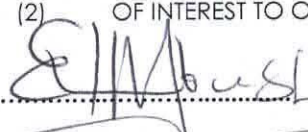




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 5483/2022

| | |
|---|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
|  | |
| E.M. KUBUSHI | |
| DATE: 19 March 2024 | |

In the matter between:

T [REDACTED] S [REDACTED]

Plaintiff

and

M [REDACTED] L [REDACTED] S [REDACTED]

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 19 March 2024.

JUDGMENT

KUBUSHI, J

Introduction

[1] The Plaintiff, T [REDACTED] S [REDACTED], issued a divorce summons against her husband M [REDACTED] L [REDACTED] S [REDACTED], who is defending the matter. The parties were married to each other in community of property on 9 July 1999. Out of the said marriage two children were born who presently are majors.

[2] In her claim, the Plaintiff sought an order for a decree of divorce coupled with an order for the division of the joint estate (which includes but not limited to the properties or proceeds of the sale of properties that are in both the Plaintiff's name and Defendant), division of all vehicles between the parties, forfeiture by the Defendant of the Plaintiff's pension benefits, in terms of section 7 of the Divorce Act,¹ as well as costs, if her claim is opposed.

[3] The Defendant is, as indicated, defending the matter. In his plea and counterclaim the Defendant does not resist the claim for the decree of divorce. He admits that the marriage relationship has irretrievably broken down, but dispute that he was the cause thereof. He furthermore, prays for the final decree of divorce on the grounds of irretrievable breakdown of the marriage, division of the joint estate in terms of the *actio communi dividundo*, division of the pension interest or benefit of the Plaintiff equally to both the Plaintiff and the Defendant, and payment of maintenance to the Defendant in the amount of R 15 000 *per month*.

[4] When the parties appeared in court for the hearing of the matter, most of the issues had been settled between them. The parties' counsel informed the Court that only the issue of forfeiture of the pension benefits due to the Plaintiff was in contestation. Counsel were in agreement that evidence should be led in respect of that issue.

Evidence

[5] In her oral evidence in Court, the Plaintiff's testimony was to the effect that the Defendant would be unduly benefited if the forfeiture order is not granted based on the following grounds:

¹ Act 70 of 1979.

- 5.1 Firstly, the assault by the Defendant which occurred in 2006. The Defendant pleaded guilty of this assault and was sentenced. The Plaintiff testified that due to this assault, she sustained serious injuries to her right hand which is now partially paralysed. The result is that she is no longer able to do certain jobs using that hand, particularly at home, and might have to employ someone else to assist her in that regard. She gave an example that she cannot cook porridge (pap), which is a staple food for the Venda people, because the 'skroef' that has been inserted in her hand attracts electricity. In order to give credence to the paralysis sustained, the Plaintiff provided a doctor's report which was handed in Court by consent.
- 5.2 Secondly, the abuse by the Defendant which she endured over the years, during the subsistence of their marriage. She gave numerous accounts of incidents where the Defendant had physically assaulted her and abused her. The abuse was mainly verbal (at times threatening to kill her) and financial.
- 5.3 Thirdly, the failure by the Defendant to share with her the proceeds of his pension pay out which the Defendant received when he resigned from his previous employment as a teacher.
- 5.4 Lastly, the Defendant's extra marital relationship with another woman during the duration of their marriage.

[6] During cross examination she conceded that by pleading guilty to the assault charge of 2006, the Defendant had shown remorse. It was also put to her, and she conceded, that except for the said assault of 2006, the financial abuse and the extra marital relationship, the other numerous assaults that happened after the 2006 incident, and the verbal abuse that she testified about, were not averred in her particulars of claim. She also conceded that she never reported any of the abuse that happened after the 2006 assault. She denied that she received any money from the pension proceeds of the Defendant and conceded that the amount of R35 000 that she received from the Defendant at the time was to pay off a deposit for the motor vehicle which the Defendant is driving. When asked about the proceeds of their property in Savannah, she conceded that she received the proceeds which was

R430 000 and used it to pay the household debts and to pay part of the debt owed to the children's school for school fees.

