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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER 4342/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
14 November 2022

In the matter between:

N[....], M[....] G[....] M[....]²
(Identity number [....])

PLAINTIFF

and

N[....], M[....]³ S[....] (born M[....]⁴)
(Identity number [....])

DEFENDANT

JUDGMENT

COLLIS J

INTRODUCTION:

“Do not look for healing at the feet of those who broke you”¹

1. The parties in the above action were married to each other on 19 November 2004, at Rustenburg, in community of property which marriage still subsists. There were no children born in the marriage although the Plaintiff entered the marriage with two children born from a previous marriage.

2. Like most marriages they grew apart and their marriage relationship has broken down irretrievably as a result of which the Plaintiff instituted divorce proceedings.

3. As per the divorce action the Plaintiff seeks the following orders against the Defendant in terms of the particulars of claim.²

3.1 A decree of divorce.

3.2 Division of the joint estate.

3.3 50% of the Defendant's Pension Fund.

3.4 Spousal maintenance.

3.5 Costs of the action.

4. The Defendant defended this action and as per her Counterclaim had pleaded for the following:³

¹ Divorce quote by Rupri Kaur.

² Caselines 001-4 to 8.

³ Caselines 001-15 to 19.

4.1 Decree of divorce.

4.2 Forfeiture of the entire patrimonial benefit pertaining to the matrimonial property situated at [....] M[....]5 Street, A[....], Pretoria and the Defendant's pension fund held at Government's Employee's pension Fund.

4.3 Division of the remainder of the joint estate.

4.4 Costs of the action.

5. At the commencement of the proceedings the parties advised the Court that:

5.1 the Plaintiff does not wish to pursue his claim for spousal maintenance and only requests a decree of divorce and division of the joint estate; and

5.2 that the Defendant does not wish to proceed with her claim for forfeiture of the Plaintiff's right to share in the matrimonial property situated at [....] M[....]5 Street, A[....], Pretoria but only towards the sharing in her pension fund held at the Gauteng Employee Pension Fund.

6. This agreement was reached by them during a second pre-trial meeting held on 19 January 2022.⁴

COMMON CAUSE FACTS

7. It was common cause between the parties that the Defendant has a pension interest as defined in terms of Section 1 of the Divorce Act 70 of 1979, read with the Government Employees Pension Law, Proclamation 21 of 1996 held in the Government Employees Pension Fund.

⁴ Caselines 003-18 to 33.

8. It was further common cause that the Plaintiff resigned in 2018 and received a pension pay out in 2019 in the amount of R 1 708 152.58 of which an amount of R 1 200 000.00 was deposited into the 10X Living annuity.

ISSUES IN DISPUTE BETWEEN THE PARTIES

8. By agreement between them, this Court was firstly called upon to determine, whether an order of forfeiture to share in the Defendant's pension fund held at the Government Employees Pension Fund is to be granted against the Plaintiff.

9. Secondly, the Court was called upon to determine whether an order should be granted for the division of the joint estate, including sharing in the benefit of the Defendants pension fund.

ONUS OF PROOF

10. As to the *onus of proof* the Defendant carried the *onus* to prove on a balance of probability that the Plaintiff should forfeit sharing in the benefit of her pension fund. It is for this reason that the parties were in agreement that the Defendant will also have the duty to begin.

APPLICABLE LEGAL PRINCIPLES

11. As for a marriage in community of property the decision of BOO v NNO⁵ is instructive. In this decision it was stated as follows:

“It has long been accepted that when parties enter into a marriage in community of property one joint estate will be formed. As such entering into a marriage in community of property is a risk each spouse takes. The spouses will on the date the joint estate is created, become joint owners of all the assets brought into the estate and will also share each other's liabilities.”

⁵ [2012] JOL 29395 (GNP)

12. H.R. Hahlo in *The South African Law of Husband and Wife* Fifth Edition at p 157 - 158 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 the financial contributions, hold equal shares.”

