

SOUTH AFRICA / JUDGMENT

I.A.T v M.Q.T (FB05/2018) [2020] ZANWHC 65 (15 September 2020)

[2020] ZANWHC 65

COURT

North West High Court, Mafikeng

BEFORE

M.E. Mahlangu, Samkelo Gura

CASE / FILE NUMBER

FB05/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION -
MAHIKENG
High
Court Appeal Case no: FB 05/2018
In

the matter between: I[....]
 A[....] T[....]
 Appellant
 and
 M[....] Q[....]
 T[....]
 Respondent

JUDGEMENT

MAHLANGU AJ

INTRODUCTION

- [1] This is an appeal against part of the judgement from the Regional Court of the North West, held at Garankuwa Magistrate Court, case number NW/ODI/RC/354/2016, handed down on 28 March 2018. The decree of divorce was granted in terms of which amongst others, division of joint estate of the parties was ordered. The appeal was directed against the finding of the division of the joint estate of the parties.
- [2] On the pleadings it was common cause that the marriage could not be saved. Parties conceded that their marriage had irretrievably broken down and that they sought a decree of divorce.

BACKGROUND

OF THE MATTER

- [3] Parties were married in community of property on 20 September 1995 at Mabopane, North West Province. They were married for 22 years at the time of divorce. Three children were born out of the marriage, the 22 years old adult, and two minor children.
- [4] On 12 July 2016, the respondent (the Plaintiff in the main action) instituted the divorce proceedings against the appellant (the defendant in the main proceedings) in terms of which the respondent claimed inter alia, in her particulars of claim, division of the joint estate on the grounds of irretrievable breakdown of the marriage relationship between the parties.
- [5] The appellant filed a counterclaim in which he prayed inter-alia, for an order that the respondent forfeit the matrimonial benefits due to her in terms of their matrimonial property scheme, namely, in community of property.

- [6] The appellant testified that, he bought the house during 1992 or 1993 before he got married to the respondent. The house was still a six roomed house when he married the respondent in 1995. In 2008, the appellant renovated the house to a 10 roomed house. The appellant alleges that, even though the respondent was at some stage employed, she failed to financially assist the appellant to renovate the house. The appellant instead alleges that, the respondent was putting the marriage estate in debt.
- [7] The appellant also alleges that the respondent had extra marital affairs which he did not personally witness. The appellant basically relied on hearsay and the suspicions he had. He says the fact that the respondent refused to be taken to work by the appellant proved that she had an extra marital affair. The respondent also started to arrive late from work, sometimes respondent would come back from work at the early hours of the morning. Appellant also alleges that the respondent would create debts he did not know of.
- [8] The appellant is adamant that, the respondent contributed nothing to the estate of their marriage and therefore had to forfeit the marriage benefits.
- [9] The respondent denied all the allegations against her and stated that, in fact, she wanted divorce because of the disrespect she was receiving from the appellant. Respondent testified that, whilst employed, she was earning far less than the appellant, but she would still assist where she could. At all times, when she was not employed, the respondent would maintain the upkeep of the matrimonial home by taking care of the children and support the appellant emotionally, morally and otherwise.

ISSUES

- [10] The following are central issues to be determined by the court in this matter:

10.1 whether the appellant has discharged the onus he bears on a balance of probabilities in proving that an order for forfeiture would be justified;

10.2 whether the court a quo in considering the issues governing the granting of forfeiture order took into account the requirements in section 9(1) of the Divorce Act 70 of 1979 (Divorce Act)

LEGAL PRINCIPLES

- [11] The counterclaim of forfeiture is governed by the provisions of section 9(1) of the Divorce Act 70 of 1979 (Divorce Act) which reads as follows:

“When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the Court may make an order that the patrimonial benefits of 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 the forfeiture is not made, the one party will in relation to the other be unduly benefited.”

- [12] Section 9(1) of the Divorce Act empowers the court which grants a decree of divorce on the ground of an irretrievable break-down of marriage to make an order that the patrimonial benefits of the marriage be forfeited, wholly or in part, by one of the spouses in favour of the other if the court, having regard to the duration of marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct of either of the parties, is satisfied that, unless the order for forfeiture is made, one party will in relation to the other be unduly benefited. The section confers a discretion on the court which is to be exercised with regard to the three factors.
- [13] In the matter of *Wijker v Wijker* 1993(4) SA 720 (A) at 727D-F (SCA) (*Wijker matter*) it was held in respect of a forfeiture that:

“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 benefited. 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 benefited if a forfeiture order is not made. Although the second determination is the value judgement, it is made by trial court after having considered the facts following within the compass of the three factors.”

