

**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

CASE NUMBER: 3616/2020

In the matter between:-

C[....]2 G[....]S[....]

Plaintiff

and

S[....]2 B[....] S[....]

Defendant

JUDGMENT

GREYLING-COETZER AJ

INTRODUCTION

[1] The plaintiff instituted divorce proceedings against the defendant, wherein she seeks a decree of divorce, division of the joint estate in specific terms, and that both parties forfeit their pension fund claims against each other. The defendant defended the action and instituted a counterclaim to the extent wherein he in seeks the division of

the joint estate per the applicable marriage regime.

BACKGROUND

[2] The parties were married to each other on 1 November 2012 in community of property, and the marriage still subsists. From the marriage relationship two children were born, whom are both still minors. It is common cause between the parties that their marriage relationship has broken down irretrievably and that there are no prospects of reconciliation between them.

[3] The pleadings in this matter are not a work of clarity. The amended particulars of claim relied on by the plaintiff and introduced in August 2021, claims the following:-

“10.1 Decree of divorce.

10.2 Division of the joint estate as per paragraph 9 above.

10.3 Both plaintiff and defendant forfeit their pension fund claim against the other spouse (party).

10.4 Contact and care of the minor children as per paragraph 8 above.

10.5 Cost of suit if defended; and ...”

[4] Paragraph 9 referenced in 10.2 above sets out that:

(a) the plaintiff is to retain the immoveable property known as Erf [...], R[...], E[...], T[...], Province of Mpumalanga;

(b) the defendant to retain the immoveable property known as Stand [...], V[...], T[...], V[...], Mpumalanga Province;

(c) the parties to share equally from the proceeds of the sale of Stand [...], K[...]-A, Mpumalanga Province; and

(d) each party is to retain his/her own pension fund.

[5] Paragraph 8 referenced in 10.4 above and respect of the minor children's contact and care, sets out a contact regime in terms of which the defendant, enjoys contact every alternative weekend, the defendant to retain the minor children on his medical aid and to make a contribution of R10 000.00, being R5 000.00 per month per child in respect of their maintenance.

[6] The defendant, in response and per his counterclaim, seeks:-

"1. A decree of divorce.

2. An order that the joint estate of the parties be divided amongst the parties in equal shares.

3. An order that the defendant is entitled to 50% of the plaintiff's pension fund benefit.

4. An order that the Government Employees Pension Fund pay 50% of the plaintiff's pension and interest directly to the defendant's bank account within 60(sixty) days after the date of final order of divorce.

5. An order that an endorsement be made in the records of the plaintiff's pension fund, Government Employees Pension Fund, to the effect that an amount equal to 50% of the plaintiff's said nett pension fund interest is so payable directly to the plaintiff's bank account as at date of divorce.

6. An order referring the children's maintenance to the Maintenance Court."

[7] In the plaintiff's replication, issue was not taken with the division of the joint estate in equal shares. The plaintiff only sought a dismissal of prayers 3 to 5 of the defendant's counterclaim.

[8] Due to the ambiguity caused by the pleadings, counsel for the plaintiff was at

the outset requested to indicate the issues in dispute and which the court will be required to decide. It was submitted on behalf of the plaintiff that the only issue truly in dispute is the forfeiture of the pension fund, as the division of the joint estate (as per paragraph 9 of the particulars of claim), the aspect of the contact and care of the minor children (as per paragraph 8 of the particulars of claim) had been agreed upon and the referral of the issue of the minor children's maintenance to the Maintenance Court for determination.

[9] Consequently, the only issues in dispute are:-

- (a) whether there are grounds for this court to grant an order for forfeiture of the pension benefit, representing a partial forfeiture of the patrimonial benefit arising out of the marriage in community of property as set out in section 9 of the Divorce Act, Act 10 of 1979;
- (b) the ground that led to the breakdown of the marriage; and
- (c) the costs.

[10] As set out above the parties are married in community of property. Community of property has been described as "*a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions hold equal share*".¹

[11] Both parties indicated that they only intended giving evidence themselves.

Plaintiff's evidence

[12] The plaintiff testified that the minor children reside with her and she takes care of them. That she tried mending their broken marriage through family meetings, but this was unsuccessful.

