SOUTH AFRICA / JUDGMENT

J.A.L (formerly V.D) v C.P.L (3146/2015) [2017] ZAECPEHC 9 (2 February 2017)

[2017] ZAECPEHC 9

COURT
Eastern Cape High Court, Port Elizabeth

BEFORE
J W Eksteen

CASE / FILE NUMBER
3146/2015

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IN
THE HIGH COURT OF SOUTH AFRICA
EASTERN
CAPE LOCAL DIVISION, PORT ELIZABETH
Case
No: 3146/2015
Date
Heard: 22 November 2016
Date
Delivered: 2 February 2017
In

the matter between:	J. A. L. (formerly V. D.) Plaintiff and C. P. L. Defendant

JUDGMENT

EKSTEEN J:

[1] The parties were married to one another in community of property on 5 December 2009. It is common cause that the marriage has irretrievably broken down and both parties seek an order of divorce. The dispute in these proceedings relates to the division of the patrimonial benefits.

[2] The plaintiff claims a division of the joint estate and a further order that she be entitled to approach this court for the appointment of a liquidator to attend to the division of the joint estate in the event that the parties are unable to agree on the division within 30 days of the date of this judgment.

[3] The defendant in his claim in reconvention alleges that the parties concluded a cohabitation agreement on 21 November 2013 regulating the proprietary consequences of their relationship upon the termination thereof. He sought an order in terms of this agreement.

In addition, however, he sought an order that the plaintiff forfeit the benefits arising from the marriage in community of property.

Although these prayers were not sought in the alternative they are irreconcilable with one another. At the trial Mr Jooste, who appeared on behalf of the defendant, recognising this difficulty, did not seek an order in accordance with the alleged cohabitation

agreement. He sought only an order that the plaintiff forfeit the benefits arising from certain identified immovable property.

Background

[4] Both parties have previously been married. The plaintiff is currently 61 years of age and the defendant 64.

[5] The plaintiff and her late husband previously lived in Storms River. At some stage, however, her husband fell terminally ill and they relocated to Port Elizabeth to enable him to obtain medical treatment. She has two children who are both attorneys in Port Elizabeth and her

daughter purchased a home for herself and her late husband to reside in during his illness. The plaintiff's children accordingly have precious memories of the last days of their father which are associated with the house in issue. Whilst resident there the plaintiff's late husband died and the plaintiff continued to reside in the house.

[6] The defendant met the plaintiff approximately a year after her husband had passed away and they formed a relationship. Whilst the defendant contends that he did not formally move in with the plaintiff it is common cause that he slept over with the plaintiff in the house every night. The plaintiff's children did not take kindly to the defendant or the relationship with their mother. Ultimately the plaintiff's daughter demanded that the plaintiff terminate her relationship with the defendant, alternatively, that they vacate the house. The plaintiff chose for the defendant and they vacated the house.

[7] At this time it was patently clear that there was a very poor relationship between the plaintiff's children and the defendant. The parties discussed the friction which existed and the plaintiff advised the defendant that in her view her children may never accept the defendant. This prediction turned out to be true. Notwithstanding this known tension the parties resolved

to be married.

[8] The plaintiff was employed at the time by a firm of attorneys where two of her children are employed in Port Elizabeth. She wished to be married by antenuptial contract as her previous marriage had been concluded on this basis. The defendant, however, suggested that the parties marry in community of property. This they duly did.

[9] Subsequent to the marriage the strained relationship between the defendant and the plaintiff's children continued and although they did not interfere in the marriage it clearly emerges from the evidence that the defendant was at times frustrated by their dislike for him.

[10] The marriage was not all plain sailing and by October 2012 the plaintiff left the common home and issued summons for divorce. She alleged that the marriage had

irretrievably broken down by virtue of the defendant's excessive use of alcohol. When under the influence of alcohol, she alleged, that he becomes extremely aggressive towards her, verbally abuses her and uses extremely foul language when communicating with her. She contended that he insults and belittles her and her family and continuously seeks confrontation.

[11] It is common cause that after receipt of the summons the defendant approached the plaintiff in tears and begged her to return to him. He apologised for his behaviour and promised to change his ways. She succumbed to the plea and acknowledges in evidence that she did so as she loved him. Thus the parties were reconciled.

[12] Little came of his undertaking to change his ways and the plaintiff again left the matrimonial home in April 2013. Again he requested her to return and again she succumbed. Approximately six months thereafter she was again driven to leave the common home and she resolved to terminate the marriage. Yet again the parties were reconciled and after the third reconciliation, in November 2013 the cohabitation agreement to which I referred earlier was allegedly concluded. To the extent that it may be material to the outcome hereof I shall revert to the causes for each of these incidents later herein. Suffice it to record that the plaintiff finally left the common home on 15 June 2015 and again issued summons for divorce.

