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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 14088/2013

Date: 28 August 2014

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

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DATE SIGNATURE

In the matter between:

J[...] R[...] M[...]

Plaintiff

and

T[...] J[...] M[...]

Defendant

JUDGMENT

PRETORIUS J.

[1] In this action for divorce the defendant requested forfeiture of the benefits of the marriage in community of property namely the plaintiff's

one half share in the defendant's pension benefits with the Government Employees Pension Fund ("GEPF").

Common Cause:

[2] It is common cause that the parties were married in community of property on 14 June 2009. It is further common cause that the defendant left the common home during April 2012, informing the plaintiff that she did not intend staying married to the plaintiff. There are no children born of the marriage, but the plaintiff has a son and daughter born from a previous relationship and the defendant has a daughter born from a previous relationship.

[3] It is further common cause that the defendant is a member of the Government Employees Pension Fund (GEPF) and that the plaintiff has been contributing to a pension fund for three years. The defendant has been contributing to the GEPF for 20 years.

[4] The plaintiff and defendant met at a church meeting whilst she was working in Polokwane and he was working in Pretoria. She commuted every weekend to see the plaintiff as she could not get a transfer from Polokwane to Pretoria.

[5] The parties are *ad idem* that the marriage cannot be saved as it has irretrievably broken down. It is thus clear that the marriage in

community of property should be dissolved and the division of the joint estate should be ordered. The main issue which has to be decided is whether a forfeiture order in regards to the plaintiff's share of the defendant's pension fund should be granted to the defendant.

[6] The defendant requests the court to make an order in terms of section 9 (1) of the **Divorce Act, Act 70 of 1979** which provides:

“9 Forfeiture of patrimonial benefits of marriage

(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.”

The pleadings:

[7] The plaintiff alleged in his particulars of claim the reasons for the irretrievable breakdown of the marriage as:

- *“During the duration of the marriage the defendant had problems with the children of the plaintiff, born from a previous marriage;*

- *These problems resulted in numerous arguments and quarrelling between the parties;*
- *The defendant vacated the common home during April 2012 and informed the plaintiff that she did not intend continuing with marriage;*
- *As a result of the above the plaintiff has lost his love for the defendant and desires a divorce from the defendant.”*

[8] The defendant mostly denied these allegations and set out in her counterclaim that according to her the reason for the breakdown of the marriage is:

- “- The plaintiff’s children do not accept the defendant as the wife of the plaintiff;*
- *There were frequent quarrels and arguments between the parties as the plaintiff is stubborn and does not follow advice;*
- *Ever since the commencement of the marriage the plaintiff and the defendant basically lived separately as husband and wife and only saw each other on weekends.”*

[9] The defendant’s allegation in the counterclaim when dealing with the reasons for forfeiture is set out as:

“Due to the duration of the marriage and the fact that the Plaintiff and the Defendant had their own immovable property before the

commencement of the marriage, and that they had mostly lived separately as husband and wife, and that they did not contribute financially towards each other's homesteads and individual households, and more particularly the reasons for the breakdown of the marriage and the duration of the marriage, it would be unfair that the Plaintiff be awarded half of the Defendant's share in the Government Employees Pension Fund with membership number 9692 3950."

[10] She bases her claim in the "unfairness" of having to share her pension fund with the plaintiff.

[11] It is clear from the evidence that the defendant had contributed to the pension fund for 22 years and that the value of the fund is presently R1 million plus. The plaintiff has only contributed to his pension fund for three years and it is presently less than R15 000.00.

[12] There are only three grounds on which the court can exercise its discretion to grant forfeiture to the defendant, as requested. These are the duration of the marriage, the circumstances which gave rise to the breakdown of the marriage and any substantial misconduct on the part of the plaintiff. The court cannot take any further factors into consideration.

[13] The evidence by both the plaintiff and the defendant was that they had both known what it meant to be married in community of property at the time that they were married. They had no doubt at the time that they desired to be married in community of property.