[13] Both parties are gainfully employed. The plaintiff is a politician and permanently employed, whereas the defendant also works for the government but on

¹ HR Hahlo, **The South African Law of Husband and Wife** 5th Ed at 157-8

municipal level and on a contract basis.

[14] The plaintiff further testified that the defendant is careless, gambles, and wasteful with money. She also testified that a prior pension benefit of the defendant of approximately R800 000.00 had been paid out to the defendant on former contract ending with the municipality. According to the plaintiff the defendant spent this money on purchasing the Elawini property in the amount of R550 000.00, and the remainder of the balance was wasted by the defendant on what the plaintiff described as “*doing his things*”.

[15] The plaintiff further testified that the defendant’s gambling had an emotional effect on her.

[16] During cross-examination the plaintiff conceded that both of the parties support the joint household, but the plaintiff would tend to cooking, cleaning and care for the children.

[17] According to the plaintiff she was aware of what she termed the defendant’s “*financial problems*” already at the commencement of her romantic relationship with the defendant, prior to marrying the defendant. The plaintiff and defendant were involved in a romantic relationship with each other for approximately ten years before they got married. According to the plaintiff, the defendant’s contribution throughout the marriage was limited.

[18] The plaintiff testified that she left her employment at H[....] in order to move to V[....] with the defendant, before they got married.

Defendant’s evidence

[19] The defendant testified and categorized the only issue in dispute to be whether the court ought to grant a partial forfeiture of the benefit in community of property in respect of 50% of the plaintiff’s pension interest.

[20] The defendant testified that during 2017 one of his contracts with the municipality came to an end, and a pension payout was received in the amount of

R870 000.00. He confirmed that this money was used to purchase the Elawini property in the amount of R550 000.00. He further confirmed that R150 000.00 of the remaining payout was utilized for a tombstone for his mother and his brothers, which he contends the plaintiff was well aware of and agreed to.

[21] He testified that both parties contributed equally to care and the schooling of the minor children. He made payment of one child's school fees and the plaintiff in respect of the other.

[22] The defendant was not cross-examined.

[23] The plaintiff proceeded with her closing address. It was argued that notwithstanding the limited evidence leads and absence of documentary evidence to support the pleaded forfeiture the defendant did not disprove the evidence by the plaintiff by any other mean that a denial.

[24] It was argued in closing on behalf of the defendant that the plaintiff failed to prove forfeiture of the partial patrimonial benefit in community of property, and that the court ought to grant a division of the joint estate as per paragraph 9 of the particulars of claim; care and contact as per paragraph 8 of the particulars of claim; and the parties to share in each other's pension benefit.

[25] The matter took a very unexpected turn, when plaintiff's counsel, as she was to address the court in reply to the defendant's argument, indicated that both she and her attorney of record's mandate to act on behalf of the plaintiff had summarily been terminated. The plaintiff in person, then addressed the court and sought, what she termed, "*to withdraw the divorce proceedings*". It was explained to the plaintiff that should she withdraw her claim, it would have the result that the defendant's counterclaim will be proceeded with as the defendant intends persisting with same.

[26] Pursuant to explanation and engagement, the plaintiff was granted an opportunity to obtain legal advice at this late stage of the hearing and who may assist her with her argument in reply. For this purpose, the matter was stood down to the following day.

[27] On the following day the plaintiff had appointed new legal representation, whom appeared and indicated that they sought a postponement of the matter in order to properly consult with the plaintiff. This postponement from the bar was opposed by the defendant. The plaintiff was granted this opportunity, and the following order was made:-

“1. The trial is postponed to Friday 22 April 2022 at 10h00, to enable the plaintiff to consult with her new legal representative;

2. In the event that the plaintiff is of the view that the matter cannot proceed on Friday or during the trial week commencing on 25 April 2022, the plaintiff is ordered to:

2.1 serve and file a substantive postponement application and a substantive application for re-opening her case and seek leave to introduce further evidence, by close of business on Friday 22 April 2022;

2.2 the defendant will enjoy until close of business on Monday the 25th of April 2022 to serve and file his answering affidavit and

2.3 the plaintiff will enjoy till 12h00 on Tuesday 26th of April 2022 to file a replying affidavit, if any.

2.4 the applications contemplated in 2.1 above will be heard on a date and time communicated to the parties by the court, which will be either on Tuesday 26 April 2022 or Thursday 27 April 2022.

