

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 030395/2022

(1) REPORTABLE: **NO**

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

(3) REVISED: **YES**

DATE 10 October 2024

SIGNATURE

In the matter between:

I[...] S[...] M[...]

PLAINTIFF

And

R[...] Q[...] M[...] M[...]

DEFENDANT

JUDGMENT

NEUKIRCHER, J

[1] This is an opposed divorce action where the initial issues were:

- a) whether an order of forfeiture of specific benefits of the joint estate should be granted against the defendant;
- b) the amount of maintenance to be granted in regards of the parties' eighteen-year-old (dependent) son;

- c) whether the defendant should be awarded maintenance and, if so, the amount;
- d) costs of suit.

[2] By the time the trial concluded the sole issues that remained were those of forfeiture and costs of suit. The others were abandoned by the defendant.

Background

[3] The parties were married on 26 September 2005 in community of property. A son was born of this marriage on 23 March 2006. He is now a major but writing his Grade 12 examinations and thus still dependent. It accordingly still falls to his parents to maintain him in accordance with their respective means: but the court's functions as Upper Guardian ceased on his 18th birthday¹ and thus no order in terms of section 18 of the Children's Act is required. Insofar as he is still dependent, the plaintiff has unequivocally undertaken to maintain his son until he is self-supporting. On this basis, the defendant abandoned the maintenance claim set out in paragraph 1(b) supra.

[4] It is common cause that the marriage relationship between the parties has broken down. Although they still live in the same house, they have not occupied the same bedroom, or been intimate, since approximately August 2020. They both seek to end their marriage.

[5] The main bone of contention is whether an order of forfeiture should be granted in favour of plaintiff and in regard to the following specific assets:

- a) the immovable property situated at 5[...] B[...] Crescent, Cedar Creek Estate, Fourways, Gauteng (the Fourways property);
- b) the immovable property situated at 1[...] R[...] M[...] G[...] P[...] Street, Weltevredenpark, Roodepoort, Gauteng, (the Roodepoort property);

¹ Section 17 of the Children's Act 38 of 2005

- c) the immovable property situated at 1[...] T[...] W[...], Rustenburg, North-West Province (the Rustenburg property);
- d) the plaintiff's Old Mutual Super Fund;
- e) the plaintiff's Alexander Forbes Preservation Fund;
- f) the plaintiff's Old Mutual retirement annuity; and
- g) the plaintiff's share portfolio.

[6] Before I deal with the evidence that was presented to found the claim for forfeiture, it is appropriate to deal with the provisions of the Divorce Act 70 of 1979, and the relevant case law.

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

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

[8] There are thus three factors, and only three factors, which a court may consider when exercising its discretion whether to grant or refuse forfeiture:

- a) the duration of the marriage;
- b) the circumstances which gave rise to its breakdown;

c) any substantial misconduct on the part of either of the parties.²

[9] In broad terms, when considering the issue of forfeiture, the following considerations play a role:

- a) the three factors set out in s9(1) are not considered cumulatively and the three categories of factors are considered by the court in broad terms;
- b) the first step is to establish whether or not the defendant will be benefitted – this is a factual issue;
- c) once that is established, the court must determine, having regard to the s9(1) factors, whether that benefit is undue – this is a value judgment the court makes after it has considered the facts falling within the compass of s9(1);
- d) “*The South African Oxford Dictionary* (2005 ed) defines ‘undue’ as ‘unwarranted’ or inappropriate because excessive or disproportionate. Thus, while this court is enjoined not to consider fairness or equity in the determination of what may be undue, my view is that, if regard is had to the duration of the marriage, then considerations of what may be proportionate may well be valid and appropriate.”³;
- e) once the court has found that the benefit is undue, the discretion to order forfeiture is a narrow one and thus it would be difficult to visualize circumstances where a court would then decide not to grant a forfeiture order;
- f) it is not necessary to prove that the misconduct complained of is substantial for forfeiture to be ordered;

² *Wijker v Wijker* 1993 (4) SA 720 (A)

³ *KT v MR* 2017 (1) SA 97 (GP)

- g) considerations of fairness play no part in the evaluation of forfeiture⁴, in all likelihood because the words “or any other factor” have been excluded from s9(1).⁵

The evidence

[10] The plaintiff's evidence sketched the background to the parties' relationship, the acquisition of the assets in the joint estate, the contribution made in regards of the maintenance, upkeep and support of their family, their home and the joint estate and the reasons for the breakdown of the marriage relationship. In the main, his evidence was uncontested.