13. Further the decision of *Lock v Keers* stated that:

“the effect of a marriage in community of property in terms of the common law and the law of South Africa, is that all property owned by the parties separately until then, now becomes owned by both of them in equal undivided shares and all debt or liabilities in each parties name, now become the debt and liabilities of both parties in equal shares.”⁶

14. Our courts in terms of the Divorce Act 70 of 1979, when granting a divorce decree, may grant an order for the division of such joint estate alternatively that a spouse forfeits his or her right to share in all the benefits derived from such joint estate or forfeits his or her right to share in a specific benefit so noted in the pleadings either wholly or partly. As mentioned *in casu*, the Defendant only seeks that the Plaintiff forfeits in sharing in her Government Employees Pension, thus a specific benefit.

15. Section 9 of the Divorce Act reads as follows:

“When a decree of divorce is granted on the ground of 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 partly, 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.”

⁶ *Lock v Keers* 1945 TPD 113 at 116.

16. As such, a party seeking forfeiture of the other party's right to share in the benefit of a specific asset, is required to show and provide proof that if such order is not granted, such party would unduly benefit before any of the other issues can even be considered as stated in the act.

17. Therefore, a claim for forfeiture must be properly formulated as ancillary relief to a claim for divorce in a divorce action ⁷ and a party requesting such order must plead the necessary facts to support such order and formulate a prayer in the pleadings to define the nature of the relief sought. ⁸

PLEADED CASE ON FORFEITURE

18. As per the Counterclaim, the Defendant had pleaded forfeiture as follows:⁹

18.1 That the Plaintiff did not communicate his intention to resign his job which was to the detriment of the joint estate.

18.2 That the Plaintiff received an amount of R 1 700 000.00 from his pension fund and that he used same for his sole benefit without discussing or sharing same with the Defendant.

18.3 Directly after the Plaintiff received his pension pay out he indicated that he is intending to proceed with the divorce proceedings and thereafter vacated the matrimonial home.

18.4 Plaintiff was financially abusive towards the Defendant and failed to contribute his fair share towards the monthly expenses of the matrimonial home.

FORFEITURE

19. In determining the forfeiture claim, this Court is guided by the decision of the Appeal Court in the matter of *Wijker v Wijker*¹⁰, where Judge Van Coller set out the following approach at the hearing of a forfeiture claim.

⁷ A Practical guide to patrimonial litigation Van Niekerk, P. 2-5.

⁸ *Koza v Koza* 1982(3) SA 462 (T) 465

⁹ Counterclaim p 001-15 to 19

“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 a purely 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 all the facts falling within the compass of the three factors mentioned in the section.” These factors were also referred to in *MC v JC*¹¹, *Molapo v Molapo*¹²

20. Although the value judgment is made after having considered the three factors that are mentioned in Section 9(1) the Court therefore does not merely exercise a judicial discretion. Only once the nature and extent of the benefit is proved, will the Court consider whether the benefit is an undue one.

21. These factors, it should be mentioned, are not accumulative. As such they need not all be alleged and proved.¹³

22. In making a determination of assessing "substantial misconduct" on the side of a party this can include conduct which has no bearing on the breakdown of the marriage and can be considered in the context of the circumstances which led to the breakdown of the marriage.

23. As to how our courts have defined an undue benefit, the decision of *KT v MR*¹⁴ by Kollapen J as he was then, in paragraph 20.17 is instructive, namely:

“The South African Concise Oxford Dictionary (2005 ed) defines undue as unwarranted or inappropriate, excessive or disproportionate.”

¹⁰ 1993(4) SA 720 (A) at 727D – F.

¹¹ 2016 (2) SA 227 (GP) in paragraph 12

¹² (4411/10) [2013] ZAFSHC 29 (14 March 2013)

¹³ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C);

¹⁴ 2017 (1) SA 97 (GP).

EVIDENCE

24. Defendant testified that the parties entered into a marriage during 2004. Almost from inception the marriage relationship between the parties had been a tumultuous and strained marriage. During their courtship she testified that she made her intentions of wanting to become a mother clear to the Plaintiff as she was already attempting to undergo In Vitro Fertilization in order to have a child. At first the Plaintiff was amenable to this, but later he changed his mind as the parties already had two children brought into the marriage from his earlier marriage. From the start she testified she played a motherly role to the Plaintiff's children whom she almost raised single-handedly, however when the parties commenced divorce proceedings the Plaintiff had purposefully severed and indoctrinated the children against her. This pained her a great deal but with time she had to accept it.

