

SOUTH AFRICA / JUDGMENT

A.R.S (born K) v M.S.S (2427/2021)

[2024] ZALMPPHC 10 (30 January 2024)

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COURT

Limpopo High Court, Polokwane

BEFORE

Sikhwari

CASE / FILE NUMBER

2427/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

NO: 2427/2021

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

DAT:

30/01/2024

In

the matter

between: A[...]
 R[...]
 S[...]
 (BORN
 K[...])
 PLAINTIFF
 And
 M[...]
 S[...]
 S[...]
 DEFENDANT

JUDGMENT

This

judgment

is delivered electronically by way of dispatching same to email addresses of the parties' legal representatives and publishing same on SAFLII. The date of delivery of this

judgment

is deemed to be 30 January 2024.

SIKHWARI AJ

- [1] The plaintiff in this matter has issued divorce proceedings against the defendant. The dispute relating to the breakdown of the marriage is common cause. There are two disputes for adjudication before this court. The first one is the maintenance amount of the parties' minor child, one T[...] M[...] S[...] who is a boy born on 1[...] J[...] 2011. The second dispute is the plaintiff's application for forfeiture of benefits of a marriage in community of property in respect of the parties' immovable property situated at Erf 6[...], F[...] P[...] in Polokwane in the district of Polokwane and the plaintiff's pension interests in the Government Employees Pension Fund ("GEPF").
- [2] In respect of the maintenance of the minor child herein, the plaintiff pleaded maintenance in the amount of R5 000.00 (five thousand rand) per month. The defendant in his plea had simply denied the said amount without putting a version regarding his views of a fair and reasonable amount which he can afford as maintenance of the minor child, save to admit that primary residence and daily care should go to the plaintiff. In his counterclaim, the defendant pleaded nothing regarding the maintenance of the minor child. In the circumstances, I regard the amount as undisputed.

- [3] During the trial, the issue of primary residence and daily care of the minor child and / or his maintenance was not canvassed. I assume that it was so because those issues were not disputed over and above what was in the pleadings. There is nothing which will prevent the parties to take this issue further in the Maintenance Court or Children's Court for full adjudication, For now, this court will award an amount of R5 000.00 as faior and reasonable amount due to the plaintiff from the defendant as maintenance of the parties' one minor child. This amount will be due on or before seventh of each month starting from 7 February 2024 until the minor child is self-supporting or the order is varied by a competent court with jurisdiction over the minor child.
- [4] On the issue of forfeiture, it is common cause the parties got married to each other in community of property on 11 July 2000. The parties met at the University of the North (now University of Limpopo) in 1989 when they were classmates and fellow students at the said institution studying towards a B.Ed degree. Their love relationship started then. They both graduated in 1994. The defendant struggled to get employment in his line of studies. He was employed Standard Bank in 1995 as a bank teller until 1996. In 1996 he was employed at South African Breweries ("SAB") until 2004 when he resigned and started his own liquor business at Ga Mothapo. He rented premises for running a Bar Lounge, using the money he got from SAS which was R98 000. Plaintiff was not happy with his resignation at the SAS. Within a year, the Bar Lounge business collapse. In 2006 the defendant joined Xerox a sales consultant. He is still employed at Xerox.
- [5] On the other hand, the plaintiff was employed as a teacher at a certain college for training teachers just after completing the B.Ed degree in 1994. She later switched from teaching and joined the government where she rose to the level of a director in one of the departments in the Limpopo Provincial government. She holds several postgraduate qualifications and a Master's degree whereas the defendant has not gone beyond his bachelor's degree in Education.
- [6] The parties concluded a customary marriage on 26 December 1999 and a civil marriage on 11 July 2000. After their marriages, the parties started by staying at Seshego, and later moved to Madiba Park where they were renting as tenants. In November 2000 they bought their own immovable property at 5 R246 000. The bond for the property was registered on 15 November 2021. This is the property which is the subject- matter of the forfeiture dispute. The bond money was deducted from the bank account of the plaintiff, and the defendant was contributing a sum of R2000 to the plaintiff for the said bond money. The bond was for a period of 20 years. It has since been paid up.
- [7] The basis for forfeiture is that the defendant was not making a meaningful contribution to the joint estate. Alternatively, he did make some contribution as and when he likes. The plaintiff stated that she had to request her brother to do some of the handywork at their house whereas the defendant was present.

