

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 33568/20

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES / NO

DATE: 04/09/2023

SIGNATURE OF JUDGE:

In the matter between:

B.L. S T

PLAINTIFF

and

M.J M

DEFENDANT

JUDGMENT

FLATELA J

[1] The Plaintiff instituted divorce proceedings against the Defendant. The Plaintiff sought *inter arlia*, division of the joint estate including 50% of the Defendant's

pension fund interest held by Government Employees Pension Fund (**GEPF**). The Defendant has filed a plea and counterclaim wherein she sought an order of forfeiture of benefits of the Plaintiff's interest in the GEPF and for an appointment of a liquidator/receiver to determine and realize the assets of the joint estate.

[2] The parties agree that the marriage between them has irretrievably broken down.

[3] This court is called to determine whether the Plaintiff will be unduly benefitted if the order for forfeiture is not granted. The onus is on the Defendant to prove on a balance of probabilities that the Plaintiff will be unduly benefitted if the order for forfeiture is not granted.

Common Cause facts

[4] The parties were married to each other by customary rites on 22 September 2018 and the marriage still subsists. The Plaintiff and the Defendant share two minor children, KT born in 2014 and OT born in 2019.

[5] The parties acquired immovable property situated at Insimbi street, Clayville, Gauteng. The parties also have a few motor vehicles between them.

[6] The Plaintiff moved out of their common home on or about 31st January 2020.

[7] The marriage relationship has irretrievably broken down.

Evidence

The Defendant's evidence.

[8] The Defendant testified that she is a Traffic Officer employed by Road Traffic Management Corporation (**RTMC**) as an examiner of vehicles. The Defendant testified that she married the Plaintiff in customary rites. The lobola negotiations

between their respective families took place during 2017 but the marriage celebrations took place on 22 September 2018, which is the date of the customary marriage. Prior to the marriage, the parties have been living together as partners in a courtship since 2011. The Defendant has two children with the Plaintiff, KT and OT born in 2014 and 2019 respectively. KT was born in 2014 before marriage.

[9] The parties have immovable property and five motor vehicles comprising of 2 (two) light vehicles and 3 (three) minibuses.

The Plaintiff's conduct.

[10] **Extra Marital Affairs** – The Defendant testified that the Plaintiff cheated on her with various partners. When she was one month pregnant with OT, she learnt that the Plaintiff was involved in extramarital affairs and that the Plaintiff fathered a child with his mistress. One of his mistresses by the name of Constance has been harassing her by calling her mobile phone and emotionally abusing her and telling her to move out of the matrimonial home. The Defendant further alleged that she has learned that the defendant has two more children with other people born during marriage. On 31 January 2020, four months after OT was born, the Plaintiff moved out of the common home.

[11] **Maintenance of the Minor Children** – The Defendant testified that the Plaintiff abandoned his children ever since he moved out of the matrimonial home. From 31 January 2020 to date, he has never contacted his children even though he was never denied access to his kids. The Defendant was solely responsible for the provision of the children's subsistence and maintenance needs until she sued the Plaintiff for maintenance. In December 2021, the Defendant was ordered by the Maintenance Court to pay an amount of R2000 per child and 50% towards other expenses.

[12] **Domestic Violence**- The Defendant testified that on 12 July 2020, the Plaintiff became violent towards her and physically abused her.

[13] **Bond Repayment** – The Defendant testified that the parties agreed that the Defendant would pay R8000 towards the bond repayment. The amount would be deducted monthly by the bank and the Plaintiff would refund her by transferring an amount of R5000 every month. The Plaintiff stopped paying the bond after moving out of the common home. The Defendant has since been responsible for the bond repayments after the Plaintiff left the common home.

[14] **Plaintiff's Pension Fund** – The Defendant testified that both parties were employed by the Road Traffic Management Corporation (**RTMC**) on 15 April 2011. By virtue of their employment, they were members of the GEPF from 15 April 2011. In August 2013, the Plaintiff resigned to take up another job and he cashed out his pension fund. The Defendant testified that the Plaintiff did not share his pension payout with her. He used it solely for his needs.

