



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: 6 April 2023

Case No. 17/7113

In the matter between:

RPB

Plaintiff

and

DB

Defendant

JUDGMENT

WILSON J:

- 1 The Plaintiff, RPB, is married to the defendant, DB, out of community of property, subject to the accrual system. He seeks a decree of divorce, an order that the matrimonial home be sold, and an order appointing a liquidator to divide the accrued marital estate between the parties. DB counter-claims for an order directing that RPB should forfeit his portion of the accrued marital estate, and an order that RPB should contribute R8 500 per month (adjusted to R500 per month in counsel's written submissions) to

the maintenance of the parties' adult son, who is 26 years old, working part-time, and studying a degree course in the humanities.

The division of the parties' estate

2 Section 3 (1) of the Matrimonial Property Act 88 of 1984 ("the MPA") provides that, on the dissolution of the parties' marriage, the spouse whose estate has accumulated the greater value during the marriage must generally pay half of the value of that accrual to the other party. However, section 9 of the MPA permits a court to direct that the spouse to whom the accrual payment is due will forfeit that right, in whole or in part. Section 9 (1) of the Divorce Act 70 of 1979 permits a court to make such a forfeiture order if it is satisfied that the party with the accrual claim would be unduly benefitted if the claim is satisfied. When considering whether to make a forfeiture order, a court is bound to consider the duration of a marriage, the circumstances that gave rise to its breakdown and any substantial misconduct by either party.

3 Given that DB seeks a departure from the usual consequences of the dissolution of the parties' marriage, she bore the onus to demonstrate that a forfeiture order is justified on the facts. It was, accordingly, DB who gave evidence first.

DB's story

4 It was common ground between the parties that they have been married for 29 years, but that they have not lived together for almost a decade. In June

2014, RPB left the matrimonial home. What caused his departure is the principal issue in this case.

5 DB says that RPB abandoned her to live with his much younger lover in Limpopo Province. His lover was also his business partner, and RPB spent long periods away from home with his lover under the pretext of doing business. To the best of DB's knowledge, this involved the acquisition and implementation of tenders for municipalities in Limpopo, which RPB's lover was able to obtain. However, DB says that, whatever RPB's business dealings were, RPB contributed next to nothing to expenses within the marital home after June 2014. DB was forced to meet these expenses herself. DB says that RPB had allowed a debt of rates and taxes to accumulate on the marital home, and that she only discovered this once the sheriff arrived to execute on the debt.

6 DB says that RPB would occasionally return home. During one of these visits home, DB says that RPB showed her a picture of his lover and made unflattering comparisons between DB's appearance and that of his lover. RPB's lover would call and ask for airtime, which RPB would provide. DB found this hurtful, since RPB was not contributing to the upkeep of the marital home. Whether because of this mental cruelty, or because of the strain RPB's adultery and absence had placed on the marriage, DB says that she eventually asked RPB to leave the marital home for good. In October 2015, RPB did just that.

7 The parties occasionally saw each other thereafter, mostly on occasions of importance to their two children. During one such occasion, RPB is said to

have warned DB that he would accede to a suggestion made by DB's brother that DB's brother would contract someone to have DB killed. This, DB says, put her in fear for her life. She placed burglar bars over the entrances of the marital home, but it appears the RPB still visited regularly.

- 8 DB accepts that her relationship has long since broken down, irretrievably, although my sense is that she has had understandable difficulty in finally letting the marriage go. She is nonetheless now intent on divorce, but with what she considers to be appropriate patrimonial consequences for RPB's treatment of her.

RPB's story

- 9 As might be expected in the context of such a long-running marriage, RPB accepts that the events DB relates took place, but he puts an entirely different inflection on them. RPB says that, between 1991 and 2009, he worked for Federal Express. He met the parties' principal expenses, including the expenses associated with the marital home, until Federal Express retrenched him in 2009. There is no real dispute that RPB used his retrenchment package, and a pension fund that was later cashed-in, to pay off the bond outstanding on the marital home, and to take the family on holiday – the last family vacation he and DB had with their children.

- 10 RPB also used some of his retrenchment money to start a new business. That business failed. Stints as a car salesman were also unsuccessful. Casting around for a new way to make money, RPB admits that he came into contact with a young woman who could work with him to obtain and implement valuable tenders from municipalities in Limpopo. RPB says,

however, that his relationship with her was brief and entirely platonic. The tenders did not materialise, and RPB did not start or continue a sexual relationship with his putative business partner.

11 Thereafter, RPB says that he found work doing home renovations with a friend in Limpopo. This earned him some money and kept him away from marital home for long periods. He returned home when he could, but DB had become increasingly unhappy and suspicious of his activities in Limpopo. She would look at his phone and find pictures of young women on it. Quite what the nature of these pictures was is unclear from the evidence. RPB accepts saying to DB that he found the women pictured attractive – in RPB’s words that they took a “good picture”. He denies, however, that he made any comparisons between the women pictured and DB.

12 RPB accepts that he left the marital home for good in October 2015, but says that DB “packed [his] bags” and “kicked [him] out”, because she had decided, erroneously, that he was committing adultery.

13 RPB accepts that DB’s brother offered to take out a contract on DB’s life, but says that he was horrified at the suggestion, and roundly rejected it. He pointed out, after some prodding from his counsel, that DB had not sought a protection order against him, and that she had given no indication that she was afraid of him. RPB visited the matrimonial home many times without any apparent resistance from DB.

14 RPB accepts that, after he became redundant, and after the failure of the various business ventures and forms of employment he took up, he was not in a position to pay the expenses associated with the marital home. He

accepts that he fell behind with the rates and taxes on the marital property, and that these and many other expenses had to be taken over by DB. RPB says that this was with DB's agreement precisely because he was not realistically able to continue paying as he had before. RPB insisted that, even after he was ejected from the marital home, he continued to contribute what he could, including, from time to time, paying clothing accounts for DB.

