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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 9417/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

NOT REVISED.

21/9/22

In the matter between:

M [....] B [....] N [....] 1

PLAINTIFF

And

J [....] N [....] 2

FIRST DEFENDANT

THE GOVERNMENT EMPLOYEES PENSION FUND SECOND DEFENDANT

The judgment was handed down electronically by circulation to the parties and or parties' representatives by e-mail and by being uploaded to Caselines. The date and time for the hand down is deemed on 21 September 2022 at 12H00.

J U D G M E N T

FRANCIS-SUBBIAH, AJ

Introduction

[1] The Plaintiff (wife) and First Defendant (husband) are married to each another in community of property. The marriage was registered on 10 November 2000. Both parties agree that the marriage has irretrievably broken down and seek a decree of divorce. The wife seeks division of the joint estate whereas the husband claims forfeiture of benefits against the wife in respect of his pension interest and the wife's share in the immovable property.

[2] The parties in the matter have agreed to limit the issues to a determination of the forfeiture of benefits. The First Defendant bears the onus of proof whether forfeiture of benefit is to be ordered against the Plaintiff. The parties further agreed that the First Defendant bore the duty to begin. Both parties testified.

The legal Framework

[3] The Divorce Act 70 of 1979 provide in section 9(1) that the following three aspects be considered in making the determination of forfeiture of benefits:

- 3.1 The duration of the marriage;
- 3.2 The circumstances which gave rise to the breakdown of the marriage; and
- 3.3 Any substantial misconduct on the part of either of the parties.

It is further provided that the court must be satisfied that if the order for forfeiture is not made, the one party in relation to the other will be unduly benefited.

[4] The matter of ***Wijker v Wijker*** 1993 (4) SA 720 (A) at 728-729 remains one of the leading cases dealing with forfeiture of benefits at dissolution of a marriage in community of property. In the matter the wife claimed a forfeiture order with regards to certain assets although the husband was the major breadwinner of the family. The court decided that not all of the three factors in Section 9(1) of the Divorce Act, need to be

alleged and proven cumulatively for forfeiture to be granted. The benefit that will be received cannot be viewed in isolation and therefore in determining whether a party would be unduly benefitted, the court must confine itself only to the three factors mentioned in the section.

[5] The court held as follows:

“...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 the trial Court after having considered the facts falling within the compass of the three factors mentioned in the section.....It is only after the Court has concluded that a party would be unduly benefitted that it is empowered to order a forfeiture of benefits, and in making this decision it exercises a discretion in the narrower sense.”

[6] In applying this provision to the factual matrix of the matter the parties are in agreement that the marriage is of a long duration of twenty-two years. Teffo, J held in **MC v SC** 2019 JDR 2265 GP that “the consideration of a neutral fault factor such as the duration of the marriage should be based on considerations of proportionality.” I agree that competing interests should be carefully balanced in a relationship having the same ratio or a long duration. Moreover, in a marriage of long duration, such as in **Singh v Singh** 1983 (1) SA 781 (C), the Court took the view that a wife’s misconduct with another man resulted in ‘substantial misconduct’ and outweighed the fact that the marriage had lasted 20 years.

[7] From this marriage one child was born, who is now a major. Plaintiff has a daughter from a previous relationship who lives in the matrimonial home. The First

Defendant also has a daughter from a previous relationship who resides with her maternal family to whom the first defendant maintained a duty of support.

Circumstances leading to the break-down of the marriage

[8] The circumstances that gave rise to the breakdown of the marriage are that the parties have lost love and affection for each other. They have no desire to remain married and no longer enjoy any meaningful communication. Instead they argue constantly. Allegations of physical and verbal abuse, including death threats have been made.

[9] The husband complains that the break- down of the marriage is due to the heavy gambling of the Plaintiff. He testified that the Plaintiff failed to take care of the children, he had to do his own washing and cooking. The Plaintiff got angry and stopped communicating with him. She also stopped intimate relations with him. Further she had the tendency to leave the matrimonial home once a month on a Friday morning and return on Monday morning. This practice occurred around the 25th of each month when she got paid her salary.

[10] The Plaintiff testified that she experienced a life-threatening illness in 2014 when she was diagnosed with breast cancer. During this time, she was depressed due to the illness and further by the lack of support from her husband. His lack of attention and affection to her stopped when she became ill. From 31 October 2014 he started sleeping out. She was severely ill from the chemotherapy and therefore could not cook. He showed no compassion and concern for her. She was surprised that he failed to support her during her severe illness despite her supporting him during his arrest when he was charged with theft.