[11] The joint estate consists of both movable and immovable property. The plaintiff conceded that, apart from the assets in respect of which he seeks forfeiture⁶, the remainder of the joint estate should be divided.

[12] The specified assets were acquired, and are valued, as follows:

a) The Fourways property

- was originally purchased by defendant and registered in the name of P[...] P[...] CC in respect of which the defendant was the director and sole member. She paid an amount of R450 000.00 to purchase the property. When the parties decided to build their home on this stand, it was transferred into both their names.
- In 2018 the plaintiff liquidated his share portfolio valued at R3 200 000.00. He also registered a bond over the Roodepoort property in the amount of R850 000.00⁷. Although the structure is not yet complete, the parties and their son reside there.
- The Fourways property has been independently valued for an amount of R2 172 000.00⁸. At the commencement of the trial I was informed

⁴ Wijker (supra)

⁵ Botha v Botha [2006] ZASCA 6 2006 (4) SA 144 (SCA) para 8

⁶ Para 5 supra

⁷ The outstanding bond is ± R650 000.00 presently

⁸ Because it is not yet completed

by Ms Lebona⁹ that the defendant accepts the plaintiff's valuations of all the assets. However, during cross-examination she attempted to place in dispute the value of this property and put it to the plaintiff that the property was not worth R2 172 000.00, but far more.

- Given the admission made at the trial's commencement, I disallowed this line of questioning: the defendant had no valuations of her own but, more importantly, the admission took the value of this property out of contention and to resurrect the dispute cannot be countenanced – it amounts to little more than trial by ambush. It is common cause that the Fourways property is unbonded, that plaintiff pays all expenses¹⁰ related to the property and has also funded the building costs.

b) the Roodepoort property

- was purchased by plaintiff in 2003, prior to the parties' marriage, for R250 000.00. It remained unencumbered until 2017 when the plaintiff took out a bond of R850 000.00 to fund the building of the Fourways house. At present, the property is valued at R930 000.00 and the outstanding bond is approximately R650 000.00. The net asset value of the property is R280 000.00. It is common cause that the defendant has never made any contribution towards any of the expenses of this property.

c) The Rustenburg property

- This vacant stand was purchased by plaintiff during 2004 prior to the parties' marriage. It is valued at R570 000.00 and is unencumbered.

d) The plaintiff's share portfolio is valued at R970 653.00;

e) The plaintiff's policies, retirement annuities and other investments is valued at R4 417 480.00.

⁹ Who acts for the defendant

¹⁰ Maintenance, rates and taxes, lights and water

[13] Thus, the total value of the assets in regards of which forfeiture is sought is:

Gross value : R 8 089 480.00

Less bond : R 650 000.00

Total net : R 7 439 480.00

[14] In my view, and given the above values, it is clear that the defendant will be benefitted were an order for forfeiture not to be granted. The question now is whether the benefit would be undue having regard to the factors set out in s9(1).

[15] The plaintiff works at N[...] as an Economist. According to him, the marriage irretrievably broke down because of the defendant's "duplicity and bloody-mindedness". He testified that their relationship finally imploded because in August 2020 his sister-in-law called him to inform him that the defendant had borrowed R155 000.00 from her in June 2019 which despite a lawyer's letter of demand – a copy of which she sent to him – the defendant had yet to repay.

[16] When he confronted the defendant about this she became angry and accused him and his family of "ganging up on her".

[17] Whilst this may have been the last straw that broke the back of this marriage, it was not the only problem: the plaintiff accused the defendant of being financially irresponsible and of being involved in pyramid / Ponzi-schemes. Despite him warning her of the pitfalls of these many times, she simply ignored him.

[18] The issue with the latter was, according to his evidence, that it placed his employment with N[...] in jeopardy because of the terms of his employment – this was never disputed by defendant who, whilst denying that she was involved in pyramid / Ponzi-schemes, certainly admitted to trading in crypto currency – an issue that appeared similarly problematic to plaintiff.

[19] It is also undisputed that defendant is, and was over the years, involved in various business ventures and was a member/shareholder/director of various corporate entities. On her version, whilst one¹¹ may have initially brought in money

¹¹ P[...] P[...] CC

via the award of small tenders, none of these entities were particularly successful or profitable and, at present, her only true (minimal) source of income is derived from her crypto-trading activities.

