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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: 4351/2022

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

DATE 30/09/2024

SIGNATURE

In the matter between:

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

PLAINTIFF

and

G[...] C[...] M[...]

DEFENDANT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 30 September 2024 at 10:00.

JUDGMENT

Mashile J

Introduction

[1] This is a divorce action central to which is the issue whether this Court should make an order for forfeiture of patrimonial benefits wholly or in part as contemplated in section 9(1) of the Divorce Act 70 of 1979 (“the Act”). *Viva voce* evidence and documentary evidentiary material before this Court suggest that the issue singled out aforesaid is the only that stands for decision. Both parties agree that their marriage relationship has irretrievably broken-down and that no possible restoration can be achieved.

Terse Factual Matrix

[2] The parties concluded a customary marriage on 14 November 2009 at Kabokweni Mpumalanga Province. The regime governing a marriage in community of property and profit and loss is applicable to a customary marriage. In consequence of the parties’ marriage relationship, a minor child, T[...] C[...] M[...], a boy now aged 9, was born. The Defendant initially challenged the paternity of the minor child, but tests conducted in that respect have confirmed that the Defendant is his father.

[3] It is common cause that the parties stopped living as husband and wife since August 2017. Both have now lost love, respect and affection for each other and both find this to be irreconcilable with a normal marriage relationship. Besides, the Defendant has openly advised family delegates from both parties who were meant to counsel and reconcile them that he did not want the Plaintiff anymore.

[4] The Plaintiff averred that the Defendant was physically abusive towards her and did so in the presence of their child. Over and above the abuse, the parties had for a period exceeding a year while living together in the matrimonial home, not afforded each other conjugal rights. Additionally, alleges the Plaintiff, the Defendant would, without notifying anyone, absent himself from the matrimonial home for days. If present, he would leave and return in the early hours of the morning. As a result of all these, the Plaintiff thought it wise to leave the matrimonial home.

[5] Besides, the trust that was once present between the parties has with time evaporated. The loss of trust, it would appear, surfaced when the Defendant learnt of the HIV positive status of the Plaintiff. He accused her of cheating on him and promiscuity generally. He pointed out that she was not infected by him because he was free of the virus. According to the Defendant, the inference that she was sleeping around remained the only reasonable one to draw.

Assertions by the Parties

[6] The brief factual background above sufficiently covers the parties' testimony in Court. As such, I deem it unnecessary to set out what each of them put forward during the proceedings. It was argued on behalf of the Defendant that a case for an order for forfeiture of patrimonial benefit in terms of section 9(1) of the Act had been made. In the alternative, the Defendant, it was asserted, had shown that the Plaintiff will unduly benefit if an order for partial forfeiture as laid out in the counterclaim is not granted.

[7] On the contrary, it was the Plaintiff's contention that the Defendant had failed to give sufficient reasons for the Court to grant forfeiture wholly or in part as intended in section 9 of the Act. The Plaintiff asserted further that the Defendant had not met the threshold to allow this Court to grant such order. There are no grounds for the Court to make an order that the patrimonial benefits of the marriage be forfeited either in whole or in part by her, the Defendant in his pleadings did not properly plead and will fail to prove his allegations.

Legal Framework

[8] The controversy in this matter is governed by section 9(1) of the Act. Thus, it could be useful to cite the section in its entirety below:

“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, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.”

[9] The section lists three factors that ought to be considered when determining whether the one party will unduly benefit if the forfeiture order is not granted. These are: (i) the duration of the marriage, (ii) consideration of the circumstances that gave rise to the break-down of the marriage, and (iii) any substantial misconduct on the part of either party. The approach of Courts that considered the issue of forfeiture of patrimonial benefits by one estranged spouse against the other has been exclusively whether or not the other party against whom forfeiture is sought would unduly benefit if the forfeiture order is not made. That issue should always be determined with due regard to the three factors that I have listed above.

[10] In *Wijker v Wijker*,¹ it was held that the context and the subject-matter of section 9(1) of the Act makes it abundantly clear that the Legislature never intended the three factors mentioned in the section to apply conjunctively. The Court in the *Wijker* gave guidance to a Court of appeal hearing an appeal that concerns a forfeiture order. The Court held that:

“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.”²

¹ 1993 (4) SA 720 (A).

