

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

CASE NO: 4081/2013

DATE: 10/8/2016

Reportable: Yes

Of interest to other judges: Yes

Revised.

IN THE MATTER BETWEEN:

**K K T**

**PLAINTIFF**

**AND**

**M S R**

**DEFENDANT**

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**JUDGMENT**

**KOLLAPEN J:**

1. The parties to these proceedings are engaged in a divorce action and one of the issues in dispute was whether the parties were married in accordance with the tenets of customary law as contemplated in Section 3 of the Recognition of Customary Marriages Act 120 of 1998.
2. The question as to whether the parties were married or not in accordance with customary law was dealt with and decided as a separated issue in terms of Rule 33(4) and on the 4th of April 2014, after a trial on the issue, MAKGOKA J found that a customary marriage

was concluded between the parties on the 2nd of May 2011. The consequence of that order was that the marriage between the parties was regarded as being one in community of property.

3. Following that finding the parties agreed, and it was ordered in terms of Rule 33(4) again, that the issue of whether the defendant was entitled to an order claiming forfeiture of the patrimonial benefits of the marriage, be dealt with and decided as a separated issue.
4. The trial on the separated issue proceeded and the defendant and the plaintiff testified in support of their case, while Mrs Ledibane, the mother of the plaintiff was also called as a witness on behalf of the plaintiff.

### **Background facts**

5. At the time of their marriage in May 2011, both parties could be described as successful professionals who were reasonably well-secured financially. The plaintiff was employed as a director in the Department of Public Works, while the defendant was a businessman *I* consultant in the employ of Sekela Xabiso Consultants in Pretoria.
6. At the time of their marriage, the plaintiff was the owner of an immovable property situated in the Irene View Country Estate and which in 2012 was valued at R2 million. The defendant on the other hand was the owner of two immovable properties situated in Highveld Estates Centurion and Afrique de Estate, Hartbeespoort Dam and which in 2012 were valued at R2.9 million and R1.5 million respectively. The Highveld Estates property was acquired in 2002 while the Hartbeespoort Dam property was purchased in 2010. The defendant also held various shareholdings in a number of entities and owned a number of motor vehicles including a Mercedes Benz AMG, a Range Rover Sport and Harley Davidson motorcycle.
7. The defendant acquired a further property during the course of the marriage in 2011 and this property, located in the Midstream Estate, was valued at R5.5 million in 2012.  
It is not in dispute that the defendant used his own resources to acquire all of the various assets to which reference has been made and that the plaintiff did likewise in respect of

the Irene View home. The defendant was also responsible for bond payments and maintenance and upkeep of the various properties and after the marriage, he assisted the plaintiff in paying the bond and with other payments in respect of the Irene View property.

8. The property values described above appear from a draft unsigned Antenuptial Contract prepared by Attorneys Van Greunen and Associates in late 2012 and it was not in dispute that the parties provided the attorneys with the property valuations which appear in the draft contract and to which reference has been made.
9. The Antenuptial Contract was never finalised largely as a result of a dispute relating to the inclusion of the Midstream property in the separate estate of the defendant as at the commencement of the marriage. It appeared that but for this, the plaintiff may have been willing to sign the Antenuptial Contract.
10. It warrants mention that the contract was styled as an Antenuptial Contract largely as a result of the attorneys working on the assumption that the parties were not married at the time. The declaration that they were indeed married on the 2<sup>nd</sup> of May 2011 was only made in April 2014 following the trial on the separated issue relating to the existence of the marriage.
11. The marriage between the parties started experiencing difficulties from an early stage. As indicated, both parties owned their own homes at the time of the marriage in May 2011 and while it is common cause that they lived together in the Highveld property from about August 2011, there is a dispute as to whether they lived together or separately in the period May 2011 to July 2011. Not much turns on this in my view as it is not directly relevant to any of the issues on which a determination is required.
12. Be that as it may, in August 2011 the defendant sought the assistance of the plaintiff's mother to address what he says was the conduct of the plaintiff whom he said failed to cook and properly take care of her daughter born of a previous marriage. The plaintiff disputed this and states that the problems in the marriage then and thereafter were largely on account of the defendant's behaviour in staying out late and coming back home often inebriated and at very late hours. The evidence of Ms Ledibane, the plaintiff's mother,

appears to confirm this as a constant and ongoing problem in the marriage which required the intervention of the elders in the family.