[11] However according to the First Defendant he was not informed about her treatment and was therefore unaware of her illness. He testified that he was unaware of her loss of hair during her treatments. His testimony is however inconsistent with the

remainder of the facts on the basis that the Plaintiff was a dependent on his medical aid. He further testified that he paid for the outstanding amounts of the treatment which were not covered by the medical aid. Clearly this indicates awareness of the diagnosis of cancer and the treatment thereof.

[12] Incidents of abuse arose in the relationship. The Plaintiff laid a criminal charge against her husband in 2006 when he kicked her arm which resulted in the arm being broken below the elbow. He accused her of having intimate relations with other men as being the reason for the assault. As well as insisting that she cooks before going out to the gym. However, the First Defendant's version is that he was defending himself by avoiding the Plaintiff throwing boiling water onto him. He was kicking the dish of boiling water and not her.

[13] The Plaintiff was put through an in-depth cross examination when she explained in detail what transpired during the incident. She stated that the First Defendant's version is a fabrication. In the event that his version was correct, then her arm would not have broken, instead it would be her fingers that would have broken. Further the water would have fallen onto her and there would be burns resulting from the boiling water. But there were no burns and no water present at the scene. She went on to explain that upon the advice from her father-in-law she did not pursue the criminal charge. He explained to her that in their culture a woman should preserve the family peace and keep the family together. Her father-in-law reprimanded his son to refrain from physical and verbal abuse and to be a responsible man. Regarding this incident I accept her version is more probable than that of the First Defendant.

[14] Later in 2019 the Plaintiff sought a domestic violence court order due to her husband swearing, passing remarks and making death threats to her. The protection order was confirmed by the domestic violence court in the presence of the First Defendant. Upon receiving the interim protection order the First Defendant left the matrimonial home and went to reside at his parental home. It is noteworthy that the provisions of the court order did not remove the First Defendant from the matrimonial

home. Acting upon his free will or his attorney's advice he left the matrimonial home on 12 August 2019 and has not returned.

Forfeiture to share in the immovable property

[15] The facts indicate that the Plaintiff owned the immovable property at the commencement of the marriage. Later due to a child maintenance claim against the First Defendant from his former partner, the couple decided to have the immovable property registered in the name of the First Defendant to reduce his maintenance payments. This entailed the First Defendant obtaining a mortgage bond in the amount of R110 000 and as he qualified for an employer's housing subsidy the immovable property had to be registered in his name. The mortgage bond held in the name of the Plaintiff was settled by the bond taken by the First Defendant and as a result the amount of R43 000 was deposited into the Plaintiff's account for the 'sale' of the property. The existing mortgage bond will be paid by 15 August 2023 and a balance of R12 000 is outstanding. The immovable property is currently valued at R291 000. There is no dispute that the First Defendant paid the bond, rates and taxes from the date of transfer.

[16] According to the First Defendant the Plaintiff made no contribution to the house, including maintenance thereof and the Plaintiff's right to share in the immovable property should be forfeited. He testified that he had no idea what the Plaintiff did with her salary. He also submits that he bought the groceries for the family and remained the main breadwinner.

[17] The Plaintiff testified that the groceries bought by the First Defendant was not enough and therefore she had to supplement the household income. When she was not employed in an official capacity, she began selling bags, toilet paper and other things to supplement the purchase of groceries and essentials for the family.

Pension Benefits

[18] The First Defendant started working on 26 November 1992, prior to his marriage to the Plaintiff. His current pension benefit is over R3.5 million. He submits that he never touched a cent of the Plaintiff's pension payments when two of her employments ended. Therefore, she must not get any of his pension and should forfeit the benefit of 50% interest in his pension fund.

[19] The provisions of the Divorce Act 70 of 1979 provide in sections 7(7) and (8) the following:

'(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....

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund-

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that –

(i) any part of the pension interest of that member which by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;'

[20] The natural consequence of a marriage in community of property is that both spouses would benefit by the division of the joint estate. A forfeiture order may not be granted simply to balance factually that one spouse had made a greater contribution than the other spouse to the joint estate. In **V v V**, the wife claimed forfeiture because her husband did not contribute to her pension fund or the mortgage bond. She took the view that her husband would be unduly benefitted if forfeiture was not granted because of his misconduct during the marriage. However, she failed to prove the misconduct and

the order for forfeiture was not granted. The fact that the husband did not contribute to the pension fund or the bond account did not mean that he would be unduly enriched at the expense of the wife if the order was not granted. It was held that the husband benefiting by the division of the joint estate is a natural consequence of a marriage in community of property, which both parties willingly contracted into.

