

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 68743/2011

DATE: 19 June 2014

IN THE MATTER BETWEEN:

R[...] H[...] K[...]

PLAINTIFF

AND

Y[...] M[...] K[...]

DEFENDANT

JUDGMENT

KOLLAPEN J:

1. This is an action in which the plaintiff seeks a decree of divorce, an order directing that the primary residence of the remaining minor child born of the marriage between the parties be awarded to him subject to the defendant's rights of access, and an order that the defendant forfeit the benefits arising from the marriage in community of property.
2. The defendant has instituted a counterclaim in which she seeks that care and primary residence of the minor child be awarded to her, and division of the joint estate including an order that she is entitled to fifty per cent of the plaintiff's pension interest in the Iscor Retirement Fund calculated as at the date of divorce.
3. The parties were able to reach agreement on a number of the issues in dispute. It is common cause that the marriage between the parties which was entered into on the 19 of January 1994, has irretrievably broken down. The defendant left the common home on the 25th of February 2008 and has been living with another person for the past six years and there is no prospect whatsoever of the marriage being saved.

The parties were also able to reach an agreement that the primary care and residency of the minor child, A[...] K[...], be awarded to the plaintiff subject to the defendant's rights of reasonable access to the child. This is also in accordance with the recommendation of the Family Advocate, who filed a report in the matter.

4. Accordingly the only issue in dispute and which requires determination is the plaintiff's claim for forfeiture and the defendant's counterclaim for division of the joint estate.

5. The plaintiff testified in his own case and also called as a witness, Ms Magda de Clerk, a social worker with the Suid-Afrikaanse Vrouefederasie. The defendant testified in her defence. The reports of the Family Advocate, the Family Counsellor and of Ms de Clerk were all accepted into evidence by agreement between the parties.

6. The evidence of the plaintiff was that from the early years of the marriage and largely as a result of the defendant's continued absence from the common home, he was left alone to care for the children born of the marriage. His evidence was that the defendant would regularly leave home to spend time with traditional healers. In addition he believed that the defendant was involved in more than one extra-marital relationship and he made reference to one incident involving one Mr Jan Mashishi whom he believed the defendant was involved with. The latter sent his driver to the plaintiff to ask for forgiveness. He also testified that the defendant had admitted to him, the existence of this relationship and she had claimed that she was in love with Mr Mashishi.

7. The plaintiff also gave evidence about what he described as the extensive gambling habits of the defendant, who would regularly visit casinos. On the occasions when she won large amounts of money, this money would be utilised for her own benefit, and save for minor contributions to the household, it would be retained by the defendant as her own. It appears that the amount of money won by the defendant totalled close to three hundred and twenty thousand Rand.

8. The assets in the joint estate for the purpose of this hearing, consist of a property situated at 2 K[...] Street, T[...], which was the common home of the parties, and the pension interest of the plaintiff in the Iscor Retirement Fund.

9. The plaintiff's further testimony was that he was solely responsible for the purchase of that property and for its maintenance and upkeep and for the expenses of the household, which he continues to pay even after he left the common home. He is solely responsible for the education of the children and is also paying a debt to the municipality in the sum of forty three thousand Rand incurred by the defendant. He characterised the defendant as being irresponsible with money. He testified that she incurred debt which he ultimately had to settle in order to avoid execution against the household goods and assets.

10. The evidence of Ms de Clerk, briefly, was that she had been approached for assistance by the plaintiff regarding his concern for the children born out of the marriage and that when she tried to engage in discussion with the defendant about the matter, the latter became aggressive and refused to discuss the matter with her or to take advice. In this regard, the defendant, while denying that she was aggressive, confirmed that she was not willing to discuss the matter with Ms de Clerk, because other social workers were already involved. Further, she was of the view that Ms de Clerk would not be objective given the fact that she and the plaintiff had known each other for some time.

11. The defendant's evidence was that the marriage between her and the plaintiff was characterised by problems from an early stage, largely on account of the plaintiff's drinking and aggression, which resulted in both physical and verbal abuse. While denying any adultery by her, she testified that the plaintiff became involved with his current girlfriend sometime in 2006 and that this placed further strain on the marriage.

12. The defendant admitted to occasionally being away from home in order to consult a traditional healer but stated that this occurred either over weekends or during school holidays and that it was always done with the support and the concurrence of the plaintiff, who at times would drive her to the location where the traditional healer was based.

She admitted to gambling occasionally but hardly on the scale described by the plaintiff. She said that she used the winnings to improve the home she shared with the plaintiff and that the plaintiff himself shared in and enjoyed the proceeds of the winnings. She was employed as a teacher and her income was utilised in the common home.

13. The rocky relationship between the parties also led to the issuing of various domestic violence interdicts against the plaintiff. These were submitted into evidence and they *inter alia* prohibit the plaintiff from assaulting or abusing the defendant. On the other hand, there was a similar interdict issued at the instance of the plaintiff against the defendant and on the 25 of February 2008,

the defendant was found guilty of common assault and she was cautioned and discharged.

