

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

Case Number: 2022/057243

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

In the matter between:

R[...] P[...] K[...], BORN N[...]

PLAINTIFF

and

M[...] A[...] K[...]

DEFENDANT

Delivered: 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 e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 17/03/2025.

JUDGMENT

MZUZU, AJ

[1] In this action, the plaintiff seeks an order for a decree of divorce, forfeiture of the defendant's matrimonial benefits, with specific regard to the pension fund interest, and the division of the joint estate. The plaintiff's pension fund interest in

respect of which forfeiture is sought is held at the Government Employees Pension Fund ("GEPF"). The defendant is a member of the Echo Company's Provident Scheme.

[2] The parties were married in community of property to each other on 28 March 2011 and the said marriage still subsists. There are no children born of the marriage between them.

[3] Both parties accept that the marriage relationship between them has broken down irretrievably and has reached such a stage of disintegration that there are no reasonable prospects of the restoration of a normal marriage relationship.

[4] It is common cause that both parties no longer have love and affection for each other and are seeking an order for the dissolution of their marriage and the division of the joint estate. It is therefore not necessary to detail the other several grounds upon which each party relies for the dissolution of their marriage.

[5] The only issue that remains in dispute between them is whether the plaintiff is entitled to an order for the forfeiture of the defendant's benefits in relation to the pension fund interest of the plaintiff held at the GEPF.

[6] It was the plaintiff's testimony that she is employed as a nurse since 2002 and has been solely responsible for all the household expenses as the defendant was not giving her money. She testified that the defendant is also employed, but has not contributed financially to their marriage or household.

[7] She testified that every time she asked the defendant for money, he always told her that he does not have money. She does not know how much the defendant is earning.

[8] She further testified that in 2018, she took out a loan from Capitec Bank in the amount of R 250 000 to build or extend a four-bedroom family home at the defendant's traditional home in Ga-Mushi Village, Steiloo, Mokopane, Limpopo Province. She is still paying the loan, and the defendant has not assisted or

contributed with the loan repayments. It was her testimony that the family home has increased in value over the years.

[9] She further testified that the defendant was physically abusive towards her, and as a result, she obtained a protection order against him at some stage.

[10] Under the circumstances, it was her testimony that the defendant will be unduly benefited if an order for the forfeiture of his claim in her pension fund interest is not granted in her favour.

[11] Under cross examination, she conceded that the defendant used to give her some money.

[12] On the other hand, the defendant testified that he is entitled to share in the plaintiff's pension fund benefit because they are married to each other in community of property.

[13] He testified that when he started dating the plaintiff, she already had a child from a previous relationship. The child has been staying with them at a place organised by him since primary school until now. At the time when he met the plaintiff, he was already working and had pension fund benefits from his employer.

[14] With regard to the house that was built in Ga-Mushi Village, he testified that it was an agreement between him and the plaintiff to build and extend the four-bedroom family home. He made monetary contributions to the plaintiff.

[15] He further testified that he was also contributing to their household by providing shelter whilst they were staying together, and he would buy whatever that the plaintiff asked him to buy. He would sometimes give the plaintiff money.

[16] He denied ever abusing the plaintiff physically or verbally. He testified that the plaintiff left their marital home without informing him, and as a result, he does not know where she resides.

Analysis of evidence and the application of legal principles

[17] The patrimonial consequences of marriage in community of property are regulated by the provisions of the Matrimonial Property Act.¹

[18] It is trite law that the consequences of marriage in community of property are that upon dissolution of the marriage, all assets and liabilities acquired before and during the subsistence of the marriage are divided equally between the parties, regardless of individual contributions or efforts.

[19] The pension fund interests are also deemed to form part of the assets of the joint estate. Section 7(7)(a) of the Divorce Act² reads as follows:

"In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed To be part of his assets."

[20] In as much as it is a general principle that parties in a marriage in community of property must both share equally in the distribution of assets and liabilities upon dissolution of the marriage, there are, however, circumstances and factors which justify deviation from the general principle.

[21] A party who believes that the other party may be unduly enriched by the equal distribution of the joint estate, may seek an order from the court for the forfeiture of the patrimonial benefits. Section 9(1) of the Divorce Act³ is instructive in that regard. It reads as follows:

"When a decree of divorce is granted on the ground of irretrievable breakdown 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-

¹ Act 88 of 1984.

² Act 70 of 1979.

³ Id.

down thereof and any substantial misconduct on the part of either 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."

[22] The forfeiture is a feature of divorce proceedings in our law that seeks to ensure that a party to a marriage does not unduly benefit as against another party to the marriage, more especially if such a party has committed financial misconduct. The court may order that a blameworthy party forfeit the patrimonial benefit to which he or she may be entitled by virtue of the chosen matrimonial property system.

[23] It is the duty of the court to scrutinise the undue benefit of the other party if the order for forfeiture is not granted in favour of the aggrieved party. There are three factors that the court will take in consideration namely, the duration of the marriage, the circumstances that gave rise to the breakdown of the marriage and any substantial misconduct on the part of either of the parties.

[24] It is not necessary that all the above three factors need to be present.

[25] In *Klerck vs Klerck*⁴ above, the court held as follows:

" it was not the intention of the Legislature that substantial misconduct or any of the other factors mentioned in Section 9(1) had to be present before the court could grant an order of forfeiture: what the court had to do was to ask itself whether one party would be unduly benefited if an order of forfeiture was not made and in order to answer that question regard should be had to the duration of the marriage, the circumstances in which it broke up and, if present, substantial misconduct on the part of one or both parties".