[7] When it was put to her that the Defendant has not been employed since 2017 when he resigned from his previous employment and that he was at the moment working with an NGO earning an income of R3 500 *per* month which is not enough to sustain him, the Plaintiff denied any knowledge of that except that she knew that the Defendant was working for himself with the NGO. It was, further, put to her that the Defendant in his plea demands equal division of the Plaintiff's pension benefits and payment of R15 000 *per* month as spousal maintenance. In response thereto, the Plaintiff denied that the Defendant was entitled to share in her pension benefits nor was he entitled to be maintained by her, because of the paralysed hand she will need to employ someone to assist her and that the Defendant was capable and able to take care of himself. In this regard she gave an example that the Defendant can use the *bakkie* (van) he has, to generate income for himself.

[8] The Defendant, on the other hand, testified that when he received his pension pay out, he used the majority of the money to build a house for his children on the stand owned by the Plaintiff's parents. This piece of evidence was never put to the Plaintiff during cross examination. He further testified that from the NGO that he is operating he earns a monthly income of R4 000. The amount was initially R3 500 but was recently increased. He testified that because of the lifestyle he enjoyed during the subsistence of their marriage, which he is used to, he cannot live on R4 000 *per* month. He, thus, requires the Plaintiff to provide him with R15 000 on a monthly basis as maintenance, to maintain that standard of life. He, also testified that the proceeds of the sale of their property in Savannah were used for the benefit of the children. The money was used to pay the children's school fees which was in arrears and to pay the household debts.

Issue for Determination

[9] What requires determination in this matter is whether the Plaintiff is entitled to an order of forfeiture. Put differently, the crux is whether the Defendant will unduly benefit if the order for forfeiture is not granted.

Forfeiture Order

[10] The dissolution of marriage by divorce is governed by the Divorce Act. The general rule is that when a marriage in community of property dissolves by divorce, the parties in that marriage share equally in the joint estate. The Divorce Act, however, provides for forfeiture of patrimonial benefits. It means that in certain circumstances a court may make an order that makes one of the parties not to share equally in the joint estate. The purpose of forfeiture is said to be to ensure that a person does not benefit from a marriage, which they have intentionally broken down. The court may order that a blameworthy party forfeit the patrimonial benefit to which he or she may be entitled by virtue of the chosen matrimonial property system. Hence, parties who are married in community of property may not necessarily share equally in the joint estate.

[11] The relevant legal principles for a claim of forfeiture are found in section 9 of the Divorce Act. Section 9(1) of the Divorce Act, is an exception to the general rule. The section provides that when a decree of divorce is granted on the ground of irretrievable breakdown 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 breakdown of 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.

[12] The question of whether a person has unduly benefited must be determined having regard to the three factors set out in section 9 of the Divorce Act, namely: the duration of the marriage, the circumstances that give rise to the breakdown, and any substantial misconduct on the part of either of the parties. In the Appellate Division in *Wijker*,² it was held that these three factors need not be considered cumulatively, and that none of these factors should be considered as ranking above others. The decision was confirmed in the Supreme Court of Appeal in *Botha*,³ wherein that court remarked that the catch-all phrase, permitting the court, in addition to the factors listed, to have regard to 'any other factor' was conspicuously absent from section 9 of the Divorce

² *Wijker v Wijker* 1993 (4) SA 720 (AD) 729E – F.

³ *Botha v Botha* 2006 (4) SA 144 (SCA); *Mashola v Mashola* (022/2022) [2023] ZASCA 75 para 29.

Act. That court, further held that section 9(1) of the Divorce Act should be construed within the context of the evidence tendered by the parties in court.

[13] The *onus* is firmly on the Plaintiff who is the party claiming forfeiture to establish the nature and extent of the benefit to be forfeited. In this instance, it is common cause that the nature of the undue benefit is the Plaintiff's pension interest, which in terms of the provisions of section 7(7) of the Divorce Act, is deemed to form part of the joint estate. The extent of the pension interest is the amount that is to be paid out when the pension benefit becomes due.

[14] From the allegations made by the Plaintiff in her particulars of claim and the evidence tendered in Court it is quite clear that the Plaintiff relies on substantial misconduct of the Defendant for entitlement to the order for forfeiture. The court in *Wijker* held that it must be found that the misconduct '*is so obvious and gross that it would be repugnant to justice to let the guilty party get away with the spoils of the marriage*.'

