



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Not reportable

Not of interest to other Judges

CASE NO: 39138/2014

In the matter between:

24/6/2016

MAHLAKO MARIA TSEBE

Plaintiff

and

MAGOGE NELSON TSEBE

Defendant

J U D G M E N T

MAKGOKA, J

[1] This is a divorce action. The only issue in dispute is whether the plaintiff is entitled to an order against the defendant for forfeiture of 50% of the plaintiff's pension interest. The defendant was employed by Toyota SA. He was dismissed from his employment in 2013. He received his pension fund payout in the amount of R125 000. The plaintiff alleges that the defendant spent his pension money exclusively for his own benefit. The defendant, on the other hand, alleges that part of the money was utilized to start a business which was not successful, and that another portion was utilized for household expenses and necessities. The plaintiff has been in the employ of the South African Post Office since 1995, and is a member of the Post Office Retirement Fund, as a result of her employment. It is half of her pension interest that she claims the defendant is not entitled to.

[2] Section 7(7)(a) of the Divorce Act provides that 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 be deemed to be part of his assets. Section 8(a) of the Divorce Act, on the other hand, provides that the court granting a decree of divorce in respect of a member of a pension fund, may make an order that 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.

[3] A claim for the forfeiture of benefits arising from a marriage is governed by section 9(1) of the Divorce Act 70 of 1979 which reads as follows:

'(1) When a decree of divorce is granted on the ground of the irretrievable break-down of the 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.'

[4] The following are common cause facts. The parties are originally from Limpopo Province. Before they got married to each other, they courted for about seven years. During their courtship, in 1995, the plaintiff had an intimate affair with one Mr Thomas Mokwatlho (Mr Mokwatlho). Despite this, the parties made up and married each other on 27 December 2002 in Mankweng, near Polokwane. Two children were born of their marriage, of which one is still a minor. The other child, though a major, is not self-sufficient yet. Both live with the plaintiff in the parties' common home in Midrand, Gauteng Province. The defendant left the common home during 2013/2014, after losing his employment, and returned to Mankweng, Limpopo Province, where he currently lives. Before he lost his employment, the defendant was responsible for the bond repayments on the parties' common home. After he lost his employment, the plaintiff has been responsible for that expense.

[5] I now refer briefly to the evidence. Both parties testified and closed their respective cases without calling further witnesses. It is not necessary to set out their respective testimonies in detail. Only the relevant aspects thereof would suffice. The plaintiff testified that the defendant had extra-marital affairs with various women during the course of their marriage, and fathered a child each with two of such women. According to the plaintiff, the defendant fathered a child with Ms Diketso Moselana (Ms Moselana), in 2008, and another child with Ms Manhlwa Nokeri (Ms Nokeri). When she confronted the defendant about him fathering a child with Ms Moselana, the defendant stated to her that he did that because the plaintiff had an affair, and that he found a shoulder to cry on from Ms Moselana.

[6] According to the plaintiff, the defendant left the common home in 2013 and went to live in Mankweng. She testified about an occasion when she visited the defendant's place in Mankweng. On the defendant's cellphone, she found a picture of Ms Nokeri. When she confronted the defendant about it, the latter stated to her that Ms Nokeri was his 'next wife.' She obtained the number of Ms Nokeri, and contacted her. Ms Nokeri confirmed to her that she was in deed in a love relationship with the defendant. As stated earlier, the plaintiff testified that the defendant also fathered a child with Ms Nokeri.

[7] She further testified that the defendant kept the details of his income secret, and apart from paying the bond, the defendant did not contribute to the maintenance of the children and other household expenses. Regarding the circumstances under which the defendant lost his employment, the plaintiff testified that the defendant absconded from work, as a result of which he was dismissed. The plaintiff also testified that her affair with Mr Mokwatlho during the parties' courtship continued to permeate their marriage. According to her, although the defendant later married her despite the affair, he never really forgave her, and actually suspected that the affair never terminated. It appears that the plaintiff works with Mr Mokwatlho at the South African Post Office. She testified that Mr Mokwatlho is her immediate boss, but denied that she had a role in securing a position for him at the Post Office.

[8] The defendant testified that the reason for the breakdown of the marriage was that the plaintiff never terminated her relationship with Mr Mr Mokwatlho. He discovered this in 2012 when the plaintiff inadvertently sent him her son's curriculum vitae, which bore Mr Mokwatlho's name and contact details. He also stated that the plaintiff had Mr Mokwatlho's contact details stored in her cellphone. He denied that he had extra-marital affairs or that he fathered children out of wedlock. The women with whom the plaintiff alleges he had intimate relations, Ms Mosealana and Ms Nokeri, were his colleagues, and not lovers. Regarding his pension money, the defendant testified that he used part of the money to build a house in Mankweng, which is not completed yet. Regarding the other part of the money, the defendant testified that after he was dismissed from his employment, he wanted to engage in a business venture with a friend. The contract fell through and he lost the money as a result of the business failure. He also bought food for the household, as well as a bicycle and cellphone for the children. According to the defendant, he was unemployed, and was totally dependent on the benevolence of extended family for survival.

[9] It is against the above factual matrix that I have to determine whether the plaintiff is entitled to an order for forfeiture, bearing in mind the twin considerations, namely that parties must be held to their ante-nuptial agreements,¹ and that s 9 does not provide for the application of the principle of fairness in order to deviate from the nature of community of property.² I must therefore consider the plaintiff's claim for forfeiture within the narrow ambit of the three factors mentioned in s 9(1), namely, the duration of the marriage, the circumstances that led to the breakdown of the marriage and any substantial misconduct on the part of the defendant. As explained in *Wijker*, the above factors need not be considered cumulatively. In other words, the presence of any one of them is sufficient for the court to make an order for forfeiture in terms of s 9(1). I consider the three factors in light of the evidence.

