

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

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

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C VAN DE VENTER

08 AUGUST 2024

CASE NO: 24664/2021

In the matter between:

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

Plaintiff

and

S[...] E[...] M[...]

Defendant

JUDGMENT

VAN DE VENTER AJ

SUMMARY: Marriage, divorce, propriety rights – marriage in community of property – forfeiture of patrimonial benefits of marriage – order only competent in terms of section 9 of Divorce Act 70 of 1979 – marriage of long duration – no adverse circumstances shown or any substantial misconduct – husband did not contribute much to the joint estate – division of the joint estate granted.

[1] The issue in front of this Court today is to make an order to settle the dispute between the parties. It is important to note that the Court needs to consider on the evidence the reason for the breakdown of the marriage, the division of the joint estate and the Defendant's claim for forfeiture against the Plaintiff in a marriage in community of property.

[2] The Plaintiff and the Defendant were married in community of property on 25 February 1996 in Johannesburg and one (1) adult child aged 25 was born from the marriage.

[3] The parties have not been living together as husband and wife for the last five (5) years and it is common cause that there is a complete breakdown of the marriage, and a decree of divorce should be granted.

[4] The only dispute is if there must be a division of the joint estate or forfeiture as pleaded in her counterclaim by the Defendant.

[5] The Plaintiff lead with oral evidence that the joint estate be divided. He supported his case with the following oral evidence:

5.1 The parties were married in community of property with a civil marriage 28 years ago on 24 February 1996.

5.2 At the time the Plaintiff was working at Morkels, a furniture shop, in Limpopo.

5.3 He testified that he also purchased all the furniture to their new home from his employer, with whom he could buy at special rates.

5.4 Shortly after the marriage the Plaintiff transferred to Pretoria because the Defendant was working at Eskom in Pretoria.

5.5 The parties together bought a flat situated at Kiepersol in Sunnyside through a bond which both parties serviced at the time. Later this bond would be transferred to Eskom finance because the Defendant qualified for housing subsidy from her employer.

5.6 At or about 2004, the parties jointly decided that he must resign because of working circumstances being not ideal and the Plaintiff being a qualified plumber, to start his own plumbing business.

5.7 He testified that he used all monies paid out from his provident fund to start the plumbing business an amount of R58000.00 was mentioned.

5.8 He testified that the business was not a success, but he managed to do part time jobs and small projects through the years of the subsistence of the marriage.

5.9 The parties later in 2007, bought a second property at Jotanya Villa in Alberton.

5.10 He testified that he was the person who renovated and maintained the properties with the financial assistance of the Defendant.

5.11 He always paid for groceries and household necessities. When he was able to afford it. He helped with laundry and cleaning of the house and cooking.

5.12 He did the school runs for their daughter.

5.13 He testified that up and until a day about 5 years ago, when he was served with a protection order and Defendant informed him that she no longer wants to be married to him he moved out.

5.14 This protection order was never finalized and was not entered into evidence during the trial.

5.15 He denies that there was any substantial misconduct by him.

5.16 He was honest when he testified about his contributions albeit little financial support during the marriage.

5.17 He contends that there should be a division of the joint estate of the immovable properties and the Defendants pension fund as per the particulars of claim.

[6] The Defendant represented herself at the onset of the trial. The Court explained her rights to her and the risk she is taking by proceeding without legal representation. The Defendant fully understood and elected to proceed.

[7] The Defendant lead her own oral evidence confirming the following:

7.1 She has a degree in administration with Tswane University.

7.2 She was working temporarily at Eskom when they were married, she subsequently was permanently employed, and she is still working with Eskom for the past 28 years.

7.3 She testified that the last time the Plaintiff formally worked was in 2004.

7.4 She testified uncontested that she has been the main breadwinner of the family from day one of the marriage.

7.5 She testified that the Plaintiff gave little or no financial support to the joint household.

7.6 She testified that the Plaintiff was involved in four (4) incidents with four (4) motor vehicles that she had bought and every time she lost a lot of money even after receiving payments from insurance.

7.7 She testified that she alone paid for the upbringing and school fees of their daughter.

7.8 She testified that the Plaintiff offered little or no emotional support to her and their daughter, and he stayed away for long periods of time without her knowing where he would be.

7.9 He never brought back any monies from any work he has done on projects.

7.10 She explained she applied to the Magistrate's Court for a protection order because she was afraid of the Plaintiff. She testified that he would threaten her that he would take her pension. This document was not before the Court and she confirmed only one such altercation happened between the parties in 2018. She testified that she moved out of the bedroom because she felt not safe, and something was not feeling good in the bedroom. She testified that before their 23rd wedding anniversary, that would have been on 25 February 2019, the Defendant left the common home and never returned.

