

SOUTH AFRICA / JUDGMENT

G.S.M v J.M.M (13945/17) [2021] ZAGPPHC 78 (26 February 2021) [2021] ZAGPPHC 78

COURT

North Gauteng High Court, Pretoria

BEFORE

N B Khwinana

CASE / FILE NUMBER

13945/17

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHERS

JUDGES: YES/NO

(3)

REVISED:NO

26/2/2021

Case No: 13945/17

Date:

In

the matter between: M[....]:
 G[....] S[....]
 Plaintiff
 And
 M[....]:
 J[....] M[....]
 Defendant

JUDGMENT

KHWINANA AJ:

AD

INTRODUCTION

1. This is a divorce matter. The parties are ad idem that this marriage has irretrievably broken down and that the decree of divorce should be issued. That the primary residence of the minor child be awarded to the defendant subject to the rights of access to the plaintiff. That the Plaintiff has agreed to the maintenance of the children, that is both the major and the minor children until the children reach age of majority or become self-supporting. The issues in dispute are whether the plaintiff is entitled to an order against the defendant for forfeiture of 50% of the plaintiff's business known as [...], and spousal maintenance in the sum of R 30 000.00 per month.

AD ABSOLUTION FROM THE INSTANCE

2. At the closure of the plaintiff's case, the defendant applied for a writ of absolution from the instance on the basis that the plaintiff had failed to prove his case of forfeiture. The application was declined, and it was ordered that the reasons would be contained in this

judgment.

3. In *Gordon Lloyd Page and Associates v Rivera and another*[1] it was held that a decree of absolution from the instance should be granted sparingly because of its ability to negate the audi alteram partem rule which enjoins a court to hear both sides of the story. In this case plaintiff's evidence called for an explanation from the

defendant.

AD SUMMARY OF FACTS

4. The parties were married to each other on the 18th day of December 1997 in community of property. They stayed together as husband and wife at Lotus Gardens and they were blessed with three female children aged 22, 18 and 7. The two major children are not self-supporting yet and they all reside with the defendant at a property herein after referred to as the [...] property. The plaintiff was employed by the Department of Justice where he later resigned

to establish his own business. The defendant was employed at a school in Soweto where she resigned and took further employment with Ellerines furniture shop where she also later resigned. The parties purchased an immovable property at [...], herein after called the N[...] property. The bonds on both the [...] and the N[...] properties have been settled.

5. Upon resigning at Ellerines, the defendant took her pay-out in the amount of R52 000.00 and paid same into the business of her brother, according to her, so that the brother could purchase a vehicle for her. According to the plaintiff the money was paid into the business as an investment in the business where the defendant continues to draw a benefit. It is common cause that the defendant continues to draw a benefit of R5000.00 per month from the business but according to her, she receives the money from the brother as a donation to assist her from suffering since she is unemployed.
6. After resigning from the Department of Justice, the plaintiff paid off the N[...] property from his pay-out. He also used part of the money in the year 2008 to start a business that he calls [...] ("[...]") which is now his sole source of income. The business operated from the N[...] property where it still operates even now. The plaintiff continued to acquire assets in the names of [...], including two immovable properties (in addition to the [...] property), vehicles and probably other immovable assets. It is common cause that two of the properties are occupied by the defendant's girlfriends.
7. The defendant established [...], a catering business in 2011 and the plaintiff assisted the defendant to purchase equipment thereof. The business has since collapsed. The plaintiff alleges that the marital problems began in 2002 as a result of the defendants lavish and extravagant lifestyle, an allegation denied by the defendant. It is common cause that the [...] property, which is currently occupied by the defendant and the children was bought for an amount of R 1 900 000.00. On the 30th September 2014, the plaintiff purchased a property at Unit [...] through [...] (the [...] property) in the amount of R980 000.00 and on the 29th October 2016, the plaintiff further purchased through [...] a property situated at [...] ([...] property) in the amount of R1 649 000.00. It is further common cause that [...] owns the following vehicles: a Nissan Navara, a Mercedes Benz and a Toyota Etios.
8. The defendant claims spousal maintenance in the sum of R 30 000.00, the said amount is calculated as follows:- groceries, R3500,00 chronic medication R500,00 Transport for B[...] R1300.00, Lunch for B[...] R600.00, Lunch for K[...] R300.00, School clothes R1800 (Once off), Casual clothes Gardener R250,00 and Woolworths Account R650,00 Total R7100.00, Toiletries R1000.00 for herself R600,00, Groceries R5000.00, Outings (me) R1000.00, Children's Outings R1000.00, Holidays R1500.00, Household Maintenance R19 100.00 Total R30 000.00.

