

SOUTH AFRICA / JUDGMENT

J.C.T v S.T (2019/22316) [2024] ZAGPJHC 1123 (31 October 2024)

[2024] ZAGPJHC 1123

COURT

South Gauteng High Court, Johannesburg

BEFORE

JL Bhengu

CASE / FILE NUMBER

2019/22316

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FLYNOTES:

FAMILY

– Divorce – Forfeiture –
Wife

much older and wealthier – Marriage for 2 years and 9 months

– Wife buying marital home and vehicle for husband

–

Wife took conscious decision to marry in community of property –
Forfeiture in relation to house and vehicle

not appropriate –

Husband withdrawing funds from bank account – Acted contrary
to undertaking and court order

– Substantial misconduct

warranting forfeiture order against him regarding the funds –

Divorce Act 70 of 1979, s 9.

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

Case No.: 2019/22316

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

31

October 2024

In the matter between:

J

C-T

Plaintiff

and

ST

Defendant

Date

Heard: 29 – 31 July 2024

Date

of Argument: 16 September 2024

This judgment was

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31 October 2024.

JUDGMENT

Bhengu AJ

Introduction

- [1] The parties were married to each other on 30 September 2016 in community of property. There are no children born from the marriage. On 25 June 2019 the Plaintiff instituted a divorce action against the Defendant seeking a decree of divorce, division of the joint estate and an order in terms of section 9(1) of the Divorce Act, 1979, ("the Act"), declaring that the Defendant forfeits the immovable property situated in Auckland Park Johannesburg, ("The Property"), an Audi A3 motor vehicle, proceeds of the FNB 32 Day Flexi Investment account ("The Investment") and ancillary relief.
- [2] In response to the Plaintiff's claim, the Defendant raised a counter claim seeking a decree of divorce, division of the joint estate and an order declaring that the Plaintiff forfeits the same immovable property and two motor vehicles in the Defendant's possession, namely, an Audi A3 and a Colt L 200. The counter claim is opposed by the Plaintiff.
- [3] The Parties agree that the marriage relationship between them has irretrievably broken down though each Party alleged different grounds for the breakdown of the marriage. The remaining issue for decision by this court is each Party's claim for forfeiture of the specific assets.

Background

facts

- [4] The Plaintiff is a citizen of The United Kingdom, and the Defendant is a South African citizen. The Parties met and fell in love with each other in Windhoek, Namibia in 2014. When the Defendant stopped working in 2015, both parties left Namibia and relocated to South Africa to start a new life together. In South Africa they stayed at the Defendant's house in Lyndhaven, Roodepoort.
- [5] It is common cause that when the parties met, the Plaintiff was in the process of divorce from her marriage relationship of 18 years. As part of a divorce settlement from that marriage, the Plaintiff received certain funds that were deposited into the Defendant's banking account held with FNB. Of the funds received, the Defendant transferred an amount of R1,024 000.00 into his FNB 32 Day Flexi investment account. This account was controlled by the Defendant and the Plaintiff was only receiving notifications of the transactions in the account.
- [6] The Plaintiff also sold one of her immovable property worth 4,500 000.00 Namibian dollars situated in Namibia and used part of the proceeds from the sale to buy the Parties' marital home situated in Oakland Park, Johannesburg for an amount of R2,700 000.00 including transfer costs.
- [7] The Plaintiff also bought an Audi Cabriolet motor vehicle for the Defendant whilst they were courting. It is these three assets that are subject to the forfeiture claim by the Plaintiff.
- [8] Due to the irretrievable breakdown of the marriage relationship between the Parties, the Plaintiff left the marital home and relocated to the United Kingdom in November 2018. The Parties marriage relationship lasted for 2 years 9 months.

Legal Framework

- [9] The claim for forfeiture of benefits is governed by section 9(1) of the Divorce Act 70 of 1979, 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 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 for forfeiture is not made, the one party will in relation to the other be unduly benefited."

- [10] In *Wijker v Wijker*[1] the Appellate Division held 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 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”.