[15] It is plain on the evidence tendered that the order for forfeiture ought not to be granted. The marriage is of long duration, approximately twenty-three (23) years at the time of the institution of the divorce proceedings. The incident of misconduct upon which the Plaintiff seeks to rely, that is, the assault that caused the partial paralysis to her right hand, occurred in 2006, approximately sixteen (16) years before the institution of the divorce proceedings. This is quite a long time ago. The Plaintiff only issued summons against the Defendant in 2022. This means that, the parties had been staying together for almost sixteen (16) years before the Plaintiff thought of dissolving the marriage. The Plaintiff remained in the relationship with the Defendant with the hand paralysis that she claims to have sustained as a result of the assault, all that time. This conduct of the Defendant cannot be said to be the immediate cause of the breakdown of the marriage, but may be considered a contributory factor. Additionally, the Plaintiff conceded that she accepted that the plea of guilty made by the Defendant at the trial of that assault was an indication that he showed remorse and she forgave him. What make matters worse for the Plaintiff is that the paralysis is not averred in the Plaintiff's particulars of claim.⁴

⁴ See *Mashola v Mashola* (022/2022) [2003] ZASCA 75 para 33.

[16] The Plaintiff's averment in her particulars of claim and as supported by her evidence in Court that the Defendant threatened to kill her, was never put to the Defendant during his cross examination. Thus, this allegation was never tested and can therefore, not be accepted in evidence. The other incidents of assault and verbal abuse she sought to rely on in her evidence in Court were, as conceded, not averred in her particulars of claim and should not be considered nor accepted in evidence as this would be prejudicial to the Defendant who was not made aware of the allegations in time to plead thereto.⁵

[17] The allegation by the Plaintiff in her particulars of claim that the Defendant abused her financially by never providing for her nor their children to date, seem not to be the truth. From her evidence it is apparent that the Defendant had been maintaining and supporting her and the children during the time he was still employed as a teacher. The parties' evidence indicates that the proceeds of the house in Savannah was used to pay the household debts including the children school fees. The Plaintiff did not provide any other evidence that proves that the Defendant had not been maintaining her and the children. In addition, this was never put to the Defendant in cross examination, so the allegation is not tested. Furthermore, it is conceded on behalf of the Plaintiff by her Counsel in the heads of argument that at all material times the Defendant had been paying for the tertiary fees of their second born child and only stopped when the Plaintiff served him with the summons.

[18] Counsel for the Plaintiff's argument in the heads of argument that the Defendant's pension pay out was an amount of R100 000, of which R35 000 was used for the deposit of the motor vehicle he is driving and the rest was used for his business, does not assist the Plaintiff's case. Only the amount of R35 000 that was used for the deposit of the motor vehicle the Defendant is driving is common cause between the parties, the rest is not on record and was never put to the Defendant during cross examination and is therefore, not tested.

[19] The Plaintiff alleges in her particulars of claim that the Defendant invited another woman into the parties' shared matrimonial home without any concern to the

⁵ See *Mashola v Mashola* (022/2022) [2023] ZASCA 75 para 33.

feelings of the Plaintiff, let alone consulting or seeking her consent. It is further alleged that the Defendant has been having an extra marital relationship with this same woman for many years since 2018, and before this affair, the Defendant had another long standing extra marital affair with another woman from 2002 - 2010. It was conceded on behalf of the Defendant by his Counsel in the heads of argument that it is common cause that the Defendant was involved in an extra marital relationship. The challenge for the Plaintiff is that this conduct of the Defendant must be substantial misconduct for it to satisfy the Court that, if the order for forfeiture is not made, the Defendant will be unduly benefited. There is no evidence on record which establishes that the extra marital relationship is substantial misconduct on the part of the Defendant. The other extra marital relationship alleged in the particulars of claim was not traversed in the Plaintiff's evidence in Court.

[20] A forfeiture order is not simply for the taking. The claim must be properly pleaded and proved. Where a party fails to prove substantial misconduct, like in this matter, forfeiture cannot be ordered.⁶ All the grounds raised by the Plaintiff in support of her claim for forfeiture, may serve as grounds for the irretrievable breakdown of the marriage, but they are not substantial misconduct for the purpose of forfeiture. The Plaintiff failed to plead and prove the assault and abuse that occurred after the 2006 incident. The allegations of the extra marital relationship by the Defendant alleged in the particulars of claim are not proven. And, she was unable to show that the only allegation of assault and abuse that was proven, amounts to substantial misconduct. This is fatal to her claim.