Factual findings

[13] The determination of the matter requires a consideration of the history of the marriage and the properties in issue. I pause to record that there are a number of disputes relating to the factual history which requires an assessment of the evidence. In this regard the defendant did not make a favourable impression in the witness box. He was a conceited, evasive and argumentative witness who sought to simply dismiss the plaintiff's evidence of his conduct during the marriage as deliberate lies. He resorted to lengthy replies which often had little or no bearing on the question put to him. I refer to only one example of his disingenuity. The plaintiff testified as to the events which gave rise to her finally leaving the common home on 15 June 2015. She gave a detailed account of the events of the evening which included an assault upon her. This he branded as a deliberate lie when he testified. The plaintiff had, however, taken a series of photographs after the event depicting a number of bruises on her body. When these were presented to the defendant in cross-examination he first postulated that the photographs were taken two days later and that the injuries may have occurred after she had left. Later he suggested that the injuries may have been self-inflicted and, still later, he proposed that the plaintiff may have affected the discolouration reflected on the photographs using mascara so as to fake the bruising. When the plaintiff testified to these events, however, her evidence was not challenged at all.

[14] The plaintiff on the other hand impressed me as a honest witness who readily conceded her own errors. By way of example, she

admitted in her evidence-in-chief, with visible embarrassment, that she had once, under extreme provocation, struck the defendant with a clenched fist. Not a single aspect of her evidence was seriously challenged in cross-examination.

[15] In these circumstances where the evidence of the plaintiff conflicts with that of the defendant I accept the evidence of the plaintiff in every respect.

Claim for forfeiture

[16] At the trial the defendant sought an order for partial forfeiture. As alluded to earlier Mr Jooste sought an order that the plaintiff forfeit the benefits of the marriage in community of property with reference only to certain

immovable properties to which I shall refer more fully below. Although reference is made in the defendant's particulars of his claim in reconvention to an order for total forfeiture, including the proceeds of the sale of a motor vehicle and certain insurance policies and pension benefits no evidence was presented in respect of these assets and Mr Jooste did not seek an order in respect thereof. I shall therefore not deal with these assets herein.

[17] The order sought relates to two properties situated in Cape Town and two properties in Port Elizabeth.

[18] The first property which is situated in San Rock, in Sunningdale, Milnerton (the Sunningdale property) was acquired by the defendant in 2002 at a purchase price of R437 000. There is no evidence as to the value of this property at the time of the marriage in

2009. No reliable evidence was presented as to its value at present. It was suggested to the defendant, who is an estate agent by trade, during cross-examination that the property is presently worth about R1,4 million, however, the defendant was unable to confirm this value. He states that he has no idea of its value.

[19] The second property is situated at Hantamberg Street, Kamma Heights, in Port Elizabeth (the Hantamberg property). There is some uncertainty in the evidence as to the precise date of the purchase of this property. The defendant contended that the property was acquired prior to the marriage, however, it is common cause that it was registered in their names jointly. It is further common cause that the property was purchased by the plaintiff for a purchase sum of R325 000 derived from her own personal funds which she states came from her inheritance from her late husband. The property was, however, a vacant erf. After the marriage the parties resolved to develop the property which later became the matrimonial home.

[20] The Sunningdale property was bonded at the time of the marriage in favour of First National Bank (FNB). In order to develop the Hantamberg property the parties raised a fresh loan in the sum of R1 million from Absa Bank and a bond was registered in favour of Absa Bank over the Sunningdale property for the said amount. R317 000 of the R1 million was utilised to cancel the existing bond with FNB and the remainder was used to develop the Hantamberg property. The bond for R1 million was registered in the name of both parties and they undertook joint liability to Absa Bank. At all material times the Sunningdale property was tenanted and the rental received covered approximately 85% of the bond repayment.

[21] The money raised on the loan from Absa Bank was however not sufficient for the development of the Hantamberg property and a further bond was later registered over the Hantamberg property. The evidence does not disclose when this occurred nor the amount of the bond. At the time of the trial, however, there was an amount of approximately R240 000 outstanding on the bond. In respect of the Hantamberg property the bond too was in the name of both parties as spouses in community of property. The

Hantamberg property is currently worth R1,5 million.

[22] The second property in Cape Town is situated in Jansens Avenue, Table View (the Table View property). This property was purchased by the defendant in February 2008, prior to the marriage. The evidence does not disclose the original purchase price nor the value of the property either at the time of the marriage or the issue of summons. The defendant estimates that the property is probably worth about R880 000 today. No valuation was presented in evidence and the said value is no more than the defendant's unsubstantiated estimate. A bond of R700 000 was registered over the property at the time of the purchase and there is currently an amount of R598 000 outstanding on this bond. This property too has at all material times been let and the rental received covers approximately 60% of the bond instalments.

[23] Finally, during the subsistence of the marriage and in March 2013 the parties purchased a further property in Chardonnay, Lorraine, Port Elizabeth (the Chardonnay property). The purchase price at the time was R750 000 and R600 000 was raised by a mortgage loan and a corresponding bond was registered against the property. There is a dispute between the parties in respect of the source of the remaining R150 000 which was paid in cash. The defendant contends that he paid the amount of R150 000 from "his own" sources whilst the plaintiff contends that each party paid R75 000 therefore contributing equally to the property. In cross-examination of the defendant he boldly declared that he had documentation to prove that he had paid the R150 000 from his personal account, however, notwithstanding an invitation to produce such documentation none was forthcoming. I accept the plaintiff's account in this regard and find that each party contributed R75 000. The Chardonnay property is currently valued at R995 000.