Analysis

- [11] Both Counsels referred this court to the decisions in Engelbrecht v Engelbrecht[2] and JW V SW[3] on the question of what constitute a benefit. I considered the common cause fact that the Plaintiff was 17 years older than the Defendant and was undoubtedly ahead of him in life with finances. Her total estate was valued at approximately R6,000,000.00 at the time of the marriage.
- [12] The Defendant on the other hand stated that when he met the Plaintiff, he was living a modest life. He was working as a material systems controller at a Uranium mine earning about R60,000.00 per month. He had a house in Roodepoort worth about R600 000.00, a stand in Carletonville, a Colt L 200 bakkie, a VW Golf and a Polo Cross (scrap). He was introduced to the lavish lifestyle comprising of an expensive motor vehicle, Audi A3, family holidays, expensive clothes and gadgets. The Plaintiff even paid for the wedding expenses and took care of the Defendant's son from a previous relationship. He stated that when he resigned from his job in Namibia, the Plaintiff promised him that she will support and help him to start a business with the money from the divorce settlement. Having regard to these facts, it is clear that the Defendant will be benefited if a forfeiture order is not made.
- [13] Having answered the first question in the affirmative, the remaining question is whether the Defendant will be unduly benefited. The court held in Wijker supra that the second enquiry in terms of Section 9(1) is a value judgment that is made by the trial court after having considered the three factors, namely, 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. It is now an established principle in our law that not all three factors need to be cumulatively present before forfeiture can be ordered.[4]
- [14] It is common cause that the Parties' marriage was not a long marriage and lasted for only 2 years 9 months when the Plaintiff filed for divorce in June 2019. Both parties blamed each other for the breakdown of the marriage. The Plaintiff alleged that soon after the parties got married, the Defendant stopped showing love and care towards her. He was contemptuous towards her on a daily basis. He would at times ignore her for no reason. She stated that the relationship slowly started to breakdown due to physical, verbal and emotional abuse. She described the physical abuse as the lack of intimacy in the bedroom which was evidenced by his insistence on strenuous sexual activity and failing to consider the Plaintiff's health challenges.

- [15] The Defendant admitted that the parties would have verbal altercations but denied all the allegations of abuse levelled against him. He alleged that the Plaintiff was the one who was controlling and abusing him emotionally because she came to the relationship with lots of money. He stated that the Plaintiff encouraged him to quit his work in Namibia by promising to assist him financially with the money from the divorce settlement to set up different business ventures in South Africa. She caused him to sell his house in Lyndhaven and said he does not need it. She gave away all his clothes to charity. According to the Defendant their relationship took strain when the said businesses failed to generate enough money than they had anticipated. That is why he decided to seek employment again in
2017. These allegations were denied by the Plaintiff.
- [16] It is evident from the testimony of both Parties that they were not happy in the relationship. Without discounting the allegations by both Parties relating to abuse in different forms, it seems to me that the challenges caused by the relocation of the Defendant to KZN in 2017 was the final straw. Despite the alleged abuse committed by the Defendant, the Plaintiff was still insistent on relocating to be with the Defendant in KZN. In this regard, the Plaintiff stated that the Defendant was visiting the Plaintiff only when he was on leave or on a long weekend. She alleged that when he visited her, he would leave her alone while he goes off to see his friends and family in Carletonville. The Defendant also stated that the Plaintiff did not like the flat that he was staying in in Durban and wanted to buy a house to which the Defendant refused. He wanted the Parties to buy another property in Johannesburg as his contract in Durban was for three years.
- [17] These facts indicate to me that the Plaintiff was willing to put behind the issues that she had with the Defendant and relocate to be with him in Durban. The Plaintiff stated that “So I realized that he had no intention of living with me in Durban”. That is when she got courage to move back to the UK. Leaving behind the said assets.
- [18] The Plaintiff contended that the Defendant should forfeit the benefit to the house and cars because he was the cause of the breakdown of the marriage due to the allegations of abuse. She alleged that the Defendant never contributed anything towards the joint estate. She alleged that after she moved back to the UK, she was still paying the gardener for regular gardening and repairs to the pool whilst the Defendant was living in the house, rent free, mortgage free and collecting approximately an amount of R7000.00 from renting out the cottage.
- [19] The Plaintiff’s counsel relied on the decision of *KT v MR*[5] where Kollapen J granted a forfeiture order on the basis of the short duration of the marriage in community of property of 20 months. The court held that: -

“in circumstances where the other factors that relate to substantial misconduct and the circumstances giving rise to the breakdown of the marriage are not decisive in determining the issue, it would appear that the consideration of a fault-neutral factor such as the duration of the marriage may well and should indeed be based on considerations of proportionality.”