2.5 the substantive application for re-opening the plaintiff's case and leave to introduce further evidence must specifically deal with the following:

2.5.1 full reasons why the evidence was not timeously led;

2.5.2 the degree of materiality of the evidence and what exactly the evidence entails, which was confirmed to already have been made available to the erstwhile attorneys of record;

2.5.3 balance of prejudice;

2.5.4 *the general need for finality in judicial proceedings;*

2.5.5 *the relevance of the advanced stage which the proceedings had reached; and*

2.5.6 *proposals for future conduct of the trial to ensure the integrity of the proceedings and rules of court remain intact.*

3. *The Plaintiff is ordered to pay the wasted costs:*

3.1 *in respect of 19 April 2022 on a party and party scale;*

3.2 *in respect of 20 April 2022 on an attorney and client scale.”*

(“postponement order”)

[28] On 22 April 2022 the plaintiff indicated that the trial matter was unable to proceed. The events contemplated in paragraph 2 of the postponement order was thus to follow. The plaintiff confirmed having already prepared the application contemplated in paragraph 2.1 of the postponement order and the hearing to take place on 28 April 2022.

[29] It transpired that notwithstanding the clear wording of the postponement order to the extent that the plaintiff was to bring a substantive application for postponement together with a substantive application for the re-opening of the plaintiff's case and leave to introduce further evidence, the plaintiff only sought a further postponement to consider whether to launch an application for re-opening of the plaintiff's case and leave to introduce further evidence. As before, this application was opposed by the defendant.

[30] Pursuant to engagement with the parties in order to find common ground, move the matter forward and obtain finality of sorts, the following order was made:-

*“1. The matter is postponed to Wednesday **18 May 2022** at 14h00;*

2. The following issues are separated for adjudication from the remaining issues which are common cause:

2.1 *Partial forfeiture of the benefit of the marriage in community of property – the pension benefit of the plaintiff;*

2.2 *Cost of divorce action*

3. *The judgment/order in respect of the remaining issues which are common cause between the parties are reserved;*

4. *The defendant is ordered to provide to the plaintiff details of his provident fund inclusive of the provident name, number and current value by no later than close of business Monday 2 May 2022 (notwithstanding that it is a public holiday);*

5. *The plaintiff is granted leave to comply with paragraph 2.1 to 2.5.6 of the order by this court dated 20 April 2022, by delivering an application for re-opening of her case and introducing of further evidence in respect of the separated issues, by no later than **10 May 2022** at 10h00, if any;*

6. *The defendant is ordered to deliver his answering affidavit to the application contemplated by 5 above read with paragraph 2.1 to 2.5.6 of the order of this court dated 20 April 2022, by no later than **16 May 2022** at 10h00, if any;*

7. *The plaintiff is ordered to deliver her replying affidavit, if any by no later than **17 May 2022** at 10h00 and simultaneously prepare the court file and cause an electronic copy to be emailed to the Judges secretary;*

8. *In the event that the plaintiff elects not to launch the application contemplated by 5 above, or in the event that the application so launched is dismissed, the parties are granted an opportunity to deliver supplementary closing arguments in writing or orally as agreed between the parties, at 10h00 on Thursday the **19th of May 2022**.*

9. *In the event that the application as contemplated in 5 above is granted:*

*9.1 the plaintiff is ordered to file her supplementary discovery affidavit, if any by no later than Monday **23 May 2022** at 10h00 and the defendant is ordered to file his supplementary discovery affidavit, if any by no later than Friday **27 May 2022**;*

*9.2 the matter will proceed on Tuesday **31 May 2022** at 10h00 for the purpose of receiving further evidence.*

10. The plaintiff is ordered to pay the costs of this postponement application on a party and party scale.”

(“Separation order”)

[31] In terms of the separation order, the matter was postponed to 18 May 2022.

[32] Not having received any application as contemplated in paragraphs 5 to 7 of the separation order by 17 May 2022, the parties were engaged to ascertain the plaintiff's election. In response the plaintiff's attorney indicated that the plaintiff elected not to launch the application, having the effect that paragraph 8 of the order becomes operative.

[33] The plaintiff's attorneys did not indicate what the parties' agreement was in respect of the filing of further submissions as contemplated in paragraph 8 of the order.

