IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) REVISED

CASE NO: 30918/2016
2/3/2018

In the matter between:

J P F **PLAINTIFF**

and

N M F (BORN C) **DEFENDANT**

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] Prior to the commencement of this trial the parties had agreed that the only issue for determination herein was the question with regard to the forfeiture

of the patrimonial benefits by the defendant as prayed for by the plaintiff in his particulars of claim.

[2] Despite the parties disagreeing with regard to the reasons for the breakdown of the marriage relationship, they are *ad idem* that the marriage relationship between them has irretrievably broken down and that a decree of divorce be granted.

[3] Accordingly, the issue for determination is whether, if the order for forfeiture is not made, the defendant will in relation to the plaintiff be unduly benefited.

BACKGROUND

[4] The plaintiff and the defendant entered into a civil marriage in community of property on 15 January 2010, which marriage still subsists. In April 2016 the plaintiff instituted divorce proceedings against the defendant claiming a decree of divorce and, *inter alia,* forfeiture of the patrimonial benefits of the marriage by the defendant, including any interest which the defendant has or may have in the immovable property, which property is situated at [….] Pretoria, Gauteng, hereinafter "the property". In her counterclaim, the defendant claimed for the division of the joint estate.

[5] Prior to the conclusion of the civil marriage, the defendant fell pregnant with the plaintiff's child which unfortunately resulted in a still birth. However, such pregnancy led to the parties moving in together in 2005. Following the above the parties entered into a customary union in August 2008.

COMMON CAUSE

[6] The following is common cause:

1. That the plaintiff had acquired the property in June 2000 with his now ex-wife, A F whilst the two were still married to each other;

2. That to date the property is paid up and its current market value is estimated at R150 000-00.

3. That whereas originally the property was an RDP house, to date same have been improved due to renovations that had taken place;

4. That the defendant contributed financially towards such improvements.

THE EVIDENCE

[7] Both parties testified and neither of them called any witnesses.

[8] In summary the plaintiff's evidence is as follows:

8.1 With regard to the property, he testifies that before he entered into the marriage relationship with the defendant he owned the property which he had acquired on 12 June 2000. He had purchased same together with his ex-wife, A F . As at 13 June 2017 the said property's market value was R150 000-00 as per the Valuation Report produced during the trial. As to why he instituted the divorce action, he testifies that it was because of the defendant who had deserted their marital home in December 2015, only to return three months thereafter. He further testifies that there was *"no other person involved, it was Just the two of us",* meaning that neither party is guilty of adultery. He denies that he ever had any extra-marital affair with any of the defendant's friends nor with any young girl as was alleged by the defendant.

8.2 He further denies that he ever called the defendant barren due to her failure to carry their two still-born kids to term, saying the loss of their stillborn children was just as painful to him as it was to the defendant. He concedes that at the time of the defendant leaving their matrimonial home, the relationship was not good and that there were physical assaults between the parties. The defendant would at times just leave their common home, sometimes overnight without giving any explanation. The defendant's explanation about her disappearance would at times be that she was going to her parental home.

8.3 However, regarding the defendant's alleged absence from the common home from Fridays through Saturdays prior December 2015, under cross-examination the plaintiff conceded that the reason for same was due to the fact that both of them attending their common Apostolic church and that they therefore had to be away from home as a result thereof to perform some rituals.

8.4 Under cross-examination, he admitted that the police were once called in on 22 November 2017 at the instance of the defendant after him refusing her access in one of the rooms in the property.