13. On the other hand the plaintiff also testified that her work commitments often took her out of town and as a result she would also return home late and at times, she would be required to stay out of town when visiting regional offices of her employer. In my view the professional demands of their respective careers meant that both parties would often have to work late and the ideal of a structured and predictable family routine was indeed difficult to achieve although the stance of the plaintiff was that the defendant's late-coming was largely social rather than business in nature.

14. The plaintiff's further testimony was that on an occasion in July 2012 she found condoms in his briefcase and a till slip evidencing the purchase of condoms from which she drew the conclusion that he was involved in an extra-marital affair. The defendant denied this and it does appear from the evidence that apart from this incident there were no other allegations or evidence of any extra-marital impropriety. The plaintiff however was aggrieved by the defendant's lack of intimacy with her for a period between April 2012 and December 2012 which apparently was ascribed to problems of erectile dysfunction. The parties however went on a vacation to Cape Town during late December 2012 to early January 2013 which was an acrimonious trip.

In early January 2013, the defendant left the common home apparently after burning the couple's wedding photographs and has not returned to the common home since then.

15. Accordingly the plaintiff's view was that the reason for the breakdown of the marriage was the unacceptable behaviour of the defendant and in particular his late-coming and socialising. On the other hand the plaintiff was steadfast in her evidence that the defendant provided adequately for the needs of the family, including the minor child born of the marriage in September 2012 as well as the daughter of the plaintiff born of her previous marriage. She did not regard the defendant as being a violent person even though on Valentine's Day in 2012, he allegedly throttled her after an argument.

## **The law**

16. Section 9(1) of the Divorce Act 70 of 1979 provides as follows:

*'9. Forfeiture of patrimonial benefits of marriage - (1) When a decree of divorce is granted on the ground of the irretrievable breakdown 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 breakdown thereof and any substantial misconduct on the part 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 benefitted'*

17. In **WIJKER v WIJKER 1993(4) SA 720 (A)** the Court set out the following approach to be adopted in hearing of a forfeiture claim:

*'It is obvious from the wording of the section that 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.'*

18. It is apparent and it was not disputed that absent an order of forfeiture the plaintiff will in fact be benefitted. This is a factual issue and when one has regard to the undisputed evidence that the defendant acquired all of the assets of the joint estate from his own resources and most of them even before the conclusion of the marriage in May 2011, then the conclusion that factually, the plaintiff will be benefitted in the event of a division, is inescapable.

In **ENGELBRECHT v ENGELBRECHT 1989(1) SA 597 (C)** the Court in dealing with this factual determination said that:

*'Unless the parties (either before or during the marriage) make precisely equal contributions the one that contributed less shall on dissolution of the marriage be benefitted above the other if forfeiture is not ordered.'*

I am satisfied that on the evidence before me, the above will be the case in this instance.  
This however is not the end of the matter.

19. The second and most significant enquiry that must follow is whether, regard being had to the duration of the marriage, the circumstances giving rise to its breakdown and any substantial misconduct on the part of the parties, such a benefit will be an undue one. This is a value judgment.

20. I now proceed to deal with those three factors:

- The duration of the marriage:

20.1. It is common cause that the marriage effectively endured from the 2nd of May 2011 until mid-January 2013 when the defendant left the common home, a period of approximately twenty months and that for most of that time it was a marriage characterised by conflict. Given the persistence of the problems and the inability of the parties to effectively resolve them, the writing was on the wall from an early stage.

- The circumstances that gave rise to the breakdown

20.2. While the lack of intimacy and the suspicion of an extra-marital affair were raised in evidence, it appears from the perspective of the plaintiff, that the overwhelming reason for the breakdown was the absence of the defendant from the marital home and the pressure such absence brought into the relationship. On the other hand, the work demands of the plaintiff also meant that she would often return late or be required to be away, which in turn was a cause of concern and discontent for the defendant.

20.3. It would be relatively easy with the benefit of hindsight to contend that a family regime characterised by a level of predictability should be the hallmark of all marriages. However reality and the demands of work may not always make this possible. People at the high end of the employment ladder often have to work long and late hours and make additional sacrifices in order to be and to remain successful

and competitive. Whether that is always desirable and compatible with a healthy family life may well be debatable, but in truth and reality it has become a feature of modern life with all the attendant consequences that go with it.