[10] The marriage was of a fairly long duration, from 2002 to 2013. As to the circumstances that gave rise to the break-down of the marriage, it seems a fair

¹ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C).

² *Wijker v Wijker* 1993 (4) 720 (A).

observation that the marriage of the parties was beset with suspicions throughout. The parties each suspected the other of extra-marital affairs. From the totality of the evidence and the common cause facts on this aspect, I accept that the defendant probably had extra-marital relationships with Ms Nokeri. I am not sure whether the same can be said of Ms Moselana. However, the extra-marital affair with Ms Nokeri, it seems, occurred in 2013, after the defendant had left the common home to live in Mankweng. It is clear that by then, the marriage relationship between the parties had broken down, such that the affair cannot be said to have given rise to the breakdown of the marriage. It was merely a symptom and not the cause of the marriage breakdown. In *Beaumont v Beaumont* 1987 (1) SA 967 (A) it was aptly observed that in many and probably most cases, both parties will be to blame, in the sense of having contributed to the breakdown of the marriage. In such case, where there is no conspicuous disparity between the conduct of the one party and that of the other, the court will not indulge in an exercise to apportion the fault of the parties and thus nullify the advantages of the no-fault system of divorce. See also *Kritzinger v Kritzinger* 1989 (1) SA 67 (A).

[11] The allegation that the defendant fathered children with these women has not been established on any acceptable evidentiary basis. It is the plaintiff's word against the defendant's. I am unable to make any credibility findings on this aspect.

[12] The upshot of the above is that nothing turns on either the duration of the marriage or the circumstances that gave rise to the breakdown of the marriage, for the purposes of a claim for forfeiture. I turn now to consider whether there was any substantial misconduct on the part of the defendant. In this regard, the plaintiff focused on the defendant's pension payout and how the defendant dealt with the money. It can be safely accepted that it would amount to substantial misconduct by the defendant if he had used the money exclusively on himself, and not for the benefit of the joint estate. It was contended on behalf of the defendant that he has given a satisfactory explanation of how the money was used (that he ventured into a failed business).

[13] I disagree. The defendant was particularly vague as to how the money was used. Right through his testimony, this Court was no wiser as to (a) the type of business the defendant ventured into; (b) the exact manner in which the money was 'lost'; and (c) how much was actually lost. Did the defendant put down money as capital investment, and if so, where, when and how much? These are simple questions that the defendant was supposed to disclose with ease, for the Court to make a proper assessment of his assertions. There is no documentary evidence of registration of any business, nor is there any documentary proof of any payment of a start-up capital.

[14] The sum total of the above is that very little is known about how the defendant's pension money was utilized, except the defendant's bald, sparse and vague *ipse dixit*. What is more, the defendant also vacillated on the issue. In one breath he said that he used part of the money for an undisclosed business venture, and in another, that he had used part of the money for building a house in Mankweng, for which no details as to the amounts, were furnished. The defendant's conduct is consistent with the plaintiff's evidence that the defendant did not consult her about how the money should be used for the benefit of the joint estate. The defendant simply informed her of his decision to 'start a business.' As it is often said, there is a difference between 'consulting' a person and 'informing' them. The defendant did the latter. He was not entitled to do so, as the pension payout belonged to the joint estate. He could not deal with it as he pleased, without conferring with the plaintiff.

[15] By failing to account properly as to how he utilized the money for the benefit of the joint estate, I come to the inescapable conclusion that the defendant used his pension money exclusively for his own benefit, to the detriment of the joint estate, and in particular, of the plaintiff. That, to my mind, constitutes substantial misconduct as contemplated in s 9(1). I find that the defendant would, in relation to the plaintiff, be unduly benefitted if an order for forfeiture in respect of the 50% of the plaintiff's pension interest is not made.

[16] The parties have reached agreement on the immovable property of the joint estate, as set out in the minute of a pre-trial conference, which I intend incorporating into the order I am about to make. An order should also be made in respect of the care and primary residence of the minor child born of the marriage between the parties. The defendant is currently unemployed. As a result, it would serve little purpose to make an order of maintenance in respect of the minor child. With regard to costs, I do not intend making any costs order, as is customary in matrimonial proceedings.

[17] In the result the following order is made:

1. A decree of divorce is granted;
2. Both parties retain their full parental responsibilities and rights in respect of the minor child born between the parties;
3. Care and primary residence of the minor child is awarded to the plaintiff subject to the defendant's rights of reasonable contact;
4. The plaintiff shall retain the immovable property of the joint estate of the parties situated at 1604/24 Bluegum Street, Ebony Park Ext 2, Midrand, Gauteng (also known as portion 24 of erf number 1604, Ebony Park Ext 2, registration Division IR, Gauteng, as her sole and absolute property, and shall be liable to pay the outstanding amount owed to ABSA Bank Ltd in terms of the mortgage bond which is registered against the title deed thereof;
5. The defendant shall transfer his half-share of the immovable property referred to above, into the name of the plaintiff, and shall sign all the necessary documentation on demand to give effect hereto, failing which the Sheriff, Halfway-House is hereby authorized and ordered to sign such documentation on behalf of the defendant;
6. The defendant is to forfeit his claim to 50% of the plaintiff's pension interest held with the Post Office Retirement Fund;
7. Each party shall pay its own costs.



T.M. Makgoka
Judge of the High Court

Dates of hearing: 11 February 2016 and 8 June 2016

Date of judgment: 24 June 2016

For the Plaintiff: Adv. M. Fabricius

Instructed by: Shapiro & Ledwaba Incorporated

For the Defendant: Mr. S.M. Mashele

Instructed by: Polokwane Justice Centre,
Pretoria Justice Centre.