

SOUTH AFRICA / JUDGMENT

Masukela M v Masukela P (DIV155/2017) [2018] ZANWHC 65 (22 November 2018)

[2018] ZANWHC 65**COURT**

North West High Court, Mafikeng

BEFORE

D I Matlapeng

CASE / FILE NUMBER

DIV155/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION, MAHIKENG****Case****Number: DIV155/2017****In**

the matter between:

MPHO

MASUKELA (born SERIPE)

Applicant

and

PHAKANE

MOSES MASUKELA

Respondent

JUDGMENT

Matlapeng AJ

- [1] There is a truism in the saying that: “absence makes the heart grow fonder”. The plaintiff and the defendant were married to each other on 23 April 2011 and in community of property. Due to work commitments, the parties did not reside together. The plaintiff was residing and working in Kimberley whilst defendant was in Mafikeng.

- [2] The defendant being the husband, could not get enough of the wife. He did all in his powers to enable the plaintiff to get transferred to Mafikeng. In 2013 she managed to obtain the necessary transfer. The wedded bliss that the defendant envisaged soon turned into marital blisters. The parties last accorded each other conjugal rights in June 2015.
- [3] In December 2016 the plaintiff moved out of the marital bed and in January 2017 she moved out of the parties' common home without informing the defendant. Around April 2017 the plaintiff fell pregnant with another man's child and a child has since been born.
- [4] On 30 June 2017, the plaintiff issued a summons for divorce out of this Court on the grounds of irretrievable break down of marriage. The reasons that she provides for this are the defendant has an extra marital relationship with the plaintiff's cousin, the defendant hardly spent time with her, the defendant disposes the assets of the joint estate without her consent, knowledge and or approval. As a result she seeks a decree of divorce and the division of the joint estate.
- [5] The defendant pled to the allegations and lodged a counterclaim where he alleges that the marriage relationship between the parties has irretrievably broken down. He mentions the following as reasons for the break down namely, the plaintiff's pregnancy by another man, the plaintiff left the common bedroom in December 2016, the plaintiff has failed to contribute meaningfully towards the acquisition of the joint estate. He prays for a decree of divorce and further that the plaintiff should forfeit the entire patrimonial benefits arising out of the marriage in community of property.
- [6] Both parties testified in support of the allegations made. First off the block was the defendant. He testified that he is the contributor of the bulk of the joint estate. He stated that he bought a flat before marriage which is paid off. He bought and is paying for the current marital home although there is still an outstanding amount of the mortgage bond. He bought and sold several motor vehicles and currently there are two motor vehicle belonging to the joint estate. He suspected that the plaintiff was playing false with him and he confirmed his suspicions through the records of a tracking company which show that the plaintiff would not be at a place she is supposed to be. He denied that he has an extra marital relationship especially with the plaintiff's cousin. He admitted that when the parties resided together and there was a marital strife, he would pray loudly for god's help.
- [7] However, under cross examination he was shown that the plaintiff contributed to the acquisition of the joint estate. It was further pointed to him that the plaintiff played a hand even in the flat that was acquired before the marriage when part of the loan that she obtained was used to pay off the flat. Furthermore, it was pointed to him that his suspicions, especially based on the tracking company's records were unfounded as the plaintiff had legitimate reasons to be where she was. He conceded that based on the explanation given, he was wrong to assume that the plaintiff was doing anything wrong. He also confirmed that he is remaining with bulk of the parties' joint property.

[8] The plaintiff in her testimony denied that she fails to contribute to the joint estate. She took a loan of R160 000-00 which money was deposited into the defendant's bank account. It was used to extinguish a debt on the flat and some of it was used to cover the parties' expenses. She, alone, is repaying the loan. She bought sofas worth over R55 000-00 and she is currently paying the instalment on them without any help from the defendant. She confirmed that she has a child with another man whom she met after leaving the parties' residence. She confirmed that the defendant never involved her in the decision making regarding to acquisition of the joint estate. She gave as example the motor vehicles. When they got married, she owned a Citroen which the defendant traded in for a Ford Fiesta which was later exchanged for a Golf 7 and later an Audi A4. She confirmed that whenever there was marital strife, the defendant would

pray loudly asking god to provide him with a wife which thing she found offensive.

[9] She admitted that the defendant would help out with some of the debts that she incurred on behalf of the joint estate. However, this was to a lesser extent.

[10] It is the choice of the parties to decide which marital regime should apply to their marriage. Where the parties elect to enter into a marriage in community of property, the consequence of that decision is that they no longer have separate estates. All their property is massed into one through the operation of the law. It is of no consequence whether the property that they bring into the joint estate was acquired individually before they entered into marriage.

[11] The general rule is that at the dissolution of their marriage, the joint estate is divided equally into two unless the provisions of section 9(1) of the Divorce Act 70 of 1979 are applied. The section deals forfeiture of the benefits arising out of marriage and may conveniently be reproduced here. It provides:

"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."

