IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no: 13966/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED. NO

21 SEPTEMBER 2022

In the matter between:

C[....] M[....] M[....]2 **PLAINTIFF**

And

A[....] M[....]3 S[....] M[....]2 **DEFENDANT**

JUDGMENT

MAKHOBA J

1. The plaintiff and defendant married were married in community of property on the 3rd July 2009. The plaintiff instituted an action for divorce against the defendant.

2. The plaintiff seeks a decree of divorce, division of the joint estate and 50% (fifty percent) of the defendant's pension interest held by the Government Employee's Pension Fund (GEPF)

3. The defendant agrees that the marriage has irretrievably broken down and ask for the forfeiture of benefits in respect of GEPF, immovable property at [....] H[....] and the immovable properties. The application for the forfeiture order is opposed by the plaintiff.

4. Thus therefore the only issue before this court is whether should the plaintiff forfeit patrimonial benefits as prayed for by the defendant in his counterclaim. It is common cause between the parties that the marriage relationship between them has indeed irretrievably broken down.

5. There are two children born from the marriage however they have obtained the age of majority.

6. Both counsel agreed amongst themselves that the defendant must testify first. The defendant testified that he was staying together with the defendant at a village called M[....]4 in D[....]. Teir children were staying with his parents.

7. The relationship between the plaintiff and defendant became sour when the plaintiff was in a habit of leaving the communal home without informing the defendant where she was going. Sometimes she will leave home and come back after a period of about three months.

8. Shortly after their marriage the plaintiff enrolled with a nursing school and left home staying at the nursing school but refused to disclose to him where the purported nursing school was.

9. In the year 2012 the defendant called a family meeting pertaining to the plaintiff's conduct and to complain that the plaintiff was not taking care of the children. In the meeting the plaintiff was reprimanded.

10. Moreover, the plaintiff used to be fetched at home by an unknown man when the plaintiff was asked who the man was the plaintiff's reply was simply *"I told you where I am going".*

11. During her absence in 2013 she only came home 5 (five) times. On the 11th August 2013 the defendant reported to the plaintiff's parents that she was no longer staying at the common home.

12. During 2014 the plaintiff came back home only 3 (three) times. On the 24th December 2014 she came back home with a child, when he asked her whose child it was her reply was *"It is none of your business"* As a result of this the two families met and the plaintiff's family decided to remove her from the common home.

13. The defendant is an educator by profession. Their marriage between the plaintiff and the defendant lasted from 2009 to 2011. The defendant further testified that the plaintiff did not contribute towards the maintenance of the 2 (two) children who are currently 29 years and 31years respectively. He and his parents financed the two daughters tertiary education.

14. In addition, the defendant testified that before his marriage to the plaintiff he had two children, born 10 October 1992 and 25 February 2005 respectively. The plaintiff was well aware of these children.

15. During cross-examination of the defendant, his evidence in respect of the children and the conduct of the plaintiff towards the defendant was not challenged. The defendant was blamed for the breaking down of the marriage. The defendant reiterated that the person who was having extra martial affairs was the plaintiff.

16. In her testimony the plaintiff refutes that she is responsible for the failure of the marriage instead she testified that it all started when the defendant refused to have sexual intercourse with her. She testified that they never had sexual intercourse for a period of one year. In the year 2011 she left the defendant because of lack of sexual intercourse. The defendant has extra martial affairs with young girls.

17. The sole reason why she went back to the house in December 2014 is that she wanted to take all her belongings. Arriving at the house the defendant prevented her from entering the house.

18. During cross-examination it was put to the plaintiff that the defendant stopped having sex with her because of her extra-marital affairs. Both the plaintiff and defendant closed their respective cases without calling any witnesses.

