

SOUTH AFRICA / JUDGMENT

K.P v N.C.P (840/2018) [2023]

ZAFSHC 46 (14 February 2023)

[2023] ZAFSHC 46

COURT

Free State High Court, Bloemfontein

BEFORE

Berry, AJ

CASE / FILE NUMBER

840/2018

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THE

HIGH COURT OF SOUTH AFRICA

FREE

STATE PROVINCIAL DIVISION

Case

Number 840/2018

Reportable:

yes/no
Circulate
to other Judges: yes/no
Circulate
to Magistrates: yes/no
In

the matter between:

K
[....] P [....]
Plaintiff
and
N
[....] C [....] P [....]
Defendant

CORAM:

BERRY, AJ
HEARD

ON: 17 JANUARY 2023
DELIVERED
ON: This judgment was handed down electronically by email to the parties' representatives and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 14 February 2023.

JUDGEMENT

BY: BERRY, AJ

JUDGEMENT

- [1] In this divorce action the only dispute is whether there should be a forfeiture order under Sec 9(1) of the Divorce Act 70 of 1979 in favour of the Defendant.
- [2] In the claim in reconvention the Defendant makes the following allegations:
- “6.1 The Plaintiff is misusing and abusing the funds of the joint estate, is using the money without the knowledge of the Defendant.*
- 6.2 Plaintiff is not keeping his marital obligations, not paying the bond. The bond is in arrears without proper explanation.
- 6.3 The plaintiff is putting the joint estate at financial risk.
- 6.4 The Plaintiff is emotional and verbally abusive towards the Defendant.
- 6.5 Defendant has lost all love and affection as a result of the Plaintiff's dishonesty.”
- [3] The Plaintiff denied these allegations in his plea to the claim in reconvention.
- [4] In the claim in reconvention the Defendant claims that it would be just and equitable that the Plaintiff forfeits the benefits of the marriage in community of property, to the extent that he forfeits his share in the Defendant's pension fund held by the Government Employee Pension Fund.
- [5] The Parties were married in community of property on 17 April 2004 and separated during July 2019, when the Defendant left the communal home.
- [6] There are two children born from the marriage. The one is 16 years and the other one is 14 years old.
- [7] The children currently reside with the Defendant.
- [8] The Defendant testified that the Plaintiff is putting the joint estate at financial risk.
- [9] The Plaintiff was employed from 2003 to 2008, where he contributed towards a pension fund.

- [10] The Plaintiff resigned from his employment to start his own business.
- [11] On resignation the Plaintiff received a pension pay-out of R39 400.00.
- [12] The Defendant testified that the Plaintiff used his pension money for his own benefit, and she did not receive any benefit from this money.
- [13] The Plaintiff testified that he used some of the money to start his new business, that he paid arrear school fees, and the house bond.
- [14] The Defendant testified that it would be unfair if the Plaintiff receive half of her pension, as she did not receive any part of his pension when he resigned.
- [15] The Defendant testified that during the marriage she paid for the pre-paid water, a Hyundai Getz, her clothing accounts and bought groceries for the common household.
- [16] The Plaintiff paid for the town house bond, as well as the bond on the communal home and the levies and taxes associated with the properties. He also paid all other expenses associated with the household such as DSTV, electricity, family holidays, the Isuzu vehicle, and the insurance on both vehicles.
- [17] The Plaintiff also paid the school fees and bus fare of the two children.
- [18] The Plaintiff testified that he bought the town house as an investment during 2006, with a view to rent the property.
- [19] The Defendant testified that she was upset about the property being rented out at a rate which was lower than the monthly instalment on the bond. She told the Plaintiff that she wanted nothing to do with this property.
- [20] The Plaintiff testified that the townhouse was repossessed by the bank during October 2009.
- [21] There was a dispute with the State Department that rented the property on behalf of one of its employees and the Department did not pay the rent. He could not afford to pay the bond without the rental income, as his business was not doing as well.
- [22] The parties bought communal property in Mandela View during 2007. This property was also re-possessed by the bank.
- [23] The Defendant blames the Plaintiff for the loss of their property and accuse the Plaintiff of not managing his finances well.
- [24] When the Defendant left the communal house, she removed the build-in cupboards from the kitchen.
- [25] When Nedbank offered to assist with selling the property in Mandela View, the Defendant was un-cooperative and only signed the approval for the assist programme, after the Court declared the property executable.