[15] **Movable properties** – The Defendant testified that they have five motor vehicles, consisting of 3 minibuses describe as **JJW...**, **FBL...** and **JXM...** and 2 light motor vehicles. The three minibuses were acquired for business purposes to be used as public transport for passengers at a fee.

[16] The Defendant testified that the Plaintiff is a taxi owner operating under Standerton Taxi Association described as The Standerton Taxi Group (Pty) Ltd (STG). The Defendant testified that in 2017 the STG was contracted by Eskom Rotec Industries Ltd to provide 17 minibuses (10 Toyota GLS and 7 Mercedes Benz 22 sprinters) for transportation of its workers from 2017 for a period of 5 years commencing from 4 June 2017. The STG formed a scheme upon which members were to avail a minibus for a period of 5 years and will be paid a fee of R14 000.00 monthly. After discussing the issue, the Plaintiff and the Defendant resolved to participate in the scheme. In securing this vehicle, the Plaintiff requested the Defendant to assist with a contribution to raise the requisite amount of deposit, the Defendant contributed about R70, 000.00 towards securing this vehicle. The Plaintiff was listed as one of the beneficiaries of the scheme to provide a Toyota GLS. The cars were to be secured but they were not going to registered in beneficiaries' names but in the name of Mr Mbonani, the chairperson of STG.

[17] **JMX**-The Defendant testified that she contributed an amount of R50 000 towards deposit for the purchase the minibus JXM. Her testimony is that at minimum, before deductions, these vehicles would make proceeds of between R700.00 and R900.00 per day and they would work for six days a week and sometimes for seven days a week. From the time the Plaintiff moved out of the house, the Defendant never received any proceeds, not for her own benefit nor for the benefit of the minor children from any of the three vehicles, which are vehicles of the joint estate.

[18] Since the parties were both working in Gauteng, the drivers would cash the money to her father-in-law, and they would travel every weekend to take the money from the father-in-law. After the death of her father-in-law the money was deposited directly into the Plaintiff's bank account. The taxis were making a monthly profit of R16 000, R11 000 and R4000 respectively.

[19] The Defendant testified that she did not have access to the account, but the Plaintiff would give her his bank card when she needed to buy something for the household.

[20] **Loans** – The Defendant testified that the Plaintiff has made loans without informing her. She was informed by one Khoza that the Plaintiff loaned an amount of R120 000 (one hundred and twenty thousand rands). During the maintenance court hearing, the Plaintiff informed the court that he took a loan of R170 000 (one hundred and seventy thousand rands) from Khoza.

[21] The Defendant testified that two weeks before the Plaintiff moved out of the common home two of the minibuses were transferred in the name of a certain entity called Nthetsopele Holdings (**Nthetsopele**). She later learnt that this organization belonged to Mr Khoza and the Defendant cousin, Ms. Mokoena. The Plaintiff did not inform the Defendant of these changes. The Defendant testified that in May, the Plaintiff transferred to her an amount of R5000 from the Nthetsopele account. She believes that this entity is another vehicle used by the Plaintiff to conceal his assets.

The Plaintiff's evidence

[22] The Plaintiff testified that he was married to the Defendant in terms of customary law. The lobola negotiations took place on 11 November 2017 and they celebrated their union on 22 September 2018. He confirmed that he has two children with the Defendant, the eldest is 9 years and the youngest is 4 years. They are both staying with the Defendant. He has not seen them since January 2020, this being when he moved out of the common home. He does not know how much the school fees cost as the Defendant has all the information regarding the children. He testified that the final maintenance order granted ordered that he should pay R2000 for each child and 50% of other expenses.

[23] **Pension Payout** – the Plaintiff testified that he was previously employed by the RTMC, and he resigned and cashed his pension payout in August 2013. At that time, he was not married to the Defendant, and they were not staying together full time; instead, they were visiting each other as boyfriend and girlfriend.

[24] **Immovable Properties** – The Plaintiff testified that in 2014 they bought a house in Clayville. He made his contributions towards the bond repayments by paying R6000 from the Standerton Taxi Association project. From 2017 to 2020 they were paying the bond together with the Defendant. He conceded that after he moved out of their common home, he made no contributions towards the bond repayments. The Plaintiff testified that he together with the Defendant also own rental rooms in QwaQwa close to the Plaintiff's home. He believes the land in which the rooms are built belongs to the neighbors of the Defendant's parents. He does not know the number of rooms in QwaQwa as he left the common home when the project was still in a plenary stage.

