

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**HIGH COURT OF SOUTH AFRICA, GAUTENG
DIVISION, JOHANNESBURG**

Case No.: 45735/2021

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE

SIGNATURE

In the matter between:

M[...] C[...] T[...]

Plaintiff

and

M[...] I[...] A[...]

Defendant

JUDGMENT

NHARMURAVATE AJ:

Divorce proceedings –Plaintiff seeks 50% of the GEPF pension- Defendant seeking forfeiture of benefits – parties married in May 2018- separated in less than 2 years- mutually destructive versions – forfeiture of benefits granted .

INTRODUCTION

- [1] This is an action for a decree of divorce wherein the Plaintiff Tumisho C[...] M[...] an adult male residing at Mfunyane, Thembisa Gauteng seeks to divorce the Defendant I[...] analyze A[...] M[...] an adult female who is currently employed with the South African Police Services residing at Rabie Ridge, Gauteng Province.
- [2] Both parties agree that this court may grant a decree of divorce as the marriage has irretrievably broken down. The only issue for this court to determine is if the Plaintiff is entitled to the 50% of the Defendant's pension fund benefits held with the Government Employee Pension Fund. Secondly, whether the Defendant is entitled to a forfeiture of benefits against the Plaintiff.
- [3] In support of their case each party testified with the Plaintiff being dominus litus. The evidence testified by both the Plaintiff and the Defendant shall be summarized below.

THE PLAINTIFF'S CASE

- [4] The Plaintiff alleges that the parties were married in community of property on the 11th of May 2018 at Johannesburg and the marriage still subsists. He was employed with Toyota Atlas earning R9 500.00 subsequent to that he lost his employment he was then paid a pension of R 57 000.00. He alleges that he spent it by visiting the Defendant who at the time was residing in Cape Town. He stayed in Cape Town for three weeks he could not recall the exact time he went to there except that it was very cold (winter) . He mentioned that he brought groceries .
- [5] It is upon his visit that he discovered that the Defendant had three more children. He was only aware of one child. The Plaintiff contends that the marriage broke down through the dishonesty of the Defendant who did not inform him about the three other children. When he left Cape Town their

marriage was not the same. This was worsened by the non-existent twins birth purportedly born in July 2020. There were no attempts made by him to recandle their marriage.

THE DEFENDANT'S CASE

- [6] She married the Plaintiff in May 2018 after meeting him through his cousin on facebook. She is currently employed by the South African Police Services and has been employed as a Sergeant for 14 years. She has four minor children whose father had passed away sometime in 2019. The Plaintiff knew about the four children before his visit to Cape Town in August. He only stayed for a weekend he came on Friday and left Sunday by bus.
- [7] She testified that he was the reason why she asked for a transfer from SAPS Stellenbosch to move to SAPS Rabie Ridge. She moved to Johannesburg on the 3rd of January 2019 only to find that the Plaintiff was not *warm* to her the Plaintiff kept leaving everyday before sunrise and arriving after dark sometimes he would not come back at all.
- [8] She testified that she used to find condoms and some tights which did not belong to her when she questioned the Plaintiff he would lie to her. Thereafter, the Plaintiff left at the end of January leaving her alone with the four children. The Plaintiff left with his bed and fridge and she was left with nothing. She recalled feeling alone and this caused her so much depression as she would have not left Cape Town and her family. She had to take depression medication because of this as the Plaintiff is the reason why she moved from Cape Town. He never once assisted her with anything she was the one paying rent and doing everything in the house. Even in Cape Town the Plaintiff never brought groceries her parents did because they were working at the time.
- [9] She testified that she struggled with the four minor children that she had to move them back to Cape Town. The Plaintiff has never contributed to their marriage be it financially or emotionally even when she was in Cape Town. He

did not even give her conjugal rights or any kind of support with the children. She also had no clue about the R57 000 it was the first time that she heard of such information during the Plaintiff's evidence. She did not even know that he was unemployed as he used to leave in the morning and come back late at night. It was only upon her stumbling upon the retrenchment /dismissal letter of the Plaintiff sometime in June or July that she came to know that he was not working. She tried assisting him to find employment which the Plaintiff was not interested in at the time.

