

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

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



CASE NO: 10856/2021

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

20 March 2023

DATE

SIGNATURE

In the matter between:

LM M

Plaintiff

and

SS M

Defendant

JUDGMENT

NEUKIRCHER J:

- 1] This is a defended divorce action where only 2 issues require determination: a) whether the plaintiff should be granted an order that the defendant forfeit certain specified patrimonial benefits of the marriage in community of property and b) the costs of the action¹.

BACKGROUND

- 2] The parties were married to each other in community of property on 5 October 1999 and the child born of the marriage has already attained the age of majority and although he lives with the plaintiff, he is self-supporting.²
- 3] Although the specific date of the parties' separation is in dispute, as are the reasons for the breakdown of the marriage, it is common cause that by the latter half of 2004 they were no longer living together. Apart from one occasion where they discussed issues pertaining to their (then minor) child, there has been no communication between them and they have lived apart for the past 19 years.
- 4] On 2 March 2021 the plaintiff issued summons for divorce and ancillary relief against the defendant. The reasons why it took her 17 years to do so were the subject of debate during the trial but nothing much turns on this other than the fact that, by operation of law, the marriage endures until this court grants the decree terminating it. In fact, however, it is a very different picture as the marriage (at best on defendant's version) lasted less than 5 years and on plaintiff's version it lasted less than 4 years.

¹ The defendant abandoned his claim for maintenance at the hearing of the trial

² This is according to plaintiff's uncontested evidence

COMMON CAUSE

- 5] The following is common cause:
- a) the marriage relationship has irretrievably broken down;
 - b) the assets forming the subject matter of the forfeiture claim and their value are:
 - (i) the common home situated at [...] K[...] Street, M[...] Gardens, Extension [...], Gauteng valued at R837 500-00³;
 - (ii) the furniture and household effects valued at R20 370-00;
 - (iii) the plaintiff's pension interest in the Government Employees Pensions Fund (GEPP) presently valued at R216 903-00; and
 - (iv) the plaintiff's Mercedes Benz A200 motor vehicle with registration number [...] purchased in 2021 and is valued at R170 000-00;
 - c) since he left the common home the defendant has made no contribution to the plaintiff, their child or the maintenance and upkeep of the common home and even during their marriage his contribution was nominal at best.

IN DISPUTE

- 6] The plaintiff's version is that the defendant never contributed much during the time they lived together and at best, contributed "small groceries" of ± R200-00 once every 3 months. During ± 2003 the defendant went to work on the mines in Rustenburg and returned home over weekends until 2004 when he stopped returning home. The plaintiff's version was also that the defendant was physically aggressive to her on an occasion and also to her late mother who he knocked to the ground when she

³ Purchased by plaintiff prior to the parties' marriage in 1997 for R106 000-00

attempted to intercede in one of their arguments - the physical aggression was not pleaded by plaintiff and is denied by defendant.

- 7] The defendant's version is that the incident that led to the breakdown of the marriage was that in December 2003 the plaintiff went out one evening with her cousin and some friends drinking and returned home after midnight. When he attempted to chastise her, she called family members who arrived and fought with him and attempted to assault him, chased him in the house and broke windows (the latter two allegations were never put to plaintiff in cross-examination, although they are pleaded) and he fled to his parental home in fear for his life. He returned to the common home a few months later but was forced to leave once more when the same circumstances played out and he fled because he feared they would kill him - he never returned.
- 8] His version is that he did support the plaintiff and their child during the marriage – he bought groceries and furniture: the latter was also never put to the plaintiff in cross-examination.
- 9] His version was also that whilst in Rustenburg he lived with the plaintiff's parents the latter was also never put to plaintiff in cross-examination.
- 10] According to defendant, the parties finally separated in June 2004 because the plaintiff's family forced him to leave the house in fear for his life – he has never returned.

- 11] Apart from defendant's evidence regarding the furniture and groceries, he conceded that once he left the common home he paid no maintenance in regards of their child⁴ he did not maintain the common home, he did not contribute towards the bond, the utilities, maintenance or upkeep of the home or make any financial contribution at all.
- 12] The plaintiff has throughout the marriage been employed by the Department of Health. She started her career in 1995. Her pension interest is at present only R216 903-00 as:
- a) she resigned in August 2009 and received her pension payout of R803 821-78;
 - b) she was then employed in the private sector and was re-employed by the Department of Health in 2011;
 - c) in August 2020 she again resigned and took her pension monies;
 - d) in September 2020 she was re-employed by the Department of Health where she still works.
- 13] Her uncontroverted evidence is that each time her pension payout was used to pay off accumulated debts. As a result, the immovable property was finally paid off in 2020.

