

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 9368/2019

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

3 MARCH 2022

  
SIGNATURE

In the matter between:

**MNB**

**PLAINTIFF**

And

**MMP**

**DEFENDANT**

**Delivery:** Transmitted by email to the parties' legal representatives. The judgment is deemed to have been delivered on 3 March 2022.

**Summary:** Husband and wife - Grounds for divorce - Irretrievable breakdown- Forfeiture of the benefits of the marriage - Act 70 of 1979 section 9 (1) - Factors to be considered in deciding whether to order such forfeiture. The factors to be considered in determining whether to order forfeiture of the benefits of the marriage in terms of section 9 (1) of Act 70 of 1979 are the duration of the marriage, the

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

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## **J U D G M E N T**

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**MOLAHLEHI J:**

### **Introduction**

- [1] The plaintiff instituted these divorce proceedings against the defendant seeking a decree of divorce and forfeiture of defendant's rights to share in the benefits of the marriage which is in community of property.
- [2] The defendant defended the claim and filed a counterclaim in which he also claimed for a decree of divorce, full parental responsibilities and rights pertaining to the minor child, division of the joint estate, payment of 50% of the plaintiff's pension fund interest and spousal maintenance by the plaintiff.
- [3] The parties were married on 26 June 2000 and two children were born from the marriage of which one of them is a minor, and the other is a major, but not yet self-sufficient. The plaintiff came into the marriage with the child from a previous relationship.
- [4] At the time of the marriage, the plaintiff had an immovable property which she occupied with the eldest child. She was responsible for the payment of the mortgage bond towards that property. After the marriage, the defendant moved in and stayed with the plaintiff in that property until 2006.

- [5] Both parties were at the time of the marriage employed in the public service; the plaintiff as a teacher and the defendant as a police officer with the South African Police Service (the SAPS) until his resignation due to health reasons in 2017.
- [6] It is common cause that the parties sold the property at number 35 Cedar Creek and the proceeds thereof were used, to purchase the motor vehicle, (currently used by the plaintiff) the payment of the improvement and furniture for the Ormonde property.
- [7] In 2017, the parties purchased the property at Barbet Street, Extension 9 Meredale, Johannesburg for R1 570 000,00. The payment for the property was made from the Government Pension Fund (GEPF) of the defendant. The plaintiff and the children are currently residing at this property.
- [8] It is common cause that the parties were before the institution of these proceedings married for 21 years. Although there is a dispute as to when the defendant left the common home, it is not disputed that he left during 2019. The case of the plaintiff is that he left the common bedroom on 24 December 2018 and left the common matrimonial home on 26 March 2019. The defendant's version is that he left the common home on 8 May 2019.
- [9] The plaintiff's assets and liabilities are set out in the financial disclosure form attached to her papers as follows:

“6.7.1 The matrimonial property situated at Meredale with a current market value of approximately R1 574 000.00 based on the municipal

evaluation and Lightstone Valuation which can vary as the Lightstone Valuation is a computer-generated valuation.

6.7.2 Bank accounts with a value of R13054,52 and liabilities of R172 296,22.

6.7.3 Policies with a value of R60 663,95 which includes the funeral policies and therefore only leaves the value of the Retirement annuity of R22 497,00.

6.7.4 Personal assets including the (Toyota) Camry vehicle, furniture, and wedding ring to a total of R 218 718,47.

6.7.5 Pension fund interest to a value of R 2 921 908,00.”

[10] The defendant states in his disclosure form that he has no assets or liabilities.

**The issues in dispute.**

[11] The following issues are in dispute between the parties:

[11.1] Whether an order of forfeiture of certain assets should be granted against the defendant.

[11.2] Whether the defendant should be ordered to pay maintenance for both the minor and major children.

[11.3] Whether the defendant should be granted an order for the payment of 50% of the plaintiff's pension fund.

[11.4] Whether costs of the action should be granted against and of the parties.

[12] It is apposite to deal first with the request of the decree for divorce by both parties. They both seek a dissolution of their marriage on the ground that the relationship between them has irretrievably broken down.

[13] The plaintiff has raised several grounds for seeking an order dissolving the marriage. The essence of such grounds is that there is no love, no communication between the parties and that the parties have not lived together for some time as husband and wife. The other complaint by the plaintiff is that the defendant has had several extramarital affairs with other women, including fathering a child with one of those women.