APPLICATION OF THE LAW TO THE FACTS

- [14] The court, during the trial proceedings heard the evidence of the parties and in application of the factors outlined in section 9(1) of the Divorce Act and exercised its discretion in favor of the respondent.
- [15] Where a court is faced with a claim of forfeiture of marriage benefits upon the division of the joint estate, a court must be satisfied that failure to grant such an order would result to undue benefit to the party against whom forfeiture is sought. Thus, the court is tasked with an inquiry as to the presence or existence of undue benefit. The factors that a court should take into account are the duration of the marriage, the circumstances leading to the breakdown of the marriage as well as substantial misconduct of the party during the subsistence of the marriage.
- (a) The duration of the marriage
- [16] As mentioned above, the parties were married to each other on 20 September 1995 and their marriage was terminated on 28 March 2018. They were married to each other for 22 years. The respondent was not working at the time of the termination of the marriage and was dependent on the appellant. The respondent was maintaining the upkeep of the matrimonial home and also took care of the children.
- [17] Every time when respondent secured the employment, she would continue to take care of the household and taking care of minor children and also offer support to the appellant.
- (a) The circumstances which gave rise to the breakdown of marriage relationship

- [18] The respondent testified that, the differences in personalities coupled with the continual desire by the appellant to control her led to the breakdown of the marriage. The appellant accused the respondent of having an extra marital affair and that at the appellant's bequest, exchange sexual partners. This made the respondent to conclude that the appellant does not love her anymore.
- [19] The appellant alleged that the following are the reasons that led to the breakdown of marriage:
- i. An alleged extra marital affair;
 - ii. Respondent returning late from work;
 - iii. Respondent's failure to contribute to the joint estate;
 - iv. Appellant being the only person growing the estate;
 - v. The respondent burdening the estate with debts
 - vi. Appellant purchasing the family car and house without the assistance of the respondent;
 - vii. Respondent purchasing movables to her maternal home without the appellant's consent.
- [20] The respondent denied all the allegations made against her. The appellant during cross examination conceded that, prior to the commencement of the divorce proceedings, respondent was committed to the relationship between the parties and furthermore, saw to the upkeep of the marital home and tended to the needs of the children. Things changed after the divorce proceedings were initiated.
- (c) Any substantial misconduct on the part of either of the parties
- [21] The appellant alleged in his evidence that the respondent misconducted herself in that she had an extra marital affair. In taking this factor into account, a court must not only be satisfied that there is misconduct on the part of either party, but that such misconduct is substantial, thus warranting the granting of an order for forfeiture against the party who so misconducts himself/herself.
- [22] The eldest son of the parties testified on behalf of the appellant during the hearing of this matter, he conceded during cross examination that, he had not seen the man it was alleged had an affair with the respondent. Furthermore, the appellant also could not tell the court the names of the man he alleged had an affair with the respondent. As mentioned earlier, the appellant relied on hearsay and did not have direct evidence of the said extra marital affairs the respondent had.
- [23] It is therefore my view that there is no substantial misconduct on the part of the respondent that she committed during the subsistence of the marriage.

[24] In the matter of Z v Z (43745/13) [2015] ZAGPPHC (18 September 2015) it was held in paragraph 7 that:

“[7] 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 a 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. Benefiting from one spouse’s sweat, in my view, would not necessarily amount to undue benefits. To come to the conclusion of 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. It is not in my view, any circumstances which can give rise to the break down which will result in a substantial misconduct to justify forfeiture. A particular circumstance may be enough for irretrievable breakdown of marriage relationship, but not necessarily sufficient to be categorized as a substantial misconduct to justify a forfeiture.

[8] A party who seeks forfeiture has the onus to establish on the balance of probabilities that such an order is justified in terms of subsection (1) of section 9 of the Act.” [my emphasis]

[25] The appellant was married to respondent in terms of civil marriage, to which the matrimonial property scheme of community of property was applicable. Upon division of the joint estate between the parties, the respondent was, and remain entitled to the 50% of the share of the joint estate. On the evidence led at trial in the magistrate court, the appellant has failed to discharge the on’]us placed upon him to prove, on balance of probabilities, that an order for forfeiture would be justified in the present matter.

[26] There is therefore no evidence before this Court that the Decree of Divorce granted by the Court a quo will result in undue benefit accruing to the respondent upon division of the joint estate and there remain no viable reasons why the appeal should succeed.

[27] For those reasons, the appeal is dismissed with costs.

M.E. MAHLANGU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION: MAHIKENG

I concur

SAMKELO GURA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 24 AUGUST 2020

COUNSEL

: DECISION ON PAPER

DATE OF JUDGMENT : 15 SEPTEMBER 2020

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Prepared on 9 October 2026 · Esheria