ANALYSIS OF THE MATTER

[10] The argument raised by the Plaintiff is that he is entitled to the Defendant's 50% of the pension fund benefits held with the Government Employee Pension Fund simply because he entered into that type of a marriage where things are shared 50/50. He simply does not take this court into confidence as to what contributions were made by him towards this marriage or this joint estate. The Plaintiff's only contribution is that he brought groceries and stuff. When he was asked to clarify under cross examination what he meant by stuff he reiterated that he meant groceries. He did not produce any documentary evidence to prove that indeed he spent money buying groceries (when and how many times) for the Defendant inclusive of the minor children eg. a bank statement.

[11] Additionally, the Plaintiff received R 57,000 (fifty seven thousand) as pension regard being had to his retrenchment. He testified that from this money he brought groceries but there was no proof produced to this court that indeed the pension received was that amount without proof it is difficult for this court to believe the Plaintiff. It was not his evidence at any point that he shared the knowledge of how much he received with the Defendant. He could not dispute the Defendant's evidence that she did not know about the retrenchment or the amount received. Possibly, the Plaintiff could have received more and that amount could still be in existence being concealed from the Defendant.

[12] The Plaintiff has also failed to produce by way of documentary evidence proof of any other transactions made in favour of the Defendant within the amount

received or even the salary. Peculiarly, he spent this money by going to Cape Town which was sometime in winter. While in Cape Town he only spent his pension buying groceries which is of course denied by the Defendant. The Plaintiff's evidence is that he spent three weeks in Cape Town which was also denied by the defendant. The Plaintiff did not produce any bus ticket or any other proof (documentary evidence or a witness to corroborate him) to prove that his trip was indeed 3 weeks. He also did not give any further evidence on how he spent R 57,000 on the Defendant while he was in Cape Town for the three weeks. The Defendant's evidence in my view is therefore, probable that he only spent a weekend in Cape Town .

[13] If indeed he spent the three weeks he would have taken this court into confidence and explained what they were doing in Cape Town as a married couple and a family for three weeks at the very least demonstrate how he contributed financially, emotionally and physically towards the Defendant and the minor children who became part and parcel of the marriage. My view is further fortified by the fact that his evidence was that when he arrived in Cape Town he discovered the three children and he was not happy about the dishonesty. It is more probable that he left immediately thereafter.

[14] The Plaintiff gave evidence that he spent the R57,000 taking care of himself for a period of two years. The Defendant's evidence was that the Plaintiff did not even contribute emotionally or physically or financially towards their marriage. She was the one who paid for the rent and did everything in the house inclusive of taking care of her four children. This the Plaintiff denied by stating that he used his pension to take care of himself. This court can draw an inference that the pension money which the Plaintiff received indeed was spent on himself not towards the joint estate nor did he contribute in any other manner otherwise to the minor children.

[15] Truly, the first question is whether the Plaintiff would be benefitted if forfeiture is not granted. In my view the answer is in the affirmative as the Plaintiff would receive 50% of the assets of the joint estate

which in this instance is the Defendants pension by his own evidence he has failed to demonstrate that he even spent at the very least half of his earnings towards their marriage or even his pension. He did not even lead evidence of how he used to take care of the Defendant before being retrenched which in all probabilities this court can draw an inference that the Defendant was taking care of herself.

[16] The Plaintiff only visited the Defendant in Cape Town once when they were married. Whereas the evidence of the Defendant was she opted to transfer to Johannesburg due to their marriage and at the time she was not aware that the defendant was not employed. This she found through finding a correspondence sometime in June or July after she had arrived in Johannesburg. It is probable that the Defendant would have not asked for a transfer to Johannesburg had she been aware that the Defendant was unemployed. She testified that even after finding out about the retrenchment she assisted in trying to find him employment which he was not interested in. This was not rebutted by the Defendant. On the other hand the Plaintiff did not even mention taking care of the Defendant in any manner .

[17] It is trite law that Section 9 of the Divorce Act 70 of 1979 (the Act) provides as follows: *“9(1) When a decree of divorce is granted on the ground of the irretrievable break-down 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 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.”*

[18] In **Wijker v Wijker**⁶ the test was formulated as follows: Section 9(1) of the Act postulates that the court considers a) whether the defendant will receive a benefit and b) if so, whether the benefit is undue. In

deciding whether the benefit is undue, 3 factors alone are considered: (i) the duration of the marriage, (ii) the circumstances that gave rise to the breakdown of the marriage, (iii) any substantial misconduct on the part of either parties.

