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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 034304-2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
_____	_____
DATE	SIGNATURE

In the matter between:

SJM Plaintiff

and

SJK Defendant

JUDGMENT

MINNAAR AJ:

Introduction:

[1] The parties were married in community of property on 16 August 1994. In April 2023, the plaintiff delivered a summons seeking the following relief:

a. A decree of divorce.

b. An order:

i. That the defendant pays the plaintiff an amount equal to 50% of the defendant's pension interest in the Government Employees Pension Fund ("GEPF") as administered by GPAA, as at the date of divorce when such pension accrues in respect of the plaintiff.

ii. The defendant makes an endorsement in terms of section 7(8)(a)(ii) of the Divorce Act 70 of 1979 ("the Act") in the records of the GEPF to the effect that an amount equal to one-half of the defendant's interest as at the date of divorce, is so payable to the plaintiff.

c. Division of the joint estate.

d. Costs of suit if defended.

[2] The defendant delivered a counterclaim in which he seeks the following relief:

a. A decree of divorce.

b. Forfeiture of the plaintiff's claim to the defendant's pension fund.

c. Each party to retain the movable assets currently in their possession.

d. Each party to be liable for his or her own debts incurred during the subsistence of the marriage and the parties indemnify each other from liability towards third parties.

e. Costs of suit.

[3] The parties agree that the marriage has broken down irretrievably. The main contention between the parties is whether the plaintiff's claim to the defendant's pension fund should be forfeited in terms of the provisions of section 9(1) of the Act. This section reads:

'9 Forfeiture of patrimonial benefits of marriage

(1) 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.'

[4] In *Wijker v Wijker* 1993 (4) SA 720 (A) at 727D – F the court set out the following approach to be adopted in the hearing of a forfeiture claim:

'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.'

[5] The plaintiff and the defendant testified in support of their cases. On behalf of the plaintiff, the couple's eldest son, Mr S, testified whilst the defendant called his elderly mother, Ms S, as a witness.

Background facts

[6] The couple met around 1980 and started a romantic relationship. In 1982, their eldest son was born. As a result of the birth of this child, the plaintiff had to leave school. In 1984 and 1986, they were blessed with two more children. In 1987, the defendant paid lobola, and the couple concluded a customary marriage. Another child was born in 1986. According to the defendant, he is not the father of this last-born child, but he accepted the child. On 16 August 1994, the couple concluded their civil marriage, in community of property.

[7] On 10 May 1997, the defendant was involved in a motor vehicle accident, and he sustained some serious injuries. He spent some time in hospital and was then recovering at his parent’s house where the plaintiff and minor children were residing. The defendant testified that the plaintiff left the matrimonial home in 1998, whilst he was still recovering, as she did not want to take care of someone with crutches.

[8] The plaintiff testified that when she visited the defendant in the hospital, she found him with his girlfriend. Despite this, she resigned from her work and she went back to his parental home with him and took care of him. She left the defendant and their children in the care of her in-laws. According to her, she left in 1998 because the relationship between the parties was strained. She further testified that when she asked him for money to pay for the Society, he would go to town to deposit money for other women in Gauteng.

[9] Since the plaintiff left the matrimonial home in 1998, they never again lived together. The defendant continued with his career as a police officer and the defendant sourced employment cleaning offices and later as a domestic worker. They earned their respective livings in Gauteng whilst the children were in the care of the paternal grandparents in Limpopo.

[10] The defendant testified that he supported his children, and the plaintiff by regularly sending money per telegram. This was confirmed by Ms S. The defendant also had the plaintiff and the children registered as dependents on his medical aid. The children were so covered until the youngest child reached the age of 25 years. In 2017, the defendant requested a copy of the plaintiff's identity document, which was needed from his medical aid. The plaintiff refused to provide a copy to the defendant and, because she refused to cooperate, she was then removed from his medical aid coverage by the medical aid.

[11] The plaintiff denied that the defendant provided for her and the children and testified that this was the reason why she had to source employment. Mr S confirmed this. It is, however, difficult to accept his evidence on this aspect as he was a child at the time. From his testimony, it would appear that he, as a man who is 42 years of age, is still insisting that the defendant should maintain him. The plaintiff also failed to obtain a maintenance order against the defendant. This, coupled with the insistence of Ms S that the defendant did provide for his children, makes it highly improbable that the defendant did not provide as alleged by the plaintiff.

[12] The plaintiff conceded that the defendant paid for their medical aid, but she denied that they were no longer covered as the children came of age, and after she refused to provide the defendant with a copy of her identity document.

[13] The defendant, in his career, mainly resided in the barracks. He does not own immovable property, and it would appear that the only substantial asset he has is vested in his pension fund. It is unclear what the value of the pension fund is.