[26] The onus is on the party seeking an order for forfeiture to prove that in the event that an order for forfeiture is not granted, the other party will unduly benefit. The party claiming forfeiture of benefits is required to prove the nature and extent of

⁴ Id at 265J -266A (Headnote).

benefits sought to be forfeited. This involves proving the value of the property as at the date of the marriage.⁵

[27] It goes without saying that before the court can make an order for forfeiture, it must be placed with sufficient information regarding the value of the estate as well as the respective contributions of each of the spouses.

[28] In *Wijker v Wijker*,⁶ the court had the following to say:

"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."

[29] It is settled law that what the defendant forfeits is not his share of the joint estate, but only the pecuniary benefits that he would otherwise have derived from the marriage. In *Smith v Smith*⁷ the court held as follows:

"An alternative interpretation of an order for forfeiture is that, 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."

[30] My first difficulty is that the plaintiff did not show the court the extent of the benefit sought to be forfeited because she did not provide the values of the properties of the parties as at the date of the marriage, save for only the value of the pension interest benefits.

⁵ Engelbrecht v Engelbrecht 1989 (1) SA 597 (C) at 5981-J (Headnote).

⁶ [1993] 4 All SA 857 (AD) at 862.

⁷ 1937 WLD 126 at 128.

[31] One of the grounds upon which the plaintiff seeks forfeiture of the pension interest benefits is that the defendant was physically abusive towards her, and she had, at some stage, obtained a protection order against him. The other ground was that even though the defendant was working, he did not make any financial contribution to the upkeep of their household. The other further ground is that she took out a loan of R 250 000 to build and extend the house at the defendant's traditional home.

[32] The ground of physical abuse, which I assume is part of the substantial misconduct that the plaintiff seeks to prove, is denied by the defendant. My difficulty is that the protection order that the plaintiff alleges to have obtained against the defendant was never discovered. This allegation was also not corroborated by evidence of any witnesses. In the absence of proof of the protection order, viewed together with the denial of this allegation by the defendant, I can therefore not hold that this allegation is probably true.

[33] In any event, the finding of a substantial misconduct does not on its own justify an order of forfeiture of benefits by the other party. The court must still satisfy itself that the other party did not contribute to the joint estate, and will be unduly enriched if the order for forfeiture is not granted. The plaintiff failed to prove that the defendant did not contribute to the joint estate.

[34] With regard to the ground of financial misconduct, that the defendant did not contribute financially to the upkeep of the household, the plaintiff conceded under cross examination that she in fact received money from the defendant during the subsistence of their marriage. That concession was fatal to the plaintiff's earlier testimony under examination in chief.

[35] It is also an undisputed fact that the plaintiff came into the marriage with a child from a previous relationship, and that child has been staying with the parties since primary school. She also did not dispute the fact that the defendant provided shelter for both her and the child during the subsistence of the marriage. That, in my view, is a contribution that cannot be ignored.

[36] The issue of the loan amount of R 250 000 is also in dispute between the parties as the defendant testified that he heard about it for the first time when the plaintiff testified in court. The plaintiff failed to prove that the loan amount of R 250 000 she took was solely to procure the building material for the house that both herself and the defendant were building. The allegations were also not substantiated by any documentary evidence in the form of bank statements and receipts for the building material. The plaintiff also failed to call any witnesses to corroborate her version. The incontrovertible evidence was that the loan amount was used for an extension of an already existing structure. The defendant also contended that he contributed money to the extension of the house and that evidence was never placed in dispute.

[37] I cannot, on the basis of the grounds and evidence adduced by the plaintiff, determine whether or not the defendant will in fact benefit from the plaintiff's pension fund interest. That being the case, I find no basis to conclude that the defendant will be unduly benefited if the order for forfeiture is not granted. The plaintiff has not been able to prove any excess that the plaintiff contributed over the contribution of the defendant.

[38] In my view, the fact that the plaintiff has got a bigger pension interest than the defendant does not, on its own, mean that there will be undue benefit if that pension interest is shared equally between the parties. Section 9(1) of the Divorce Act⁸ is not intended for a party who has made a greater contribution to seek deduction from such contribution. Accordingly, the claim for forfeiture of benefits cannot succeed.

[39] The issue of costs is generally in the discretion of the court. In divorce proceedings, the court is usually guided by the provisions of section 10 of the Divorce Act⁹ which reads as follows:

"In a divorce action the court shall not be bound to make an order for costs in favour of successful party, but the court may, having regard to the means of

⁸ Above n 2.

⁹ Id.

the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties."

[40] In my view, neither party can claim to have been successful in these proceedings as both parties seek dissolution of their marriage. I see no reason why I should depart from the approach set out in section 10 above. Accordingly, the appropriate order in the circumstances would be for each party to pay his or her own costs.

[41] In the result, I make the following order:

1. The decree of divorce is granted;
2. The joint estate is to be divided equally, including the pension funds;
3. The order for forfeiture of the defendant's claim in the plaintiff's pension interest is dismissed;
4. The Government Employment Pension Fund is ordered to pay the defendant an amount of 50% of the plaintiff's pension interest held under membership number:9[...], which will accrue to the defendant at the date of this order;
5. The Echo Company's Provident Scheme is ordered to pay the plaintiff an amount of 50% of the defendant's interest, which will accrue to the plaintiff at the date of this order;
6. Each party is to pay his or her own costs.

N MZUZU
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Plaintiff: Adv TR Maphutha
Instructed by: Malatji MT Attorneys, Pretoria

For the Defendant: Adv S Mashabela

Instructed by: Melford Monwa Attorneys, Johannesburg

Heard on: 27 January 2025

Judgment delivered on: 17 March 2025