[25] **Vehicles** – The Plaintiff testified that he owns three (3) cars, a Golf, Polo, and a Toyota Quantum JJW. The Plaintiff confirmed the Standerton Taxi Association deal but stated that each beneficiary of the scheme had to raise an amount of R100 000 for the Association to deposit new vehicles for the project. He testified that he did not have the required amount as he was able to only raise an amount of R60 000 (sixty

thousand rands only). He paid an amount of R60 000 to the Taxi Association hoping to raise R40 000 in time to be part of the scheme. He failed to raise the R40 000, and he was removed as a beneficiary. The Plaintiff did not inform the Defendant that he was no longer a beneficiary in the scheme.

[26] The Plaintiff testified that there was shortage of vehicles in the scheme and the Association contracted one of his minibuses (FBL) for the project for a period of 5 years from June 2017. The R60 000 deposit he paid toward acquiring the minibus was refunded to him by the Taxi Association. He saved it and used it for house renovations. The Defendant was not aware of this. He used the profits earned from the scheme for household needs.

[27] **Profits from other minibuses** – the Plaintiff testified that the taxi business was affected by Covid-19 pandemic, and they stopped working or did not go to work. He used the profit from all other taxis to pay for the JJW, the maintenance of taxis and payment of drivers. The Defendant was not aware of how the profits were used.

[28] **Loans** – the Plaintiff testified that in 2019 he took a loan of R170 000 from Mr. Khoza and R100 000 from Absa bank to purchase the JXM minibus. The Plaintiff testified that the Defendant was not aware of these loans, but she was informed by Khoza late in 2019 if not in early 2020. The Plaintiff testified that he failed to repay Khoza's loan because he had issues that needed money and he could not pay him back. Khoza then took possession of the two minibuses, the JXL and FBL and he registered them in Nthetsopele. The Plaintiff testified when Khoza met the Defendant to inform her about the loan and to discuss the failure of the Plaintiff to repay the loan, the Defendant and Khoza agreed that Khoza should take possession of the cars if the Plaintiff fails to repay him his loan. Nthetsopele belongs to Khoza and the Plaintiff's cousin Ms. Mokoena. The Plaintiff's cousin is Khoza's business partner.

[29] The Defendant further testified that he did not tell the Defendant about all these business transactions because he does not discuss business with the Defendant.

[30] **Extra-Marital Affairs and Domestic Violence** – regarding the extra-marital affairs allegations, the Plaintiff laughed when confronted about them by his own counsel. However, he denied cheating on the Defendant. He conceded that he had an extra marital relationship after he moved out of the common home. He does not regard this relationship as cheating on the Defendant. He denied physically abusing the Defendant.

Legal Framework

[31] A claim for the forfeiture of benefits is governed by Section 9 of the Divorce Act No. 70 of 1979, which provides for the forfeiture of patrimonial benefits of marriage. A patrimonial benefit is a benefit that accrues to a party's interest in the assets of the estate of the marriage by virtue of the marriage.

[32] Section 9(1) provides as follows:

‘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.’

[33] The entitlement to a half share in the pension interest of the other spouse is governed by ss 7(7) and 7(8) of the Divorce Act. It provides:

‘7(a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled; the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.’

[34] In *Engelbrecht v Engelbrecht*¹ it was held that “the court has the discretion when granting a divorce on the grounds of irretrievably breakdown of the marriage or civil union to order that the patrimonial benefits of the marriage or civil union be forfeited by one party in favour of the other. The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefitted. The court has a wide discretion, and it may order forfeiture in respect of the whole or part only of the benefits”.

[35] In *Wijker v Wijker*² the Appellate Division set forth the following principles when it comes to the application of s 9(1) and forfeiture orders.