- [26] According to the Defendant, the Plaintiff proposed that they should get divorced so that half of her pension can be paid to him, which he said they can use to pay the bond on the communal home. She declined this proposal.
- [27] The Plaintiff testified that his businesses manage events.
- [28] The Defendant hid the Plaintiff's computer on 27 November 2016 whilst he was busy with a tender for the Local Authority.
- [29] This prevented him from submitting a tender for a three-year contract, which was the root cause for his business failure.
- [30] Prior to this incident, the company was doing so well that the bank financed a BMW X6 bought in the company's name.
- [31] The Defendant only handed computer back to the Plaintiff when he approached the police.
- [32] The Plaintiff testified that during June 2017 he wrote a long WhatsApp message to the Defendant wherein he explained the things that made him unhappy in their marriage.
- [33] He hoped the WhatsApp would make the Defendant do some introspection and that she would try to address the cause of conflict in their marriage.
- [34] The Defendant however responded that it is a sad day and that they should try and reach a settlement.
- [35] The Plaintiff contemplated this response and finally decided during December 2017 to proceed with the divorce.
- [36] The Plaintiff saw an attorney during January 2018 and the summons was issued during February 2018.
- [37] The Plaintiff testified that his mother passed away during June 2019. He had to attend to his parental home as he is the eldest son, to make all the arrangement and take care of the logistics.
- [38] During July 2019 the Plaintiff returned to their communal and found that the Defendant has moved out of the communal home and left him a bed, headboard, two couches, cutlery and gardening tools.
- [39] It was with this move that the Defendant removed the cupboards from the kitchen.
- [40] This is the extend of the evidence placed before Court.
- [41] The Defendant did not allege any misconduct by the Plaintiff, other than the alleged mismanagement of his income, which the Defendant argues constitutes misconduct and the circumstances that lead to the breakdown of the marriage.

- [42] According to the Defendant the financial mismanagement of his finances by the Plaintiff, constitutes sufficient grounds to declare that the Plaintiff must forfeit his interest in her pension fund.
- [43] Section 9(1) of the Divorce Act 70 of 1979 reads:
- “(1) 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.”*
- [44] The parties separated during 2019 and the divorce did not settle because of the dispute about forfeiture.
- [45] This resulted in the Defendant contributing towards her pension fund for four years, whilst the parties did not share a communal home.
- [46] The Plaintiff will benefit from the Defendant’s pension benefit. The question is whether the benefit is undue?
- [47] The reality is that financial strain often causes conflict in relationships, but does the fact that the Plaintiff’s business struggle, constitute financial misconduct?
- [48] The Plaintiff’s uncontested testimony is that the Defendant hid his computer, which caused him to miss the deadline to file for a three-year tender.
- [49] His business has not recovered.
- [50] The Defendant earns a good salary as a teacher. Yet, for some inexplicable reason, she elected not to pay the bond on the communal home and allowed the property to be re-possessed.
- [51] Yet the Defendant blames the Plaintiff for the loss of their communal home and regards the loss as a risk to the joint estate, because of the Plaintiff’s financial failures.
- [52] The parties have been married for 19 years, of which they lived apart for the last 4 years. The duration of the marriage is thus not a factor which carries great weight in determining whether there should be forfeiture or not.

