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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION – MAKHANDA]

CASE NO.: 755/2021

In the matter between:

B[...] G[...] N[...] **Plaintiff**

and

N[...] P[...] N[...] (Born V[...]) **Defendant**

JUDGMENT

ROBERSON J:

[1] This is a divorce action. The plaintiff and the defendant were married in community of property on 26 July 1999. The two children born of the marriage, A[...], born in 1995, and N[...], born in 2003, are now majors. Both parties want a divorce but differ on the grounds of the breakdown of the marriage. In particular, the defendant wants the plaintiff to forfeit his entitlement to half of her pension, which forfeiture the plaintiff resists.

[2] In his particulars of claim the plaintiff alleged that he and the defendant argued frequently, there was a lack of meaningful communication between them, the defendant abuses alcohol, he has lost all the love and affection he once had for the defendant, and he and the defendant had not lived together as husband and wife for at least one year. He further alleged that the defendant was a member of the Government Employees Pension Fund and that he was entitled to a 50% share of her pension interest. In her plea the defendant admitted that the parties argued but alleged that the arguments were caused by the plaintiff. She denied the allegation of alcohol abuse. She agreed that the parties had not lived together for at least a year but alleged that the plaintiff left the common home without notice and had not returned.

[3] In her counterclaim the defendant alleged, inter alia, that: the plaintiff abuses alcohol; he wants 50% of her pension in order to pay lobola for another woman; he never contributed to the common home; he is abusive and violent and on several occasions swore and assaulted her; was violent towards her and her child; and he only purchased a vehicle during the marriage and left the common home with the vehicle. She alleged that the plaintiff would be unduly benefited if he were to receive 50% of her pension. In his plea to the counterclaim the plaintiff denied all these allegations.

[4] The plaintiff testified that in the beginning of the marriage there were some happy times. From 2013 he and the defendant argued frequently. From 2013 the defendant would spend time at her parental home and when she returned to the common home in Makhanda they would argue.

[5] The defendant would arrive home under the influence of alcohol and because of this the plaintiff would consume alcohol. The plaintiff moved out of the matrimonial home during 2021 and currently resides with his sister in Fort Beaufort. He said he left because all his clothes had been taken out of wardrobes and left outside. He agreed that the defendant maintained the children after he left, that she was responsible for clothing and school fees, and that he had not contributed to the purchase of groceries and school fees. He did not know that the younger child was at school. He denied that when he left there were debts still outstanding.

[6] The plaintiff recounted his previous employment experience. When he and the defendant married, he worked for Citrus Co-op and worked there for six years. After that he was a seasonal worker and received an income from the government because he had been arrested for his involvement in the struggle. At the time the defendant was studying at Cape College. He was then employed at a Total garage for three years earning R480.00 per week. He worked for a short while as a casual worker at the Monument in Makhanda and at the same time he was self- employed as a money lender, earning 30% interest on loans. He pursued this business until 2020. In 2010 he was employed on a contract basis at Rhodes University, Makhanda (Rhodes), earning R3 400.00 fortnightly, until 2020. He said that during these periods of employment he contributed to the household, by giving the defendant R1 500.00 per month, sometimes more and sometimes less. He denied that he had possession of the defendant's bank card and used it to buy food for his family in Fort Beaufort. The plaintiff said he is currently unemployed and had applied for a social grant.

[7] He said that after he left Rhodes he was offered a job there but was not told that it was a permanent job. It was for three days a week. He did not take up the offer because at that stage he was living in Fort Beaufort and did not have a place to live. He agreed that for most of the duration of the marriage he was employed or self-employed.

[8] He acknowledged that in 2018 he received R50 000.00 from the Department of Land Affairs but denied that with that money he purchased a motor vehicle for R38 000.00 and spent the balance of R12 000.00 on alcohol. He denied receiving R11 500.00 from Rhodes. He agreed that he received a UIF payment when he was in Fort Beaufort and did not give any of that payment to the defendant or the children. He said he tried to speak to the defendant telephonically but she ignored his calls.

[9] The plaintiff said that he and the defendant had put together the money to buy their first motor vehicle, a Ford Laser. He agreed it was sold for R5 000.00 to a

purchaser who was introduced by the defendant. He denied not giving the defendant any of the proceeds.

[10] With regard to the motor vehicle which the defendant alleged the plaintiff had taken when he left the common home, the plaintiff said the motor vehicle was not in running order. He said he sold it for R8 000.00 and the purchaser only paid R3 500.00 from which he gave the defendant R2 000.00. The purchaser of the vehicle gave him a further R1 000.00 which the plaintiff used for household needs.