[21] The court in *Engelbrecht*,⁷ 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 benefited. The court has a wide discretion, and it may order forfeiture in respect of the whole or part only of the benefits".

This Court is not satisfied that the Defendant will be unduly benefited if the forfeiture order sought by the Plaintiff is not granted.

⁶ *Matyila v Matyila* 1987(3) SA 230 (W).

⁷ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C).

Spousal Maintenance

[22] Although the parties' counsel had indicated that the only issue for determination was that of forfeiture, the Defendant is, in the heads of argument, praying for spousal maintenance. During his oral evidence, the Defendant led evidence that purported to establish his entitlement to spousal maintenance. The challenge for the Defendant, however, is that that evidence is inadequate for an order to be granted for spousal maintenance that he seeks.

[23] It should be mentioned that the Plaintiff's counsel did not, correctly so, address the issue of spousal maintenance in the heads of argument. This is so because this was not an issue before Court. The parties' counsel agreed that only the issue of forfeiture was before court. Be as it may, the Defendant's claim to spousal maintenance could, in any event, for the reasons stated below, not succeed.

[24] It is common cause that in his papers the Defendant seeks an order for spousal maintenance in the amount of R15 000 *per* month. The Defendant's testimony is to the effect that he seeks spousal maintenance because the Plaintiff earns more money than him, and that the standard of life he enjoyed during the marriage, that he is used to, should be maintained.

[25] Section 7(2) of the Divorce Act provides that in the absence of a settlement agreement, the court may find it just to make an order stipulating that one spouse should make a maintenance payment to the other. When determining spousal maintenance, the courts consider several factors, including: income and earning capacity of the parties, existing or prospective means of each of the parties, their respective earning capacity, standard of living of the parties prior to the divorce, the duration of the marriage, financial needs and obligations of the parties, the age and health of each of the parties, their conduct in so far as it may be relevant to the breakdown of the marriage, and any other factors which in the opinion of the court should be taken into account.

[26] Except that it is common cause that the Plaintiff earns more money than the Defendant, of paramount importance is that there is no evidence on record indicating how much the Plaintiff earns on a monthly basis, and whether she will afford to pay the sought amount of R15 000. The Defendant seeks to maintain the lifestyle enjoyed

by both parties during the marriage, yet, he proffered no evidence to proof the type of lifestyle they enjoyed during their marriage. Nor did the Defendant tender evidence to prove his financial needs and obligations on a monthly basis in order to justify his claim for R15 000 *per month*.

[27] Therefore, the Court is unable to decide if maintenance is payable and, if so, for what amount and duration. This claim by the Defendant is not sustainable.

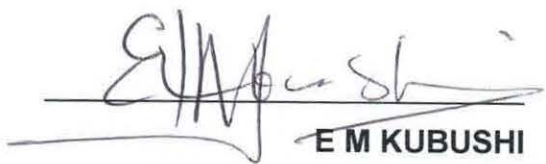
Conclusion

[28] It is common cause that the marriage between the parties has irretrievably broken down and ought to be dissolved. There is no dispute that since the parties were married in community of property the joint estate should be divided equally between them. The Plaintiff has failed to establish that the Defendant will be unduly benefited if the order for forfeiture is not granted, therefore, her prayer for an order for the forfeiture order ought to be dismissed. The pension money should be divided equally between the parties. The Defendant's claim for spousal maintenance ought to be dismissed as he has failed to establish same in his evidence.

Order

[29] In the premises the following order is made:

1. The Decree of Divorce is granted.
2. Division of the joint estate, which includes the pension interest of the Plaintiff is granted.
3. The Defendant's claim for spousal maintenance is dismissed.
4. Costs in the cause.


E M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 08 February 2024

Date of judgment: 19 March 2024

APPEARANCES:

For the Plaintiff: Adv P Magagane instructed by Mutavhatsindi Attorneys Inc.

For the Defendant: Adv H Scholz instructed by Couzyn Hertzog Horak