

SOUTH AFRICA / JUDGMENT

L.M v E.M (16840/2015) [2017] ZAGPPHC 944 (15 December 2017) [2017] ZAGPPHC 944

COURT

North Gauteng High Court, Pretoria

BEFORE

M. Mbongwe

CASE / FILE NUMBER

16840/2015

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 16840/2015

15/12/2017

In

the matter between:

L

M

Plaintiff

And

E

M

Defendant

JUDGEMENT**MBONGWE, AJ: INTRODUCTION**

- [1] The plaintiff in this action proceedings seeks an order for divorce against the defendant to whom he is married in community of property. In addition, plaintiff seeks an order that the defendant forfeits 15% of the benefits arising from their marriage. In her counterclaim, the defendant seeks an order of divorce, a division of the joint estate as well as maintenance for herself and costs.

FACTS

- [2] The plaintiff is an adult male practising attorney and the defendant is a teacher who works in the human resources office of the Gauteng Department of Education. The parties entered into a marriage in community of property in December 1992. At the time the divorce summons was issued, the parties had been married for a period of 17 (seventeen) years and have a major son together. Although still married to each other, the parties have been living apart since September 2012, the plaintiff being the party who left the common home.

GROUND FOR SEEKING DIVORCE

- [3] As reasons for seeking divorce, the plaintiff alleged lack of support to him personally and professionally, by the defendant; his isolation of him by the defendant from his friends and relatives towards whom the defendant displayed an unwelcoming attitude, inter alia, by not returning greetings to her or out-rightly not engaging in and/or participating in their entertainment. With regard to the parties' finances, the plaintiff cites the defendant's lack of meaningful financial contribution, although she is gainfully employed and capable of doing so, towards the acquisition, accumulation and maintenance of the common estate, the maintenance thereof including payment of municipal rates and taxes as well as the maintenance of their son. The plaintiff also cites attempts of assault which include stabbing with a knife and indeed other forms of physical assault on him by the defendant. These allegations are denied by the defendant who, in respect of financial contribution, testified that she has contributed financially specifying the purchase of vegetables when the parties still lived together and payment of municipal rates and taxes as well as effecting improvements on the common immovable property after the plaintiffs departure therefrom in September 2012.
- [4] The grounds for seeking a divorce order stated in the defendant's counterclaim are that:
- 4.1 The plaintiff moved out of the common property in September 2012 for no apparent reason and has never returned;
- 4.2 The plaintiff started a relationship outside the wedlock , and
- 4.3 The plaintiff never supported the defendant financially and emotionally.

THE EVIDENCE

- [5] It is common cause that the marriage relationship between the parties has irretrievably broken down. Correspondence was shown in court during the trial wherein the plaintiff proposed that counselling be sought with a view to saving the marriage, but the defendant never responded thereto. This she confirmed at the trial adding that she had wanted the plaintiff to speak to her personally instead of writing to her. To this the plaintiff repeatedly stated that it had become impossible to have a discussion with the defendant owing to the fact that she became emotional and abusive whenever any discussion to resolve differences was underway.
- [6] The defendant denied having assaulted the plaintiff on three occasions and at one stage attempting to stab him with a knife. A document was produced showing that the plaintiff has had to call the police as a result of the assaults. The defendant admitted the calling of the police, but further stated that it would be the plaintiff who started the fight and then call the police.
- [7] With regards to the plaintiff's allegation of being isolated as stated above and his loneliness that followed , the defendant

testified that the people, including plaintiff 's family and friends had interfered in her marriage instead of allowing her and the plaintiff to resolve their problems. I find it difficult to believe the defendant's responses to the questions she was asked pertaining to the aspects in this and the two preceding paragraphs, particularly the reasons for the plaintiff calling the police and the defendant's none response to written communication suggesting counselling and explicitly giving the impossibility of a verbal discussion as the reason for writing to her. I find that the defendant's alleged conduct was not only wrongful, but also hugely contributed to the failure of the parties' marriage.

- [8] According to the plaintiff, the adversarial circumstances in his marriage persisted for a long time and that his marriage to the defendant was dead as early as in 2008, although they still lived together until he left the common home in September 2012. This

evidence was not disputed. He testified that he has been living with his lover since thus confirming the defendant's allegation that the plaintiff left the common home in September 2012 and has never returned.

- [9] I will now focus on aspects raised by the plaintiff in motivation of his prayer for partial forfeiture by the defendant. It is impossible for parties in a marriage in community of property to contribute equally to the cent financially towards the joint estate. There are just too many aspects that would be at play for me to mention. In any event a contribution need not necessarily be financial for it to be recognised as such. However, it has to be disturbing where, while a financial contribution can and should be made, a party simply shuns the responsibility to share the financial burden resulting in the other being unduly overburdened. That the defendant did not contribute as she could and should is borne by

the following- :

9.1 she admitted that the plaintiff made the bond repayments on the house alone.

9.2 although the defendant denied that it is the plaintiff has always been paying the municipal rates and taxes stating that she has been paying for these items after the plaintiff had left the common home, she was unable to produce the necessary proof even after she had undertaken to do so on the next day of the hearing. On the contrary, the plaintiff showed payments he made and still makes via his bank statements.