[11] According to the plaintiff the family resided in a house which was built by his brother. When the State built RDP houses, they were told to add an extension to the existing house.

[12] The plaintiff was referred to an interim protection order which was granted against him on 25 November 2013 on the application of the defendant, in terms of the Domestic Violence Act 116 of 1998. In her application the defendant alleged that: the plaintiff swore at her in front of the children; he threatened her for talking to another man; he swore at her; he forced her to have sex; if she refused to have sex he would start fighting; he did not give her money (she said she understood that he was self-employed); and he assaulted their child A[...]. The plaintiff denied all these allegations. He also said that he did not receive the protection order and a final protection order was not granted.

[13] The plaintiff said that the only protection order for which he had to attend court was an interim order granted in August 2022, when he had already left the common home. In the application for this protection order, the defendant stated, inter alia, that the plaintiff had accused her of wanting to kill him. The plaintiff appeared in court and he and the defendant were questioned by the magistrate. The magistrate told the defendant that the reason she applied for the protection order was because she had been reported to the police for threatening to have the plaintiff killed. In her application the defendant alleged that: the plaintiff had threatened to hire people to kill her and the children; he wanted half of her pension; he was going to divorce her to get money with which he would renovate his uncle’s house and marry the mother of his other child; he did not buy anything (presumably for the household); in 2014 he

fought with A[...] when she was eight months pregnant; and there was a case opened in 2018 when he pointed a firearm at her. The plaintiff denied all these allegations. In her application the defendant said that she had struck the plaintiff with an iron while he was fighting with A[...]. He opened a case against the defendant but agreed to withdraw it and A[...] withdrew the case she had opened for assault.

[14] On one occasion, after he quarrelled with the defendant and her mother, his firearm was taken away by the police. The defendant and her mother told the police that they were afraid of him. He denied ever pointing the firearm at the defendant and denied taking out the firearm when he consumed alcohol. He agreed that he had shot himself with the firearm, not when he was playing with it as was put to him, but when he was cleaning it. He denied shooting someone at a tavern. He said the person was grabbing his firearm and during a struggle a shot went off. He was found not guilty in a consequent criminal trial. He denied that the charge had been withdrawn following mediation.

[15] The defendant testified that she is employed as a teacher at Archie Mbolekwa school in Makhanda. She started work as a teacher in 2009. Prior to her teaching post, she worked at an old age home, earning R1 800.00 per month. Her daughter A[...] is unemployed and N[...] is a student at Midlands College.

[16] She said that while the plaintiff was employed at the Total garage and at Rhodes he did not support her and the children. He spent his money on himself, buying clothes and alcohol, and spending money on his friends. She was aware of the payment to the plaintiff of R50 000.00 from the Department of Land Affairs. She said that with that money he purchased a motor vehicle for R38 000.00 and with the balance bought clothes and alcohol. She does not know the whereabouts of this vehicle. The plaintiff took it when he left the common home. When he received the R11 500.00 from Rhodes, which was paid in terms of a contract, he said he wanted to perform a ceremony at his parental home and returned with nothing. He did not give her any money from the UIF payment he received. Although they were not on speaking terms, she said he could have sent her a whatsapp message if he wanted to give her money.

[17] The defendant said that the plaintiff never did anything for the children. When they were menstruating and she did not have money for sanitary pads, they would ask the plaintiff for money to buy pads. The plaintiff would refuse, saying that he was not going to buy something for children who have “muds”.

[18] The defendant said that she gave the plaintiff R3 000.00 to start a business which she said was selling alcohol. She said that maybe he was lending money. The plaintiff did not give her any of his earnings from that business. She also said that it was she who had found the employment for him at the Total garage and Rhodes.

[19] While the defendant was working at the old age home and while she was employed as a teacher, the plaintiff had possession of her bank card. She said that as head of the house he had requested the card from her, saying that when the children came home from school there was nothing for them to eat. He would use it to buy only small items of food and use the rest of the money. When she asked him about the money he would start quarrelling with her. She took back her bank card in 2018 and when she did so the plaintiff’s mother called her and said she was no longer receiving money.

[20] When she received her bonus the plaintiff would insist on having half of it. When she did not give him half, he quarrelled with her and they ended up fighting. If she took a loan, he wanted her to give him money from the loan.

[21] The defendant said that she never went to the maintenance court because the plaintiff would spend the money he earned on the same day. She said that in 2013 A[...] went to the maintenance court to apply for maintenance from the plaintiff but was not able to do so.