[19] In **Wijker**, the SCA made it clear that the Legislature never intended the 3 above factors to be considered cumulatively and the approach to be followed was the following⁷: *“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. Although the second determination is a value judgment, it is made by a trial Court after having considered the facts falling within the compass of the three factors mentioned in the section.”*

[20] The second inquiry is whether the benefit would be undue, and my view in this regard is in the affirmative. Taking into account the factors set out in section 9 of the Act, the fact is that irrespective of the fact that the legal duration of the marriage is less than 2 years, the *de facto* position is that the parties were married in 2018 May and only lived as husband and wife from at least January 2019 until they separated in March 2020. This separation date was disputed by the Defendant as she testified that they only lived together for the month of January 2019. She gave an account of how the Plaintiff left her alone without a bed and a fridge she gave a full detailed account and how this led to her suffering depression.

[21] My view is further strengthened by the fact that in the Plaintiff's particulars of claim he alleged that he had two children with Defendant which the Defendant has denied. The Plaintiff got to find that these children did not exist when he was sent by his legal

representative to retrieve documents at Home Affairs. This is a clear indication that the Plaintiff moved out in January 2019 otherwise he would have seen the Defendant pregnant. Simply because ,if these children were allegedly born in July if indeed he moved out in March 2020 , he would have seen the pregnancy . Pregnancy is one of those things that cannot be hidden because if he left in March 2020 , the Defendant would have been 6 months pregnant which is clearly visible. The fact that he alleges that the Defendant was disingenuous about being pregnant with twins is evidence that he was not living with her as he would have known as early as October 2019 or soon thereafter. The Defendant version in this regard is therefore preferred.

[22] In my view the Defendant's version is more probable simply because from the Plaintiffs own version when he left Cape Town, their marriage relationship was no longer the same. So if he left Cape Town in winter which may have been anywhere between June, July or August. In September the marriage relationship was no longer there emotionally and physically. He also conceded not to having made any attempts to recandle their marriage by way of counseling or otherwise. The court therefore can draw an inference that it is more probable that upon the Defendant's arrival in January 2019 he indeed left their rented household at the time due to love being lost.

[23] During the Plaintiffs examination in chief he could not give an account of what he contributed towards their marriage whilst they were together. In all probabilities he brought the groceries once because the Defendant only moved permanently to Johannesburg in January 2019. Thereafter the Plaintiff left their common household. Peculiarly, the Plaintiff was only asked pertaining to his employment in 2015 and the pension that he received in 2018. The Plaintiff did not take this court into confidence as to how he has been sustaining himself/livelihood since 2018 which is the time when he lost his employment with Toyota. For all we know the Defendant could be

employed or running a business which the Defendant will also be entitled to. It is highly improbable that he is leaving on nothing bearing in mind that he also was able to employ the services of a legal practitioner to represent him in these proceedings which requires fees as it was never his evidence that his divorce was done *pro bono*.

[24] The Plaintiff also failed to make any contribution if at all to the maintenance of his step children or even the one child he purported to know of. The Plaintiff simply ignores his legal obligation which is against the best interest principle¹. Under common law a step-parent has no legal duty of support in respect the step children. In *Heytek v Heystek*² it was held that a step-father who is married in community of property has an obligation to maintain the step child in his capacity as administrator of the joint estate and his control of the common purse.³ The emphasis on this judgment was the fact that the parties are married in community of property and it follows that such an obligation to pay maintenance may not follow when such parties are divorced. The step children's upbringing and maintenance is the responsibility of the Defendant. The Plaintiff's failure to provide any explanation not to maintain financial or otherwise the minor/s is unfathomable except to say that the he took an advantage of the Defendant.

