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REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO: 15402/2010

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

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DATE

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SIGNATURE

In the matter between:

D, T

Plaintiff

and

D, A

Defendant

JUDGMENT

MILTZ AJ:

INTRODUCTION

1. The plaintiff sues the defendant to whom he was married in community of property for a decree of divorce as well as an order in terms of section 9(1) of the Divorce Act 70 of 1970 declaring that the defendant forfeits certain patrimonial benefits of the marriage which was in community of property. The claim for forfeiture is in relation to specific immovable property, movable property and the plaintiff's pension scheme benefits.
2. The defendant counterclaims for a decree of divorce incorporating an order for division of the joint estate and an order that the plaintiff pays the defendant one half of the plaintiff's pension interest to be calculated as at the date of divorce and payable in terms of the provisions of section 37D of the Pension Act 24 of 1956.

THE COMMON CAUSE FACTS

3. The plaintiff and the defendant dated for approximately four years prior to their marriage in community of property at Port Elizabeth on Saturday 14 June 2008.

4. Shortly before their marriage, the plaintiff requested the defendant to accompany him to an attorney. The reason therefor was that the plaintiff wanted the marriage to be governed by an ante-nuptial contract with accrual.
5. Having seen an attorney and discussed their options the defendant insisted that the marriage should be in community of property. The plaintiff agreed and they were married.
6. The plaintiff, a television journalist, was on consignment in New York where he had been for some time. The plaintiff's tour of duty had approximately 18 months to run after his marriage to the defendant. He returned to Port Elizabeth for the wedding. The defendant lived and worked in Cape Town and she also travelled to Port Elizabeth for the wedding.
7. The plaintiff returned to New York after the wedding. The defendant returned to Cape Town where she resigned from her employment and during August 2008 she travelled to New York to join the plaintiff.
8. In the months that followed, the marriage went through troubled times. In the pleadings and at the trial the parties blamed each other for the strife in and breakdown of the marriage. I will refer to this briefly below.

9. In any event the parties returned to South Africa in December 2008 and spent the holiday period together in Port Elizabeth. At the end of January 2009 the plaintiff returned to the United States alone while the defendant went to her sister in East London.
10. During the period that followed the plaintiff provided some financial support to the defendant but he did so reluctantly. He also frequently did not take her telephone calls or respond to her text messages and e-mails.
11. Later in 2009, the defendant learnt that the plaintiff had returned to South Africa. A meeting was held amongst the parties' families and the plaintiff and defendant spent time together in Port Elizabeth. The plaintiff then returned to the United States to complete his assignment there. He did not inform the defendant of his subsequent return to South Africa. The defendant found out later in 2009 that he had returned through his use of a local e-mail address.
12. In January 2009, the defendant instituted maintenance proceedings against the plaintiff in Cape Town. The plaintiff then paid maintenance to her for a few months. When the plaintiff returned to the postponed maintenance hearing during June 2009 the defendant was not present. He learnt then that the defendant had obtained employment in the interim and that he no longer had to pay maintenance.

13. The plaintiff instituted the present action during late April 2010.

MARRIAGE IN COMMUNITY OF PROPERTY

14. Marriage in community of property carries major implications for ownership of the parties' assets, liability for their debts as well as their capacity to enter into legal transactions. Community of property entails the pooling of all assets and liabilities of the spouses immediately on marriage, automatically and by operation of law. The same regime applies to assets and liabilities which either spouse acquires or incurs after entering into the marriage. The joint estate created by marriage in community is held by the spouses in co-ownership, in equal, undivided shares. See *Boberg's Law of Persons and the Family* (2nd ed) at page 185; and also *HR Hahlo, The South African Law of Husband and Wife* (5th ed) at 157 to 158.
15. It is common cause that the marriage relationship between the parties has broken down irretrievably and that the joint estate is to be divided.
16. In *Soupionas v Soupionas* 1983 (3) SA 757 (T) at 759 A/B to C, to which I was referred by Ms de Villiers-Golding who appeared for the defendant, FS Steyn J stated that:

“If people, after finding solace and satisfaction in each other's physical company for a period of years, decide to marry, the legal consequences of the marriage must be an important motivating factor for that contract of marriage and, consequently,

all the material consequences of that marriage must have been thoroughly contemplated between the parties and it would be sound public policy to enforce such contractual views of the two parties against each other.”