² Ibid at 727D-F.

[11] Nowhere in the papers of the Defendant nor in the evidence that he levied in Court could I find any intimation that the Plaintiff will be unduly benefitted were the Court to refuse to grant the forfeiture order. Put differently, there is no evidence that if the order is not granted, the Defendant will be worse-off. To consider this in the context of the three factors, as this Court is required to do. The parties have to date been married for almost 15 years.

[12] Both parties have been working as police officers and have been contributing towards their joint estate. There having been no allegations that the Plaintiff did not pull her weight behind the joint estate, this Court regards the period of 15 years as fairly substantial to disregard the contribution that the Plaintiff made towards the estate. Accordingly, on the duration of the marriage, I find that an order that she forfeits the patrimonial benefits of the marriage, either wholly or in part, will unduly disadvantage her. In any event, the Plaintiff has not made a case that she will undeservedly be benefitted if the order is not made.

[13] Turning to the circumstances that led to the break-down of the marriage. The argument of the Defendant is that the Plaintiff must have been cheating on him because she is HIV positive while he is not. The assumption is that she acquired the HIV from men with whom she ought to have been in sexual relationships. The assumption is made in circumstances where there is dearth of evidence before Court that the HIV was acquired from the Plaintiff engaging in sexual relationships with other people. Given that transmission of HIV is varied, this Court cannot justly surmise that it emanated from any repugnant relationship.

[14] Clearly, when the minor child was born in 2015, it implied that his parents had been sexually active and that both had been HIV negative. If this were not the case, it would be difficult to explain why the child was born free of the virus. I should perhaps also point out that even if the Plaintiff had acquired the HIV as a result of engaging in sexual relationships with other people, if there is no proof that her act brought about a

diminution in the joint estate, there would be no justification in ordering forfeiture against her. This is aside from the fact that such an act is possibly morally reprehensible.

[15] It was the evidence of the Plaintiff that the issue regarding her HIV status had nothing to do with the break-down in her marriage. Insofar as she is concerned, the marriage broke-down because of the Defendant physically abusing her, disappearing without any notification and when around, leaving and coming back in the early hours of the morning. In substantiation, she pointed out that following the birth of the minor child in 2015, the parties continued living together until her departure in 2017 mindful of her HIV status. Accordingly, she concluded, the break-down was about the abuse and that the Defendant had declared to their family delegates that he no longer loved her.

[16] In conclusion, it is the finding of this Court that the duration of the marriage, the circumstances that led to the break-down of the marriage and conduct of the parties will not unduly benefit the Plaintiff.

[17] The above considered, I make the following order:

1. A decree of divorce is granted;
2. The joint estate shall be divided equally between the parties;
3. The counterclaim is dismissed with costs;
4. Both parties shall retain full parental responsibilities and rights with regard to the guardianship of the minor child;
5. The Plaintiff shall retain full parental responsibilities and rights with regard to the care of the child;
6. The primary residence of the child shall be with the Plaintiff;

7. Specific parental responsibilities and rights with regard to contact with the minor child is awarded to the Defendant.

8. The **GOVERNMENT EMPLOYEES PENSION FUND (GEPF)** is directed to pay **50%** of the pension interest, under pension 9[...] of the Defendant to the Plaintiff and the Defendant **50%** in the said pension fund calculated as at the date of divorce as provided for in terms of section 7(7) and 7(8) of the Divorce Act, 70 of 1979;

9. The registrar of the Court shall notify the **GOVERNMENT EMPLOYEES PENSION FUND** that **50%** of the pension fund interest is payable to the Plaintiff and the administrator of the fund to furnish proof of such endorsement to the registrar, in writing, within 30 days of receipt of such notification;

10. The Defendant shall be liable for the costs hereof

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES

Counsel for the Plaintiff: Adv LD Tjale
Instructed by: TP Radebe Attorneys

Counsel for the Defendant: Mr Meintjies
Instructed by: Meintjies and Khoza Attorneys

Date of Judgment: 30 September 2024