In this regard the court reasoned that

“the longer the marriage the more likely it is that the benefit will be due and proportionate, and, conversely, the shorter the marriage the more likely the benefit will be undue and disproportionate”

[20] I have considered this argument, however I take note that the court in the same matter stated its findings did not translate into a rigid and mechanical exercise, as the court still has to exercise value judgment whether this factor alone will justify a forfeiture order. Each matter has to be looked at on its own merits.

[21] While I accept that the Plaintiff is the one who bought the assets in question, I cannot however ignore the fact that the parties were married in community of property. In BOO v NNO[6] Makgoba J stated the following in relation to the consequences of a marriage in community of property: -

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

[22] I take note of the Defendant's counsel argument that the Plaintiff was coming from a divorce from a marriage out of community of property with accrual and that she took a conscious decision to marry the Defendant in community of property even though he was unemployed at the time of the marriage. Although the Plaintiff testified that she was pressurised into marrying the Defendant in community of property, her evidence under cross examination indicated that she understood the consequences of such a marriage. She stated that “the marriage leads to a joint estate...there is one basket”. It does not follow that the forfeiture order can be granted merely on the basis that the Plaintiff made a greater contribution to the joint estate. The onus is on the Plaintiff to show that the Defendant will be unduly benefited.

[23] The following factors persuaded me against granting forfeiture order in respect of the immovable property and the Audi motor vehicle: - I take note of the common cause fact that when the parties came to live in South Africa, the Defendant provided accommodation for the Plaintiff in his house before they got married. I accept the evidence of the Defendant that the Plaintiff persuaded him to sell his house in order to live with her in the new house. The Plaintiff in her evidence confirmed this fact by stating the following:

“He was losing money when he was trying to rent, so I advised him to sell”

- [24] The Plaintiff also paid for renovations to that house to boost its resale value. The Defendant stated that the house was sold for R770 000.00 and that he used the profit of approximately R200 000.00 made through the sale to contribute to the household expenses of the new house in Oakland Park. The decision to sell the Defendant's house was therefore a joint decision after the Defendant accepted advice from the Plaintiff to sell.
- [25] I further take into consideration the uncontested evidence of the Defendant which I accept that since the Plaintiff left their matrimonial home, he has been the one responsible for the maintenance of the house and all motor vehicles. He took an insurance policy for all the vehicles and is also responsible for payments of premiums for building and household contents insurance policy which is up to date. He pays for a security company to ensure that the house was safe and is also paying for the municipal rates Account which is up to date. His evidence was that if he had not taken care of the house for over five years in the absence of the Plaintiff, the house would have been dilapidated. He stated that the household contents and the Plaintiff's personal effects are still intact just as she had left them in 2018. It emerged during cross examination that the Defendant used some of the money from the investment account to fund the maintenance and also for his personal needs. I intend to deal with the investment separate from the immovable property and the Audi motor vehicle.
- [26] It is only after the court has concluded that a party would be unduly benefited that it will order forfeiture of benefits. I am of the view that considering the aforesaid evidence of the Defendant, the Plaintiff has failed to prove on a balance of probability that the Defendant will be unduly benefited. A forfeiture order in relation to the house and the motor vehicle will not be appropriate under the circumstances.

FNB 32 Day Flexi Investment Proceeds

- [27] The plaintiff seeks forfeiture of the proceeds from the investment account. It is common cause that on 23 February 2017, an amount of R1 624 548.00 was paid by the Plaintiff's ex-husband to the Defendant's FNB cheque account ending 3[...]. According to the Plaintiff, she decided to use the Defendant's account because it was expensive for her to use her Nambian account. She could not open her own South African bank account because she did not have a spousal VISA. On 04 August 2018 the parties agreed to transfer an amount of R1 024 000.00 into a 32-day Flexi account in the name of the Defendant. The Defendant had full control of this account, and the Plaintiff was only receiving notifications of transactions in the account.
- [28] The parties differ as to the purpose of the 32 Day Flexi account with the Plaintiff alleging that it was meant to be her retirement funds as she did not have pension. The Defendant denied that the funds were for the Plaintiff for her retirement. According to the Defendant, they opened a flexi account that when they needed the money, they could use it, but when it's not in use, it can generate income. I accept the Defendant's explanation that the funds formed part of the joint estate as opposed to being retirement funds. The Defendant reasoned correctly that if the funds were meant to be for Plaintiff's retirement they would have been invested in a long-term investment account that would have been accessible on