[14] In the plea and counterclaim the defendant concedes that the relationship with the plaintiff has irretrievably broken down. He blames the plaintiff for the cause of the breakdown and alleges that she continued with the relationship with the father of her child after the marriage. He also alleges that the plaintiff was abusive towards him.

It is clear from the above that the marriage of the parties has irretrievably broken down.

### **Maintenance of the children**

[15] The plaintiff indicated during the hearing that she was no longer pursuing her claim for the sole parental responsibility and rights and supervising contact of the minor child by the defendant.

[16] There is thus consensus between the parties that full parental responsibilities and rights pertaining to the care, contact, maintenance and guardianship of the minor child should be granted to both parties. However, the primary

residence is to be retained by the plaintiff, subject to the defendant having contact rights with the minor child as may be arranged between the parties.

[17] The plaintiff claims maintenance for both the minor child and the major child. It has not been disputed that the major child is not self-sufficient and thus both parties have in law, the duty to support her.

[18] The defendant has tendered to contribute R3 000.00 per month as a contribution towards the maintenance for both children.

### **Spousal maintenance**

[19] In the counterclaim the defendant claimed spousal maintenance. In my view, regard being had to the evidence before this court, no case has been made for such a relief and thus the claim stands to fail.

### **The forfeiture of benefits**

[20] There are two main relief sought by the plaintiff as concerning the prayer for the forfeiture order. She seeks forfeiture of the matrimonial home which was purchased by the defendant's pension fund. She further seeks forfeiture of the interest in her GEPP pension money. She has no objection in sharing the movable assets of the joint estate with the defendant.

[21] The parties being married in community of property, means that the universal partnership between them was concluded at the time of concluding the

marriage, resulting in all the property, movable and immovable, forming a joint estate. Thus the consequence of marriage in community of property is that the parties to the marriage become owners of the undivided half share in all the assets, irrespective of whatever contribution each one of them may have made.

[22] It is trite that upon dissolution of a marriage in community of property the parties share equally both the movable and immovable assets of the estate. The exception to this rule is provided for in section 9(1) of the Divorce Act (the Divorce Act) which provides as follows:

“(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.”

[23] It is clear from the above that section 9(1) of the Divorce Act provides the court with a discretion to make an order for forfeiture after having regard to the following factors:

- (a) duration of the marriage,
- (b) the circumstances that gave rise to the breakdown of the marriage relationship, and
- (c) substantial misconduct on the part of the party against whom the order is sought.

[24] The onus is on the party seeking forfeiture to show that in the event an order of forfeiture is not granted the party against whom the order is sought will unduly benefit from the benefits derived from the marriage.

[25] It is trite that the court has a discretion to make an order of forfeiture of benefits if satisfied that the party against whom the order is sought would be unduly benefited in relation to the other party if the order is not made.

[26] The party claiming forfeiture of benefit is in terms of the decision in *Engelbrecht v Engelbrecht*<sup>1</sup>, required to prove the nature and extent of the benefits sought to be forfeited. This involves proving the value of the property as at the date of the marriage.

[27] In *Smith v Smith*<sup>2</sup>, the court explained the word "

"... what the defendant forfeits is not his share of the common property but only the pecuniary benefits that he would otherwise have derived from the marriage. It is not uncommon to refer to division and forfeiture as alternative remedies upon the plaintiff. On this view forfeiture means that each party keeps what he or she brought into the community. ... . An alternative interpretation, of an order for forfeiture is that it is really an order for division of the estate plus, an order that the defendant is not to share in any excess that

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<sup>1</sup> 1989 (1) SA 597 (C).

<sup>2</sup> 1937 WLD 126.



the plaintiff may have contributed over the contribution of the defendant."<sup>3</sup>

(Footnotes omitted)

[28] The relief of forfeiture of benefits as envisaged in section 9(1) of the Divorce Act does not provide an opportunity for a party that may have made a greater contribution to seek a deduction from such contribution. To succeed in a claim for forfeiture, the party making such a claim has to, as indicated earlier, show the nature and extent of the benefit and that the benefit would be undue to the other party if the order of forfeiture is not made.

[29] The main ground upon which the plaintiff basis her claim for forfeiture is the conduct of the defendant, more particularly after he vacated the matrimonial home. She contends that the defendant committed a substantial misconduct in having extramarital affairs with other women and fathering one child with one of them.