AD LEGAL PRINCIPLES

9. A claim for the forfeiture of benefits arising from a marriage is governed by section 9(1) of the Divorce Act [2] which reads as follows:-

- (i) When a decree is granted on the ground of 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 of forfeiture is not made, the one party will in relation to the other be unduly benefited.
10. In the matter of Engelbrecht v Engelbrecht[3] it was held that “the court has the discretion when granting a divorce on the grounds of irretrievable breakdown of the marriage or civil union to order that the patrimonial benefits of the marriage or civil union be forfeited by one party in favour of the other. The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited. The court has a wide discretion, and it may order forfeiture in respect of the whole or part only of the benefits.”
11. This court is enjoined to ask itself whether one party would be unduly benefitted were such an order to be made. I continue to take into account factors alluded to supra.

The duration of the marriage;

12. The marriage, as at the date of hearing was twenty-three years old. However, parties are not ad idem as to when the challenges of the marriage relationship began, a factor I consider to be irrelevant.
13. It is common cause that the parties were separated from each other, however what is in dispute is the period of such separation. That the parties became so intimate after the reconciliation to the extent that a child was conceived and born makes the fact of the separation irrelevant for our purposes. The plaintiff’s evidence that a “child was conceived in a one night stand episode where he was inebriated” should be rubbished because it is nonsensical and disrespectful. The fact that the plaintiff had previously issued a divorce summons against the defendant in the Regional Court, which summons he later withdrew, points to there having been an intention to salvage the marriage relationship by means of a reconciliation.
14. It is my finding that a consideration of the duration of the marriage should lean in favour of the defendant as opposed to the defendant.

The circumstances that gave rise to the breakdown of the marriage

15. It is common cause that the plaintiff kept multiple extramarital relationships openly without consideration for the defendant. He purports himself as a polygamist whereas he is married in terms of civil rites and not customary law. The plaintiff had ample time to convert his marital regime into a customary marriage with the consent of the defendant, but he failed to do so. During cross examination he rightfully conceded that he was ashamed of his actions.

16. The plaintiff alleges that the defendant was always quiet and refused to wash his laundry, an allegation denied by the defendant. The plaintiff does not tell the court what means he undertook to change the situation. I find it inconceivable that such trivialities can be said to have brought a marriage relationship to its demise if they are indeed true. The plaintiff has a misconception as to what consortium entails. Washing clothes is not a duty earmarked for a specific gender and that includes all household chores. I agree with plaintiff's counsel in her heads of argument where she stated that Flemming J in Swart[4] where a detailed analysis was made of conduct of factors that lead to a breakdown of marriage relationships, especially where it is said that adultery and desertion might in certain instances merely be symptoms, not causes of a marriage breakdown, and also that conduct which could not be considered to be morally very blameworthy, such as refusal to engage in conversation, might be a factor leading to marriage breakdown. It is my finding that a refusal to wash clothing cannot be a morally very blameworthy factor that can be said to have brought a marriage to its demise.
17. The plaintiff raises issue of debts of creches, clothing accounts and eating out at restaurants as a cause of the irretrievable breakdown of the marriage. However, during cross examination he conceded that these debts pre-existed the challenges in the marriage. The plaintiff did not take the court into his confidence about the hardships that he experienced with the effect of the debts.
18. The argument of the plaintiff is self-defeating in that the plaintiff informed the court that Ms. M[....], one of his mistresses also wines and dines similarly to what the defendant does. The plaintiff accords his mistresses amenities that he denies his wife. The plaintiff says the defendant moved out of the common home and with the same tone says he was living with Ms. M[....]. Essentially if we accept that the defendant moved out then the plaintiff would not have been in a position to accept her as he had already moved on with a girlfriend at a different address.
19. It is my finding that the circumstances that the plaintiff alleges brought the marriage to its demise, even if it were to be found that they were proven, are not substantive enough to entitle him to his prayer of forfeiture.

SUBSTANTIAL MISCONDUCT

20. The plaintiff alleges that the defendant used the money she received from her pension fund in her brother's business and is now a shareholder. According to the defendant she gave the money in order for a motor vehicle to be bought for her. She does not have a car at the present moment.
21. The plaintiff testified about how he spent a lot of time with Ms. M[....] to the extend that he bought a microbus and started a taxi business together with her. This was done without knowledge of the defendant. The plaintiff ran the taxi business with the mistress to the exclusion of the defendant.