THE LAW ON FORFEITURE OF BENEFITS

- [53] The starting point when dealing with a marriage in community of property is that the parties agreed before the marriage that they would share in the proceeds of the marriage equally. The principle is *pacta sunt servanda*, agreements must be honoured.
- [54] The legislature in the 1979 Divorce Act determined that guilt is no longer determinative in divorce proceedings.

- [55] The factor of guilt cannot be smuggled back into the Act through the backdoor with Sec 9. (Klerck v Klerck 1991 (1) SA 265 (W) at 269C – D).
- [56] The first step is to determine whether the party against whom the order is sought will benefit. This is a factual issue. (Wijker v Wijker 1993 (4) SA 720 (A) at 727E).
- [57] The next step is a value judgment considering facts within the compass of the three factors mentioned in Sec 9. (Wijker 727E – F).
- [58] All the factors mentioned in section 9, namely (i) the duration of the marriage, (ii) the circumstances which gave rise to the breakdown thereof; and (iii) any substantial misconduct on the part of either of the parties must be considered. The court must look broadly at the three categories. (Klerck 269D – G confirmed in Wijker 729A – G).
- [59] It is not a prerequisite that all three factors must be present. (Klerck 268B – 269G; Binda v Binda 1993 (2) SA 123 (W) at 127C – D).
- [60] The Court can order that a percentage of the estate or an asset be forfeited, as was done in Singh v Singh 1983 (1) SA 781 (C).
- [61] The misconduct contemplated in Sec 9(1) is of a more serious nature than what is contemplated in section 7(2), where the court is dealing with redistribution. (Singh at 788H).
- [62] The forfeiture order is confined to patrimonial benefits, under Sec 9(1). (Singh 788E – F).
- [63] The facts and circumstances on which a party relies for a forfeiture claim must be pleaded and canvassed in evidence. (Koza v Koza 1982 (3) SA 462 (T) at 465H).
- [64] The legislature did not give any direction on the relative importance of the three factors. The factors have been defined in a wide-ranging and vague manner (Klerck 268H).
- [65] To determine whether one spouse will benefit if the order is not granted, the Court must determine the contributions by the spouses to the joint estate.
- [66] The Court held obiter that the benefit is “undue” if it can be described as disturbingly unfair (Engelbrecht v Engelbrech 1989 (1) SA 597 (C) at 602F).
- [67] The purpose of a forfeiture order is not to punish the guilty spouse. The element of fault has been removed from our divorce law and exists only in the limited extent provided in Sec 9(1).
- [68] Courts are reluctant to make forfeiture orders because the fault principle is no longer part of our law.
- [69] Forfeiture orders made by trial Courts were set aside in Wijker and Engelbrecht. In Klerck the court refused to make a forfeiture order. In Koza the trial Court’s refusal to make a forfeiture order was confirmed on appeal.
- [70] In Singh (at 791E – F) a forfeiture of 20% was ordered.

[71] The concept of “benefits” is explained in *Smith v Smith* 1937 WLD 126:

“What the defendant forfeits is not his share of the common property, but only the pecuniary benefit that he would otherwise have derived from the marriage. It is really an order for division plus an order that the Defendant is not to share in any excess that the Plaintiff may have contributed over the contributions of the Defendant.” A “benefit” as envisaged in Sec 9 of the Divorce Act can take various forms, inter alia “contributions” made by one party towards the joint estate during the existence of the marriage. The Court considers the salaries earned by the spouses, what they owned at the time of the marriage. What they received as inheritances, legacies, donations, and so on.”

[72] The Claimant in respect of a claim for the forfeiture of benefits in a marriage in community of property, must prove a contribution which exceeds the contribution of the other party towards the joint estate.

[73] The Defendant’s pension is currently worth R1 526 949.00. This benefit accrued through twenty-two years’ service with a single employer. The Defendant started contributing towards her pension fund on 01 July 2000.

[74] The Plaintiff was a businessperson when the parties got married in 2004 and only obtained permanent employment for a period of 5 years from 2003 to 2008.