17. Although Steyn J was not dealing in *Soupionas* with a marriage in community of property, nevertheless the above passage is pertinent to the common cause facts of the present matter. The parties did not find themselves accidentally married in community of property. On the contrary the plaintiff wanted to protect his estate from community of property by entering into an ante-nuptial agreement as aforesaid. The parties considered the options that were available to them. Having done so they agreed to a matrimonial property regime that was in community of property to the exclusion of other options.

18. The natural consequence of holding the parties to their marriage agreement is that on divorce the joint estate will be divided equally between them unless a forfeiture order is made. In such event the value of the assets in the joint estate that must be divided will be determined at the date of the divorce. See *Matthee v Koen 1984 (2) SA 543 (C)*.

FORFEITURE

19. However, as observed above, whereas the defendant seeks an equal division of the joint estate the plaintiff seeks a forfeiture order in terms of section 9(1) of the Divorce Act in respect of certain specified items.

20. Section 9(1) provides, beneath the heading “**Forfeiture of Patrimonial Benefits of Marriage**” that:

“(1) When a decree of divorce is granted on the ground of the 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, circumstances which gave rise to the breakdown 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.”

21. In *Wijker v Wijker 1993 (4) SA 720 (A)* at 727 E to F Van Coller AJA said that:

“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 valued 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.”

22. Ms de Villiers-Golding contended that the plaintiff, in seeking to invoke the forfeiture provisions of section 9(1), in truth is attempting retrospectively to apply a matrimonial property regime to the marriage that was never agreed to nor intended to apply upon the termination of the marriage whenever that occurred. The parties chose deliberately to be married in community of property with full knowledge of the proprietary consequences thereof. However that of itself is not a reason not to make an appropriate order in terms of section 9(1) if the

circumstances giving rise to the discretion to declare a forfeiture exist, whether in whole or in part.

23. The evidence of the parties as to the extent of the assets and liabilities which they respectively brought into the marriage is inadequate to enable me to find that the division of the joint estate will result in a benefit to the defendant, never mind that any such benefit will be undue. See *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) at 601 E/F to 602 F.
24. In this regard as I have already observed the approach of the plaintiff to forfeiture was limited to an immovable property which is bonded and therefore burdened with liabilities, certain movable assets and his pension fund benefits. No evidence at all was presented as to either parties' other assets and liabilities.
25. It follows that if there is equity in the immovable property and it is excluded from the joint estate by a forfeiture order then the defendant could be prejudiced in the division of the remainder of the estate. All/any liabilities of the parties will be brought into account as part of the division of the estate upon the dissolution of the marriage.
26. I am not satisfied that the plaintiff has shown in relation to the immovable property or the movable items mentioned in the particulars of claim that if a forfeiture order is not made in the terms sought, then

the defendant will receive a benefit in the course of the ordinary division of the estate.

27. However, if my view is incorrect and the defendant will receive a benefit, then I am not satisfied in any event that such benefit as she will receive by virtue of the division of the estate according to normal principles will be undue in the circumstances.
28. However, I consider that the plaintiff's pension fund benefits are on a different footing to the other specified immovable and movable assets referred to above. The accumulated benefits of the plaintiff's membership of the SABC pension fund are earmarked for his retirement. The plaintiff is 10 years older than the defendant who had only recently started working before the marriage. She accumulated her own pension benefits during the 6 month period of her employment prior to the marriage. These she paid to her parents and did not bring into the community of her marriage as she ought to have done. The defendant did not contribute to the plaintiff's pension fund in any manner at all and was maintained, however poorly, by the defendant until her re-employment during the first half of 2010.
29. On the other hand the defendant gave up her job in Cape Town, travelled to the United States to be with her husband for what turned out for her to be a miserable and unhappy four months and from a relationship point of view apparently has been marking time ever since.