[12] The approach to the application of this section came the fore in *Wijker v Wijker* 1993 (4) SA 720 (A) at 727 D – F where the court held:

"It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be purely a factual issue. Once that has been established the trial court must determine, having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefited if a forfeiture order is not made."

- [13] When the court exercises a discretion whether to grant an order of forfeiture, it has to look no other factors except those listed in s 9(1). *Botha v Botha* [2006] ZASCA 6; 2006 (4) SA 144 (SCA). What this entails is that the factors listed in the section namely, the duration of the marriage, the circumstances which led to its breakdown and any substantial misconduct on part of either party are a closed list. Furthermore, the factors mentioned in the section are not to be considered cumulatively.
- [14] Reverting to the facts of this case the question is whether the plaintiff would be unduly benefited if forfeiture is not ordered. The parties own a flat which is fully paid, an Audi A3 fully paid, a house that is bonded, and an Audi A4 which is still under credit agreement pieces of furniture the major one being sofas which are also under credit agreement.
- [15] The defendant has failed to provide the court with the values of these properties. In *Smith v Smith* 1937 WLD 126 at 127 – 8 the court held in relation to the concepts benefits:
- “What the defendant forfeits is not the 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 contribution of the defendant.”*
- [16] In absence of any value of the property, it becomes impossible to determine whether there are benefits if any to be had by the plaintiff in case an order of forfeiture is not made. The fact that the parties jointly own property, does not turn the property into a benefit. It may well be that if the value of joint estate was to be compared to the debts, there would not be any benefit to speak of.
- [17] The parties were married for a period of six years. Both of them were employed. The defendant admitted during testimony that he was earning more than the plaintiff. In the scheme of things, it stands to reason that his contribution will be more than that of the plaintiff. The plaintiff contributed towards the acquisition of the property. She obtained a loan of R160 000-00 for the benefit of the joint estate. This was the money part of which was used to settle an outstanding debt on the flat initially purchased by the defendant. Some of the money was used to pay for a Ford Fiesta. The balance, the defendant used for what purpose the plaintiff does not know. What is clear is that the burden of the repaying the bond is on the shoulders of the plaintiff. Furthermore, she came into the marriage having furniture that she received from her mother. She bought sofas on credit agreement for R55 000-00 and she is still paying for the sofas.
- [18] The defendant on the other hand would like this court to believe that he carried the burden of acquiring the joint estate alone and the plaintiff bought inconsequential things like plastic things (Tupperware). The facts belie his suggestion.

[19] The marriage of the parties was marred by the defendant's insecurities. He falsely accused the plaintiff of lying when she said she was going to work. This was based on an inconclusive report of the plaintiff's motor vehicle movement on one particular date. There was an innocent explanation why the plaintiff was not at her place of work after informing the defendant that she was going to work. There was an event organised by her employers which was not held at her place of

employment. The tracking company gave her movement for that which was at this venue which was not her place of employment.

[20] I was urged to find that there is a substantial misconduct on the part of the plaintiff in that she gave birth by another man whilst still married. I do not agree. The marriage between the parties at the time when the plaintiff fell pregnant was just a shell. The defendant himself stated that the parties last had coitus in 2015. In 2016 they separated from the marital bed and in 2017 the plaintiff left for good and became pregnant whilst no longer residing at home.

[21] The defendant too was not as clean as he pretends to be. He caused the plaintiff to be hugely indebted by requesting her to acquire a loan of R160 000-00 which was paid into his bank account. The plaintiff did not have a say on how the money was expended and this would ordinarily cause a distress. When the relationship turned sour, instead of repairing it, the defendant looks for divine intervention, prays loudly and asks god to give him a wife whilst still married to the plaintiff.

[22] In acquiring the assets of the joint estate, the defendant like any reasonable husband with the means and in a loving marriage, contributed more than his wife. The prayer for complete forfeiture of the benefits is actuated by nothing more than vindictiveness. The defendant thought that he was the sole recipient of his wife's favours. The fact that the plaintiff left him and made a child with another man, filled him with wrath as a result of hurt pride. In my view, there are no sufficient factors placed before me which can justify a finding that forfeiture of the benefits arising from marriage should be ordered.

[23] In the circumstances the following order is granted:

1. a Decree of divorce;
2. Division of the joint estate;
3. Payment of an amount of money equivalent to fifty percent (50%) from each other's pension benefits to be payable within 60 days of the granting of this order;
4. There is no order as to costs.

D I MATLAPENG

ACTING JUDGE

North West Division, Mahikeng

APPEARANCES:

DATE OF HEARING:

22 OCTOBER 2018

DATE OF JUDGMENT:

22 NOVEMBER 2018

COUNSEL FOR THE PLAINTIFF: ADV. T. MASIKE

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