22. While the defendant's alleged misconduct seems to be immaterial, the same cannot be said about the defendant's conduct, which he admitted to being ashamed of. He openly conducts adulterous extra-marital relationships; he begets children outside of the marriage relationship and he even ensures that his mistresses enjoy the benefits of the joint estate.
23. In casu the parties' assets started the business and to-date the estate continues to house the business. The defendant therefore will not unduly benefit from [...] which owes its existence to the estate. In the matter of Z V Z[5], Legodi J alluded to what is meant by "undue benefit" and stated that a cumulative consideration of all relevant factors seem to be at play in terms of subsection 1, and the court will make an order only when is satisfied that, if an order for forfeiture is not made, the one party ('guilty party') will unduly be benefited in relation to the other party ('the innocent party'). It is an exercise of a discretion guided by consideration of the duration of marriage, the circumstances which gave rise to the breakdown and any substantial misconduct on the part of either of the parties. It is clear from the wording of the subsection that to qualify for forfeiture, based on misconduct, such misconduct must be "substantial".
24. If I were to borrow from Legodi J, and in the light of the facts in casu, declaring the plaintiff an innocent party would not be escapable. The same cannot be said about the defendant.
25. Undue benefit, one would be guided by a number of factors for example, refusal to work when it is possible to do so, squandering of money and other assets of one's estate and other factors on the handling of the estate which is prejudicial to the other spouse. According to the plaintiff the defendant acquired a legal secretary qualification which she did not use. The plaintiff despite being in the legal fraternity never offered the defendant work neither did he say he solicited work for her. He did not tell the court that he offered her employment which she refused. Further, she started a business which he supported and she was able to solicit work. The plaintiff also mentioned how he bought equipment for the business and he noted that its failure emanated from the drawing up of quotations which would seem were far low. The plaintiff also testified that the defendant would wine and dine therefore using the funds extravagantly. Except that the plaintiff said the defendant failed to pay for a creche in the early years of their marriage there is no evidence that she refused to assist in the maintenance of the children or the household. I therefore cannot find how she refused to work nor how she squandered the income of the joint estate. It is also not clear how the defendant would have prejudiced the joint estate save for the fact that third parties have access to the joint estate assets because of the plaintiff.
26. It is upon the plaintiff to show the extent to which the defendant will be unduly benefited. The plaintiff has not attempted to prove same. He instead gave evidence that makes his case weak. For example, he testified that that he is using the assets of the joint estate to grow [...].
27. The plaintiff failed to show that the defendant carried an extravagant lifestyle and it would seem I agree with the defendant's counsel in their heads of argument that a joint estate is formed for parties married in community of property as stated by Makgoba J in O v O[i]

[6] .The parties are joint owners and will share each other's liabilities. It has been also stated that "community of property is a universal economic partner 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".[7]

28. What is apparent is that the plaintiff has been paying for the accommodation expenses, household related expenses and food. The defendant has therefore succeeded to prove that she must be maintained however it cannot be for a lifetime, but it can be rehabilitative maintenance.
29. The plaintiff reiterated that he has the means thus his contribution was more than that of the plaintiff. The test for forfeiture is not whether one party has contributed more than the other. It is as already alluded to in terms of section 9 of the Divorce act 70 of 1979. I must concur that the courts discretion is limited two factors already mentioned indeed the case of Botha v Botha[8].
30. The plaintiff argues that fairness should prevail in so far as the sharing of the joint estate. In the matter of Wijker v Wijker [9]the proper approach was stated in determining whether an order of forfeiture should be made. It was held that the court should first

determine whether or not the party against whom the order of forfeiture is sought will in fact benefit if the order is not made.

Once it is determined that the party will benefit, the next enquiry is whether such benefit will be an undue one".

31. In casu the plaintiff used the assets of the joint estate to grow his business, he fathered children outside the marriage relationship, he entered into the illicit and adulterous relationships and he is using two immovable properties and other assets of the joint estate for the benefit of his two mistresses at a great cost to the marriage relationship, both emotionally and financially.

LEGAL PRINCIPLES ON MAINTENANCE

32. There is no automatic right to maintenance after divorce however entitlement to maintenance must first be shown before a court determines the quantum and duration thereof.[10] This area of law is governed by the Divorce Act 70 of 1979, which permits a court to make an award which it deems just. The Act further grants the court discretionary powers when considering the question of spousal maintenance and the following considerations apply:

34.1 Existing of prospective means of the parties / Prospective earning capacities of the parties

In casu, the plaintiff is shown to be a man of good means whereas the defendant has less means. In this regard, one has to look at the success of the plaintiff's business as opposed to the defendant inability to generate income.

34.2 Financial needs and obligations

That there are financial needs and obligations on the defendant's part is clear from the facts and the fact that the plaintiff is in a position to provide and that he has in fact been providing calls upon a recognition of an obligation on his part to continue to provide for the defendant, albeit on a rehabilitative basis.