[75] The Plaintiff received R39 400.00 from his pension fund. He testified that he used the money to start up his business, pay the bond and pay school fees.

[76] The parties lived together for a further 11 years after the Plaintiff started his business, when the Defendant left the communal home.

[77] The Plaintiff, being a businessperson, was always part of the deal between the parties.

[78] No doubt, when the Plaintiff’s business was doing well, the Defendant shared in the spoils. Now that they are divorcing, she wishes the benefit in her pension fund be forfeited.

[79] *Singh v Singh*

The marriage lasted 20 years. The Defendant’s misconduct was substantial. The duration of the marriage was 20 years. The circumstances which gave rise to the breakdown were 50/50. A forfeiture of 20% of the joint estate was ordered.

[80] The Plaintiff will benefit if an order for forfeiture is not made. The Defendant’s pension fund is worth R1 526 949.00. The Plaintiff will receive half of this if a forfeiture order is not made.

[81] The next enquiry involves a value judgment considering the three factors mentioned in Sec 9.

[82] The principle of *pacta sunt servanda* entails that the agreement to share equally between the parties must be honoured.

[83] There are no substantial misconduct. The Plaintiff’s financial problems gave rise to the breakdown of the marriage.

- [84] The Plaintiff did not make any contribution towards the common household since August 2019, after the Defendant left the common household during July 2019.
- [85] It will be just to order that the Plaintiff do not share in the growth of the Defendant's pension fund from 01 August 2019 to the date of this order.
- [86] The following order is made.
1. A decree of divorce is issued.
 2. The Plaintiff forfeits any benefit in the growth of the Defendant's pension fund from 01 August 2019 to the date of this order.
 3. Division of the joint estate, excluding the benefit the Plaintiff forfeits in terms of order 2, is ordered.
 4. Both parties shall have full parental responsibilities and rights with regard to the minor children, as specified in Section 18(2) of the Children's Act, 38 of 2005.
 5. The primary place of residence and care of the minor children is awarded to the Defendant.
 6. Specific parental responsibilities and rights with regard to contact with the minor children, as contemplated in Section 18(2)(b) of the Children's Act, 38 of 2005, is awarded to the Defendant, in the following manner:
 - 6.1 The Plaintiff is entitled to contact the minor children telephonically at all reasonable times.
 - 6.2 The Plaintiff shall be entitled to take the minor children with him for:
 - 6.2.1 Alternative weekends, commencing on Friday at 14:00 and ending on Sunday at 17:00.
 - 6.2.2 Short school holidays which shall rotate between the parties and for half of the long school holidays which shall be divided equally between the parties on such a basis that each party shall be entitled to have the children with him/her on every alternative Christmas.
 - 6.2.3 Easter and public holidays shall alternate between the parties.
 - 6.2.4 At least four hours contact with the children on his and the children's' birthdays.
 - 6.2.5 Contact with the children on fathers-day from 08:00 to 17:00 if fathers-day does not fall on a contact weekend.
 - 6.2.6 The Plaintiff shall be responsible for transport of the children to and from school. The children shall be returned to their maternal home within one hour after school closure.
 7. The parental responsibilities and rights regarding guardianship of the minor children, as contemplated in Section 18(2)(c) and 18(3) of the Children's Act, is awarded to the parties jointly.

8. The Plaintiff shall pay maintenance in the amount of R2500.00 per child per month, which shall be payable before the 3rd day of each month with the first payment to be made on or before 03 March 2023.
9. The Plaintiff shall pay all reasonable expenses relating to school wear including uniform and sport clothing for both children.
10. The Plaintiff shall pay for airtime and data for both children.
11. The Plaintiff shall pay the school fees for the minor daughter S.
12. The Defendant shall pay the school fees for the minor son K.
13. Each party is to pay its own costs.

AP BERRY, AJ

APPEARANCES:

For the Plaintiff:

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