In raising the children, she testified she had paid for almost all their expenses and had assisted the children in paying for school fees, university fees and medical aid. It was her testimony that the Plaintiff had purposefully married her to play the role of a mother to his children and to use her as a "cash cow" and on occasion also called her a "fat cat". Shortly after the children completed their studies her husband commenced divorce proceedings in 2020 and refused for her to have any contact with his children. She testified that during her marriage that she had been financially abused by the Plaintiff. During 2007, she was also assaulted by the Plaintiff and they were reconciled when their relatives intervened. During the subsistence of their marriage the Plaintiff never bought her anything, nor did she receive any money from him. In 2018, the Plaintiff resigned from his employment and received a pay out from the Government Employees Pension Fund. At the time she was not advised by him as to how much money he had received nor was the manner in which this money was to be used discussed between them and the Defendant had not benefitted at all from his Pension Fund. It was at this point that she perceived their marriage to have broken down irretrievably. Some of the money the Plaintiff had received from his Pension Fund, he had squandered and had transferred the remainder of his pension fund into a living annuity the details in the form of a statement she had only received after the commencement of these divorce proceedings. From his entire pension proceeds he only gave her an amount of

R3000.00 for her personal use. It is on this basis that she testified that the Plaintiff would be unduly benefitted in relation to her if an order for forfeiture of patrimonial benefits was not made in favour of her against the Plaintiff in respect of her pension fund. As at date of her testimony, her pension fund was valued at R 3 667 308 00.¹⁵

25. The Plaintiff testified that when he left the matrimonial home, he only left with his clothes and that the reasons for the breakdown of his marriage to the Defendant was many. It was his testimony that they had not been on speaking terms with one another for some time; communication was poor and when his health took a beating in 2014 things had changed for the worse. It was around this time that his wife had denied him conjugal rights which was fuelled by his wife moving out of their bedroom. As a result of his failing health having suffered from anxiety and stress, they jointly took the decision that he should resign from his place of employment and at the time he had received a pension payment in the amount of R1 674 103, 96. He further testified from the amount he received he transferred an amount R 1 200 000.00 to a living annuity namely 10x¹⁶ and the balance of the money he used to settle some of their debt, such as paying up the bond, settling some personal loans, paying off the balance owed on his motor vehicle and buying clothes. All this had taken place with the knowledge of the Defendant especially the living annuity that the amount of R 1 200 000.00 was invested in. It was his testimony that when he was still employed, he carried a number of the household expenses such as paying for water and electricity, school fees, DSTV, paying insurance policies and buying uniform for the children. As such he denied that he had financially abused the Defendant.

26. In assessing as whether the Defendant had proven her pleaded case on forfeiture the following is of relevance:

26.1 The Defendant had to plead and provide proof of what the Plaintiff was to benefit where her pension fund is considered if an order is not to be granted, by

¹⁵ Joint Trial Bundle 007-290-291

¹⁶ Joint Trial Bundle 007-40

showing what the value of the Defendant's pension fund would have been at the date of the marriage in 2004 versus what it is now. This the Defendant failed to prove to support her claim for forfeiture. The only evidence presented by the Defendant, was the value of her Government Employees Pension Fund as at date when she gave evidence in court.

26.2 In relation to the resignation of the Defendant, it was the Defendant's pleaded case that the Plaintiff had not discussed his resignation with her and that this resignation was to the detriment of their joint estate. As mentioned, it was the Plaintiff's evidence that he resigned as a result of ill health and that the decision was discussed with the Defendant. Albeit that this was denied by the Defendant, the evidence presented before court by the Plaintiff proves otherwise. In this regard, it is noteworthy that the Defendant did not provide any proof in rebuttal that the Plaintiff should not have resigned as a result of his health or that his health did not deteriorate during that time that he resigned. In this regard, it is telling that the Plaintiff testified, that the Defendant was aware that he was even hospitalised as a result of his ill health as she collected him when he collapsed and even took him to the hospital. This evidence as tendered by the Plaintiff was not rebutted by the Defendant.