[34] It was thus necessary to again engage the parties in order to establish the election in respect of the format of the further closing arguments to be submitted or delivered at 10h00 on 19 May 2022. It appeared from the responses received that the parties' legal representatives attributed a contrasting interpretation of the separation order. According to the plaintiff's attorneys they were to deliver closing agreement by 10h00 on 19 May 2022, and although the correspondence seems to suggest that they sought to do so orally, same was not expressly communicated. The defendant's attorneys' position was that the plaintiff elected not to proceed with

the application to re-open her case, and as such the matter is considered to be finalized, and no further submissions are necessary.

[35] From aforementioned it was clear that the parties' legal representatives failed to engage one another at all in respect of these issues, which was most regrettable.

[36] Clarity was provided to the parties with reference to paragraph 8 of the order. However, same seemingly did not address the issue. This is so as the plaintiff indicated that she wished to submit oral argument, but same would not be just since the defendant's legal representative indicated that he is of the opinion nothing more stands to be done and is not available at 10h00 on 19 May 2022 which was the allotted time for such argument.

[37] A directive was therefore issued in the following terms:-

"1) The Plaintiff is granted an opportunity to file written supplementary closing submissions by 10h00 on 23 May 2022;

2) The Defendant is granted an opportunity to file written supplementary closing submission in response to the submission, if any by the plaintiff by 10h00 on 26 May 2022;

3) The Plaintiff is ordered to file the original marriage certificate by 10h00 on 26 May 2022;

4) Judgment will be reserved on 26 May 2022."

Supplementary closing submissions

[38] Before dealing with the contents of the submissions, it bears mention that the plaintiff, on 23 May 2022, filed further written closing submissions. The defendant has to date failed to do so. What the defendant elected to do is file same on 24 May 2022 by e-mail. In terms of the applicable practice directive, unless specific leave from the court is obtained to filing by e-mail, all filing received by e-mail will be ignored and regarded as if no such filing had taken place.

[39] Pursuant to the purported filing, electronically, the defendant's legal representatives were engaged and advised of aforesaid provision. They were similarly requested to ensure that proper filing is done in order for the matter to be finalized. Notwithstanding the position explicitly being explained to the defendant's attorneys, they had not cured the defective filing of the further submissions. In the interest of justice and in order for this matter to be dealt with, I reluctantly herewith condone the electronic filing in order for both sets of submissions to be considered before the order is granted.

[40] It was conceded by the plaintiff that she has failed to prove her entitlement to an order in terms whereof the benefit from the marriage in community of property or portion thereof should be forfeited. It was contended that the plaintiff proved that the defendant failed to disclose that he is a member of a pension fund where he is employed, and that in his counterclaim he only sought division of the plaintiff's pension fund but failed to offer division of his own. It was submitted that aforementioned can be inferred from the pleadings.

[41] It was submitted on behalf of the plaintiff that from the evidence before the court it is clear that an order should be made that the joint estate be divided between the parties in equal shares. This must include an order against the Government Employees Pension Fund of which the plaintiff is a member, in terms whereof it is ordered to note the defendant's interest in that fund and to pay the benefit to the defendant into the defendant's bank account as disclosed to the Fund. Similarly, an order should be made against the defendant's pension fund in favor of the plaintiff. It should also be provided that both parties shall be liable for the tax on their portions of the pension fund benefits to be paid to them.

[42] It was argued that the defendant and his attorney could easily have disclosed the fact that the defendant was prepared to share his pension fund and statements with the plaintiff under cross-examination, or in evidence by the defendant, but as this was not done, it gave rise to a delay in the matter and the plaintiff "changing horses" when she did. In the circumstances, it was submitted that it would be unfair to order the plaintiff to pay the costs of suit and defendant should pay the costs, or at worse, each party should bear their own cost.

[43] It was submitted on behalf of the defendant that the plaintiff was granted an indulgence to procure the services of a new legal team. She was also granted a further opportunity of postponement in order to ...seek re-opening of her case on the basis that critical information relevant to her case had not been brought before court. No such application for the re-opening was ever launched. The court was on this basis asked to conclude that no evidence or such critical information existed, and the delay in finalizing the divorce can squarely be placed at the door of the plaintiff, therefore the plaintiff stood to pay the cost of the divorce on the scale as between attorney-and-client.

[44] Since the events detailed above, the only live issue was that of costs.