- (a) The party seeking an order for forfeiture of benefits does not have to prove the existence of all three factors in s 9(1) cumulatively.³ The Court needs to ask itself whether one party will be unduly benefitted if an order of forfeiture was not made, and to answer that question, regard should be had to the factors mentioned in s 9(1).

- (b) *Wijker* says, ‘the first step is 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 the trial Court after having considered the facts falling within the compass of the three 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.’⁴

¹ 1989 (1) SA 597 (C)

² *Wijker v Wijker* 1993 (4) SA 720 (A).

³ *Ibid* at 721F

⁴ *Ibid* at 721G-H

- (c) Furthermore, according to *Wijker*, notwithstanding the introduction of the no-fault principle in divorce, a party's misconduct may be taken into account in considering, in terms of s 9(1), the circumstances which gave rise to the breakdown of the marriage. Additionally, '*substantial misconduct may include conduct which has nothing to do with the breakdown of the marriage and may for that and other reasons have been included as a separate factor. Too much importance should, however, not be attached to misconduct which is not of a serious nature.*'⁵ It must be found that it is so obvious and gross that it would be repugnant to justice to let the 'guilty' spouse get away with the spoils of the marriage.

Discussion

[36] During the trial, I found the Plaintiff to be wanting in many respects. He did not give honest and credible evidence; instead, he adopted an evasive and dismissive stance whereas the Defendant gave honest, credible, and reliable evidence.

Circumstances that led to the breakdown

[37] On circumstances leading to the breakdown of the marriage, this falls on the Plaintiff's conduct, having moved out of the common home, just shortly four months after OT was born. The Defendant's allegation that the Plaintiff had an extra marital affair with one Constance stood undenied by the Plaintiff. The Plaintiff brushed off the extra marital affairs, however he conceded to having an extra-marital relationship after he moved out of the common home with the Defendant. On his own account, he does not consider this as cheating. He did not take the Court into his confidence either about why he had moved out of the common home just four months after the birth OT. On the face of it, it seems as if it is indeed the Plaintiff's extramarital relations that *inter alia*, led to the breakdown of the marriage.

⁵ Ibid at 721G-H.

Duration of the marriage

[38] In *Matyila v Matyila*⁶, the court stated the following:

‘The meaning of the words “duration of the marriage” as appearing in s9(1) aforesaid is clear. It means no more nor less than the period during which the marriage has, from the legal point of view, subsisted, namely from the date of marriage to the date of divorce or, at the very least, to the date of institution of divorce proceedings. This is in accordance with the primary rule of interpretation that words should be understood in their ordinary meaning.’

[39] In this regard, I consider the marriage of the parties to have lasted for 1 year and 10 months, this counting from 2018 September to July 2020, which is date the Plaintiff instituted divorce proceedings.

Substantial misconduct

[40] The pertinent allegations by the Defendant to find substantial misconduct on the part of the Plaintiff are that:

- a. **The Plaintiff’s extramarital affairs** – the Plaintiff conceded to having an extra marital relationship after the separation, but he denied the Defendant’s allegations about having two children with other partners during their marriage. The Plaintiff admitted to having two children prior to his marriage to the defendant.
- b. **Maintenance of the minor children** – on his own account, the Plaintiff severed contact with his minor children although he was not denied access to them. He last saw them when he moved out of the common home and had to be ordered by Court to pay maintenance. The Defendant alleged that the only time the Defendant saw baby OT was during at a DNA testing laboratory at his insistence. Under cross

⁶ 1987(3) SA 230 (W) at page 236 B-C.

examination, the Plaintiff admitted that he has not celebrated the children's birthdays because he does not want to see his children in the presence of their mother until such time the Defendant change her attitude towards him.

- c. **Bond repayments** – after he moved out of the common home the Plaintiff stopped paying his share towards the bond despite the parties' agreement to share the costs of the bond.
- d. **Taxi business** – the Defendant was kept out of the loop about the business dealings of their minibuses fleet, nor did she have access to the accounts despite having contributed to their purchase. The Plaintiff also did not inform her that he was no longer a beneficiary of the taxi association scheme.
- e. **Loans** – Furthermore, the Plaintiff, without the Defendant's knowledge, disposed of some of the fleet to Khoza as collateral and repayments for loans which he took from Khoza, again without the knowledge of the Defendant. His reason for this is that he does not discuss business dealings with the Defendant. He also took a loan from ABSA, for reasons unbeknown to the Defendant, let alone with her consent. It needs be stated that to put the joint estate in debt of this magnitude, consent of the Defendant is by law, should have been obtained.