[25] In my view, the Plaintiff 's version cannot be accepted as he could not produced evidence to substantiate his evidence. He failed to prove any meaningful contribution towards the joint estate be it emotionaly ,physically or otherwise. No contribution was even pleaded by the Plaintiff in his particulars of claim. Failure to prove what his earnings were before retrenchment and what he did to provide for the Defendant and the minor children /child is proof that he will be

¹ Section 28 of the Constitution and section 7 of the Children's Act, 2005.

² *Wilkie-Page v Wilkie-Page* 1979(2) SA 258 (R) and *Mentz v Simpson* 1990 (4) SA 455 (A) at 460 C– D.

³ *Heystek v Heystek* 2002 (2) SA 754(T) at 756E – I. This case was distinguished in *MB v NB* 2010 (3) SA 220 (GSJ) which was a divorce matter and the obligation to pay was contractual rather than an issue of maintenance and not a duty to support pendente lite.

unduly benefitted from the proceeds of the pension. Tritely although a court has a wide discretion when considering whether to grant forfeiture or not, considerations of fairness and equity are not relevant⁸, nor can it be granted because one spouse's contribution was greater than the other's⁹. However in this instance the Plaintiff deliberately did not take care of the Defendant and the four minor children.

[26] The Plaintiff further argued that the counterclaim for a forfeiture of benefits was not pleaded by the Defendant therefore she is not entitled to seek same before this honourable court. However, the counterclaim is there and as one of the prayers sought by the Defendant, she does seek a forfeiture of benefits against the Plaintiff. Although, the counterclaim did not plead the forfeiture with particularity but she did pray for same. The remedy that was available to the Plaintiff at the time was to raise an exception in line with rule 23 of the uniformed rules of court. However he opted not to do so, this means the Plaintiff waived his right to argue the vagueness of the forfeiture pleaded. The Plaintiff should have raised the complaint and not pleaded⁴. He opted to answer to this prayer as if pleaded with precision. It was clear to the Plaintiff that the Defendant was seeking a forfeiture of benefits against him. It cannot at this stage be argued that it was not pleaded. Pleadings are read as a whole not in isolation and I am satisfied that the Defendant made out a case for same.

[27] Insofar as the reasons the parties parted ways is concerned being the fact that the Plaintiff was dishonest about the four children whereas the Plaintiff knew of one child in all probabilities is not true. The Plaintiff clearly lost love and affection for the Defendant for other reasons. It is not probable that the Plaintiff will go to an extent of marrying the Defendant without knowing about the four minor children. Infact if that was the case she would have not moved with the children to Johannesburg.

⁴ An exception is a pleading, and in terms of Rule 23(4) whenever an exception is taken to any pleading, no plea, replication or other pleading shall be necessary. In terms of this sub-rule it will not be necessary for a party to plead once an exception is filed. That exception must be dealt with to finality before a party will be required to plead or file a replication.

[28] These two versions lead by the parties are mutually destructive and logic dictates that where there are two conflicting versions or two mutually destructive versions both cannot be true only one can be true consequently the other must be false⁵

I find that the defendant was overall a more reliable witness as many important parts of the her version were not disputed by the Plaintiff .

CONCLUSION

[29] I therefore accept that the marriage relationship has broken down. Thus, given the short *de facto* duration of the marriage and the reasons for the breakdown inclusive of the contributions made by the Plaintiff, I find that the Plaintiff will be unduly benefitted if an order for forfeiture of benefits is not granted. Accordingly the Defendant retains sole guardianship of the four minor children as she is the primary care giver in the absence of their father who has since demised.

[30] The order that I grant is the following:

1. A decree of divorce is granted and the marriage between the Plaintiff and the Defendant is hereby dissolved.
2. A forfeiture order is granted in favour of the Defendant against the Plaintiff in respect of the Defendants pension held with the Government Employees Pension Fund.
3. The Plaintiff shall forfeit in full his entitlement to a share in the Defendants pension interest held with the Government Employees Pension.
4. Each party to pay his or her own costs.

⁵ Stellenbosch Farmers Winery Group Ltd and another v Martell & Cie SA and others 2003 (1) SA 11 (SCA) para 5.

**NHARMURAVATE, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

For the Plaintiff: Mr. Sehunane

Instructed by : Sehunane Inc Attorneys

For the Defendant : Mr. Bila

Instructed by : Bila Mashamba Attorneys

Date of Judgment: 24 June 2024