[45] The costs arguments were not directed at cost of a normal divorce action. The focus was on the "*delay caused in finalizing the matter*". The plaintiff contends that had she known that the defendant was to share his pension interest with her, she would not have persisted with her claim for forfeiture. The defendant lays the blame for the delay before the plaintiff's door, saying she delayed the finalization of the divorce to bring fictitious evidence before court, which, according to her, was critical, but then abandoned same, therefore merely causing a delay.

[46] I am of the view that both parties contributed to this matter not being finalized with expediency. It is correct, as submitted on behalf of the plaintiff, that from the pleadings it cannot be said to be clear that a pension benefit/interest existed in respect of the defendant, and that he was willing to share same with the plaintiff. The plaintiff was under the impression that there was no pension benefit. However, is such an impression reasonable in the circumstances? The plaintiff knew that the defendant was employed in a similar capacity as before, therefore it would have been reasonable for her to assume that again he would be having and contributing to a pension fund. The defendant was not cross-examined on the issue or at all, this would have been an opportunity to solicit the information from the defendant in circumstances where he did not tender such evidence himself.

[47] On the opposite side of the coin, the defendant did not correct the plaintiff during trial preparation, and more specifically during the pre-trial that was held when

all questions were focused and dealt with on the presumption that he had already cashed in his pension benefit and does not contribute to a new fund.

[48] Further, the plaintiff has already stood in for the costs associated with the postponements which she reaped the benefit of and thus her changing of her legal team and quest to potentially introduce new evidence has been accounted for.

[49] Having regard to that set out herein above, I am of the view that each party should bear their own cost in respect of this matter.

[50] Consequently, the following order is made:

1) The bonds of marriage between the parties are dissolve and a decree of divorce is granted.

2) Primary residence of the minor children, C[....] P[....] S[....] and K[....]² P[....]² S[....], is awarded to the plaintiff subject to the defendant's right of access, being:-

2.1) every alternative weekend from 17h00 on the Friday until 17h00 on a Sunday;

2.2) every alternative long and short school holiday, which will rotate between the parties;

2.3) the minor children are to spend one annual long or short holiday, depending on the rotation between the parties, annually with the defendant;

2.4) the defendant is to enjoy access to the minor children on their respective birthdays as agreed to between the parties;

2.5) access to the minor children will at all times be exercised in their best interest and in such a manner so as to minimise the degree of disturbance to their scholastic and daily routine; and

2.6) the defendant is to enjoy telephone and electronic contact, and other communication with the minor children, which contact should be reasonable and not disturb the minor children's routine during school terms.

3) The parental rights and -responsibilities in respect of the minor children are awarded to both the plaintiff and the defendant, as envisaged in Section 18 of the Children's Act 38 of 2005.

4) The maintenance in respect of the minor children is referred to the Maintenance Court for determination.

5) The joint estate of the parties must be divided between them and as follows:-

5.1) Each party to retain those moveable assets which he or she possesses, together with all personal effects which may be in the possession of the other party.

5.2) The plaintiff to retain as her exclusive property Erf [...], Riverside E[...] 5, Province of Mpumalanga.

5.3) The defendant will retain as his exclusive property Stand [...], V[...] T[...], V[...], Mpumalanga Province.

5.4) The parties to share equally from the proceeds of the sale of Stand [...], K[...] -A, Mpumalanga Province.

5.5) 50% of the pension interest due and assigned to the defendant held by the Municipal Employees Pension Fund under pension fund number [...] are to be paid to the plaintiff within 60 (sixty) days from date of divorce.

5.6) 50% of the pension interest due and assigned to the plaintiff held by Alexander Forbes be to be paid to the defendant within 60 (sixty) days from date of divorce.

5.7) The respect pension funds are ordered to endorse its records accordingly and make payment to the defendant in terms of the provisions of section 37D(4) of the Pension Fund Act, 24 of 1956.

5.8) Any tax liability incurred as a result of the draw down and endorsements of the plaintiff's and the defendant's pension interests are for each respective parties account and will be deducted by the respective Fund before payment of any monies is made to the defendant and plaintiff respectively.

6) That each party is to pay their own legal costs.

GREYLING-COETZER AJ

JUDGMENT RESERVED: 26 MAY 2022
DATE OF JUDGMENT: 12 AUGUST 2022

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