26.3 As to the ground that the Plaintiff never discussed investing a portion of his pension payment in a living annuity and the balance thereof to settle their joint debts, the Plaintiff provided full detail and sufficient testimony about what he did with his pension fund payments and accepted that same should form part of the joint estate. The details testified to by the Plaintiff relates to the following:

26.3.1 The Plaintiff testified, that the parties were in discussions with each other when he attended to the GEPF to determine where the funds were.¹⁷ The Plaintiff then stated on this communication that it was transferred to 10X Living Annuity and when the Defendant asked

¹⁷ Caselines p 992-37

“what’s that” he answered Preservation Fund, Private Fund which is going to pay our pension.

26.3.2. As to the balance of the pension payment he testified that an amount of R 499 806,10¹⁸ was paid to him as his third that he was allowed to be paid out to him without a tax deduction. From this he paid the following:

26.3.2.1. He testified that he paid an amount of R 293 679,76 to settle the outstanding bond on the matrimonial home loan.¹⁹ This evidence as presented by the Plaintiff was not rebutted by the Defendant.

26.3.2.2 The Plaintiff further testified, that he paid an amount of R 7 000.00 to the Edgars and Woolworths accounts in the name of the Defendant.²⁰

26.3.2.3 He gave evidence that he paid R80 890.30 towards the Wesbank account being the Plaintiff’s motor vehicle.²¹ This property formed part of the joint estate of the parties and in as much as it was a vehicle used by the Plaintiff, the Defendant in law was also liable for this debt.

26.3.2.4 The Plaintiff also paid an amount of R35 000.00 towards the Blue Bean Credit Card and Jet Account.²² Albeit that these accounts were in the in the name of the Plaintiff, both parties remained liable for these debts given their marital regime of being married in community of property.

¹⁸ Caselines 007-34

¹⁹ Caselines 007-34

²⁰ See Caselines 007-35

²¹ See Caselines 007-34 and 007-36

²² See Caselines 007-34

26.3.2.5 Lastly, he testified that he also spent an amount of R 9 500.00²³ on clothes which he had bought for himself and the children.

27. From the amounts listed above, it is evident that the Plaintiff had paid out a total of R 416 570,06 on the joint debts from the third of his pension fund received. As the Defendant (carrying the *onus*) was unable to present any evidence in rebuttal thereto the inescapable conclusion to reach on the conspectus of evidence is that the Defendant has failed to present evidence that the Plaintiff used his pension fund payment for his sole benefit as alleged and pleaded by her. Furthermore, this amount used by the Plaintiff from his pension fund pay-out is less than half of the amount the Plaintiff now claims the Plaintiff should forfeit in sharing. This will result in the Defendant in fact unduly benefitting from a forfeiture order, if such an order is to be granted by the Court.

28. Before this Court, it was the Defendants' case that she had not given her permission as to the vehicle within which the Plaintiff's pension pay-out was to be invested in. It seems that this is really what sparked her discontent with the step taken by the Plaintiff. This reference to consent or not would be applicable in a claim for a re-adjustment in terms of Section 15(9) of the Matrimonial Property Act 88 of 1984. This is not the Defendant's pleaded case. See in this regard *Mahloe v Mahloe* dated 20 November 2017 [2019] JOL 42224 (GP). Absent thereof, it is for this reason that forfeiture of the Plaintiff's assets can only be assessed with reference to the factors listed in the Divorce Act 70 of 1979.

29. As the asset in respect of which forfeiture is sought refers to the Defendant's pension fund it is also necessary to have regard to the provisions of Sections 7(7) and 7(8) (a) of the Divorce Act 70 of 1979 which reads as follows:

²³ See Caselines 007-34

“7. 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, subject to paragraphs (a) and (c) be deemed to be part of his assets.

8. Notwithstanding the provisions of any other law or the rules of any pension fund-

(a) the court granting a decree of divorce in respect of a member of such fund, may make an order that-

(i) 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...”

30. The last ground pleaded by the Defendant for forfeiture is that the Plaintiff soon after receiving his pension pay-out, he vacated their matrimonial home. In this regard the Plaintiff testified that he resigned in 2018 and received the pension fund payment on 27 May 2019. It was further his testimony that he moved out of the matrimonial home on 20 March 2020. From the evidence of the parties, it appears that for the majority part of their marriage that they lived in separate homes, primarily because of their respective places of employment. To my mind it is of no moment as to when the Plaintiff finally announced that he will be seeking a divorce from the Defendant. On the evidence presented by both parties, their marriage had taken strain almost from inception and it was almost certain that they eventually would end up seeking a divorce from a court. This certainly cannot be seen a substantial misconduct on the part of the Plaintiff which in turn would justify a forfeiture order.