[22] Overall, the defendant said that while she and the plaintiff were living together as husband and wife he never provided for her and the children. He never bought anything for the home, as she said, not even a spoon.

[23] The defendant said that the debts remaining after the plaintiff left the common home were loans which she had taken to build the house and to pay school fees.

[24] The defendant denied that she and the plaintiff resided at a house built by his brother. She said that she as a working a person had hired the plaintiff's brother to build the two room house. The plaintiff would buy materials using her bank card. She said they initially lived at a squatter camp in a home which she built. She left there for health reasons and rented a home at Extension 9, and while there she heard that people were being given plots at Transit Camp. She could not recall the year. She went to the local municipality in order to acquire a house. On the day the plot was to be determined, she was not at the site and the plaintiff gave the officials his name. The plot was registered in his name.

[25] With regard to the Ford Laser vehicle, the defendant said that she had bought it for R19 000.00 with a loan. She did not have a driving licence and the plaintiff would not drive her to work. The plaintiff sold the vehicle for R5 000.00 and did not give her any of the proceeds.

[26] The defendant applied for a protection order because the plaintiff was fighting, insulting the family and beating them. When asked to elaborate on the abuse, she said the plaintiff assaulted her. A week would not go by without him assaulting her. He also assaulted the children. She used to call the police because she did not have the strength to fight. Her complaint to the police was that he was assaulting them at home and they could not sleep. She was eventually advised to apply for a protection order. When they fought and he hit her, she would hit him back. If he wanted to have sex with her and she refused, he would go outside and shout about parts of her body and insult her family. If she did not give him money or refused to have sex, he would go to her place of work and insult her, saying that she was sleeping with the male teachers. At times he took out his firearm and moved around the house with it. He pointed the firearm at her several times. One evening while they were out walking, the plaintiff discharged the firearm, striking himself on the finger. He was treated at hospital. The firearm is at the police station. In 2018 he pointed it at her while she was sleeping and she called the police who took the firearm away from him.

[27] The defendant agreed that she had applied for a second protection order. The police told her that the plaintiff had reported that he was afraid she was going to kill him. The defendant denied any threat to kill the plaintiff and said it was the plaintiff who was doing that. After his firearm was taken away, he said he was going to look for an unlicensed firearm.

[28] On one occasion the defendant and the plaintiff were fighting and A[...], who was pregnant at the time, intervened. The plaintiff pushed A[...] away and she fell, thereafter reporting to the defendant that she was in pain. A[...] went to hospital where she was informed that the child was not moving and was instructed to open a case against the plaintiff. The plaintiff asked the defendant to withdraw the case because the charge was attempted murder. The defendant asked A[...] to withdraw the case.

[29] The defendant denied that she abused alcohol and said that she only consumed alcohol at a ceremony. She said that it was the plaintiff who had an alcohol problem. He would return home after consuming alcohol and wake the family up.

[30] The defendant denied that she had chased the plaintiff from the common home. She said her children had informed her that the plaintiff was packing his clothes and leaving. At that time they were not on good terms and quarrelled most of the time. When he left he told her that he was going to stay at his parental home and divorce her, get 50% of her pension and buy a house and a car. He also said he would go to Gqeberha and marry the mother of his other child, Asanda. Since he left the common home the defendant has supported the family, including paying N[...]'s education fees.

[31] When asked why she did not want the plaintiff to get 50% of her pension, she said that he had already eaten it up because all the years they stayed together she was the one supporting him and the children.

[32] A[...] V[...], the older daughter, testified. She recalled that the plaintiff was employed at Rhodes University and at that time did not maintain her or her sister. Growing up it was the defendant who would buy food and clothes. She bought food with her bank card, of which there were two. The plaintiff would tell A[...] to ask the defendant for money, saying that the defendant had a lot of money and he did not. In 2013 A[...] applied for a maintenance order against the plaintiff but the application did not proceed. She was told by an official that because she was 18 years' old she should be accompanied by her mother.

[33] A[...] said she was not on good terms with the plaintiff because of the way he treated her. She opened a case against the plaintiff when she intervened in a quarrel between him and the defendant. The plaintiff pushed her and her stomach struck a chair. She was eight months pregnant. At the hospital it was found that the baby was not moving or breathing. The doctor advised her to open a case against the plaintiff. After the plaintiff spoke to the defendant, she withdrew the case. The baby survived.