[9] In summary the defendant's evidence is as follows:

9.1 In her evidence, the defendant admits that she did indeed leave the marital home in December 2015 but that on 25 December 2015 she was still there. She testifies that the conditions in her marriage at the time were unbearable, which, in part, were caused by the extra-marital affairs the plaintiff had with some of her friends and young girls. However she testifies that she did not desert the common home *per se* since the plaintiff had agreed thereto. Though this was not put to the plaintiff, the defendant testifies that she went back to the common home in January 2016 by which time the plaintiff had since changed the house locks, thus denying her access into same and even refusing to share the main bedroom or even a bed with her. The plaintiff would even call the names due to her inability to give him children whom he so desperately needed. *Re* the property's improvements, she testifies that in 2009 she started with the house renovations after securing a bank loan of approximately R100 000-00, which loan she had to repay all by herself. She paid the labourers and also bought some furniture. Under cross- examination, she stated that since at the time of securing the R100 000-00 loan she had no other accounts to pay, that's how she managed to pay same back. She denies that her benefitting from the matrimonial benefits would be undue since, *inter alia,* she even attended to

fix the property roof which at the time of her arrival at the property, was leaking and that, also, the property itself was in a dilapidated state. She also attended to doing the gate, the walls and the tiles of the property. She denied ever assaulting the plaintiff.

LEGAL POSITION

[10] The legal principles applicable to a claim for forfeiture are laid down in section 9(1) of the Divorce Act 70 of 1979 , hereinafter "the Act", which provides as follows:

> *"When* a *decree of divorce is granted on the ground of the irretrievable break-down of* a *marriage the court may (my emphasis) 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".*

[11] Accordingly, the three factors governing the value judgment to be made by the trial Court in terms of s 9(1) are limited to the following:

11.1 The duration of the marriage;

11.2 The circumstances which gave rise to the breakdown of the marriage; and

11.3 Any substantial misconduct on the part of either of the parties.by one or both of the spouses.

[12] As stated by Van Coller AJA (as he then was) in the matter of *Wiiker v Wiiker 1993 (4) SA 720 (A) at 727 D -F,* the Supreme Court of Appeal (SCA), when considering the question whether proof of 'substantial misconduct on the

part of either of the parties' was an essential requirement for a forfeiture order, held that it was not since the context and the subject-matter of s9(1) made it abundantly clear that the legislature never intended the three factors mentioned in the section to be considered cumulatively.

[13] Regarding the approach that needed to be followed by the court hearing the appeal ('the matter in our/ this instance) in respect of a forfeiture prayer, the SCA stated the following:

> *"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".*

[14] In ***Botha v Botha (393/04) {20061 ZASCA 6; 2006 (4) SA 144 (SCA); £200612 All SA 221 (SCA) (9 March 2006),*** Van Heerden JA held that the trial Court may not have regard to any factor5. other than those listed in s9(1) in determining whether or not the spouse against whom the forfeiture order is claimed will, in relation to the other spouse, be unduly benefited if such an order is *not* made.

[15] **SUBMISSIONS**

15.1 **Benefit:**

In her written closing arguments, plaintiff's counsel submits that the fact that the plaintiff's house was already paid off at the time of the defendant's departure from

the common home, coupled with the fact that during her living thereat , that is the common home, she did not contribute much except for the bricks which were used to build the wall around the property, should weigh against the defendant. She submits therefore that the property in question does qualify as a 'benefit' in terms of s 9(1) as cites Schreiner J (as he then was) in the matter of **Smith v Smith 1937 WLD** 126 at 127-8 where the following was held with regard to what the concept of 'benefits' by stating the following:

> *"What the defendant forfeits is not his share of the common property, but only the pecuniary benefit that he would otherwise have derived from the marriage.... It is really an order for division plus an order that the defendant is not to share in any excess that the plaintiff may have contributed over the*

15.2 She further submits that a *'benefit'* as envisaged in section 9 of the Act includes what the parties owned at the time of the marriage.