31. In assessing as to whether the Plaintiff had financially abused the Defendant, I was saddened to learn on the evidence presented that the Plaintiff during the course of the marriage had given the Defendant very little money for her personal use. It seems that

as the parties mostly lived apart and the fact that the Defendant throughout their marriage earned more than the Plaintiff that this contributed primarily to the state of play. What spouses agree on during a marriage around maintenance differs from one marriage to another and it appears when things is left unchallenged by one spouse the other find it easier to accept the status quo. The Plaintiff when he testified denied that he financially abused the Defendant. It was also his testimony that during the marriage he paid the Water and Lights, DSTV, school fees for the children. Uniforms which he bought at Jet Stores, Fuel for family outings and when vehicles were used, Insurance on three vehicles, maintenance of the Defendant's vehicle, licence disks, groceries, rates and taxes and water and lights and other household expenses. This part of his evidence in part was admitted by the Defendant and as such I am not persuaded that the Defendant has proven that the Plaintiff was financially abusive during the marriage.

32. In the decision *Z v Z*²⁴ it is stated at paragraph 7 in relation to a forfeiture order that: "It is clear from the wording of the subsection that to qualify for forfeiture, based on misconduct, such misconduct must be substantial, I understand this to mean that, it must not only be misconduct which does not accord with the marriage relationship, but also that the misconduct must be serious. Undue benefit in my view, is also a relative term. Benefitting from one's spouse sweat, in my view would not necessarily amount to undue benefit."

33. On the conspectus of evidence presented, I am therefore not persuaded that the Defendant has discharged her *onus* of proving substantial misconduct to justify a forfeiture order.

34. In as far as the duration of the marriage is concerned, it is common cause that the parties were married in 2004 and that the parties separated in March 2020. Their marriage is thus one of a long duration, and as such not a ground which could justify a forfeiture order.

²⁴ 43745/13 [2015] ZAGPPHC 940 (18 September 2015)

COSTS

35. In determining the costs order to be awarded in this action, the Plaintiff requested costs in his favour given the manner in which the Defendant has defended this action. In contrast on behalf of the Defendant Mr Lazarus had submitted that each party is to pay their own costs of suit.

36. The awarding of costs falls within the discretion of the court and the usual practice is for costs to follow the result. In the present matter however this court in exercising its discretion is of the opinion that the appropriate costs to be awarded given the prevailing circumstances, is for each party to pay its own costs.

ORDER:

37. In the result the following order is granted:

37.1 A decree of divorce.

37.2 It is ordered that the Plaintiff being a non-member spouse of the Defendant's pension interest held at the Government Employees Pension Fund with Membership number [...], Employer Code GA 193D as defined in Section 1 of the Divorce Act 70 of 1970 is paid an amount of R 1233 654 (One Million Two Hundred and Thirty Three Thousand Six Hundred and Fifty Four Rand).

37.3 This amount as mentioned on paragraph 1.2 above is to be paid into the Plaintiff's nominated account namely, Wolvaart Incorporated, Trust Account held at Standard Bank Menlyn Branch Code 051001, Account Number: [...].

37.4 It is ordered that the Government Pension Fund, is to endorse its records to reflect the Plaintiff's entitlement in terms of this order pending payment or transfer to the Plaintiff of the amount of R 1233 654.00 of the pension interest of the Defendant in terms of the provisions of section 37D (4) of the Pension

Funds Act 24 of 1956 after receipt of notification by the Plaintiff or the Defendant.

37.5 Division of the remainder of the joint estate.

37.6 Each party to pay its own costs.

C.COLLIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

APPEARANCES:

COUNSEL FOR THE PLAINTIFF:
ATTORNEY FOR THE PLAINTIFF:

Adv. T. Engelbrecht
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ATTORNEY FOR THE DEFENDANT:
ATTORNEY FOR THE DEFENDANT:

Mr. J. Lazarus
Shapiro & Ledwaba Incorporated

DATE OF HEARING:
DATE OF JUDGMENT:

04 & 08 April 2022; 06 May 2022
14 November 2022