[21] First Defendant holds the view that the Plaintiff's misconduct is that she failed to contribute to the joint estate and lost money for the joint estate. He testified that the Plaintiff used her money from her pension pay-outs and the R43 000 from the transfer of the immovable property on gambling and nothing was used for the house. She never paid his debt, nor did he see any money from her pension fund.

[22] The focus was on the Plaintiff's pension payout and the proceeds from the property transfer and how she dealt with the money. She testified that she bought and paid for the BMW and other motor vehicles that the First Defendant and the family travelled in. She explained that she paid school fees for the children for the whole year. This also included school fees for the First Defendant's biological child from the previous relationship. She purchased clothes for all members of the family, paid off the First Defendant's debts, tiled the house, repainted the exterior walls of the house and bought a gas stove. On a monthly basis she had to supplement the grocery needs of the family because the First Defendant's salary was insufficient. In regard to the paving done at the matrimonial house she conceded that her daughter paid for the labour costs and she paid for the building materials by providing receipts. In summary she used the money for the benefit of the joint estate.

[23] She was taken through a rigorous cross examination and she gave a satisfactory explanation on how the money was used in the marriage. I cannot find from the evidence before this court that the Plaintiff's pension payouts and the R43 000 received from the property transfer was used exclusively for the Plaintiff's sole benefit and to the detriment of the joint estate.

[24] The onus rested on the First Defendant to provide the the court with evidence of the Plaintiff's heavy or addictive gambling that impoverished the joint estate. His evidence was that he knows of two times when she gambled in 19 years. Neither are bank statements provided to substantiate his allegations or any other evidence indicating addictive gambling. The Plaintiff testified that she did gamble for entertainment on the occasion when they went on a trip. This would be twice in a year. The First Defendant also gave her money to gamble. On this score no substantial misconduct could be proven against the Plaintiff.

[25] To the rest of his allegations there was no evidence that the Plaintiff failed to take care of the children. He alleged that he had to do his own washing and cooking but failed to show how this contributed to misconduct on the Plaintiff's part. In **Wijker** it was held that conduct must be "so obvious and gross that it would be repugnant to justice to let the guilty spouse get away with the spoils of the marriage." There is no evidence in this matter to show the Plaintiff's conduct being so obvious and gross that to allow her to share in the community of property will just be repugnant and unjust.

[26] It was further held in **Botha v Botha** 2006 (4) SA 144 (SCA), that the court may not take into account any other factor but the three mentioned in s9 of the Divorce Act. Even the factor of just and equitable is not a consideration. According to the Plaintiff the First Defendant took the view that she recovered from cancer because of his medical aid that paid for her treatments. This is certainly acknowledged as a benefit toward the treatment of the Plaintiff but does not qualify as a factor to disqualify her of patrimonial benefits. In **Wijker** the court pointed out that in a marriage in community of property one spouse shares in the other's successful ventures is a consequence of the matrimonial property system. In any event the duty of support is entrenched in marriage irrespective of the matrimonial property system.

[27] The First Defendant having the onus to prove a claim for forfeiture of benefits has failed to do so and therefore the claim is dismissed with costs.

[28] In the result I make the following order:

1. A Decree of Divorce is granted;
2. Division of the joint estate is ordered;
3. An order that the Plaintiff is entitled to 50% of the pension interest of the First Defendant's pension fund, Government Employees Pension Fund (hereinafter referred to as GEPF), with member number [...] and that the GEPF is ordered to endorse its records and pay the Plaintiff;
4. An order that the First Defendant is entitled to 50% of the pension interest of the Plaintiff's pension fund MOTOR INDUSTRY PROVIDENT FUND (hereinafter referred to as MIPF), with member number [...] and that the MIPF is ordered to endorse its records and pay the First Defendant;
5. First Defendant to pay costs of the action.

Francis-Subbiah, AJ

Acting Judge of the High Court

Gauteng Local Division: Johannesburg

Appearances:

Plaintiff: Adv C Britz
Instructed by Heine Bezuidenhout Attorneys

Defendant: Adv M Fabricius
Instructed by Shapiro & Ledwaba Inc

Date Heard: 29-30 August 2022

Date Judgment Delivered:

21 September 2022