] In the result the following order is made:

1. A decree of divorce is granted.

2. The joint estate shall be divided equally between the parties including the plaintiff's pension fund.
3. The plaintiff's pension administrator, the Government Employers Pension Fund is ordered to pay the defendant an amount of 50% of the plaintiff's pension interest which would have accrued to the plaintiff at the date of this order.
4. The plaintiff's pension fund administrator is ordered to make the said 50% of the plaintiff's pension interest thereof to the defendant within ninety (90) days from the date of this order.
5. The defendant's claim to be retained in the plaintiff's medical aid, post-divorce is dismissed.
6. Both parties retain their parental rights and responsibilities regarding guardianship of the minor children as contemplated in terms of section 18(2)(c) of the Children's Act 38 of 2005.
7. The Parental Rights and Responsibilities of the primary care and permanent residency of the minor child (as contemplated in Section 18(2)(a) of the Children's Act 38 of 2005), born of the relationship between the parties, is awarded to the defendant.
8. The specific Parental Rights and Responsibilities with regard to contact of the minor child, as contemplated in section 18(2)(a) of the Children's Act is awarded to the plaintiff in the following manner (but not limited to):
 - 8.1 Every alternative weekend from a Friday at 17h00 until Sunday at 17h00.
 - 8.2 Short holidays are alternated between the parties.

- 8.3 Long school holidays to be shared equally with Christmas and New Year's Day rotating between the parties.
- 8.4 Regular and structured telephone contact be maintained as agreed by the parties.
- 8.5 The parties to celebrate special days such as Father and Mother's Day and the parties' birthdays with the minor child by the relevant party spending time with the minor child on that day.
- 8.6 The minor child's birthday to be alternated between the parties.
9. Each party to pay his or her own costs.

NP MNGQIBISA-THUSI
Judge of the High Court

Date of hearing: 30 January 2023

Advocate Report Filed on the 07 September 2023

Date of judgment: 02 August 2024

Appearances

On behalf of the Plaintiff: Adv. VJC Chabane (Instructed by Msimeki (A) Attorneys)

On behalf of the Defendant: Adv L Chigomana (instructed by Kubayi Attorneys)