[24] The Chardonnay property has at all material times been let and the rental generated is used to service the bond and pay the expenses related to the property. It is not clear from the evidence whether the rental is sufficient to cover all the expenses related to the property.

[25] During the evidence presented at the trial there was much debate as to who had paid the bond instalments, levies, rates and taxes, maintenance and other expenses in respect of the various properties. Initially the defendant contended that he had borne all these expenses and that the plaintiff had made no contribution whatsoever towards the immovable properties. It is trite that in a marriage in community of property the rental received in respect of a property vesting in the joint estate accrues to the joint estate and the portion of the costs covered by the rental therefore derived in each case from the joint estate. In these circumstances I consider that the bond repayments which were paid from the rental are contributed equally by the parties during the subsistence of the marriage.

[26] Notwithstanding that the parties were married in community of property, the evidence establishes that the parties each controlled their own separate bank accounts and that all their respective earnings were deposited into these accounts. There was therefore no real merger of their finances. Hence the debate as to who paid what. The evidence reveals that at

the end of each month the plaintiff drew up a list of all expenses incurred during that month and the account from which such expenses were paid. She then prepared a reconciliation which the parties debated. Where one party had paid more than 50% of the total monthly expenses, including bond repayments and other expenses related to the properties, the other reimbursed that party so as to ensure that each contributed 50% from his or her resources.

[27] Whilst the defendant was ultimately constrained in cross-examination to concede that the expense sharing arrangement existed and was implemented he later contended that this arrangement ceased in November 2013, after the plaintiff had returned to him following her third desertion. This she denied and states that the arrangement persisted until her ultimate departure in June 2015.

The defendant's concession is contrary to the position he took during his evidence-in-chief and he did not produce any documentary

proof to support his ultimate assertion that the plaintiff's contribution to the expenses relating to the properties ceased in November 2013. The plaintiff's evidence, on the other hand, remained untainted by cross-examination.

Legal principles relating to forfeiture

[28] Section 9(1) of the Divorce Act, 70 of 1979 (the Act), empowers a court which grants a decree of divorce on the ground of an irretrievable

breakdown of the 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 the marriage, the circumstances which gave rise to the breakdown 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 enumerated in the section.

[29] In considering a prayer for forfeiture the court's point of departure should generally be to hold the parties to their antenuptial agreement. When the parties in the present instance were married it was on the basis of their express, alternatively implied, agreement that each will become co-owner of the property of the other. Co-ownership of the property of the other spouse is

an entitlement which each of the spouses acquired at the conclusion of their marriage. Unless the parties make precisely the same contribution to the joint estate, whether prior to the marriage or during the subsistence of the marriage, the one who has contributed less at the termination of the marriage will necessarily be benefited unless an order for forfeiture is made. That is the inevitable consequence of their marital regime. The Act does not afford the spouse who has made the greater contribution an opportunity to bewail himself thereof. He may only complain about an undue benefit. Unless it is proved what the nature and extent of the benefit

was the court cannot determine whether the benefit was undue or not. Only when the nature and extent of the benefit has been proved does it become necessary for the court to consider the factors which determine whether the benefit is undue or not. (See Engelbrecht v Engelbrecht 1989 (1) SA 597 (C) at 601F-H.) The party alleging that his/her spouse would acquire an undue benefit bears the onus of proving the nature and extent of the alleged benefit which is to be forfeited.

[30] The first step is therefore to determine whether the spouse concerned will in fact be benefited. This determination relates to a purely factual issue. (See Wijker v Wijker 1993 (4) SA 720 (A).) In the present instance the alleged undue benefit which the defendant contends for is limited to four immovable properties. On behalf of the defendant it is argued that the plaintiff will be unduly benefited if she were to share in the value of the these immovable properties. I turn therefore to consider whether any benefit arises.

[31] The Table View property was owned by the defendant prior to the conclusion of the marriage. There is no evidence as to the

value of the property at the time of the conclusion of the marriage. There was, however, a bond registered over the property in the amount of R700 000. The defendant accordingly brought an asset and a corresponding liability to the joint estate at the conclusion of the marriage. In the event that the value of the property equated to the outstanding bond, which may conceivably be the case, then the asset and the liability would necessarily cancel each other out so that no net asset was brought to the joint estate at all. Since the conclusion of the marriage the property has been let and the rental received, which accrues to the joint estate, covered the bulk of the instalment on the outstanding bond. The remainder of the expenses in respect of this property were paid in equal amounts by the plaintiff and the defendant. In the circumstances I find that the defendant has failed to prove the nature and extent of any benefit which may accrue to the plaintiff in respect of the Table View property; a forticori he has failed to prove an undue benefit.

[32] The Chardonnay property was purchased during the subsistence of the marriage. The purchase price was funded primarily from a bond registered against the property. The remaining R150 000 was contributed in equal shares by the plaintiff and the defendant. This property too was let and the rentals received by the joint estate were utilised to pay the instalments on the bond. All additional expenses in respect of this property were paid in equal shares by the plaintiff and the defendant. I am therefore satisfied that in the case of the Chardonnay property too the defendant has not established the nature and extent of any benefit which the plaintiff would derive if the joint estate were divided in the ordinary course.