[14] The plaintiff testified that she bought a stand in Limpopo in 2016 and that she had built a dwelling on this stand. During cross-examination, it was divulged that the plaintiff is the owner of a property situated at No. 4[...] G[...], Extension 4, C[...] C[...], Johannesburg, Gauteng. She testified that it is an RDP house, which she purchased about 12 years ago without any assistance from the defendant. The value of the property was not divulged. The plaintiff did not plea forfeiture of these two properties from the joint estate. She seeks a division of the joint estate.

[15] The bone of contention herein is the defendant's pension fund, which he contributed to since 1992. He has now retired from the South African Police Service after a career spanning 31 years. The defendant testified that the plaintiff is only entitled to 3 years of his contributions and not to 50% thereof. The 3 years are based on the time the couple lived together as husband and wife after their civil marriage. For the remainder of their marriage, the defendant testified that the plaintiff was not part of his life and she was not there when he needed her.

[16] Interestingly enough, it was the defendant's testimony that he phoned the plaintiff on 16 February 2023 and asked her to take her identity document to a police station as it was needed to be scanned for the GEPF. From this, I deduce that the defendant intended that the plaintiff be registered as a beneficiary on his pension fund. When the divorce summons came, he was taken aback. He testified that he still loves the defendant, and the divorce came as a surprise as they are old people now, and they need to look after one another.

[17] On the pension fund, it was the plaintiff's testimony that she is not seeking the money for herself but for her children. This testimony, considered with the sequence

of events, raises questions as to the motivation behind the divorce. Is it indeed the plaintiff that instigated this process for her benefit, or is there some force behind the election to issue the summons shortly after the defendant wanted to register the plaintiff on his pension fund and the defendant's retirement? For the past 25 years, the plaintiff and the defendant each went their way with no attempts to seek a divorce and suddenly, weeks after the request for the plaintiff's identity document, the summons was issued.

The law: section 9(1) of the Act

[18] From *Wijker* it is clear that the following approach must be adopted: 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 section 9(1) of the Act, whether or not that party will, in relation to the other party, be unduly benefitted if a forfeiture order is not made. Those factors are:

a. The duration of the marriage.

b. The circumstances which gave rise to the breakdown of the marriage.

c. Any substantial misconduct on the part of either of the parties.

This is a value judgment. These factors need not be considered cumulatively (*Wijker* at 729D-E).

[19] If no forfeiture in the pension fund is granted, the plaintiff will, in fact, be benefitted. This is a factual issue. The defendant contributed to his pension fund for 31 years. The parties lived separate lives and very little support, if any, was forthcoming from the plaintiff. In *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) the court in dealing with this factual determination said that:

> *'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.'*

I am satisfied that, on the evidence before me, the above will be the case in this instance. This, however, is not the end of the matter.

[20] The next stage of the inquiry is a value judgment:

The duration of the marriage

[21] In terms of customary law, the marriage commenced in 1987. The defendant commenced employment in Johannesburg shortly thereafter, and he would visit the matrimonial home at monthly intervals. Equally so, the plaintiff obtained employment. The plaintiff left the matrimonial home in 1998.

[22] In effect, the parties had a marriage for 12 years (1987 to 1998), and they would occasionaly get to spend some time together as husband and wife. This is not the ideal marriage, but it is not uncommon for couples in rural areas where employment opportunities are limited and the husband, and sometimes also the wife, have to seek employment in bigger cities.

[23] After the first 12 years of their marriage, and for the past 26 years, they have lived their separate lives. In effect, the parties only lived as husband and wife for about a third of their married lives.

[24] The plaintiff's return to the defendant's parental home in January 2022, when her father-in-law passed away, and the plaintiff assisted the family, is of no consequence to prove that the marriage indeed lasted for the total duration thereof.

The circumstances that gave rise to the breakdown:

[25] The couple had to face the reality of raising a family in the rural area of Limpopo as they were both forced to seek employment in Gauteng. It is my understanding that the defendant's parents took care of the couple's children.

[26] Allegations were made against the defendant's apparent infidelity. There is also the aspect of the last-born child not being the child of the defendant and that the plaintiff at one stage went to live with the father of this child. Nothing much turn on these allegations as the parties lived separate lives for 26 years.

[27] Although not ideal, it would appear that the couple proceeded with their lives isolated from each other and they did their best to earn a living and to provide for the children.

[28] The defendant's absence from the marital home was not the sole cause of the breakdown. The allegations that he failed to provide for his family are rejected, and as such, this is also not regarded as a contributing factor to the dissolution of the marriage.