20.4. In my view the reasons for the breakdown of the marriage, certainly on the parties' own versions, relate in the main to the time spent outside of the marital home by both of them and their inability to find an acceptable manner of dealing with this source of the ongoing tension and conflict in the marriage. I would not on the evidence before me ascribe much weight to the plaintiff's suspicion of an affair - it remained at best a suspicion, and was a once-off incident after which it appears to have been laid to rest, albeit unsatisfactorily and without resolution.

20.5. Thus even though the evidence points strongly in the direction that the defendant could have done more during the marriage to devote dedicated time to the marriage, this factor in itself was not the only reason for the breakdown of the marriage. The plaintiff's own work demands coupled with the unpredictable nature of the demands their respective employment put on them was an exacerbating factor in fuelling the discontent that had set in.

▪ Substantial misconduct

20.6. The plaintiff took the position that the conduct of the defendant, consisting of his persistent late-coming and socialising, the condoms found in his possession, his lack of intimacy, his throttling of the plaintiff on a single occasion and his burning of the couples' wedding photographs constitute substantial misconduct.

20.7. It is trite that the misconduct must be substantial in nature and in this regard all of the complaints of the plaintiff (but for the late-coming) relate to single incidents which did not repeat themselves. Without suggesting that such conduct is acceptable between spouses, I would not characterise them as constituting substantial misconduct. To the extent that they occurred, it is clear that the throttling incident as well as the burning of the photographs took place after an argument and there was no evidence to suggest that it was thought out or deliberate. In fact the plaintiff accepted that violence was not a feature of the marriage between herself and the defendant and

that the defendant diligently discharged the financial obligations of attending to the needs of the plaintiff, the child born of the marriage and the plaintiff's child born of her previous marriage.

20.8. The condom incident remained at best a suspicion which was never resolved and the parties appeared to have moved on after the incident and the allegation of infidelity never emerged again.

20.9. With regard to the late-coming, I have already dealt with that and my view is that even if the defendant was remiss in this regard in not paying sufficient attention to the needs of his family, it could hardly constitute substantial misconduct.

20.10. For these reasons and even on the plaintiff's version I am not satisfied that it could be said that there was substantial misconduct on the part of the defendant. That being the case, the only ground on which a claim for forfeiture then stands to be considered is the duration of the marriage.

▪ Duration of the marriage

20.11. This was a short marriage and given the substantial estate the defendant has built up, most of it prior to the marriage, the question is whether the benefit the plaintiff stands to gain can be considered to be an undue benefit.

20.12. While it is so that a marriage in community of property is a universal economic partnership where the assets and liabilities of the parties are merged in a joint estate (see Hahlo and Kahn *The South African Law of Husband and Wife* 5th edition at pages 157 to 158, referred to in *Wijker v Wijker* supra), the enactment of Section 9(1) of the Divorce Act contemplates a departure from this principle upon the dissolution of a marriage in defined circumstances.

20.13. In determining whether a benefit will be undue, the Court in **WIJKER** also cautioned that the equitable principle of fairness cannot be used to justify an order of forfeiture as it runs counter to the basic concept of community of property. The Court, without defining what an undue benefit would constitute, pointed out however

that in determining whether it was undue, regard must be had to the three factors set out in Section 9(1) and to which reference has already been made. Interestingly the Court in **KLERCK v KLERCK 1991 (1) SA 265 (W)** in dealing with a claim for forfeiture based solely on the duration of the marriage said:

*'Ek beskou dit as onbehoorlik en onbillike bevoordeling vanweë diefeit dat die huwelik so kort geduur het ...' (at 273B).*

20.14. Clearly implicit in the concepts of what is '*onbillik en onbehoorlik*' are notions of equity and fairness but the Court in **WIJKE** was clear that these have no relevance in the determination of what would constitute an undue benefit.

20.15. What then would constitute an undue benefit? Clearly where a party enters into a marriage with the intention that it will be of a short duration and with the object of extracting a benefit, such a benefit will be an undue one. This is obviously not the case here as there is simply no suggestion that this is what motivated the plaintiff.

