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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, PRETORIA

CASE NO: 29933/2017

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED :

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DATE

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SIGNATURE

In the matter between:

B M

Plaintiff

And

S M

Defendant

JUDGMENT

SENYATSI J:

- [1] The Plaintiff instituted divorce action against the Defendant during 24 April 2017 in terms of which he claimed a decree of divorce and

division of the joint estate and costs of this action only when the action is defended.

- [2] A counter-claim was instituted by the Defendant and she claimed for a decree of divorce; forfeiture of all patrimonial benefits arising out of the marriage in community of property, more specifically the Defendant's pension interest held and administered by Government Employee Pension Fund (GEPF) by virtue of her employment with the Department of Telecommunication. The Defendant also claimed forfeiture by the Plaintiff of all policies and monetary investments held in favour of the Defendant; all movable assets including the Defendant Kia motor car with registration No: [...]GP and VW Polo Classic motor car with registration No: [...]GP. As an alternative, she claimed the division of the estate on the basis that each party retains assets currently in his/her possession and costs of suit.
- [3] The parties were married to each other on the 4th December 1995 in community of property and the marriage still subsists. Two children were born of the marriage and they are all majors. None of the parties claims spousal maintenance.
- [4] It is common cause that the marriage has broken down irretrievably and there are no prospects of reconciliation between the parties.
- [5] The only issues that are in dispute are:
- 5.1. Whether there are grounds for this Court to grant an order

that the Plaintiff forfeits all patrimonial benefits arising out

of the marriage in community of property in favour of the Defendant and;

5.2. The grounds that led to the breakdown of the marriage and the costs of suit.

- [6] Both parties are employed and have not lived together since 25 February 2016. The Plaintiff is employed by Business Connexion as a customer engineer. The Defendant is employed by Department of Telecommunication as a deputy director. She is a former teacher.
- [7] Each party testified in support of his/her case. The first to testify was the Plaintiff.
- [8] The Plaintiff testified that he was married to the Defendant for 23 years. He further stated that he contributed to the estate and was responsible for taking their children to school. He earned less than the Defendant and for that matter conceded that the Defendant was the bread winner of the household.
- [9] He testified that he moved out of the common home and that this was by agreement with the Defendant as they quarrelled continuously.
- [10] He admitted that he had an extra marital affair with one Ms. M M ("M") out of which one child known as P was born. The relationship continued after the Plaintiff left the common home.

- [11] The Plaintiff also conceded that the parties had two bonded houses and that he was responsible for the repayment of the bond for one of the houses. He failed to pay for the bond as he could not afford it as he relied on his travel claims to service the bond repayment.
- [12] The Plaintiff conceded that his relationship with M continued during the subsistence of the marriage and he abandoned the common home to live with her. The Plaintiff conceded further that he currently lives with the said M.
- [13] The Plaintiff did not deny that due to the birth of P, the Defendant suffered acute stress and depression and was treated by Doctor Mokhuane.
- [14] The Plaintiff also conceded that the fallout between the parties was also caused by his failure to pay the mortgage bond as agreed between the parties.
- [15] The Defendant testified that the Plaintiff deserted her and their children and went to live with M. She testified that she was tested HIV positive as a result of the Plaintiff's adulterous behaviour.
- [16] She testified that she prays for forfeiture of the benefits arising from a marriage in community of property.
- [17] The issue to be determined is whether or not the Plaintiff is entitled to division of the joint estate or whether forfeiture of the benefits

arising out of the marriage in community of property should be granted.

[18] Section 9(1) of the Divorce Act 70 of 1979 provides as follows:

(1) When a decree of divorce is granted on the grounds of 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 the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefitted.

[19] In *Wijker v Wijker*¹ the Appeal Court said the following with regards to the approach to be followed:

“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 benefitted. 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 benefitted if a forfeiture order is not made.”

¹ 1993 (4) SA 720 (A) at 727 E-F

[20] It is only after the Court has concluded that a party would be unduly benefited that it is empowered to order a forfeiture of benefits and in making this decision the Court is exercising a discretion in a narrow sense.²

[21] The factors stated in Section 9(1) of the Divorce Act, are three fold; namely:

- (a) the circumstances giving rise to the breakdown;
- (b) misconduct of the party;
- (c) the duration of the marriage.