Discussion

[34] The quality of the plaintiff's evidence was not impressive. In his evidence in chief, with regard to income and employment, he merely mentioned employment at the Total garage and Rhodes University, and that he was a money lender and sold meat. I understood that it was from these sources of income that he gave the defendant R1 500.00 per month, sometimes more and sometimes less. The R50 000.00 from Land Affairs, the R11 500.00 from Rhodes University, the offer of further employment from Rhodes and the UIF payments were elicited in cross-examination. In answer to my questions he disclosed that he had been a seasonal worker, that he had been employed at Citrus Co-op, that he received an income from the government and had been a casual worker at the Monument.

[35] Although the plaintiff denied using the R50 000.00 from Land Affairs to purchase a motor vehicle for R38 000.00 and spending the balance on clothes and alcohol, he did not say what he did with that money. While he denied not contributing to the household, his evidence of what he did contribute was very

sparse, namely the R1 500.per month. He gave no evidence of what he had contributed to the assets of the joint estate, other than to say that he and the defendant had put money together to purchase a motor vehicle. His responses to allegations of abuse including pointing a firearm at the defendant, were bare denials.

[36] The defendant, on the other hand, was an impressive and persuasive witness. She supported her allegations with specific details of what she had contributed to the joint estate, how she had kept the household going and what she had endured during the marriage. She gave the impression of someone who had tried to do the best she could to create a financially stable home and provide for the children. It is she who is currently supporting the family and ensuring that her younger daughter gets an education.

[37] A[...] was also an impressive witness and her evidence was not seriously challenged.

[38] Given the poor quality of the plaintiff's evidence, I find that where there is a dispute of fact, the defendant's version is to be preferred. The fact that she applied for a protection order in 2013 renders it probable that she did suffer the abuse which she alleged she suffered in her application. It is far more probable that the police took away the plaintiff's firearm because she complained that he had pointed it at her. His explanation was implausible, namely that the defendant had told the police she was afraid of him. Her evidence that the plaintiff did not contribute towards the household and maintenance of the children is supported by A[...]. The fact that A[...] tried to get a maintenance order against the plaintiff strongly supports the allegations that he did not play his part in supporting the family.

[39] The evidence of the defendant demonstrates that during the marriage the plaintiff was physically and verbally abusive. The defendant would have been humiliated when the plaintiff shouted about her body in the street, and came to her place of work accusing her of sleeping with her male colleagues. She must have been in fear when the firearm was pointed at her. It must have been very wearing for her to be the sole supporter of the family when the plaintiff was in a position to make a contribution.

[40] Section 9 (1) of the Divorce Act 70 of 1979 provides:

> **" Forfeiture of patrimonial benefits of marriage.—**(1) 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."

[41] In *Molapo v Molapo* [2013] ZAFSHC 29 (14 March 2013) Kruger J comprehensively and helpfully set out the law in this regard, as follows:

> "The principles can be set out as follows:
> (1) The starting point when dealing with a marriage in community of property is that the parties agreed before the marriage that they would share in the proceeds of the marriage equally. The principle is *pacta sunt servanda*, agreements must be honoured. (See "**Die Onbehoorlike van Huweliksvoordele en *pacta sunt servanda*", J.C. Sonnekus**, **TSAR** 1993 774 at 779.)
> (2) The legislature in the 1979 **Divorce Act unambiguously** set its face against the element of guilt at divorce. This rejected element of guilt cannot be smuggled in via the backdoor at **section 9.** (**Klerck v Klerck 1991 (1) SA 265** (W) at 269C – D).
> (3) The first step is to determine whether the party against whom the order is sought, will in fact be benefitted. This is a purely factual issue. (**Wijker v Wijker 1993 (4) SA 720** (A) at 727E).
> (4) The next step is a value judgment after having considered the facts falling within the compass of the three factors mentioned in **section 9** (**Wijker** 727E – F).

(5) All the factors mentioned in **section 9**, namely (i) the duration of the marriage, (ii) the circumstances which gave rise to the breakdown thereof; and (iii) any substantial misconduct on the part of either of the parties must be considered. The court must look broadly at the three categories (**Klerck** 269D – G confirmed in **Wijker** 729A – G).

(6) It is not a prerequisite for making a forfeiture order that all three factors mentioned in **section 9(1)** must be present (**Klerck** 268B – 269G; **Binda v Binda 1993 (2) SA 123** (W) at 127C – D).

(7) The court can order that a percentage of the estate or an asset be forfeited, as was done in **Singh v Singh 1983 (1) SA 781** (C).

(8) The misconduct contemplated in **section 9(1)** is of a more serious nature than what is contemplated in **section 7(2)**, where the court is dealing with redistribution. (**Singh** at 788H).