retirement. Further, conduct of the parties before the separation indicated that the funds were used to fund their living expenses. I also take note that the Plaintiff was a holder of a banking account held with Standard bank where she was receiving payments from other sources. If the funds were indeed not for use, there would have been no reason to entrust retirements funds in the control of the Defendant.

Dissipation of funds

[29] Having found that the invested funds formed part of the joint estate. It is important to state that even though the Defendant was in control of the account, he did not have unfettered control as he admitted under cross examination that the transactions performed on the account were to be authorised by the Plaintiff.

[30] In June 2019 the Plaintiff instituted these proceedings claiming amongst other relief, forfeiture of the investment funds. Her attorneys addressed a letter to the Defendant's attorneys requesting that the funds be frozen or preserved pending finalization

of the divorce action. In response to this request, on 17 July 2019, the Defendant's attorney sent a letter with the following

response: -

"the account has been placed on hold/frozen, which is clear from the statement provided... It is our instructions that the account will stay on hold/frozen up until the outcome of the court processes".

[31] At the time of this undertaking the remaining balance on the investment account was an amount of R1,064,859.03 as per bank statement dated 4 May 2019 provided by the Defendant's then attorneys.

[32] Despite making this undertaking, the Defendant on 03 April 2020 closed the investment account and withdrew all the funds without the Plaintiff's knowledge or consent. The remaining balance as per statement dated 03 April 2020 when the account was closed was R1,101 581.03 which was transferred to the Defendant's Money Maximiser account. When the Plaintiff realized that she no longer had access to the account she instructed her attorneys to send a letter of demand to the Defendant demanding that the amount of R1,101 581.03 be immediately transferred to the Plaintiff's attorneys trust account. When no funds were received, the Plaintiff successfully launched an urgent application to the High Court for the return of the funds. The Court ordered the Defendant on the 23rd of June 2021 to return an amount of R1,065 658.07 by depositing same to the Plaintiff's attorney's trust account.

[33] It is common cause that the Defendant failed to comply with the Court Order and that he instead paid an amount of R600,000.00 to the trust account of the Plaintiff's attorneys leaving a deficit of R465 658.07.

- [34] The Plaintiff's counsel took the Court through a series of entries in the Defendants bank statements showing transfers out of the account to his personal account for his lawyer's fees and other amounts for his personal use. The closing statement at the end of the statement is just over R22.00. When the Defendant was confronted with this information, he first denied that there was ever an undertaking from him not to use the funds pending finalization of the divorce action. He later admitted that he did give instructions for the undertaking.
- [35] The Defendant confirmed that the balance of the Funds as of 22 June 2021 when the Court Order was issued was an amount R865 880.00. In his defence for disregarding his own undertaking and the Court Order, he stated that he was frustrated about what was happening to him. He thought that he was using his part of the money as the relationship had failed. He stated that he was not coping as he was used to an expensive kind of life. The evidence of the Defendant on how he used the funds is rejected. On his own admission, he agreed that the Funds would be preserved pending divorce. Even after he was ordered by the court to return the funds, he acted in contempt of the court order.
- [36] The Defendant's counsel argued that there was no dissipation of monies because the parties were married in community of property and that whatever money that was in the joint estate belonged to both Parties. He argued that the Defendant used the money for the upkeep of the joint estate and for his legal fees. He further argued that the Defendant paid back the R600,000.00 to the plaintiff's attorneys trust account and that the Plaintiff's forfeiture claim should be dismissed. This argument by the Defendant's counsel cannot stand because it fails to address the undertaking made by the Defendant to preserve the funds, the withdrawal of investment funds from the 32-day investment account without consent from the Plaintiff in contravention of section 15(2) of the Matrimonial Property Act and noncompliance with the Court order.
- [37] I'm of the view that even though this misconduct was committed after the breakdown of the marriage, it is a substantial factor that influenced the court to consider in its value judgment on whether to grant forfeiture. In *Wijker* above, the court further held that:
- "Substantial misconduct may include conduct which has nothing to do with the break-down of a 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".*
- [38] I consider the conduct of the Defendant in this regard to qualify as substantial misconduct warranting the granting of a forfeiture order against him. The Defendant confirmed that the sole purpose of closing the 32 Day Investment was to deny the Plaintiff access to the account for fear that she would remove the money. These reasons given by the Defendant shows gross misconduct that leads me to conclude that he will be unduly benefited if the forfeiture order is not granted.
- [39] The Plaintiff in her amended particulars of claim sought an ancillary relief in a form of an adjustment to be effected in her favour on the division of the remainder of the estate as envisaged in terms of section 15(9)(b)[7] of the Matrimonial Property Act whereby the