[33] The Sunningdale property was, like the Table View property, owned by the defendant prior to the conclusion of the marriage. In this case too the defendant brought both an asset and a corresponding liability to the joint estate. There is no evidence as to the value of the property at the time of the conclusion of the marriage and there was an amount of R317 000 outstanding on the bond. Shortly after the conclusion of the marriage, however, this

property was recapitalised and a bond was registered over the property in the amount of R1 million. I shall accordingly accept, for purposes of the present judgment and in the absence of any proof to the contrary, that the property had a value of R1 million at the time. The parties accepted joint liability for the bond with Absa Bank and portion of the bond was utilised to pay off and cancel the pre-existing bond in favour of FNB. The effect hereof was that the value of the property was cancelled out by the corresponding bond raised against the property and the parties jointly accepted liability for the full value of the property. This property too was let out and the rental received by the joint estate covered 85% of the bond repayment. The remaining expenses, as in the case of the other properties, were shared equally between the plaintiff and the defendant. On a consideration of the facts set out herein I do not consider that the defendant has established the nature and extent of any benefit which the plaintiff would derive in respect of this property if the joint estate were divided in the ordinary course. It is accordingly not necessary to consider whether any benefit will be undue.

[34] The Hantamberg property was purchased by the plaintiff utilising her own personal funds. The improvements were funded partly by a bond raised against the property in respect of which the parties accepted joint liability. The remaining R670 000 utilised in the improvement of the property was obtained from the bond registered over the Sunningdale property. Any further expenses relating to the property were shared equally between the plaintiff and the defendant.

[35] The R670 000 which was derived from the bond on the Sunningdale property represents the free residue after settlement of the

outstanding bond which existed in the value of the Sunningdale property prior to the conclusion of the marriage. This was an asset in the estate of the defendant at the time of the marriage. Leaving aside for the moment the bond raised on the Hantamberg property, for which the parties accepted equal responsibility, it seems to me that the plaintiff contributed an amount of R325 000 to this property whilst the defendant contributed an amount of R670 000. In respect of the Hantamberg property the defendant accordingly made a greater contribution than the plaintiff. Of the funds contributed from the pre-existing means of the parties the defendant contributed approximately two thirds. The remaining cost and expenses were shared equally. In my view this is the extent of the benefit which the defendant has established that the plaintiff would acquire if the joint estate were to be divided equally.

[36] By virtue of my conclusion that a benefit has been established in respect of the Hantamberg property it is necessary to exercise a discretion having regard to the factors set out in section 9(1) of the Act. Whilst the court is required to consider all three factors set out therein it does not follow that if one of these factors is not established that an order for forfeiture cannot be made. (Compare Klerck v Klerck 1991 (1) SA 265 (W) at 269D-G; and Wijker v Wijker supra at 729.) These factors are not to be considered cumulatively.

[37] In the particulars of his claim in reconvention the defendant relies for the order for forfeiture on the following:

"15.1 The short duration of the marriage;

15.2 The Plaintiff has over time left the matrimonial home on various occasions and has threatened the Defendant with divorce (to the extent that she has even in the past sued for divorce, which proceedings are simply discontinued by the Plaintiff) only to return to the Defendant. In acting in this fashion the Plaintiff exerted emotional pressure upon the Defendant, in an attempt to obtain an undue financial benefit over the Defendant; and

15.3 The Plaintiff has spread vicious rumours in respect of the Defendant during the subsistence of the marriage to the effect that the Defendant is verbally, emotionally and physically abusive to the Plaintiff and abuses alcohol.

15.4 The Plaintiff has incurred liabilities arising from the purchase of a motor vehicle and has stood surety in respect of the purchasing of immovable property, without informing and/or obtaining the consent of the Defendant."

[38] Whilst the defendant testified that the plaintiff informed her children and family that the defendant abused alcohol this evidence is clearly of a hearsay nature and totally unsubstantiated. No other foundation was laid for alleged rumours and I accordingly do not think that it is necessary to deal with this allegation further.

[39] In argument Mr Jooste relied solely on the brief duration of the marriage. He contends that it would be incorrect to consider the marriage to have endured until June 2015, when the plaintiff finally left the common home. Mr Jooste argues that the marriage was effectively over by October 2012 when the plaintiff first issued summons for divorce. This, it is argued, is borne out by the plaintiff's subsequent desertion of the defendant. I think that this is an over-simplification of the history of the marriage. It is clear from the evidence that the plaintiff returned to the matrimonial home each time and the parties were reconciled because the plaintiff loved the defendant and she remained committed to the marriage.

[40] It is undoubtedly so that the marriage is of relatively short duration and it cannot be gainsaid that there may be circumstances where such a brief duration of the marriage might of its own be sufficient, in the absence of any findings relating to the other two factors, to justify an order for forfeiture. The fact that it is not necessary to establish all three factors set out in section 9(1) does not necessarily lead to the conclusion that the satisfaction of one of the three factors entitles a party to an order for forfeiture. A court is required to have regard to all three factors to the extent that they are applicable and then to exercise a discretion (see Engelbrecht v Engelbrecht supra at 602G-H). It is accordingly necessary to have regard to the factors which gave rise to the breakdown of the marriage and to any substantial misconduct on the part of either of the parties.