19. It is submitted on behalf of the plaintiff that, the defendant did not prove the nature and extent of any patrimonial benefit capable of being forfeited. The value of the pension fund nor the document relating to the pension fund were not proved.[1]

20. Counsel for the defendant contends that the plaintiff will be unduly benefited when the order for forfeiture is not made.[2]

21. Section 9(1) of the Divorce Act 70 of 1979 provides as follows: *"When a decree of divorcing is granted on the ground of the irretrievable break-down of 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 benefitted."*

22. In Wijker v Wijker[3] the learned judge, in interpreting section 9 of the Divorce Act, stated that the court must first make a factual finding as to whether or not the party against whom the order is sought will in fact benefit. Once it is held that the party will indeed derive a benefit the court may proceed to determine whether such benefit will be undue. This determination will be done after considering the factors mentioned in section 9 *viz.*

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[1] Vide caseline 5-6 paragraph 1.5
[2] Vide caselines 5-36 paragrgh 25
[3] (325/92) [1993] ZASCA 101; (1993) 4 ALL SA 857 (AD) (26 AUGUST 1993)

a. The duration of the marriage;

b. The circumstances which have risen to the break-down of the marriage or

c. Any substantial misconduct on the part of either of the parties.

23. Counsel for the respondent referred the court to the case of Engelbrecht v Engelbrecht[4] in which the full bench held as follow:-

> *"In order to succeed a party who seeks a forfeiture order must first establish what the nature and extent of the benefits were: unless this is done, the court cannot decide if the benefit was undue or not. Hence, only when the nature and extent of the benefit have been proved is it necessary to analyse the three factors which may be considered in deciding whether it will equitable to order a forfeiture of benefits".*

24. In Moodley v Moodley[5] the court granted a forfeiture order where the parties were married for more than 20 (twenty) years due to substantial misconduct on the part of the defendant. It is therefore trite that each and every case must be approached on its own merits.

25. In JW v SW[6] the court held that it is a well-established principle of law that a party can only benefit from an asset brought into the estate by the other party, not from his own, a *fortiori*, such party could not be ordered to forfeit his or her own asset.

26. The plaintiff in this matter cannot forfeit any assets because she did not bring any tangible asset into the marriage. She did not even contribute to the upbringing of the two daughters until they completed their studies. She can only benefit from the dissolution of the marriage. The question is therefore will she benefit unduly if she is given 50%(fifty percent) of the assets accumulated during the subsistence of the marriage.

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[4] 1989 (1) SA 597 (C)
[5] [2008] JOL 22279
[6] 2011 (1) SA 545 GNP

27. The submission by the plaintiff that the defendant did not prove the nature and extent of any patrimonial benefit capable of being forfeited cannot succeed because in his pleadings the defendant does ask for the forfeiture order in respect of the pension fund and the property in stand number [....] H[....]. It is not a requirement that the defendant must prove the correct financial value of the house or property including the pension fund for which to succeed in his claim.

28. In my view the plaintiff when she abandoned the common home, the defendant was left alone to build their common assets including his pension fund and raising their children.

29. The infidelity of the plaintiff in my view caused the break-down of the marriage. This court is satisfied that the defendant gave his testimony in a clear and direct manner and the court accept his testimony as the truth. The plaintiff's testimony is very much unreliable and riddled with improbabilities and inconsistencies. The evidence of the defendant was not challenged under cross-examination for instance it was not put in dispute that the plaintiff was fetched at home in the presence of her husband by unknown men. The plaintiff instead of seeking for a divorce returned to the common home with another man's child.

30. The infidelity of the plaintiff and her conduct amounts to a substantial misconduct on her part as referred to in case law and section 9 of the Divorce Act.

31. The defendant succeed in his counter claim. I make the following order in favour of the defendant.

1. A decree of divorce

2. The plaintiff forfeits the following benefits of the marriage in community of property.

2.1 The defendants benefit/ contribution from the Government Employees Pension Fund (GEPF)
2.2 The immovable property situated at stand number [....] H[....]

3. The plaintiff to pay the defendants party and party costs.

D. MAKHOBA
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the plaintiff :	**Advocate Radamba**
Instructed by:	**Shapiro & Ledwaba Attorneys**
For the defendant:	**Advocate Mpenyana**
Instructed by:	**J M Masombuka Attorneys**
Date heard:	**21 July 2022**
Date of Judgment:	**21 September 2022**