[30] In *Klerck v Klerck*,<sup>4</sup> the court held that in considering a forfeiture of benefits in marriage in community of property, regard should be had to the duration of the marriage, the circumstances which led to the breakdown and substantial misconduct on the part of one of both of the parties.

[31] In *Binda v Binda*<sup>5</sup>, the court held that the legislature in section 9(1) of the Divorce Act required that each of the factors should be given due

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<sup>3</sup> Id at 127-128.

<sup>4</sup> 1991 (1) SA 265 (W).

<sup>5</sup> 1993 (2) SA 123 (W) at 124.

consideration without requiring the presence of each one of them, including their accumulative effect.

[32] In *Wijker v Wijker*<sup>6</sup>, the court adopted the following approach in dealing with the issue of forfeiture claim:

"It is obvious from the wording of the section (section 9) 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 a purely 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."<sup>7</sup> (Emphasis added)

[33] In *KT v MR*,<sup>8</sup> the court in dealing with the marriage that broke down within 24 months, where the issue of misconduct did not arise, held that:

"... the longer the marriage, the more likely it is that the benefit will be due and proportionate, and conversely, the shorter the marriage, the more likely the benefit will be due and disproportionate."<sup>9</sup>

[34] Substantial misconduct, as envisaged in section 9(1) of the Divorce Act, is a factor to consider in weighing whether the forfeiture of benefits should be

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<sup>6</sup> 1993 (4) SA 720 (A).

<sup>7</sup> Id at 727.

<sup>8</sup> 2017 (1) SA 97 (GP).

<sup>9</sup> Id at 105.

granted. This notion has to be understood in the context of the general principle confirmed in our jurisprudence as far back as 1904. In this regard, the court in *Celliers v Celliers*,<sup>10</sup> held that it was generally accepted that a spouse could not forfeit that which he or she brought into the marriage. It must also be considered in the context of the development of our jurisprudence regarding the consequences of infidelity and cheating with third parties. Whilst in *DE v RH*<sup>11</sup> the Constitutional Court dealt with a delictual claim against a third party for adultery; I am of the view that the element of wrongfulness, consequent cheating and adultery between the spouses should be weighed in a similar way in case such as the present. In that case the Constitutional Court held that the claim for damages against a party that committed adultery with one of the spouses was no longer part of our law.<sup>12</sup> The Constitutional Court further held that the court cannot be held responsible "to shore up or sustain an otherwise ailing marriage."<sup>13</sup>

[35] In *Tsebe v Tsebe*,<sup>14</sup> the case with similar facts as those of the present, Mr. Tsebe had extramarital affairs with various women and fathered two children with two of them. He left the matrimonial home and went to live in Limpopo after losing his employment. The difference between that case and the present matter is that Mr. Tsebe spent his pension money alone and did not use it for the benefit of the joint estate or share it with his wife.

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<sup>10</sup> 1904 T.S. 926.

<sup>11</sup> 2015 (5) SA 83 (CC).

<sup>12</sup> *Id* at para 63.

<sup>13</sup> *Id* at para 71.

<sup>14</sup> [2016] ZAGPPHC 575 (24 June 2016).

[36] For the purpose of emphasis, in that case the court found that Mr Tsebe committed substantial misconduct as envisaged in section 9(1) of the Divorce Act in that he used the pension he received exclusively for himself to the exclusion of the joint estate and his wife.<sup>15</sup> It was for this reason that the court found that the conduct of Mr Tsebe amounted to substantial misconduct and that he would be unduly benefited if the forfeiture order was not granted.

[37] In the present matter, the plaintiff seeks the forfeiture of the immovable property which was, as indicated earlier purchased from the monies received from the defendant's pension fund. It is not in dispute that the amount used for the purchase of the property is a significant amount of R1 570 000.00. The plaintiff did not dispute during cross examination that the total expenditure used in the joint estate using the defendant's pension fund is well above R2 700 000.00. This means that the largest portion of the defendant's pension money was used for the benefit of the joint estate.

[38] In relation to the movable property, the plaintiff testified that she was suspicious that the plaintiff purchased such items for other women he had extramarital affairs with. She, however, did not deny that the defendant did purchase numerous movable assets and consumables for the use of the joint households until he vacated the matrimonial home in 2019. Some of the examples of the assets which the defendant purchased, is a fridge for R11 999.00, a bed for R2 200.00, and a trailer for R10 500.00. The plaintiff also admits that the defendant paid the amount of R314 003.08 towards the mortgage bond for the immovable property at Ormonde.