[14] The defendant had commuted every Friday to Pretoria where she and the plaintiff lived as husband and wife with their respective children. This situation even existed for a couple of months before they had married. They were *ad idem* that the defendant would travel to the communal home in Pretoria to spend every weekend together until she could get a transfer to Pretoria. They subsequently bought a house in Orchards which was registered in both their names. The plaintiff still had his house in Soshanguve. The defendant paid the bond of the house in Orchards, whilst the plaintiff paid the bond of the house in Soshanguve. The plaintiff's evidence was that he had cared for the defendant's daughter for a period when she came to live with him in the common home. He bought her food, clothes and saw to it that she attended school. The defendant conceded that this had been the position for at least six months. She further conceded that her daughter changed her surname to that of the plaintiff. The court cannot find that these actions reflect abuse on the part of the plaintiff, but rather that the defendant's daughter regarded the plaintiff as a father.

[15] They regarded the house they had bought in Orchards as a home for them and that is the reason for the defendant coming to

Pretoria each weekend. The court does not find anything untoward or sinister in this arrangement, as both parties had known from the outset of the practical difficulties when one partner is working and living in Pretoria and the other is living and working in Polokwane from Monday to Friday. The parties are married for 5 years, but the past two years they had lived apart due to the defendant leaving the common home. The court cannot find for the defendant that the duration of the marriage was so short that forfeiture should be granted in her favour.

[16] According to the plaintiff the defendant had problems with his children living with them to such an extent that she locked them out of the house in April 2012. This led to an argument which caused the defendant to leave the common home, never to return. She informed the plaintiff at the time that she did not want to be married to him any longer. Although her evidence was that she did not have problems with the plaintiff's children, it was one of the reasons in her counterclaim for requesting a divorce.

[17] According to the defendant the quarrels and arguments were about other matters and not the children. The plaintiff had insulted her on more than one occasion. Her further evidence was that he had pushed her and assaulted her with his clenched fists. This version of assaulting her with his clenched fists was never canvassed with the plaintiff under cross examination. Unfortunately the court is not in a position to decide on the defendant's evidence that the plaintiff had

abused her. Her evidence was that she had reported it to the church elders, but failed to call any of them to testify.

[18] I cannot find that the defendant, who has the onus to prove substantial misconduct has done so on a balance of probabilities.

[19] Counsel for the defendant argued that it would be unfair to the defendant if the court did not grant forfeiture. In **Wijker v Wijker 1993 (4) SA 720 SCA** van Coller AJA dealt with fairness at p 731 D – E:

*“The finding that the appellant would be unduly benefited if a forfeiture order was not made, was therefore based **on a principle of fairness**. It seems to me that the learned trial Judge, in adopting this approach, lost sight of what a marriage in community of property really entails. H R Hahlo in The South African Law of Husband and Wife 5th ed at 157-8 describes community of property as follows:*

'Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares.'” (Court’s emphasis)

[20] In the present matter both the plaintiff and the defendant knew exactly what was meant by marrying in community of property and they both associated themselves with the consequences of a marriage in community of property.

[21] It is also clearly stated in *Wijker (supra)* that it is accepted that the Legislature never intended the three factors mentioned in section 9 to be considered cumulatively. This was confirmed in **Botha v Botha 2006 (4) SA 144 SCA**. I cannot find that the defendant has proved the claim for forfeiture of the pension fund on a balance of probabilities.

[22] I have considered all the circumstances and the authorities. Due to the fact that I have found that no substantial misconduct has been proved, I cannot find that the plaintiff will be unduly benefited if an order of forfeiture as claimed by the defendant in the counterclaim is made.

[23] Therefor I make the following order:

1. A decree of divorce is granted;
2. Division of the joint estate, including both parties' pension funds and policies;
3. Each party to pay its own costs.

Judge C Pretorius

Case number : 14088/2013
Heard on : 19 August 2014
For the Plaintiff : Adv Groenewald
Instructed by : AJ Weyers & Associates Inc
For the Defendant : Mr Grobler
Instructed by : Thomas Grobler
Date of Judgment : 28 August 2014