Undue benefit

[41] In *Z v Z*⁷, Legodi J when he was dealing with the word "undue benefit" in terms of section 9(1) of the Divorce Act, stated the following:

"[6] Cumulative consideration of all relevant factors seem to be at play in terms of subsection (1), and the court will make an order only when is satisfied that, if an order for forfeiture is not made, the one party ("guilty party") will unduly be benefited in relation to the other party ("the innocent party"). It is an exercise of discretion guided by consideration of the duration of marriage,

⁷ *Z v Z* (43745/13) [2015] ZAGPPHC 940 (18 September 2015).

the circumstances which gave rise to the breakdown and any substantial misconduct on the part of either of the parties.

[7] It is clear from the wording that of the subsection that to qualify for forfeiture, based on misconduct, such misconduct be "substantial". I understand this to mean that, it must not only be a misconduct which does not accord with the marriage relationship, but also that the misconduct must be serious. Undue benefit in my view, is also a relative term. Benefiting from one spouse's sweat, in my view, would not necessarily amount to undue benefits. To come to the conclusion of undue benefit, one would be guided by a number of factors for example, refusal to work when it is possible to do so, squandering of money and other assets of one's estate and other factors on the handling of the estate which is prejudicial to the other spouse."

[42] The parties are married in community of property. Upon marriage, the spouses' separate estates automatically merged into one estate for the duration of the marriage, and the spouses became tied co-owners in undivided and indivisible half-shares of all the assets and liabilities they had at the time of the marriage as well as the assets and liabilities they acquired during the marriage. In assessing whether an undue benefit would accrue to the Plaintiff if the forfeiture order were not to be granted, I could not lose sight of the fact that the Plaintiff has in indebted the joint estate and disposed of its assets without the Defendant's knowledge or consent. It immediately appears that he recklessly diminished the patrimony of the joint estate by transacting in clandestine, questionable business dealings. From this fact alone, it would be a gross injustice to the Defendant to depreciate her pension fund any more than the patrimonial assets of the joint estate have been diminished and indebted by the Plaintiff.

[43] From the foregoing, I find the Plaintiff to have committed substantial misconduct as envisaged in section 9(1) of the Divorce Act regard being had to the fact that he depreciated and indebted the joint estate without the knowledge nor the consent of the Defendant.

[44] On the allegation that the Plaintiff cashed out his pension fund in 2013, I did not take this allegation into consideration as the parties were not married by then. On the allegations of the Plaintiff's extramarital affairs, though I find merit to them, that too has not weighed in my judgment because as it was said in the *Wijker* case *supra*, adultery may support an allegation on the breakdown of the marriage, but it is not necessarily 'substantial misconduct' for the purposes of a forfeiture order. It must be 'so obvious and gross' that it will be repugnant to justice to let the guilty spouse get away with the spoils of the marriage.⁸ However, on the economic ruin and reckless decisions of the Plaintiff which affected the patrimonial assets of the joint estate, that I find to be substantial misconduct justifying a forfeiture order.

[45] The defendant's counterclaim succeeds.

ORDER

[46] Accordingly, I make the following order:

1. A decree of divorce is granted.
2. The Defendant's counterclaim for the Plaintiff to forfeit his share in her Government Employees Pension Fund succeeds.
3. Division of the joint estate.
4. The Defendant's prayers from paragraph (C) to (J) in her draft order are herein incorporated as orders of Court.

FLATELA L

JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 4th day of September 2023.

⁸ Singh v Singh 1983 (1) SA 787 (C) at 788H.

Appearances

Counsel for the Plaintiff:
instructed by

T Mokgoatsane
T. Motala Attorneys

Counsel for the Defendant:
Instructed by

M Mokwena
Mokwena Nkopane Inc.

Date of Hearing:

03 March 2023

Date of Judgment:

04 September 2023