15.3 She further cited the matter of *Engelbrecht v Engelbrecht 1989 (1) SA 597 (C)* where the court held, in dealing with factual determination, 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".*

15.4 She further submitted with regard to the above the court can order that a percentage of the estate or an asset be forfeited, as was done in *Singh v Singh 1983 (1)* SA *781 (C).*

15.5 The defendant's counsel submits that in *casu,* the plaintiff has failed to prove the nature and extent of the benefit

DURATION OF THE RELATIONSHIP

[16] With regard to the above, plaintiff's counsel cited the matter of *Singh supra* where the parties had been married for 22 years. The plaintiff husband had alleged that the wife had been away from the common home overnight on 73 occasions, had been intimate with other men *" and had committed adultery with one of them"* (sic). The further allegation was that she had neglected her marital duties. The wife denied all these allegations, stating that she only left the common house as a result of the plaintiff's treatment of her. She admitted the adultery allegations but stated that she committed same only later. Regardless, on evidence, the court found her misconduct to be "substantial" , which outweighed the fact that the marriage had lasted for 20 years. As a result, forfeiture was decreed. In *casu,* the plaintiffs counsel submits that the court should regard the seven year period as short, which submission the defendant's counsel refutes, arguing that the period establishing the parties' "duration" should be back-dated to 2005, when they were cohabiting.

[17] **SUBSTANTIAL MISCONDUCT AND REASONS FOR THE BREAKDOWN**

In the matter of *Wiiker supra* the Supreme Court of Appeal stated that although misconduct was no longer a requirement for obtaining a forfeiture order, the introduction of no-fault divorce did not do away with fault as a factor in respect of forfeiture orders.

However, plaintiff's counsel cited what was held in the matter of *Binda v Binda 1993 (2)* SA *123 (W)* that it ls not essential for a claimant to prove substantial misconduct before a forfeiture order can be granted. However, as stated above she submits that but for the defendant's departure from the common home for a period of three months, the plaintiff would not have instituted these divorce proceedings.

ANALYSIS

[18] With regard to the property in question, I must state that I do find same to constitute a benefit as submitted by plaintiff's counsel. It must further be borne in mind that the plaintiff admits that whilst the parties lived together in the common home, the defendant contributed to the matrimonial joint expenses to the extent that her salary allowed her to as part of their agreement.

[19] It must further be noted that the defendant also conceded that she does own a property.

[20] From the uncontroverted evidence of both parties, the defendant made the following contributions whilst still living at the common home:

1) Towards the improvement of the property, the defendant bought the building materials which the plaintiff estimated to be approximately R15 000-00 to R20 000-00 whereas she stated it was for approximately R100 000-00;
2) She bought groceries;
3) She kept the common home and would also cook; and
4) She contributed towards the parties' white wedding.

[21] From the plaintiff's counsel's submissions, it is evident that the nub of plaintiff's forfeiture claim is based on the following:

1) the defendant's departure from the marital home which, she argues, bordered on substantial misconduct, and
2) the fact that the defendant contributed very little financially towards the property's renovations and the general joint expenses of the marriage. She argues that the estimated R15000-00 to R20 000-00

contribution by the defendant is not significant.

[22] Plaintiff's counsel also disputes the defendant's alleged contribution of approximately R100 000-00 from the loan she testified she had secured. To buttress her argument, she further submits that given the defendant's then monthly salary which was arguably very little, it is highly improbable that the defendant could have even qualified for a loan that much.

[23] In respect of the above argument by plaintiff's counsel, I am not persuaded, especially when one has regard to *Wiiker supra,* where the SCA criticized the trial court's finding that *' it would be unfair to permit the appellant husband to share in the respondent wife's estate agency business while he had made hardly any contribution towards its management, administration and profit-making'.*

[24] The SCA went on further in the above cited *Wiiker* matter in response to the trial Court's above finding and held that *"the finding that the appellant would be unduly benefited if* a *forfeiture order was not made,* was *therefore based on a principle of fairness. It seems to me that the learned trial Judge, in adopting this approach, lost sight of what* a *marriage in community of property really entails.... The fact that the appellant is entitled to share in the successful business established by the respondent is* a *consequence of their marriage in community of property. In making* a *value judgment this equitable principle applied by the Court* a *quo is not justified. Not only is it contrary to the basic concept of community of property, but there is no provision in the section for the application of such* a *principle..... The benefit that will be received cannot be viewed in isolation, but in order to determine whether* a *party will be unduly benefited the Court must have regard to the factors mentioned in the section. In my judgment the approach adopted by the Court* a *quo in concluding that the appellant would be unduly benefited should* a *forfeiture order not be granted was clearly wrong'*

[25] It is common cause that the thrust of the plaintiffs argument is that to the

extent that the defendant did not contribute equally to the joint expenses, in particular the property renovations, that that should disqualify her from benefiting half the proceeds of the matrimonial benefits upon the dissolution of the marriage. She is of the **view** that anything less will benefit the defendant unduly.