[41] I turn to consider the factors which gave rise to the breakdown of the marriage. I have recorded the background leading up to the marriage earlier herein. The plaintiff alleges that the marriage was initially happy notwithstanding the fact that the standoff between her children and the defendant persisted. The evidence clearly reveals that the defendant's frustration with this situation led to arguments and the plaintiff testified that on more than one occasion the defendant assaulted her. This the defendant denied. I find his denial unpersuasive and I have referred earlier to the evidence relating to one such incident which occurred on the night of the final separation.

[42] The plaintiff was employed by various attorneys during the subsistence of the marriage. She testified that throughout the duration of the marriage the defendant repeatedly accused her of having improper liaisons, inter alia, with three well-known attorneys in Port Elizabeth. He shamelessly accused her of being a harlot and, notwithstanding that

these accusations were entirely unfounded, he appeared to have an obsession therewith.

[43] During 2012 she was a member of the Women's Agricultural Association in Port Elizabeth and attended meetings during the evening. She related her recall of a particular evening when she arrived home at approximately 22h30 to find the defendant intoxicated. He enquired from her what a married woman was seeking on the streets at this time of night. When she protested that she had been at the meeting of the Women's Agricultural Association he accused her of dishonesty and asserted that she had been with another man. He approached her and smelt her body to determine whether aftershave could be detected and later went to the extraordinary lengths of smelling her underclothes when she went to bed and then asserted that he could detect from this exercise that she had engaged in intercourse. This, not surprisingly, led to an argument during which the defendant assaulted her.

[44] Again the defendant simply denies that the event ever occurred and asserts that he in fact encouraged the plaintiff to attend meetings of the Women's Agricultural Association.

[45] In support of her assertion of the defendant's obsession with the notion of her infidelity she related a further incident where she had been shopping. When she returned to her motor vehicle she noted numerous missed calls from the defendant. Upon her return to their home the defendant grabbed her handbag and sifted through her wallet to find all invoices of her shopping. The invoices revealed the times of the purchases and he proceeded to interrogate the plaintiff as to her conduct between purchases and he again accused her of being with another man. Again the accusation was devoid of substance. The defendant does not deny the accusation. He states that he was angered by her lengthy absence and her failure to answer her telephone. He acknowledges that he inspected her invoices but states that he cannot recall what he may have said.

[46] The plaintiff testified that prior to her first departure from the common home the defendant had frequently accused her of affairs with other men. The defendant does not testify to any event or circumstance which could have justified such an accusation.

Frequently, when she returned home from work, she says, at half past four in the afternoon the defendant was already drinking.

The defendant acknowledges that he does consume alcohol but protests that the plaintiff was unreasonable in this regard as she did not consume alcohol at all and therefore found it improper for him to have a glass or two glasses of wine before supper. When he was tested under cross-examination in respect of his abuse of alcohol he was consistently evasive on each occasion putting forward this explanation for the plaintiff's assertion. He did not however, deny his excessive consumption of alcohol.

[47] Shortly before her initial departure from the common home the plaintiff testifies that she noted a message on the defendant's cellphone one evening whilst she was making coffee. The message said simply:

"Lekker doeks" (sleep tight)

[48] This she found strange and enquired from the defendant who had sent such a message to him. The defendant laughed and denied any knowledge of the identity of the sender. This the plaintiff found unpersuasive and she dialled the number, however, there was no reply. Two days later she again dialled the number and a lady answered. When she explained the reason for her enquiry the lady acknowledged that she had previously had an affair with the defendant and that she had merely called to find out how he was.

[49] At approximately the same time she noted pornography on the defendant's computer and found that he had been visiting a "dating site" where he represented that he was much younger than he in fact is and invited women between the ages of 35 and 45 to communicate with him. This again led to an argument and gave rise directly to the plaintiff initially leaving the common home.

[50] The defendant, for his part, simply denies that there has ever been pornography on his computer. Notwithstanding his denial in the witness box, the plaintiff's evidence in this regard was not challenged at all. Whilst the summons issued in October 2012 does not specifically refer to pornography the averments contained in the summons accord broadly with the plaintiff's account leading up to her desertion. I pause to record that the defendant does not testify to any conduct on the part of the plaintiff which may have prompted her departure.

[51] I have recorded earlier that following her desertion she returned to the common home in consequence of the defendant pleading with her to do so and undertaking to change his ways. The plaintiff testified that she forgave him and returned to the common home. The defendant, on the other hand, suggests in chief that the plaintiff simply just arrived back at home, unannounced, as if nothing had happened. In cross-examination, however, he was

constrained to admit that he proceeded to plaintiff's place of employment early one morning and begged her to return.

[52] The defendant was not true to his promise to mend his ways and the plaintiff again left the common home in April 2013. This again followed a most unpleasant experience. The parties had retired to bed that evening. The defendant proceeded, dressed only in his underwear, to stand out on the deck in front of their house and scream out obscene insults relating to the plaintiff, her daughter and her parents. He screamed out repeatedly into the silence of the night that the plaintiff and her daughter were harlots and her father, who had been an alcoholic, was a rubbish. The plaintiff was deeply embarrassed and humilated by these events and pleaded with him to come inside, but, to no avail. In these circumstances the plaintiff states that she realised that she had to terminate the marriage. She again left.