dissipated amount of R465,658.07 will be deducted from the Defendant's share in the division of the joint estate. I agree with this contention in that the conduct of the Defendant resulted in the joint estate suffering a loss for the difference between the total amount of R1,064,859.07 as per court order dated 23 June 2021 less the R600,000.00 paid to the Plaintiff's attorneys Trust Account.

Counterclaim

- [40] The Defendant's forfeiture claim of the Auckland Park house is based on the fact that "The plaintiff has not contributed to the payment, repair, maintenance and upkeep of the Oakland Park property since their separation on 10 November 2018". He contended that the Audi A3 was bought by the Plaintiff before marriage as a gift for him and it belonged to him. He stated that the Plaintiff must forfeit the benefit to the Colt Bakkie because the Plaintiff has no use for it.
- [41] As it has been established by the evidence that save for the Colt bakkie, all the assets claimed by the Defendant in his counter claim were bought by the Plaintiff using her own funds, the Plaintiff correctly argued that the assets were not benefits to her and as such cannot be forfeited. It is trite that that a party can only benefit from an asset brought into the estate by the other party, not from her own, and that such party could not be ordered to forfeit his or her own asset.[8]
- [42] The plaintiff's counsel referred this court to a decision in *Singh v Singh*[9] and *Engelbrecht v Engelbrecht* where the same principle regarding the concept of benefits was enunciated. The Defendant thus failed to pass the first leg of the enquiry in terms of Section 9(1) and as such his counter claim for forfeiture must fail.

The issue of costs

- [43] Section 10 of the Divorce Act provides that: -

'... the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties'.

- [44] The Plaintiff asked for costs on a punitive scale or alternatively on a party and party scale B. I take into consideration that the parties had already agreed that they both seek a decree of divorce and division of the remainder of the joint estate. The Plaintiff was partially successful with her claim for forfeiture. Having considered all the facts of this case, I am of the view that each Party should pay its own costs.

- [45] In the result, the following order is made: -

1. A decree of divorce is granted;

2. The Defendant shall forfeit R1,076 859.93 previously held in the FNB 32 Day Flexi Notice account number ...449.
3. The remainder of the joint estate shall be divided between the Parties.
4. An adjustment shall be effected in favour of the Plaintiff on division of the remainder of the joint estate.
5. Fullard Mayer Morrison Incorporated attorneys shall pay to the Plaintiff the amount of R600 000.00 held in trust in terms of the Court order dated 23 June 2021 together with any interest that may have accrued on the amount.
6. The Defendant's counter claim is dismissed.
7. Each Party is ordered to pay its own costs.

JL BHENGU

ACTING JUDGE OF HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

For the Plaintiff: Instructed by: Adv B Manning Fullard Mayer Morrison Inc. Attorneys For the Defendant: Instructed by: Adv M Shakung Ditheko Lebethe Attorneys

[1] *Wijker v Wijker* 1993 (4) SA 720 (A) at 727D–F

[2] *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C)

[3] *JW v SW* 2011 (1) SA 545 (GNP)

[4] *Binda v Binda* 1993 (2) SA 123 (W) at page 411

[5] *KT v MR* 2017(1) SA 97 GP para 20.18 - 20.19

[6] *B.O.O v N.N.O* [2012] JOL 29395 (GNP)

[7] Section 15(9)(b) – “that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the

joint estate”.

[8] *JW v SW* 2011 (1) SA 545 (GNP)

[9] *Singh v Singh* 1937 WLD 126 at 127 -128

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