34.3 Age of the parties

The defendant's age makes her a proper candidate for future employment and her share in the joint estate should be able to sustain her and it is my finding that an order for rehabilitative maintenance would be just and equitable under the circumstances.

34.4 Duration of the marriage

The plaintiff has survived in the marriage for 23 years while enjoying the benefits of the joint estate to which the plaintiff was the main contributor. It is therefore only fair that the benefit should proceed, albeit on a rehabilitative basis.

34.5 Standard of living of the parties prior to the divorce

Taking judicial notice of the fixed properties amassed by the joint estate and their locations, a finding to the effect that the standard of living of the parties was above average is inescapable. It would therefore be unfair to expect that the plaintiff's standards be allowed to drop abruptly.

34.6 The parties' conduct in relation to the demise of the marriage

So much has been said above about the plaintiff's negative conduct and the conclusion that that conduct should weigh against him is inescapable.

33. It is therefore my finding that the plaintiff is entitled to spousal maintenance, albeit on a rehabilitative basis.

COSTS

34. Both parties pray and argued for costs orders in their favour. I will take guidance from Section 10 of the Divorce Act 70 of 1979 which enjoins me to take into consideration the means of the parties and their conduct.
35. So much has been said about the plaintiff's means vis-à-vis those of the defendant and the conclusion that the plaintiff should endure a cost order is inescapable.
36. Looking at the plaintiff's conduct, which I find brought the relationship to its demise, for example open adulterous relationships; bearing children out of wedlock and sustaining mistresses using resources of the joint estate and thereafter approaching the court with a prayer for forfeiture should be frowned upon.

I am in agreement with the defendant's contention that the plaintiff conduct can be characterized as "catch me if you can" as referred to in the defendant's heads of argument. It is my finding that the plaintiff, by conducting the proceedings as he did, wanted to frustrate the defendant by, inter alia, putting her out of pocket. A conduct that I frown on, thus the costs order below.

In the result, I grant the following orders:

1. A decree of divorce;
2. That the Plaintiff pay maintenance in respect of the minor child born from the marriage relationship between the parties at the rate of R 7500.00 per month from the 1st day of the month subsequent to the granting of a final decree on or before the 1st of each month and every successive month thereafter;
3. That the defendant contributes 100% per cent towards the maintenance of the minor child including medical, dental, pharmaceutical, ophthalmological, hospital and the like expenses on demand, pre-primary school fees, primary school fees, secondary school fees, prescribed school books, prescribed school stationary, prescribed school uniform, prescribed school tours, reasonable aftercare school fees, reasonable extramural activities, school related expenses and reasonable extramural activity equipment on demand;
4. That the plaintiff pays rehabilitative maintenance to the defendant in amount of R15 000.00 from the date of this order until the joint estate has been wound up and the parties have been awarded their respective shares;
5. A division of the joint estate, including the business known as Gilbert Matsunyane Costs Consultanting CC;
6. That the plaintiff pays costs of suit.

E N B KHWINANA

ACTING JUDGE OF THE HIGH COURT

PRETORIA

DATE OF HEARING: 17-20 NOVEMBER 2020

DATE OF JUDGMENT: 26 FEBRUARY 2021

HEADS OF ARGUMENT FILED: 07 DECEMBER 2021

(FOR PLAINTIFF)

HEADS OF ARGUMENT FILED: 11 DECEMBER 2021

(FOR DEFENDANT)

ATTORNEY FOR PLAINTIFF: TOMLINSON MNGUNI JAMES INC.

ADVOCATE FOR PLAINTIFF: ADVOCATE JL KHAN

ATTORNEY FOR DEFENDANT: SHAPIRO & HAASBROEK INC.

ADVOCATE FOR PLAINTIFF: ADVOCATE AJ SCHOEMAN

[1] 2001

(1) SCA at 92E – 93A as formulated in Caudle Neron lights (SA) Ltd v Daniel 1976 (4) 403 (A) at 409 G-H

[2] 70 of 1979 as amended

[3] 1989

(1) SA 597 (c)

[4] 1980 4 SA 364 (O)

[5] Z v Z (43745/13) [2015] ZAGPPHC 940 (18 September 2015)

[6]

[7] HR Hahlo: The South African law of husbands and wives 50 edition at page 157-158

[8] 2006 ZASCA 6 2006 (4) SA 144 SCA

[9] 1993

(4) SA 720 (A)

[10] Botha v Botha 2009 (3) SA 89 (W)

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Prepared on 14 October 2026 · Esheria