[20] The result is clear: whilst defendant may have brought in income, it was minimal, came in drips and drabs, was seldom used for the common home and although she may have bought some movables, her main contribution was through P[...] P[...] CC which purchased the stand on which the common home in Fourways now sits.

[21] For the remainder, it is common cause that plaintiff has paid all the bonds on the properties purchased both before and after the marriage, and maintained the Roodepoort and Randburg properties, maintained the common home, the parties, and their son and paid all monthly expenses (with minor exceptions).

[22] The defendant's characterisation of the breakdown of the marriage, unsurprisingly, vastly differs from that of the plaintiff:

- a) she detailed her suspicions about the plaintiff's extra-marital affairs with several of his work colleagues and/or mentees; she produced whatsapp conversations and photographs which lead one to the ineluctable conclusion that the marriage was not a monogamous one;
- b) her last straw was that she found text messages between the plaintiff and one "N[...]" in October 2020 about which she confronted him and which led to an argument during which the plaintiff allegedly threatened to kill her;
- c) this argument was recorded and the recording played for the court and translated. The plaintiff denied saying "I'll kill you". His version is that, properly translated, he said "They'll kill you" meaning the various people from whom defendant took money to invest in her alleged "pyramid scheme". He testified that he warned her that these people would kill her and that when this comes about, he will not bury her because he had warned her.

[23] Much of the plaintiff's evidence was left undisturbed by defendant who simply failed to cross-examine on several important issues. Furthermore, important issues raised in her evidence-in-chief were not put to plaintiff in cross-examination. To name a few:

- a) it was never put to plaintiff what defendant actually did to earn an income. Although she admitted in her evidence-in-chief that she traded in crypto, this was never put to plaintiff. Instead a cat-and-mouse game took place around this issue during plaintiff's cross-examination;
- b) it was never put to plaintiff what income defendant actually earned or earns from her trading activities;
- c) it was never put to plaintiff that he physically assaulted the defendant after she confronted him about an affair with N[...] – specifically that he “beat me and kicked me and pulled me towards the bathroom, and wanted to hit me with the tin of air freshener on the head.”;
- d) that in 2011 he had an affair with one Lerato and in 2018 the defendant became suspicious that he had reignited the affair; or that when she confronted him, he became angry;
- e) that in 2007, at the beginning of their marriage, the defendant came across messages between plaintiff and another woman;
- f) that in 2022 there was an altercation between them because he alleged she had scratched the door of the motor vehicle;
- g) that she had lived with his threats because she was fearful as he had a gun;
- h) that she did not work because plaintiff told her she did not need to – their child was sickly when young and they did not want to expose him at a crèche and so they agreed she would stay at home but eventually as she

did not want to do nothing, she did network marketing from home by selling two products and, as and when she received income, she would purchase movables for the house;

- i) that it was her sister-in-law who heard about her trading activities and wanted to invest R300 000.00 but defendant refused and suggested she start off with half that amount and if she makes a profit she can invest the rest. Unfortunately, the investment was unsuccessful.¹²

[24] At the end of the day, these aspects add weight to the parties' respective allegations of substantial misconduct and the reasons for the breakdown of the marriage. But given that defendant failed to put this version to the plaintiff, issues of credibility and the reliability¹³ of her version must arise as it is incumbent upon a party to put his/her version to the opposing party to elicit a response.¹⁴

[25] The defendant's version also faced several other challenges:

- a) she failed to make full disclosure of all her business interests and income: the latter particularly related to income received from her mother in regard of the rental of a farmland near Brits in the amount of R50 000.00 per year between 2019 and 2022;
- b) she failed to disclose any income made either from her crypto trading or her network marketing activities;
- c) she has no proof for any of the purchases she made for the common home;
- d) her version of the conduct that led to the breakdown of the marriage was not fully canvassed with the plaintiff in cross-examination and became more and more elaborate as her evidence progressed.