[53] It is not in dispute that the incident occurred, however, the defendant denies that he uttered any obscenity and suggests that he merely shouted he was fed up (gatvol). He denies too that he was dressed only in his underwear. When asked in cross-examination

why he thought that the defendant left on the second occasion he was unable to provide any logical reply thereto. When pressed he suggests that he may have done something wrong as no person is perfect, however, he was unable to suggest what it might have been. This evidence was most unpersuasive.

[54] The third departure by the plaintiff from the common home occurred late in September 2014. The plaintiff states that the defendant was again intoxicated when she arrived home. She proceeded to the kitchen where she prepared food and attempted to conduct a normal conversation with the defendant. He was seated at the table near the braai when he suddenly exclaimed: "Those f..... children of yours". Her enquiry as to what he meant led to a tirade of accusations against her children. The plaintiff states that she wished to avoid a confrontation and accordingly took a cup of coffee and proceeded down the passage towards the bedroom. She had a small old Dachshund which was always by her side. The defendant, she says, was frustrated by her refusal to engage and he accordingly kicked the little Dachshund with such force that it sent the dog flying through the air. It was on this occasion that she impulsively struck the defendant with a clenched fist. When he sat down on the ground she followed this up with a kick. She thereafter again left the common home.

[55] Again the defendant simply denies that the event every occurred. It was suggested to him in cross-examination that this was the occasion that the plaintiff had struck him with clenched fist. Although the defendant had previously acknowledged that the complainant had, on occasion, struck him with a clenched fist he persists that he does not even recall this occasion. He explains that he considered that her striking him with a clenched fist was insignificant. So insignificant in fact that he denies that such conduct on the part of the plaintiff contributed at all to the breakdown of the marriage.

[56] The final straw came on 15 June 2015. The parties experienced an electrical problem with their geyser which repeatedly tripped the electricity supply. Plaintiff had not bathed for three days as a result of this problem. She wished to bath this evening and therefore turned the geyser on. Whilst it warmed up it tripped the electricity supply repeatedly and she proceeded through the lounge to the garage to turn it on again. This occurred several times. When she did so the last time she was already undressed and had only a towel around her body. As she passed the defendant seated in the lounge he enquired why she had such an obsession with bathing and again suggested that she had been with another man. At the time he was listening to romantic music and the plaintiff noted that his cellphone was lying on the speaker and that a call was in progress. Prompted by the defendant's accusation she enquired which harlot of his was on the phone. As she uttered these words she saw that the call was terminated. A struggle ensued for possession of the phone and defendant again assaulted her. She eventually fled to her bedroom and locked the door. She called the police for assistance, however, by the time they arrived the defendant had left the home. Plaintiff finally left the matrimonial home that evening.

[57] In the defendant's plea he raises two incidents of financial misconduct by the plaintiff as causes for the breakdown of the

marriage. I shall revert to these when considering any substantial misconduct.

[58] The reasons leading to the breakdown of a marriage are necessarily complex and it is seldom possible to identify a particular event as being decisive. It clearly emerges from the evidence that the parties argued frequently and that the plaintiff on occasion reacted inappropriately as emerges from her own evidence. I have not under this section dealt with the alleged financial misconduct. Suffice it for present purposes to record that the defendant did not testify to any impact which these events may have had on the marriage relationship at the time. I am satisfied that the evidence establishes that predominant factor giving rise to the breakdown of the marriage was the defendant's consumption of alcohol over an extended period and his conduct towards the plaintiff whilst under the influence of alcohol. His repeated and unfounded accusations of infidelity and the unseemly manner in which he expressed it was deeply humiliating and could only have left an indelible scar on their relationship. Whilst it is undoubtedly true that he experienced great frustration by the refusal of the plaintiff's children to accept him into their family it is clear that the children never interfered in the marriage relationship, rather it seems that the defendant took out his frustrations on the plaintiff. Significantly there is no reference to the role of the plaintiff's children in the grounds for the breakdown of the marriage set out in defendant's plea. Whilst it is common cause that the plaintiff left the common home on a number of occasions her conduct has fully been explained in evidence and there can be no merit in the suggestion that she did so in order to exert emotional pressure upon the defendant in an attempt to obtain an undue financial benefit over the defendant.

[59] I turn to consider the alleged financial misconduct. I have recorded earlier that the parties each conducted and controlled their own bank accounts in which their earnings were deposited and that there was, for practical purposes, no real merger of their finances. Their monthly expenses were balanced at the end of each month and a reconciliation done. During or about 2011 the plaintiff entered into a credit agreement in terms of which she purchased a vehicle for her son. She admits that she entered into the agreement of sale, however, it is not clear from the evidence that plaintiff in fact paid any instalments, and if so what the amounts were. In entering into the credit agreement she did not disclose to the bank that she was married in community of property and she did not obtain the consent of the defendant.