30. Upon a consideration of all the relevant circumstances I am satisfied that the defendant will benefit unduly in relation to the plaintiff within the contemplation of section 9(1) of the Divorce Act if a forfeiture order is not made in relation to a portion of the plaintiff's pension fund benefits.
31. In considering that a forfeiture order is indicated I have had regard to the relatively short duration of the parties' marriage. The other factors referred to in section 9(1) do not arise for determination, particularly as I am not persuaded of any misconduct on the part of the plaintiff or defendant or any particular circumstances other than those I have already mentioned that impact on the order I propose to make. Quite simply, the parties were never compatible with one another and ought never to have married each other. Even the short period of time they spent together as man and wife was intolerable for them.
32. However I do observe that had it been necessary for me to choose one parties' version as to the circumstances which gave rise to the breakdown of the marriage or as to the other's misconduct, I unhesitatingly would have chosen the cogent, consistent and plausible version of the defendant over that of the plaintiff. However such a finding would not have impacted on the order. *Engelbrecht v Engelbrecht (supra)* at 602J to 603B.

33. The plaintiff's evidence that the cause of the breakdown of the marriage was the defendant's payment to her parents of her pension benefits during September 2008 was contrived and improbable. On the other hand, the defendant's attempts at reconciliation despite what she considered to be the serious misconduct of the plaintiff in hiding the marriage, not supporting her adequately, being emotionally unsupportive and spending considerable time with friends and associates to her exclusion, particularly when she was with him in New York was not seriously placed in issue.
34. On the contrary the plaintiff attempted to justify his behaviour towards the defendant by referring to his discovery in September 2008 that the defendant, without telling him, had remitted her pension benefits to her parents. I have already referred to that above. The conceded meeting of the parties' families during mid or late 2009 lent further credibility to the defendant's version. If the marriage was already over in December 2008 as alleged by the plaintiff then there was no reason for the parties families to meet or for any other attempted reconciliation between the parties.
35. The defendant's complaints about the plaintiff's behaviour throughout the relevant period were corroborated not only by the plaintiff's own testimony but also by the bank statements reflecting erratic maintenance payments.

36. Finally the intimately sexual e-mail sent by the plaintiff to TN that was referred to in evidence raised questions about and cast serious doubt upon his reliability as a witness. The plaintiff insisted that he only ever enjoyed a professional relationship with N but when faced with the e-mail was quick to retort that it was dated long after the marriage broke down. While the timing of the e-mail might have excused his relationship with N it did not excuse his earlier evidence that their relationship was always and only a professional one.
37. The parties will be partially successful in their respective claims. The costs probably should be borne by the joint estate. However I will order that the parties respectively bear their own costs.

CONCLUSION

In the premises, the following order is made:

1. A decree of divorce is granted;
2. In terms of section 9(1) of the Divorce Act 70 of 1970 the defendant forfeits half of her fifty percent entitlement to share in the pension benefits of the plaintiff (member number 06090/00131290XO) in the SABC pension fund;

3. The plaintiff is to pay the defendant twenty five percent of the plaintiff's pension benefits in the SABC Pension Fund (membership number 06090/00131290XO) calculated as at 10 May 2013 and payable in terms of section 37D of the Pension Act 24 of 1956, alternatively when such benefits accrue to the plaintiff, which occurs first;
4. An endorsement is to be noted against the records of the plaintiff's pension fund, which is administered by Sanlam, in respect of the orders in 2 and 3 above;
5. Save as aforesaid the joint estate is to be divided equally between the parties;
6. The parties shall bear their own costs.

I. MILTZ
ACTING JUDGE OF THE SOUTH
GAUTENG HIGH COURT,
JOHANNESBURG

MR W FREYSEN OF THE FIRM FREYSEN ATTORNEYS APPEARED FOR
THE PLAINTIFF

ADVOCATE C DE VILLIERS-GOLDING INSTRUCTED BY ATTORNEYS
HEYNS & PARTNERS APPEARED FOR THE DEFENDANT