[8] The further evidence by the defendant is that he was assisting in a number of handywork and was solely responsible for gardening. The defendant testified that during the times he was employed, he did contribute towards the bond except during the years he was not working. He was the one who used to drive their three children to school throughout their schooling days although one of the kids testified that it appeared to her that he was doing it without passion as much of a routine because they were talking less during those daily trips. The defendant stated that his salary has always been far less to that of the plaintiff and that was the reason that his proportional contribution appeared smaller to that of the plaintiff. It is common cause that the defendant is the one who is physically taking the minor child, T[...] M[...] S[...], to school. The plaintiff stopped taking this minor child to school after seeing the defendant with a girlfriend.

[9] On the pension forfeiture, the main reason is that the defendant failed to improve himself academically so that he could attract better employment offers. It is not in dispute that the pension payout of R98 000 which the defendant received from SAB was used for a Bar Lounge business which did bring some money to the family. Though the plaintiff was opposed to resignation at SAB and was not informed of the Bar Lounge, in her version, she did later assist in the said business in one way or another.

[10] The plaintiff testified that the defendant had several extra-marital affairs with several women including their former classmate at the University. The court has been requested to consider this as a contributory factor to the breakdown of the marriage. These

allegations of infidelity were denied by the defendant. Other than the word of the plaintiff and her daughter who testified as a witness of the plaintiff, there was nothing material which was advanced in this regard. They both testified on the same event. It was more of a repetition rather than corroboration.

[11] In the leading case on forfeiture in *Mashola v Mashola* (022/2022) [2023] ZASCA 75 (26 May 2023) at paragraphs 25-31, Mbatha JA outlined the legal principles applicable on forfeiture as follows:

"[25] Section 9

(1) of the Divorce Act provides that:

'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 a 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 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.'

[26] The entitlement to a half share in the pension interest of the spouse is governed by ss 7 (7) and 7

(8) of the Divorce Act, which provides as follows:

'7(a) 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 (b) and (c), be deemed to be part of his assets. '

- [27] The Divorce Act did away with the fault element as a ground for divorce. However, a consideration of whether there was substantial misconduct on the part of one of the parties, is one of the factors that may be taken into account. It is not a stand-alone factor but has to be considered with the other factors mentioned in s 9 (1).
- [28] There are several seminal Judgments which have clarified the legal principles in relation to the application of s 9 (1). The principles stated by the Appellate Division in *Wijker v Wijker* 1993 (4) SA 720 (A) at 721F are as follows:
- (a) The party seeking an order for forfeiture of benefits does not have to prove the existence of all three factors in s 9 (1) cumulatively. The court needs to ask whether one party will be unduly benefited if an order of forfeiture was not made, and in order to answer that question, regard should be had to the factors mentioned in s 9 (1).
 - (b) *Wijker* advocates that when dealing with s 9 (1) the following approach should be followed: 'the first step is purely a factual one. 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 benefited if a forfeiture 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 (Page 727D-F). It further advocated the approach adopted in an unfair labour practice dispute, where the word discretion is used in a wider sense. A court will not be exercising a discretion in the narrower sense. Therefore there will be no choice between the permissible alternatives involved.
 - (c) The court emphasised that when making a value judgment, applying the principles of fairness is not justified, as s 9 (1) contains no provision for the application of such principle. Not only is it contrary to the basic concept of community of property but there is no provision in s 9 for the application of such a principle. It held further that in considering the appeal the court is therefore not limited by the principle set out in *Ex Parte Neethling and Others* 1951 (4) SA 331 (A) and it may differ from the court a quo on the merits. It is only after the court has concluded that a party would be unduly benefited that it is empowered to order a forfeiture of benefits, and in making this decision it exercises a discretion in the narrower sense.