[60] Furthermore, during the subsistence of the marriage the plaintiff stood surety for a mortgage loan which her son entered into in order to purchase an immovable property. Again she did not acquire the consent of the defendant. The defendant contends that his signature was forged on the document and he alleges that the plaintiff forged the said signature. This the plaintiff denies and no evidence has been presented to me upon which I am able to make any finding in this regard. The immovable property concerned has since been sold and the mortgage loan repaid. The plaintiff's suretyship had no impact on the joint estate and there is no evidence of any conflict between the parties at the time as a result of the plaintiff's suretyship.

[61] In all the circumstances, to summarise, it seems to me that there is evidence that the purchase and the development of the Hantamberg

property cost R1 235 000 (R670 000 from the Sunningdale property, R325 000 from the plaintiff and R240 000

from the bond registered against the property). The parties accepted joint responsibility in respect of the bond registered

against the property. In respect of the remainder of the costs the defendant contributed R345 000 more than the plaintiff did.

[62] The duration of the parties marriage, as recorded earlier, is relatively brief and was categorised by volatility. That is a factor which militates in favour of a forfeiture order. On the other hand, the evidence suggests that the conduct of the defendant over an extended period may have triggered the events leading to the ultimate breakdown of the marriage. Although the application of the plaintiff's signature as surety on a mortgage loan agreement whilst she was married in community of property may be categorised as misconduct there is no evidence of the impact which it may have had on the relationship between the parties at the time and it has had no effect on the joint estate at all. The plaintiff's conclusion of a credit agreement during the subsistence of the marriage in community of proper was equally improper. In this instance too, however, there is no evidence as to the impact which this conduct had on the marriage at the time nor on the joint estate. I do not lose sight of the fact that "substantial misconduct" as set out in section 9(1) of the Act, may include conduct

which has nothing to do with the breakdown of the marriage. On the other hand, too much importance should not be attached to misconduct which is not of a serious nature. (See Wijker v Wijker supra 730B-C.) Where the parties conducted their financial affairs on the basis of separate accounts and where no evidence has been presented of any effect which the transgressions may have had on the joint estate I think that this aspect should not be overstated.

[63] What is required of the court is to consider the three issues set out in section 9(1) of the Act in broad terms and to then make a value judgment whether the plaintiff would be unduly benefitted if a forfeiture order is not made. An undue benefit, it has been held, is one which is disturbingly unfair (see Engelbrecht v Engelbrecht supra at 602F). On a careful consideration of all the facts I do not think that the plaintiff would be unduly benefited if the joint estate were divided equally.

Co-habitation agreement

[64] I referred earlier to the co-habitation agreement allegedly concluded between the parties. The document was concluded on 21 November

2013. Although the document provides for witnesses to the signatures no witnessing signatures appear on the document. The document was concluded shortly after the plaintiff returned to the common home in November 2013. The material portion of the agreement records:

"1. Movable assets

Neels and Jackie agreed that should one leave the current property of 58 Hantamber(g) Street, Kamma Heights all movable assets remain in the property and will remain the property of the party not leaving the property.

2. Immovable property

2.1 Jansens Avenue, Milnerton, Cape Town is the property of Neels and will remain in his name and Jackie will not claim ownership should the relationship terminate. Neels will be solely liable for the payment of the bond, rates and taxed etc as well he will be responsible for the upkeep of the property. Any alterations to the property will be for his account.

2.2 Sunningdale, Milnerton, Cape Town is the property of Neels and will remain in his name and Jackie will not claim ownership should the relationship terminate. Neels will be solely liable for the payments of the bond, rates and taxes etc as well he will be responsible for the upkeep of the property. Any alterations to the property will be for his account.

2.3 Chardonnay, Lorraine, Port Elizabeth will remain in both Neels and Jackie's names an both will be responsible for the upkeep thereof as well as the payment of the bond and the levies, rates and taxes etc.

2.4 58 Hantamberg Street, Kamma Heights, Port Elizabeth will remain in both Neels and Jackie's names and both will be responsible for the upkeep thereof as well the payment of the bond and the levies, rates and taxes etc."

[65] There is considerable dispute as to the manner in which this agreement came into existence.

[66] The defendant testified that after the plaintiff had again left the common home in October 2013 he approached an attorney, one Victor, to represent him. Victor, of his own accord, made an appointment with Attorney Ungerer, who had previously acted on behalf of the plaintiff. Victor, so the defendant says, persuaded Ungerer that the properties in Cape Town should not form part of the joint estate. I pause to record that neither Victor nor Ungerer testified.

[67] Approximately a week after this alleged meeting had occurred the defendant states that the plaintiff contacted him and advised him that she wished to return to the marital home. The defendant was reluctant and they first met one another on neutral grounds in a restaurant. There he advised the plaintiff that he did not wish to proceed with the marriage. He advised her that he could not proceed with the marriage and run the risk of forfeiting the Cape Town properties. It is in these circumstances, he says, that the plaintiff advised him that Victor had persuaded Ungerer that the Cape Town property should fall outside of the joint estate. The plaintiff undertook to draw up a document which would record this position. In these circumstances the defendant agreed that the plaintiff could return to the common home on condition that such an agreement was prepared.