[29] It would appear that the parties aligned themselves with the lives they lived until the reality of a pension fund payout to the defendant saw the day of light. This pot of gold at the end of the rainbow seemed to trigger the plaintiff's decision to institute the divorce proceedings.

Substantial misconduct

[30] It is trite that the misconduct must be substantial in nature (*KT v MR* 2017 (1) SA 97 (GP) at par 20.7).

[31] On the evidence before me, I cannot find that either party, let alone the defendant, committed substantial misconduct.

Conclusion

[32] The only ground on which a claim for forfeiture stands to be considered is the duration of the marriage.

[33] The parties were married by customary law in 1987. That would constitute a marriage of 38 years. As already stated, the couple only lived together for 12 of those years, whereafter each of them went their own ways.

[34] The defendant commenced contributing to his pension fund in 1992 until his retirement in 2023. For 31 years, he made these contributions. The plaintiff, having

left in 1998, was only part of 6 years of this period of contribution. There is no evidence that she in any way made any contributions towards the plaintiff.

[35] While it is so that a marriage in community of property is a universal economic partnership where the assets and liabilities of the parties are merged in a joint estate (see Hahlo & Kahn *The South African Law of Husband and Wife* 5 ed at 157 – 8, referred to in *Wijker v Wijker* supra at 731D), the enactment of s 9(1) of the Divorce Act contemplates a departure from this principle upon the dissolution of a marriage in defined circumstances (*KT v MR* at par 20.12)

[36] In determining whether a benefit will be undue, the court in *Wijker* also cautioned that the equitable principle of fairness cannot be used to justify an order of forfeiture, as it runs counter to the basic concept of community of property. The court, without defining what an undue benefit would constitute, pointed out, however, that in determining whether it was undue regard must be had to the three factors set out in section 9(1), and to which reference has already been made.

[37] The concept of a benefit that is 'due' as opposed to 'undue' has been associated with the duration of the marriage. In *Wijker* the fact that the marriage endured for approximately 35 years appeared to have been a factor militating against an order for forfeiture being granted.

[38] Accepting as a starting point that marriages in community of property evidence a universal economic partnership of spouses, it does appear that as the marriage endures the accrual of a benefit that may initially be characterised as not due is rendered more warranted, more proportionate and more appropriate. Thus, in circumstances where the other factors that relate to substantial misconduct and the circumstances giving rise to the breakdown of the marriage are not decisive in determining the issue, it would appear that the consideration of a fault-neutral factor such as the duration of the marriage may well and should indeed be based on considerations of proportionality (*KT v MR* at par 20.18).

[39] The longer the marriage the more likely it is that the benefit will be due and proportionate, and, conversely, the shorter the marriage the more likely the benefit

will be undue and disproportionate. This is however not a a rigid and mechanical exercise, as the court is after all enjoined to make a value judgment in this regard (*KT v MR* at par 20.19 and 20.20).

[40] Considering all of the above, my view is that the plaintiff will indeed be unduly benefited if an order for forfeiture is not made. The defendant solely contributed to his pension fund. It cannot be ignored that the plaintiff was part of the defendant's life for 6 of the 31 years he made these contributions.

[41] Under those circumstances, a partial forfeiture would be justified. It would be appropriate that the plaintiff be entitled to 20% of the defendant's pension fund.

Costs

[42] The awarding of costs is in the discretion of the court. I am of the view that it would be just and equitable for each party to bear their own costs.

ORDER:

The following order is made:

1. A decree of divorce is issued.
2. An order:

a. That the plaintiff forfeits 80% of her claim to the defendant's pension interest in the Government Employees Pension Fund ("GEPF") as administered by GPAA.

b. That the defendant pays the plaintiff an amount equal to 20% of the defendant's pension interest in the Government Employees Pension Fund ("GEPF") as administered by GPAA, as at the date of divorce when such pension accrues in respect of the plaintiff.

c. The defendant makes an endorsement in terms of section 7(8)(a)(ii) of the Divorce Act 70 of 1979 ("the Act") in the records of the Government Employees Pension Fund ("GEPF") as administered by GPAA, to the effect that an amount equal to 20% the defendant's interest as at the date of divorce, is so payable to the plaintiff.

d. The defendant will retain 80% of his interest in the GEPF.

3. With the exclusion of what has been provided for in prayer 2 above, division of the joint estate.

4. Each party to pay its own costs.

Date of Hearing: 4 – 6 November 2024

Date of Judgment: 7 February 2025

MINNAAR AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Plaintiff:
Adv L Tshigomana instructed by PE Nwafor Attorneys

For the Defendant:
Adv V Nyabane instructed by Hlongwane SZ Attorneys Inc