20.16. On the other hand the concept of a benefit that is 'due' as opposed to 'undue' has been associated with the duration of the marriage. In **WIJKE** (supra) the fact that the marriage endured for approximately thirty five years appeared to have been a factor militating against an order for forfeiture being granted.

20.17. The South African Concise Oxford Dictionary (2005 edition) defines undue as 'unwarranted or inappropriate because excessive or disproportionate'. Thus while this Court is enjoined not to consider fairness or equity in the determination of what may be undue, my view is that if regard is had to the duration of the marriage then considerations of what may be proportionate may well be valid and appropriate.

20.18. Accepting as a starting point that marriages in community of property evidence a universal economic partnership of spouses, it does appear that as the marriage endures, the accrual of a benefit that may initially be characterised as not due is rendered more warranted, more proportionate and more appropriate. Thus, in circumstances where the other factors that relate to substantial misconduct and the circumstances giving rise to the breakdown of the marriage are not decisive in

determining the issue, it would appear that the consideration of a fault-neutral factor such as the duration of the marriage may well and should indeed be based on considerations of proportionality.

20.19. While not cast in stone, it must therefore follow that in the determination of whether a benefit is undue, a Court is more likely to make such a determination where the marriage is of short duration as opposed to circumstances where the marriage was of a long duration. Simply put, 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 undue and disproportionate.

20.20. One must be careful however that this does not translate into a rigid and mechanical exercise as the Court is after all enjoined to make a value judgment in this regard.

20.21. Taking all of this into consideration my view is that the plaintiff will indeed be unduly benefitted if an order for forfeiture is not made.

21. This was a short marriage and given the substantial estate the defendant has built up, most of it prior to the marriage, my view is that the plaintiff will indeed be unduly benefitted if an order for forfeiture is not made. In this regard I am also mindful in considering undue benefit that the plaintiff has sold her Irene home and retained the profits from the sale for her own benefit. Her evidence was that part of the proceeds were utilised to fund her litigation as well as to pay for her studies which she is currently pursuing in the United States of America.

22. On the other hand, I must accept that the plaintiff's career was interrupted by the birth of her minor son and that while she will be able to resume employment hopefully at a higher level with her soon-to-be-completed post-graduate studies, the marriage and the birth of her child has also had a detrimental effect on her own work trajectory.

23. Under those circumstances a partial forfeiture would be justified and it would seem that an order of forfeiture of all the benefits of the marriage but excluding the Highveld property would be an appropriate order to make in the circumstances. I intend

accordingly to make such an order. In excluding the Highveld property, I do so not on the basis of the period when it was acquired, nor the means used to do so. It has been selected because its net value would provide a suitable financial basis for the partial forfeiture order that I intend to make. In this regard I take the view that while the short duration of the marriage justifies an order of forfeiture, there also needs to be some economic consequence arising from the fact that the marriage endured for some twenty months. Sharing in the net value of the Highveld property would in my view be appropriate when I have regard to all the circumstances.

### **Costs**

24. Given the discretion vested in the Court with regard to costs, it would in my view be just and equitable for each party to bear their own costs. This is fortified by the conclusion that both parties achieved some measure of success .

### 25. **ORDER**

- I. It is ordered that the plaintiff forfeits all the patrimonial benefits of the marriage entered into between herself and the defendant on the 2<sup>nd</sup> of May 2011 except for the benefits arising out of the property known as Erf [...] Highveld Extension 43 Township Registration Division J.R. Gauteng Province.
- II. The plaintiff shall be entitled to fifty percent of the net value of the aforementioned property to be determined as at the date of this order, the net value being the market value of the property less the total value of all mortgages registered against the property.
- III. Each party is to pay its own costs.

N KOLLAPEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

HEARD ON: 25, 26, 28 & 29 APRIL 2016

FOR THE PLAINTIFF/RESPONDENT : ADV. D A SMITH SC

INSTRUCTED BY: HUGO & NGWENYA INC. (ref.: Mr Hugo/H3391/Marike)

FOR THE DEFENDANT/APPLICANT : ADV. P A VAN NIEKERK SC

INSTRUCTED BY: L MBANJWA INCORPORATED INC. (ref.: L

Mbanjwa/MM/Mulalo/R48)