7.11 She testified that her sister came to stay in the common home after her husband passed away and she heard for the first time that it created a problem for the Plaintiff.

7.12 She concurred that it was a joint decision for the Plaintiff to resign because he was working 7 days a week and not earning a lot of money.

7.13 She concurred that the Plaintiff renovated their houses, did the laundry and cleaning.

7.14 She concurred with the Plaintiff's testimony about his contributions in kind to the joint estate.

[8] This Court recognize the noble and ongoing contributions of the Defendant. She testified that, she has been working fulltime for the last 28 years, keeping the household intact, bringing in the salary to finance and pay for monthly expenses and hoping things will change, but it never did.

[9] This Court is acutely aware not to be prejudiced by the gender of the parties in the matter before me.

[10] This Court also recognized the contribution by the Plaintiff in kind, during the years of the marriage which is pointed out in *Bezuidenhout v Bezuidenhout* 7 case number 264/2003 a SCA 2005 (2) SA 187 which pointed out that the role of the homemaker, housewife, mother, or, for these circumstances the father and husband, the renovator and maintenance man, should not be undervalued, because it is not measurable in terms of money.

[11] This Court considers that the decision made for the Plaintiff to resign and start a business 20 years ago, was a joint decision.

[12] If the Court has regard to the evidence, as a whole, there is no proof in the Court documents or the oral evidence by both parties that any substantial misconduct by the Plaintiff or adverse deliberate financial abuse of the joint estate can be considered.

[13] The Court is bound to section 9 of the Divorce Act 70 of 1979 “The Act” when a forfeiture order is pleaded, which provides 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 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 benefited”.

[14] The default position of this marriage is as follows and can be found in the SA Law of Husband and Wife by Hahlo 5th edition as follows: “Community of 8 property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of the financial contributions, hold equal shares.”

[15] This Court considered various recent caselaw where forfeiture or part forfeiture orders were made and concluded that no evidence was presented orally or on the papers that can be considered to order forfeiture of the Plaintiffs 50% undivided part in the joint estate.

[16] In the present case the Plaintiff and Defendant started with nothing and both efforts accumulated two (2) properties and the defendant's pension fund.

[17] Having regard to the above the division of the joint estate can be dealt with in the following way when exercising this Court's discretion based on the evidence and oral testimonies and the very long duration of this marriage.

17.1 The immovable properties that are jointly owned by the parties be sold and the net proceeds be divided equally between them. In the absence of specific amounts and for good housekeeping the court orders that all outstanding monies including any bonds and rates and taxes and any other loans that relates to the properties be deducted before the net proceeds be divided equally as at date of divorce.

17.2 The Plaintiff be awarded 50% of the Defendant's interest in the ESKOM Pension Fund, of which the Defendant is a member, in terms of Section 7 (8) of the Divorce Act, Act 70 of 1979 as at 31 DECEMBER 2018. The last day of the 9 year, the Plaintiff left the common home. The Defendant's Pension Fund is ordered to specifically pay the pension interest to the Plaintiff within sixty (60) days from date of receipt of the final order of divorce. The Plaintiff shall be liable for any and all taxed, penalties and costs occasioned hereby.

COSTS

[18] The general rule is that the successful party should be given costs, and this rule should not be varied unless there are good cause shown. Here we are dealing with an exceptional long duration of marriage and distribution of a joint estate and because there is a division it will be fair and in the interest of equitability that each party pays their own legal costs.

ORDER

[19] In the circumstances, the following order is made:-

1. A decree of divorce is granted and the marriage between Plaintiff and Defendant is hereby dissolved.
2. An order is granted for the division of the Defendant's interest in the ESKOM Pension Fund, of which the Defendant is a member, in terms of Section 7 (8) of the Divorce Act, Act 70 of 1979. The Defendant's Pension Fund is ordered to specifically pay the pension interest to the Plaintiff within sixty (60) days from date of receipt of the final order of divorce. The Plaintiff shall be liable for any 10 and all taxed, penalties and costs occasioned hereby. The date on which this amount is to be determined is 31 December 2018.
3. The Defendant shall retain as her sole and exclusive property the motor vehicle identified as the Tiguan.
4. The immovable properties that are jointly owned by the parties be sold and the net proceeds be divided equally between the parties subject to any outstanding monies, or loans accruing to the joint estate to be deducted.
5. Each party shall retain as her/his sole and exclusive property any and/or all movable property presently in her/his possession and each party shall be solely responsible for any and/or all debts incurred by her/him subsequent of the divorce.
6. Each party shall bear her/his own costs of this defended action.

C VAN DE VENTER

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 05 August 2024

Judgment: 08 august 2024

Appearances

For Plaintiff: Adv A Vosloo-De Witt

Instructed by: Burnett Attorneys

For Defendant: S[...] E[...] M[...]

Instructed by: Self Represented