[26] What I further find is that plaintiff's counsel fails to appreciate that the contribution towards the joint estate *per* se was never viewed by the legislature as a primary consideration, no less a consideration at all. I am inclined to find as was held by the SCA in the matter of *Wiiker supra* that the extent of the contribution or no contribution at all was never intended by the Legislature as a factor to be considered in instances of this nature. I also find in accordance with the reason held by the SCA in *Botha supra* that the trial court must shy away from considering factors that were never prescribed by the Legislature.

[27] Having stated the above, when one considers the statutory factors to be taken into account by the court in making a forfeiture determination, can it be said that from the evidence, the defendant falls foul of any? When one has regard to the issue of the duration of the marriage, it is common cause that as early as August 2008 the parties were married in a customary union which again was followed by a civil union in 2010, having been in a relationship since 2005 and moving in together in 2005. To date, the parties have been married for a period of 9 years from the date of the customary union.

[28] Regarding the counter-allegations *re* issues which both parties raise as the reason for the breakdown of the marriage, it is my view that there is nothing substantial on the part of the defendant which qualifies as such. What I find as more of a probability is what was testified to by the defendant that her failure to bear kids in the marriage most probably led its breakdown due to the plaintiff's anger and disappointment at such failure. I am of the further view that a further probability is that the defendant left the common home around December 2015 due to the fact that same was already broken down. I am therefore not

persuaded that the defendant's departure was the catalyst which led to the institution of the divorce proceedings by the plaintiff, rather that taking into account the totality of the evidence, the defendant's traction just gave way to the inevitability of bringing to a halt the already irretrievably broken down marriage relationship.

[29] Another major consideration to be made is whether the defendant will be benefited unduly should a forfeiture order not be made. Despite it being held by the SCA that contribution towards the joint estate by a party is not a requirement *per se,* one cannot discount the fact that the plaintiff himself conceded that the defendant's financial contribution was, *inter alia,* in respect of the household groceries and that such contribution was as per agreement between them. The plaintiff further conceded that, to the extent of her financial means, the defendant did contribute to the joint estate. I understand this concession to mean that whatever financial means the defendant had, she withheld nothing of same and thus contributed to the marriage's material and financial needs.

[30] The above therefore bring me to the following conclusions:

[31] Regarding the question why if the defendant will benefit unfit unduly in the event the patrimonial benefits·, including the property, are shared equally between the parties, the plaintiff replied in the affirmative, further stating that he holds this view because at the time the defendant moved in with him, the RDP house {'the property') was already paid off. I find that this basis is not sustainable legally and therefore ought to be disregarded. Furthermore, despite the fact that lack of contribution to the marital estate is not a statutory requirement, I find that the defendant's contributions to the renovations of the property, that is, in the form of the cooking and the cleaning of the house, the financial contributions she made, whether of R20 000-00 odd as alleged by the plaintiff or of R100 000-00 as alleged by herself, entitle her to benefit from the patrimonial benefits of the marriage.

plaintiff. It is trite that costs follow the result. Counsel for the plaintiff submits that an ordinary costs award should follow in favour of the plaintiff. I am of the view that in this instance costs should follow the result.

[36] In the result I make the following order:

ORDER

1. A decree of divorce.
2. Division of the joint estate.
3. Costs are awarded to the defendant.

L Vuma
Acting Judge of the High Court
Gauteng Division, Pretoria

Head on: 4 December 2017
Judgment delivered: 2 March 2018

Appearances

For Appellant: Adv. N. Fourie
Instructed by: Shapiro & Ledwaba Inc.

For Defendant: Adv. K Mhlanga
Instructed by: Mahlangu Mashoko Inc.