(9) The forfeiture order is confined to patrimonial benefits, under **section 9(1)** the court cannot order a redistribution of capital and property. (**Singh** 788E – F; Hahlo, **The South African Law of Husband and Wife**, 5th Ed (1985) 376.)

(10) The facts and circumstances on which a party relies for a forfeiture claim must be pleaded and canvassed in evidence (**Koza v Koza 1982 (3) SA 462** (T) at 465H).

(11) The legislature has given no direction as to the relative importance of the three factors (Sonnekus at 777, **Klerck** at 268I). The factors have been defined in a wide-ranging and vague manner (**Klerck** 268H).

(12) To determine whether one spouse will benefit if the order is not granted the court must determine the respective contributions by the spouse to the joint estate (**LAWSA**, vol 16, 2nd Ed par 90, footnote 11) where it is stated that the court considers the salaries of the parties and what they owned at the time of the marriage. The court has regard to the household duties of the spouses as a contribution (*loc cit*).

(13) It has been said obiter that the benefit is “undue” if it can be described as disturbingly unfair (**Engelbrecht v Engelbrech 1989 (1) SA 597** (C) at 602F; see Sonnekus at 777).

(14) The purpose of a forfeiture order is not to punish the guilty spouse. The element of fault has been removed from our divorce law and exists only in the limited extent circumscribed in **section 9(1).**

(15) Courts are reluctant to make forfeiture orders because the fault principle is no longer part of our law. Forfeiture orders made by trial courts were set aside in **Wijker** and **Engelbrecht**. In **Klerck** the court refused to make a forfeiture order. In **Koza** the trial court's refusal to make a forfeiture order was confirmed on appeal. In **Singh** a forfeiture of only 20% was ordered (at 791E – F)."

[42] The plaintiff will benefit from a 50% share of the defendant's pension. He is currently unemployed and clearly wants the 50% share in order to benefit materially.

[43] The parties have been married for nearly 26 years although they ceased living together in 2021. In my view the duration of the marriage is not significant in the circumstances. The defendant's complaint is that the plaintiff never contributed to the common home, despite having the means to do so. The plaintiff may well have earned less than the defendant while she was a teacher, but the defendant made it clear that being the sole supporter was not easy and was obliged to take loans. A contribution from the plaintiff would have eased her burden.

[44] Each party blamed the other for the breakdown of the marriage. It is common cause that the marriage, at least after 2013, was marked by constant arguments and that the inability to communicate meaningfully was mutual. The plaintiff's conduct would have substantially contributed to the breakdown of the relationship and this is a factor of significance in deciding whether or not forfeiture should be ordered. It seems that the impetus for the plaintiff's sudden departure and decision to institute divorce proceedings was the hope of benefiting from the defendant's pension, so that he can improve his financial position and move on.

[45] The third factor for consideration, namely substantial misconduct, is in my view the decisive factor in this matter. It is a spouse's and a parent's obligation to provide support. To fail to do so when there are the means, is in my view substantial misconduct. Financial support determines to a large extent a child's quality of life in

the present and the future. This is something tangible. The plaintiff, apparently without any feeling of shame, chose not to provide for his children, even referring to them derisively when asked to pay for sanitary pads. Whatever money he earned he kept for himself and made no contribution to the common home and the joint estate. His failure to contribute was not an isolated incident: it endured for the marriage while the defendant took responsibility for the home and the children. In addition, the plaintiff's abusive conduct clearly amounts to substantial misconduct, taking as it would a physical and emotional toll on the defendant and the children. Given this misconduct, I am of the view that the benefit of 50% of the defendant's pension would clearly be undue. The plaintiff is not being deprived of all the benefits of the marriage in community of property. There is at least a house and he will benefit from his half share.

Costs

[46] The trial concerned only the issue of forfeiture and whether or not grounds for forfeiture had been established. The defendant, although wanting a divorce, was obliged to defend the action and institute a counterclaim in order to protect her pension interest. The defendant is the substantially successful party.

[47] The following order will issue:

[46'1] A decree of divorce is granted.

[46.2] The plaintiff is to forfeit his half share of the defendant's pension interest.

[46.3] There is otherwise a division of the joint estate.

[46.4] The plaintiff is to pay the costs of the claim and the counterclaim.

_____

J M ROBERSON

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Plaintiff	:	Mr D Mili Mili Attorneys 110 High Street MAKHANDA
For the Defendant	:	Mr A V Mgangatho Mgangatho Attorneys No. 7 Somerset Street MAKHANDA (Ref: A Mgangatho/N165)
Date heard	:	10 and 12 February 2025, 24 March 2025
Date delivered	:	15 April 2025