(d) Furthermore, the Wijker

judgment

states that notwithstanding the introduction of the no fault principle in divorce, a party's misconduct may be taken into account in considering, in terms of s 9 (1), the circumstances which gave rise to the breakdown of the marriage. Additionally, 'substantial misconduct may include conduct which has nothing to do with the breakdown of the marriage and may for that and other

reasons

have been included as a separate factor. Too much importance should, however, not be attached to misconduct which is not of a serious nature (Wijker, p 721G-H). It must be found that it is so obvious and gross that it would be repugnant to justice to let the 'guilty' spouse get away with the spoils of the marriage.

(e) In *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (1) (C) the court held that it could never have been the intention of the legislature that a wife, who had for 20 years assisted her husband faithfully should, because of her adultery, forfeit benefits of the marriage in community of property. This confirmed the principle that the finding of substantial misconduct does not on its own justify a forfeiture order.

[29] The principles in *Wijker* were endorsed by this Court in *Botha v Botha*

[2006] ZASCA 6; 2006

(4) SA 144 (SCA) where it was confirmed that only the factors in s 9 (1) should be accorded consideration. This Court in *Botha* pointed out that the so-called phrase, permitting the court, in addition to the factors listed, to have regard to 'any other factor' was conspicuously absent from s 9. It further held that s 9 (1) should be construed within the context of the evidence tendered by the parties in court.

[30] In *Badenhorst v Badenhorst* [2005] ZASCA 116; 2006 (2) SA 255 (SCA), though dealing with the provisions of s 7 (3) of the Divorce Act, this Court also endorsed the principle that the factual consideration of issues raised ins 7

(3) cannot be a matter of a discretion. It restated the principle that one party to the marriage cannot control and abuse the assets of a joint estate as if he has marital power in the case where assets were beyond the reach of the other party. This principle should equally apply to the consideration of the forfeiture sought by spouses married in community of property and profit and loss as they hold undivided shares in the joint estate. The Matrimonial Amendment Act has long abolished marital power in South Africa.

- [31] In *BS v PS* [2018] ZASCA 37; 2018 (4) SA 400 (SCA) para 10-11 (*BS v PS*), this Court in considering an appeal from the Eastern Cape Division of the High Court, Grahamstown, found that the court below should not have focused on an isolated incident of adultery by one of the spouses instead of considering the duration of the marriage and circumstances which gave rise to the breakdown of the marriage.
- [12] In applying the above principles endorsed by the Supreme Court of Appeal, this court is of the view that there is no evidence that the defendant did not contribute to the financial position of the family, taking into account the acquisition of the immovable property which is the subject-matter of the forfeiture herein, maintenance of the family or taking care of the children. The defendant did contribute in his own right in line with his income which is almost 50% lower than that of the plaintiff. The defendant's failure to improve his academic qualification is an irrelevant factor, especially when one taking into account the fact that he did try to do an "honours" degree but did not go far. Not all of us are academics but that does not make those who have no interests in academic qualifications to be mulcted with forfeiture if married to a spouse who is an academic achiever of some note.
- [13] As stated above, the plaintiff has failed to discharge her duty to prove infidelity or adultery on the part of the defendant or misconduct on the part of the defendant except to mention it in her papers and in her evidence except to mention one isolated incident based on a missed telephone call. The plaintiff did confront the former classmate who is alleged to be in a love relationship with the defendant and she also denied it and offered a sound explanation. She was not subpoenaed as a witness in order to test her denial or otherwise. The issue of the duration of the parties' marriage dating back from December 1999 to December 2023 when the trial started is 24 years, their respective ages are over 55 years of age, and as such they are very close to their respective pension ages. These factors, assessed in line with section 9 (1) of the Divorce Act for the purposes of determining if one party in this litigation will be benefited unduly if forfeiture is not granted, weigh heavily against forfeiture. This court does not think that the defendant will benefit unduly if forfeiture is not granted in this case.
- [14] The plaintiff has emphasized allegations of adultery and lack of financial support by the defendant as reasons for the breakdown, amongst others. The defendant has stated that the plaintiff disrespected him and never treated him like her spouse; and that such disrespect even happened in front of their children. He testified that she took major decisions without involving him. The fact which the parties are missing, in my view, is that their respective funds or money belongs to one undivided joint estate.
- [15] In the circumstances, the plaintiff's claim on forfeiture stands to fail. I will not award costs in this matter. In the exercise of my discretion. Costs will follow success. The plaintiff will have to bear the costs on this action on party and party scale.
- [16] In the premises, I make the following order:

1. That the divorce decree is granted for the dissolution of a marriage between A[...] R[...] S[...], born K[...], of identity number 69[...] and M[...] S[...] S[...] of identity number 67[...].
2. That the plaintiff's prayer for forfeiture of benefits arising from the marriage in community of property in respect of the plaintiff's

pension benefits from the Government Employees Pension Fund ("GEPF") and in respect of the parties' immovable properties is hereby dismissed.

3. The plaintiff and the defendant shall retain full parental responsibilities and rights over the minor child, T[...] M[...] S[...], a boy born on [...] J[...] 2011, inclusive of acting as guardian, to care for and to maintain contact with and contribute to the maintenance of the minor child.
4. The plaintiff shall have the following specific parental responsibilities and rights in respect of the said minor child, to wit guardianship, and daily care and residence of the minor child.
5. The defendant shall have specific parental responsibilities and rights of the minor child; such contact rights shall include having the minor child with him during alternative weekends and / or every alternative short and long holiday.
6. The defendant is ordered to pay to the plaintiff a sum of R5 000.00 (five thousand five hundred rand) per month as maintenance for the parties' aforesaid minor child, T[...] M[...] S[...], with the first payment due on or before the seventh day of February 2024, and thereafter on or before the seventh day of each succeeding month until the minor child is self-supporting or this maintenance order is duly varied or set aside by the competent maintenance court with jurisdiction over the aforesaid minor child.
7. That it is ordered that the defendant is entitled to fifty percent (50%) of the plaintiff's pension interests and / or benefits held at the Government Employees' Pension Fund ("GEPF"), the pension holder or administrator on behalf of the plaintiff's employer, which pension benefits must be calculated as at the date of the divorce decree herein, being 30 January 2024.
8. An order directing the manager or administrator of the said pension scheme/ fund, the GEPF, that:

7.1. He / she must endorse the records of the aforesaid Pension Fund to reflect the defendant's aforesaid entitlement to the pension benefits of the plaintiff,

7.2. He/ she must pay to the defendant, alternatively, to a preservation fund nominated by the defendant an amount equal to fifty percent (50%) of the defendant's pension interests in the said pension fund, calculated as at the date of the divorce hereof, such payment to be made within sixty (60) days of the defendant notifying them in writing, which of the two options she elects.

7.3. He / she must furnish written proof of the endorsement referred to in (h)(1) and (h)(2) above to the assistant registrar of this Honourable Court within one month of receipt of the notification hereof.

8. That the remainder of the parties' joint estate, including their immovable property, be divided equally between the parties.
9. That the plaintiff is ordered to pay the costs of this action on party and party scale.

MS SIKHWARI

ACTING JUDGE OF THE HIGH

COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES: For Plaintiff Ms MC De Klerk Instructed by DDKK Attorneys Inc For Defendant Adv TD Sibiya Instructed by Makgoba Kgomo Makgaleng Inc Date of Hearing 2, 3 & 6 October 2023 Date of

Judgment

30 January 2024

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