FORFEITURE

⁴ Which he admits in the plea

14] In her particulars of claim, the plaintiff pleads⁵ that having regard to the fact that the parties co-habitation was short-lived, the lack of any meaningful financial contribution towards the maintenance and upkeep of her, the child or the joint estate by the defendant and the defendant's misconduct as alleged, he would be unduly benefitted were this court not to order that he forfeit the benefits of the marriage.

THE LEGAL POSITION

15] 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.”

16] 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.

17] In **Wijker**, the SCA made it clear that the Legislature never intended the 3 above

⁵ And I paraphrase here

⁶ 1993(4) SA 720 (A)

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.”

- 18] It is also important to note that, 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.
- 19] Thus the first question is whether defendant would be benefitted were forfeiture not to be granted. In my view the answer must be “yes” as the defendant would receive 50% of the assets of the joint estate.
- 20] The second question is whether the benefit would be undue, and again I am of the view the answer is “yes”. 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 23 ½ years, the *de facto* position is that the parties have been separated since (at the latest)

⁷ At 727 E-F

⁸ *Wijker supra*; *Rousalis v Rouailis* 1980 (3) SA 446 (C) at 450 D-E

⁹ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) at 601

mid-2004. Since then, and on both versions, they communicated only once in the past 19 years. The defendant has also failed to make any contribution at all to the maintenance of his child by his own admission. This simply ignores his legal obligation and flies in the face of the best interest principle held so dear to section 28 of the Constitution and section 7 of the Children's Act, 2005.

- 21] The fact is also that the immovable property was acquired by plaintiff 2 years prior to the marriage and she paid the bond, the utilities and the upkeep with no contribution at all by the defendant either prior to 2004 or subsequently and it is as a result of her efforts that the property is now bond-free. None of this evidence was disputed by the defendant.
- 22] The plaintiff's motor vehicle was purchased by her in 2021 – 17 years after the parties had separated and her pension fund is also \pm 2 years old and the previous pension monies received used to pay off debts accumulated.
- 23] In my view, the defendant's version that he bought household furniture cannot be accepted as he produced no evidence whatsoever to substantiate this and his evidence on this issue did not ring true especially when seen in the light of the pleadings themselves where he fails to plead this at all. Given the fact that he neither led nor provided any documentary evidence to demonstrate that he worked in the 23 ½ years, what work he did or what his earnings were, I find his version improbable. The plaintiff version that defendant's contribution consisted of "small groceries" is, on the probabilities, more likely.

24] Insofar as the reasons the parties parted ways is concerned, I find that the plaintiff was overall a more reliable witness as many important parts of the defendant's version were never put to plaintiff in cross-examination eg the furniture issue, the fact that he lived with her parents whilst working in Rustenburg, that plaintiff's cousins chased him in the house and broke windows in 2003.

25] I therefore accept that the marriage relationship broke down as a result of the defendant's conduct.

26] Thus, given the short *de facto* duration of the marriage and the reasons for the breakdown thereof, I find that the defendant will be unduly benefitted were an order for forfeiture of the following assets not to be granted:

- a) the immovable property situated in M[...] Gardens, Extension [...], as well as the furniture and household effects;
- b) the plaintiff's A200 Mercedes Benz with registration number [...];
- c) the plaintiff's pension interest in the GEPF Pension Fund.

COSTS

27] I am also of the view that costs should follow the result.

ORDER

28] The order that I grant is the following:

1. A decree of divorce shall issue.
2. The defendant is ordered to forfeit the following benefits of the marriage in community of property in favour of the plaintiff:
 - 2.1 the immovable property situated at [...] K[...] Street, M[...] Gardens, Extension [...], Gauteng (the immovable property);
 - 2.2 the furniture and household effects at the immovable property;
 - 2.3 the plaintiff's pension interest in the GEPF pension fund;
 - 2.4 the A200 Mercedes Benz motor vehicle with registration number [...] registered in plaintiff's name.
3. Save as aforesaid the joint estate shall be divided.
4. The defendant is ordered to pay plaintiff's costs of suit.

B NEUKIRCHER
JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 March 2023.

Appearances:

For Plaintiff : Adv Z Marx du Plessis

Instructed by : Shapiro & Ledwaba Inc

For Defendant : Adv S Mchasa

Instructed by : T Chiloane Attorneys

Heard on : 6 March 2023