EVALUATION

14. In ***WIJKE v WIJKE* 1993 (4) SA 720 (AD)** the Court said that the first enquiry in matters such as these is to determine whether or not the party against whom the order is sought will in fact be benefitted and said that this was purely a factual issue. Only once that issue was decided upon in the affirmative, would the Court proceed to the next stage of the inquiry and determine whether or not there will be an undue benefit if an order of forfeiture is not made.

15. Returning to the first issue, it is common cause that at least until early 2008 when the plaintiff left the common home, the parties were both gainfully employed, and while the marriage was troubled, they both contributed their salaries to the acquisition of assets and to the maintenance of the household. While the plaintiff's evidence was that he was significantly responsible for this, this was placed in dispute by the defendant and at the end of the day the Court was left with conflicting versions about the financial arrangements that existed in the marriage from 1994 until 2008. It would certainly have been helpful if the financial records of the parties, including banking records and other such information, would have been made available in order to test the competing claims of the parties. However, for some unknown reason nothing of this sort was forthcoming.

16. Under such circumstances, all that remained was the evidence of both parties on the issue. During the course of their testimony, while both parties were visibly emotional and upset, neither of them retracted their respective versions. Both parties certainly came across as being honest in their accounts of the marriage, even though they differed substantially from each other.

17. Accordingly on this score, the plaintiff, who carries the evidentiary burden in respect of his claim for forfeiture, has not, with respect, made out a case that the defendant will in fact be benefitted, if regard is had to the respective financial contributions of the parties. Therefore the claim for forfeiture is destined to falter on this ground.

Beyond that, and even if my conclusion on the first aspect is wrong, when one has regard to the factors that would ordinarily require consideration in a claim for forfeiture - the duration of the marriage, the circumstances that gave rise to the breakdown and any substantial misconduct on the part of one of the parties - what emerges from the evidence is clearly a tumultuous marriage that was placed under strain by the conduct of both the parties. The various interdicts issued either way, the strong suspicion of adulterous conduct on both sides, the absence of the defendant from the common home and the drinking and aggression of the plaintiff, all paint a picture of two incompatible persons bound by a marriage that was destined for failure.

18. To the extent that the plaintiff seeks forfeiture, I am not satisfied on the evidence that it can be said that misconduct in the form of adultery was established, even though there is a suspicion that it may have taken place. Equally, if the defendant was a callous, uncaring mother, it hardly makes sense that the plaintiff left the common home at a time when the youngest child would have been about ten years old. This must point compellingly in the direction that he was comfortable to leave home and to entrust the care of the children to the defendant at that stage. This puts into question his claim that the defendant was not a suitable mother.

19. In *MATYILA v MATYILA* 1987(3) SA 230 (WLD), the Court expressed the view that misconduct

should be taken into account only when it is so obvious and gross that it would be repugnant to justice to allow the guilty spouse to 'get away with the spoils of the marriage'. Even though the Appellate Division in *WIJKE* found *MATYILA* wrong on another aspect, namely that all three factors mentioned in Section 9(1) of the Divorce Act must be alleged and proved, it did take issue with the above characterisation of misconduct.

20. On what is before me and for the reasons already traversed an order for forfeiture would not have been justified. This is so when I have regard to the duration of the marriage, some twenty years, during which time the parties to a greater or lesser extent worked together to build a home, the circumstances that gave rise to the breakdown, which in my view were deeply-rooted in their different characters and their inability to simply find each other as husband and wife, as well as the absence of evidence that points to substantial misconduct.

In the circumstances the claim for forfeiture must fail and correspondingly the counter-claim for division of the joint estate must be upheld.

21. Having regard to the respective conduct of the parties, which is set out more fully in this judgment, my view is that the Court in exercising its discretion with regard to costs should make an order that is just and equitable. Such an order would require that each party pay its own costs.

ORDER

22. I make the following order:

22.1 A decree of divorce is granted;

22.2 It is ordered that the joint estate of the parties be divided;

22.3 An order is made that:

22.3.1 The plaintiff and the defendant will retain full parental responsibilities and rights with regard to the guardianship of the children;

22.3.2 The plaintiff is to retain full parental responsibilities and rights with regard to the care of the children born of the marriage;

22.3.3 The primary residence of the children shall be with the plaintiff;

22.3.4 The specific parental responsibilities and rights with regard to the contact with the children is awarded to the defendant;

22.4 It is ordered that the defendant shall be entitled to one half of the plaintiffs pension interest in the Iscor Retirement Fund;

22.5 It is ordered that one half of the plaintiffs pension interest as at the date of divorce be paid to the defendant when the plaintiffs interest in the Iscor Retirement Fund accrues to the plaintiff;

22.6 It is ordered that an endorsement be noted against the records of the aforesaid pension fund that one half of the plaintiffs pension interest, determined as of the date of the divorce, be paid to the defendant when the plaintiffs interest in the aforesaid pension fund accrues to the plaintiff.

22.7 Each party is to pay its own costs.

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HEARD ON: 15 & 16 MAY 2014

FOR THE PLAINTIFF: ADV M MOGOTLANE

INSTRUCTED BY: MATSEPE ATTORNEYS (ref: MR MOGOTLANE)

FOR THE DEFENDANT: MR D SELAHLE

INSTRUCTED BY: SELAHLE ATTORNEYS (ref: SELAHLE/MAT 159)