[22] The Defendant bears the onus of proving that the Plaintiff will be unduly benefitted if forfeiture is not granted. The Court can only order forfeiture if the factual evidence is led on the nature and extent of the undue benefit.³

[23] In *Engelbrecht v Engelbrecht*⁴ Conradie J said the following on the consequences of marriage in community of property:

“Joint ownership of another party’s property is a right which each of the spouses acquires on concluding a marriage in community of property. Unless the parties (either before or during the marriage) make precisely equal contributions the one that contributed less shall on dissolution of the marriage be benefited above the other if forfeiture is not ordered. This is the inevitable consequence of the partys’ matrimonial regime. The legislature (in section 9 of the Divorce Act 70 of 1979) does not give the greater contributor the opportunity to

² See *Wijker v Wijker* supra at 728B

³ See *JWv SW* 2011(1)SA 545

⁴ 1989 (1) SA 597 at 601F-G

complain about this. He can only complain if the benefit was undue. Unless it is proved (and the burden of proof rests on the party who seeks the forfeiture order) what the nature and extent of the benefit was, the Court cannot decide if the benefit was undue or not. Only if the nature and ambit of the benefit is proved is it necessary to look to the factors which may be brought into consideration in deciding on the inequity thereof. In this connection, it should be borne in mind that misconduct and gross unreasonableness do not always go hand in hand. Although it appears as if the Legislature wanted limit the Court's discretion as to the granting of a forfeiture order and did not intend to authorise the Court to take cognisance of the same wide-ranging considerations as those which section 7(3);(4);(5) and (6) (where parties are married out of community of property), with reference to the transfer of assets from one party to the other, permits the Legislature did not intend to elevate fault, in the granting of forfeiture order so prominently above other considerations. It could lead to the advantages of a no-fault divorce system being eroded by disputes over fault on the division of the estate."

[24] I now consider the evidence led by the Defendant on whether or not the Plaintiff will be unduly benefited. I have not heard the nature and ambit of undue benefit that the Plaintiff will have if forfeiture is not ordered.

[25] The only evidence led is that the Defendant is a member of Government Employees Pension Fund. I have not been informed

of what size of the Defendant's contribution or value of this pension is. I have also not heard any evidence on what other assets either than the cars and immovable properties mentioned and what values of these assets are and who contributed more than the other.

[26] Having regard to the evidence led by the Defendant to prove that she is entitled to a forfeiture order, I am not persuaded that she has discharged the onus of showing factual undue benefit by the Plaintiff if the forfeiture order is not granted. She failed to lay a factual basis of what she has contributed to the joint estate and what value that contribution amounted to as compared to the Plaintiff.

[27] Consequently, the prayer for a forfeiture order must fail.

ORDER:

[28] The following order is made:

(a) The decree of divorce is granted.

(b) The joint estate shall be divided equally between the parties including the parties' respective pension funds.

(c) The Defendant's pension administrator, the Government Employers pension Fund is ordered to pay the Plaintiff an amount of 50% of the Defendant's pension interest held and will accrue to the Defendant at the date of this order.

(d) The Defendant's pension fund administrator is ordered to make the said 50% of the Defendant's pension interest thereof to the Plaintiff within sixty (60) days from the date of this order. The Defendants pension details are:

Pension No: [...]

Salary No: [...]

Pension Administrator: GEPF/GPAA

(e) The Plaintiff's pension administrator, Alexander Forbes Pension Fund is ordered to pay to the Defendant 50% provident interest of the Plaintiff pension interest held and administered by Alexander Forbes the Plaintiff's pension benefits will accrue to the Plaintiff to him the date of this order.

(f) The Plaintiff's pension fund administrator is ordered to make payment of the 50% of the Plaintiff's pension interest thereof to the Defendant within sixty (60) days from the date of this order.

Plaintiff's pension details are:

Pension No: [...]

Pension Administrator: Alexander Forbes

(g) Each party shall pay their own costs.

SENYATSI ML

**Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg**

Date matter heard: 18 November 2019

Date of Judgment: 26 March 2020

Plaintiff's Counsel: Mr. V. Mabe

Instructed by: Victor Mabe Inc. Attorneys

Defendant's Counsel: Miss N. Matlhatji

Instructed by: Naledi Matlhatji Attorneys