¹² This is the R155 000.00 referred to in paragraph 15 supra

¹³ Small v Smith 1954 (3) SA 434 (SWA)

¹⁴ President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (C) SA 1 (CC) par 63

[26] But what is more troubling is that, based on an incomplete and incorrect version of her financial affairs, the defendant was awarded a contribution towards her legal costs of R469 000.00. Some of this was spent appointing an expert to support her maintenance claim, which she abandoned. She also appointed a “financial expert” – this expert was also never called. Whilst this does not impact on the s9(1) factors, it does impact on the issue of costs.

[27] It is without doubt that the marriage is one of long duration. Even if one accepts that the date of irretrievable breakdown was August 2020, it was still one of 15 years. As at date of hearing, it was one of 19 years.

[28] Both parties had a hand in the breakdown of the marriage: the plaintiff on his part had - at best for him - dalliances with other women and, at worst, several extra-marital relationships. He knew of the defendant's suspicions and of the dissatisfaction with this conduct and yet continued. The whatsapp messages and photographs certainly don't assist in disproving the defendant's suspicions.

[29] On the other hand the defendant knew that the plaintiff disapproved of her trading activities. She also knew of the consequences for him vis-à-vis his employment if her activities were discovered or something went wrong which it ultimately did with her sister-in-law. This did not deter her. Whilst it was submitted that her conduct did not amount to substantial misconduct because the dire consequences warned of did not materialize, that is not the point: the defendant knew that the plaintiff was subjected to strict compliance procedures because of his position at N[...], she knew that her activities could potentially impact his standing at work. The knock-on effect could also impact their entire family as the plaintiff is, and always has been, the breadwinner and provider.

[30] It is also common cause that the only asset of any tangible value that the defendant has contributed towards is the purchase of the stand in Fourways. Other than that, the other substantial assets were acquired by plaintiff, paid for by plaintiff, maintained by plaintiff and grew in value thanks to plaintiff's efforts.

[31] Even if I accept that defendant did purchase a few movables during the marriage, the fact is that she has been less than candid about the extent of her

income. Had her true financial position been properly before court perhaps I could have concluded that her income was so meagre that her contribution was focused on her wifely and motherly contributions – but I cannot.

[32] Whilst it is the plaintiff who bears the onus to prove forfeiture his allegations of the defendant's fiscal irresponsibility, the defendant had an obligation to make full financial disclosure in her FDF – she did not. I expected her to be more forthright and forthcoming in her evidence. She was not.

[33] In my view, although not a perfect witness¹⁵, the plaintiff was the better witness. He was candid, made concessions where he needed to and made full disclosure of his financial affairs. Defendant failed to put her version to plaintiff, elaborated on her version in evidence in chief, failed to place her financial information before court and concealed income received¹⁶.

[34] However, I am of the view that although the defendant's failure to properly disclose her financial affairs at trial is to be frowned upon, it is not a factor that can be considered vis-à-vis the breakdown of the marriage relationship. Insofar as that is concerned, each party's conduct and mistrust in the other was the cause of that and therefore I find that each is responsible for the breakdown of the marriage. I cannot find that the defendant's dealings in crypto-currency tipped the scales in plaintiff's favour vis-à-vis forfeiture, when viewed through the lens of his own hand in the breakdown of the marriage relationship. This being so, the plaintiff's claim for forfeiture must fail.

[35] However, the defendant's conduct at the trial is quite a different issue: she failed to make full and frank disclosure of her financial contribution, her income and her expenses to this court. She concealed income, she failed to put her true position before a court which saw her receiving a contribution towards costs of R469 000.00. This conduct cannot be countenanced and a court will express its displeasure regarding a party's conduct with an appropriate costs order.

The order

¹⁵ If there is ever such a witness

¹⁶ The R50 000.00 per annum set out in par 25 supra

[36] The order is the following:

1. A decree of divorce is granted.
2. The joint estate is to be divided.
3. It is ordered that defendant is entitled to 50% of the following assets which will be payable to the defendant when such accrues to the plaintiff:
 - a) Old Mutual Super Fund;
 - b) Alexander Forbes Preservation Fund;
 - c) Old Mutal Retirement Annuity;
 - d) Plaintiff's share portfolio.
4. The defendant is ordered to pay plaintiff's costs of suit.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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 10 October 2024.

For the plaintiff	:	Adv Z Marx du Plessis
Instructed by	:	Shapiro & Ledwaba Inc.
For the defendant	:	Adv N Lebona
Instructed by	:	Ndekwe Attorneys

Matter heard on : 16 August 2024
Judgment date : 10 October 2024