The forfeiture claim

15 It is on RPB's and DB's competing versions – and substantially only on those versions – that the forfeiture claim must be determined. In their heads of argument counsel made thorough and helpful submissions on how the test in section 9 of the Divorce Act applies to the facts they argued had been proved. In particular, counsel for RPB sought to persuade me that RPB's adultery, even if proved, does not amount to "substantial misconduct" under the Act, given developing social attitudes to marriage, and sexual fidelity within it. I am not sure that DB's claim is as simple as that. DB protests at what she sees as RPB's callous disregard for her well-being, and the substantial mental cruelty she believes RPB has inflicted.

16 However, that is not an issue I am called upon to decide. The bottom line is that RPB and DB have given two mutually incompatible versions of the same fundamental events. Neither has presented any significant evidence in corroboration of their versions, although I was directed to bank statements which show that RPB had made more payments toward joint household expenses that DB was willing to admit. DB and RPB were the only witnesses called in support of their respective cases. At the end of the

trial, I was left with no way of deciding whether RPB was in fact the callous philanderer that DB said he was, or whether he was simply an unfortunate victim of DB's suspicions and insecurities. The conclusions I am tempted to draw based on the demeanour of the parties in court would be no more than speculation, based on an unarticulated set of personal sympathies.

- 17 That is no way to decide a case. The facts, evaluated as a whole, do not establish the truth of either party's version on a balance of probabilities. In these circumstances, I cannot say that DB has discharged the onus on her to prove the facts underlying her forfeiture claim. This means that the forfeiture order DB seeks must be refused.

Maintenance of the parties' adult son

- 18 The evidence relating to the needs of the parties' adult son, D, is not much clearer. The claim for maintenance cannot be refused simply because D has reached his majority (*Burse v Bursey* [1999] 2 All SA 289 (A)). Section 6 (1) (a) of the Divorce Act forbids me from granting a decree of divorce unless and until I am satisfied that "the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances". Though not a minor, the evidence is that D is a dependent child, working part-time while pursuing his studies.

- 19 That said, it would not be "satisfactory" on the facts before me to direct that RPB pay the maintenance that DB asks for. His declared income is under R2000 per month. This was not challenged. RPB disclosed in his evidence that he receives a further R5000 per month from D himself, having ceded to

D a contract for pool maintenance on condition that D pays him R5000 per month. DB, on the other hand, has a nett income of between R20 000 and R30 000 per month. Whatever D's needs, the evidence is that RPB is contributing to them to the extent of his means, and that DB is capable of meeting any shortfall. In other words, the current arrangements are "the best that can be effected in the circumstances".

20 The maintenance claim must accordingly be refused.

The form of order and costs

21 The upshot of all this is that the main claim should succeed, and the counter-claim must be dismissed. A decree of divorce should be granted, the marital home should be sold, unless the parties can agree otherwise, and the marital estate should be divided subject to the accrual system delineated in Chapter 1 of the MPA.

22 Counsel were agreed that, if I reached this conclusion, there would be an accrual payment due to RPB. They differ, however, on the value of that payment. The sole difference between the two calculations is around R25 000, or about half of the current value of a Lexus motor vehicle. RPB's calculation includes the value of the vehicle in DB's estate, but DB's does not. It was not seriously disputed at trial that DB has exclusive possession and use of the vehicle, but counsel for DB argued that documentation produced at the car dealership demonstrates that the vehicle was a gift that stands to be excluded from the accrual. The evidence does not bear that out. It is true that the documentation produced at the car dealership records that RPB was buying the vehicle "for his wife". But that does not establish

that RPB intended the vehicle to be a gift. It establishes only that RPB was buying the vehicle for the use of DB. It is, accordingly, RPB's calculation of the accrual that must be adopted.

23 Counsel for RPB emphasised in her submissions that a "with prejudice" tender had been made before the trial commenced. She asked that, when handing down judgment, I postpone the determination of liability for costs until that tender has been disclosed and submissions on its significance have been made. She also emphasised the need for a precisely worded order in relation to the division of DB's pension fund, in the event that the forfeiture order is refused.

24 Counsel were also agreed that I need not appoint a liquidator of the marital estate if my decision on the forfeiture order, the maintenance order and the value of the accrual due to RPB were made known. In that event, it was submitted, the division of the marital estate could be worked out between the parties. That, if possible, is by far the more desirable course.

25 Counsel for DB also submitted that the accrual calculation may need to be revised to deal with the tax implications of the division of DB's pension fund. If that revision is made by agreement, then there is no reason why I should not adopt it.

26 In these circumstances, the parties will be directed to submit an agreed draft order dealing with the division of marital estate, and the payment of costs. If counsel cannot agree on the appropriate order, they may submit competing drafts, and submissions of no longer than five pages addressing any outstanding issues.

27 I should record my gratitude to counsel for the fair, forthright and collegial manner in which they conducted the trial.

28 For all these reasons, I make the following order –

28.1 The parties' marriage is dissolved.

28.2 The parties' counsel are directed, by no later than 14 April 2023, to submit an agreed draft order, consistent with the conclusions reached in this judgment, dealing with the division of marital estate, and the payment of costs.

28.3 If counsel cannot agree on the appropriate order, they may submit competing drafts, and submissions of no longer than five pages addressing any outstanding issues.

S D J WILSON
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 6 April 2023.

HEARD ON: 14 and 17 March 2023

DECIDED ON: 6 April 2023

For the Plaintiff: G Olwagen-Meyer

Alan Jose Inc

For the Defendant:

C Bornman
Scheepers Pretorius Inc