9.3 Until he instituted these proceedings, the plaintiff continued to deposit between R7000 and R10000 per month into the banking account of the defendant. These allegation were not disputed, but proved by the plaintiff. The defendant nonetheless alleges in her counterclaim that she received no financial support from the plaintiff.

9.4 The defendant alleged that she effected improvements on the property after the plaintiff had left, but the plaintiff denied this. Proof of whatever improvements were made could not be produced by the defendant and no reference to any improvements that the defendant allegedly effected is made in the valuation certificate issued subsequent to the initiation of these proceedings in respect of the property.

[10] A document was handed in by agreement between the parties which I marked "D" which purports to indicate the value of the parties' joint estate and includes individual investments and banking accounts . My attention was drawn in particular to items relating to the defendant's cash component of her savings. The total amount, bearing what her monthly income is, clearly indicate that she has saved a substantial amount over the years ostensibly without the knowledge of the plaintiff who testified that he did not know what the defendant was doing with her money and would not ask to avert reprisals.

[11] The contents of paragraphs 9 and 10 constitute a summary of the plaintiff s motivation for seeking an order that the defendant

forfeits 15% of the benefits arising from the parties' marriage. In addition, evidence was led and a submission made that the ages of the parties be taken into consideration in the assessment and determination of the prayer for partial forfeiture by the defendant. The plaintiff testified that he is due for retirement at 65 years of age, that is, in December 2019. He, therefore, has two years of working life left. The defendant , on the other hand, who stands to keep the fully paid for common home against a deduction of 50% of its value from the total value of the joint estate, has another minimum ten and a maximum of 15 years of working life remaining. This aspect will be dealt with further later in this

judgment.

- [12] May I state at this stage that I will consciously not deal with issues relating to the defendant's alleged extra marital affair as well as the protection order(s) allegedly having been obtained against her for the reason that the allegation of such an affair is based on hearsay evidence and the protection order referred to or a copy thereof was not shown to this court. In any event the defendant has denied the existence of both.

THE LAW

- [13] It may be necessary to reiterate the principle that the outcome, in the dissolution of a marriage in community of property on divorce with regard to the joint estate of the parties, is ordinarily that the estate will be divided equally between them. Where forfeiture of a benefit arising out the marriage is sought against one party, the provisions of section 9(1) of the divorce Act 70 of 1979 come into play. The said section provides thus:

"When a decree of divorce is granted on the ground of irretrievable breakdown 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 breakdown 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"

- [14] I am satisfied that there has been assaults of the plaintiff by the defendant and that, considering the cash component in the banking accounts of the defendant, the defendant had wilfully not contributed financially to the joint estate despite her being in a position to do so. Her assertions in the counterclaim that she was not supported financially by the plaintiff are negated by several factors; the admission that the plaintiff paid the house alone; the proof of monthly deposits of amounts into the defendant's banking account by the plaintiff, the uncontested evidence that the defendant used the plaintiff's petrol card and that the plaintiff was responsible for the maintenance of her car as well as the maintenance of the parties' son. In short, the plaintiff has proved that he solely carried the financial burden in the common home without the unexplained assistance of the defendant. The defendant's conduct in these circumstances coupled with the isolation of the plaintiff and her reluctance to heed to the plaintiff's suggestion that counselling be sought to save the marriage does, in my view, constitute gross misconduct which could only culminate in the destruction of the marriage.

- [15] It is not clear when the plaintiff's admitted extra marital relationship started nor has either party alleged that such relationship played a role in the breakdown of the marriage between the parties. It nonetheless remains an extra marital relationship and is at odds with the norms of a normal marriage relationship. The plaintiff should have sought the dissolution of his marriage prior to engaging in another intimate relationship.

[16] Another aspect that was raised for consideration is the age of the plaintiff and his remaining short period of working life compared to the favourable situation of the defendant. Considering the manner the parties intend to deal with the joint estate upon divorce being granted, it is clear on Annexure D that the plaintiff will be left with a debt in the order of R1.5 million due to the defendant which he will have to pay despite him being due for retirement in the next two years, unless he cashes one or more of his policies, in which event he will have to face penalties. The defendant will keep the common home which has already been paid off by the plaintiff. Considering my finding of gross misconduct on the part of the defendant and the circumstances

awaiting each party after the divorce, I am of the view that the plaintiff will be left worse off financially and that the defendant

will be unduly benefitted on the other hand. I find, therefore, that it will accord with justice and fairness that an order for forfeiture by the defendant to the extent of 15% of the benefits arising out of the parties' marriage be granted. This in essence means that the plaintiff still has to pay just over R500 000-00 to the defendant to finalise the division of the joint estate.

[17] It is noted that in her counterclaim the defendant has prayed for an order for her maintenance which prayer is contested by the plaintiff. I find that the defendant is and nothing suggests that she will not be financially capable of maintaining herself. With regards to costs, I am of the view that each party should pay its own costs.

[18] In the result I make the following order:

1. The bond of marriage between the parties is hereby severed.
2. It is ordered that the defendant forfeits 15% of the benefits arising out of the marriage of the parties.
3. Each party is to pay their own costs

M. MBONGWE, AJ

ACTING JUDGE OF THE HIGH COURT.

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