[68] Three days after the plaintiff had returned to the common home no agreement had been forthcoming and the defendant states that he insisted that such an agreement should now be drawn. The plaintiff, he says, undertook to do so. Some days later he again demanded the signature of such an agreement. The plaintiff then produced the document which was signed in his presence. The document was stored in his study and he states that the plaintiff was thereafter unemployed for a period and accordingly worked with him in his business. The plaintiff, he says, removed the original from his study and he was accordingly only able to produce a copy. He states that a relative had advised him that he should keep a copy of the agreement at a different place from the original and that he had then given a copy to this relative for safe-keeping. Thus he fortunately had a copy of the agreement. This relative did not testify.

[69] The plaintiff's version is somewhat different. She contends that after she left the common home it was the defendant who contacted her and requested that they meet. She confirms that they then met in a restaurant in Lorraine and had dinner together. During this meeting he requested her to return to the common home. Although she did not immediately agree and although she had reservations about the wisdom thereof she states that she loved him and that she truly believed that he would now change. She therefore returned to the common home.

[70] Approximately two weeks later after she had returned to the matrimonial home the defendant approached her and advised her that an agreement had now to be signed in respect of the properties in Cape Town and the furniture in the home. I pause to record that the uncontested evidence is that the plaintiff inherited a home full of furniture and that all her furniture is currently still in the Hantamberg property. The plaintiff declined to sign the agreement and advised him that they were married in community of property. Approximately two or three days later the parties were seated at the table near the braai. The defendant produced the document headed co-habitation agreement, placed it before the plaintiff and instructed her to sign the document. Upon enquiry he advised her that the document regulated the Cape Town properties. The plaintiff was defiant and tore up the document uttering an obscenity. She did not sign. Shortly thereafter, the plaintiff states, that the defendant again approached her with a new copy of the same agreement and placed it on the table before her. He grabbed her hair at the back of her head and threatened to bash her head into the table if she did not sign. Plaintiff states that she truly believed that he was capable of doing so and she feared that he would injure her. She states, that in any event, she was of the opinion that the agreement would be void as no witnesses were present to sign and no attorneys were involved. She accordingly applied her signature to the document. Once she had signed she states that the defendant was satisfied.

[71] Following these events, the plaintiff states that there was no communication between the parties for approximately two weeks. She did not prepare any food for the defendant and she did not eat at the common home. She returned to the common home in the evening, made a cup of coffee and went to her bedroom. At times he followed her to the bedroom, swore at her and scolded her, however, she did not respond. It was only after the lapse of approximately two weeks that the defendant approached her. He apologised to her and acknowledged that he had a drinking problem and that he required treatment. She was supportive of him and offered to accompany him to the Alcoholic Anonymous and to visit a marriage counsellor. In these circumstances the parties discussed their differences and the plaintiff resolved to give the defendant one further opportunity. The defendant then produced the document and tore it up in her presence, hence the reason for him being unable to produce the original. The plaintiff observed the destruction of the original and noted that there were multiple signatures on the last page. Whilst she regarded the position as being resolved she later retrieved the pieces from the dustbin and noted that the defendant's mother and her carer had signed as witnesses to the signatures on the original document.

[72] I have recorded earlier that I accept the plaintiff's evidence of the events. Again, notwithstanding the evidence of the defendant the plaintiff's evidence in this regard was not challenged in cross-examination. I have recorded too that Mr Jooste, at the trial, did not seek the implementation of the contract but argues that the conclusion of the contract, if freely and voluntarily

concluded as the defendant contends that it was, provides support for the defendant's claim for forfeiture.

[73] In order to avoid the consequences of a contract the party who seeks to rely on duress must allege and prove: (a) a threat of considerable

evil to be the person concerned or to his/her family; (b) that the fear was reasonable; (c) that the threat was of an imminent or inevitable evil and induced fear; (d) that the threat of intimidation was unlawful or contra bonis mores; and (e) that the contract was concluded as a result of duress. (See Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) 360; Savvides v Savvides and Others 1986 (2) SA 325 (T) 330; and BOE Bank Ltd v Van Zyl 2002 (5) SA 165 (C) para [36].) It cannot be gainsaid that the threat to bash a woman's face into a table constitutes a threat of considerable evil to her. Her evidence that she believed that the defendant would do so and that she was afraid has not been challenged. I consider such fear to be reasonable. I have equal clarity as to the imminence of the danger which she described and, in the context of the present matter, the threat was clearly contrary to public morals. (Compare BOE Bank Limited v Van Zyl supra at para [52].) In the circumstances I find that the agreement is void.

[74] In the result, I make the following order:

1. A decree of divorce will issue.
2. A division of the joint estate is to be effected.
3. The plaintiff is granted leave to approach this court for the appointment of a liquidator to attend to the division of the joint estate in the event that the parties have not reached agreement in respect of the manner of the division of the joint estate within 30 days from the date of this judgment.
4. The defendant is ordered to pay the plaintiff's costs of suit.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv Pretorius instructed by Greyvensteins Inc, Port Elizabeth

For Defendant: Adv Jooste instructed by Strombeck Pieterse Inc, Port Elizabeth

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Prepared on 9 October 2026 · Esheria