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<sup>15</sup> Id at para 15.

[39] The other ground upon which the plaintiff seeks forfeiture of benefits is that she wished to retain the immovable property, where she is currently residing, as it is conveniently located for the children because it is near a school. In applying the principles set out in the authorities above, I find no merit in this contention.

[40] The plaintiff testified that her suspicion that the defendant had extramarital affairs was confirmed by a letter from the church, confirming that the defendant was given permission to go away and apparently on church business but that would be without her.

[41] The other incident relating to the infidelity of the defendant, relates to a woman claiming that she had a child with the defendant and that the defendant was expected to attend a DNA testing. There was however no evidence presented as to whether the DNA test was conducted and what its results were. Be that as it may be, it would appear to me that if substantial misconduct was to be determined from the relationships with third parties, then both parties as the evidence reveals are not innocent. It should also be noted that the plaintiff also testified that she forgave the defendant for the alleged extra marital affairs.

[42] In my view to penalise the defendant in the circumstances where the relationship has, even on the version of the plaintiff, broken down would amount to depriving him of freedom of association. He has in the circumstances walked away from the relationship that had, even on the

plaintiff's version, broken down. To cast aspersions on him having relationships with other women and having a child outside of the marriage amount to undermining his dignity and even stereotypes the innocent child.

[43] The other complaint raised by the plaintiff is that the defendant made a payment of R350 000,00 to Ms Nene and that he retained the proceeds from the sale of the Toyota Fortuner.

[44] In relation to the payment to Ms Nene the defendant testified that the payment was for a loan he had received from Ms Nene. In support of this version he introduced the letter demanding payment for the loan by Ms Nene. He stated that the money was used for certain debts and the rest was used to renovate the property at Ormonde. He disputed having had an intimate relationship with Ms Nene.

[45] Ms Nene was never called as a witness. The plaintiff argued that an adverse inference should be drawn against the defendant.

[46] As concerning the sale of Toyota Fortuner the defendant stated that he used the proceeds for the household. It should be stated that at that stage the defendant was unemployed.

[47] In my view, the totality of the evidence reveals that the defendant made a significant contribution to the joint estate, in particular, with regard to the purchase of the immovable property for which the plaintiff seeks forfeiture thereof. Accordingly, I find no basis to conclude that the defendant will unduly

benefit if an order of forfeiture of benefit is not made against him. I am thus not persuaded that I should exercise my discretion in favour of granting an order for forfeiture of benefits against the defendant in respect of both the immovable and immovable properties including the pension interest of the defendant in the GEPP. And concerning the payment made to Ms Nene it seems to me that the appropriate remedy available to the plaintiff was the adjustment upon the division in terms of section 15 of the Divorce Act.

### **Costs**

[48] Section 10 of the Act provides that:

"In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties."

### **Order:**

[49] The following order is made:

- 1 The decree of divorce is granted.
- 2 The joint estate shall be divided equally between the parties including the plaintiff's pension fund.
- 3 The plaintiff's pension administrator, the Government Employers Pension Fund is ordered to pay the defendant an amount of 50% of the plaintiff's pension interest held under membership number 96445223 which will accrue to the Defendant at the date of this order.

- 4 The plaintiff's pension fund administrator is ordered to make the said 50% of the plaintiff's pension interest thereof to the defendant within sixty (60) days from the date of this order.
- 5 Parental responsibility and rights, specifically in respect of care and guardianship, in respect of the minor child is awarded to the plaintiff.
- 6 The minor child's primary care and residence is to remain with the plaintiff.
- 7 The defendant is entitled to contact with the minor child as and when agreed with the minor child.
- 8 The defendant is to pay the plaintiff the sum of R3 000,00 per month as contribution towards the maintenance of the children until such time as each become self-sufficient.
- 9 Defendant's claims in reconvention are dismissed
- 10 Each party shall pay his or her own costs.



E Molahlehi

Judge of the High Court

Gauteng, Johannesburg

**Representations:**

For the Applicant: Adv T Engelbrecht

Instructed by: Coetzee Duvenage

For the Defendant: Adv Z Marx Du Plessis

Instructed by: Shapiro Ledwaba Inc



Date of hearing: 17 Nov 2021 and 13 Dec 2021

Delivered: 3 March 2022