

SOUTH AFRICA / JUDGMENT

M.C v J.J.C (A231/2014) [2015] ZAGPPHC 1140; 2016 (2) SA 227 (GP) (26 August 2015) [2015] ZAGPPHC 1140

COURT

North Gauteng High Court, Pretoria

BEFORE

Semanya, Jansen

CASE / FILE NUMBER

A231/2014

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THE

GAUTENG HIGH COURT, PRETORIA

(REPUBLIC

OF SOUTH AFRICA)

CASE

NO: A231/2014

In

the matter between:

M.

C.

Appellant

and

J.

J. C.

Respondent

JUDGMENT

SEMENYA AJ

- [1] This is an appeal against the whole judgment handed down by a Regional Magistrate on the 17 December 2013. The matter was heard at different regional courts due to the burning of the premises of Polokwane magistrate's court. The parties in this matter were married to each other out of community of property with an ante-nuptial contract that included accrual system in accordance with the provisions of The Matrimonial Property Act 88 of 1984.
- [2] The only disputes the Regional Magistrate had to adjudicate upon were the claim, by the respondent, (plaintiff in the court a quo) for forfeiture of marital benefits by the appellant (defendant in the court a quo) on the basis of substantial misconduct in accordance with the provisions of section 9(1) of The Divorce Act 70 of 1979 read with section 9 of Matrimonial Property Act 88 of 1984 as well as the issues of costs. That the marriage relationship is irretrievably broken down was a matter of common cause. All three children born of the marriage relationship between the parties had reached the age of majority at the time the matter went to trial. The marriage was concluded on 24 October 1987.
- [3] The Regional Magistrate found in favour of the respondent and granted an order of partial forfeiture of marital benefits and a costs order against the appellant.
- [4] During the hearing of the appeal the judges requested the two counsel to submit supplementary heads of argument on the following: —
- “The Constitutionality or otherwise of section 9(1) of the Divorce Act pertaining to forfeiture of patrimonial benefits where there was alleged substantial misconduct on the part of either of the parties within the context of a divorce regime which effectively no longer apportions blame.”*
- [5] Both parties subsequently filed supplementary heads of arguments to which I am indebted. I shall deal with these aspects at a later stage.
- [6] I proceed to deal with the issues raised in the appeal.
- [7] It was common cause that, as at the date of the institution of the proceedings, there had been a larger accrual in the estate of the respondent than in that of the appellant. In consequence, the appellant acquired a claim against the respondent for an amount equal to half of the difference between the accrual of the respective estates.
- [8] Counsel for the appellant criticised the wording of the order of the Regional Magistrate on the basis that it gives the impression that the appellant acquired the right to share in the accrual of the respondent's estate, whilst, according to counsel, what she acquired was a claim to such a share.
- [9] The Regional Magistrate's order is in line with the wording of section 9 of Matrimonial Property Act which provides as follows: —

“Section 9 Forfeiture of rights to accrual sharing-The right to share in the accrual of the estate of a spouse in terms of this Chapter is a patrimonial benefit which may on divorce be declared forfeit, either wholly or in part.” (own emphasis)

[10] It is on this basis that I find that counsel’s criticism is unfounded. It in no way reflects that the Regional Magistrate did not understand the concept of the accrual system.

[11] As already alluded to above, the finding of the Regional magistrate was based on the provisions of section 9(1) of the Divorce Act 70 of 1979 read with section 9 of Matrimonial Property Act 88 of 1984. Section 9(1) of the Divorce Act reads as follows: —

“When a decree of divorce is granted on the ground of irretrievable break-down of the 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 of the marriage or any substantial misconduct on the part of either of the parties, is satisfied that, if the order of forfeiture is not made, the one party will, in relation to the other, be unduly benefited.”

[12] In *Wijker v Wijker* (325/92)

[1993] ZASCA 101; [1993] 4 All SA 857 (AD) (26 August 1993) the learned judge, in interpreting section 9 of the Divorce Act, stated that the court must first make a factual finding as to whether or not the party against whom the order is sought will in fact benefit. Once it is held that the party will indeed derive benefit the court may proceed to determine whether such benefit will be undue. This determination will be done after considering the factors mentioned in section 9 viz.

- a. the duration of the marriage;
- b. the circumstances which gave rise to the break-down of the marriage or
- c. any substantial misconduct on the part of either of the parties.

[13] Counsel for the respondent referred the court to the case of *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) in which the full bench held as follows: —

“In order to succeed a party who seeks a forfeiture order must first establish what the nature and extent of the benefits were; unless

this is done, the court cannot decide if the benefit was undue or not. Hence, only when the nature and extent of the benefit have been proved is it necessary to analyse the three factors which may be considered in deciding whether it will be equitable to order a forfeiture of benefits.”

[14] Counsel for the appellant argued that the respondent in this case failed to prove the nature and extent of the benefit in that the extent of the difference between the accrual of the two estates was not established. Furthermore, it was argued that no part of the difference in the accrual between the respective estates of the parties was the result of an asset brought into the estate by the appellant, as otherwise the appellant would be forfeiting, in part, an asset that she brought into the estate.

[15] I differ with the argument raised by the appellant in this regard. Counsel for the respondent correctly submitted that there is ample evidence in this case to enable the Regional Magistrate to make a proper finding with regard to the nature and extent of the accrual. Apart from it being common cause that the growth of the respondent's estate is more than that of the appellant, the respondent, in his evidence in chief, dealt extensively with the assets that the parties had jointly accumulated during the

subsistence of their marriage. He went to the extent of supporting most of his allegations with documentary evidence. Of

note is the fact that he maintained that, though most of the assets were registered in his name, they were acquired by him and the appellant jointly to the extent that it did not matter to them as to whom they factually or legally belonged. It appears from the Regional Magistrate's judgment that he was aware of the contributions made by the appellant towards the growth of the estate registered in the respondent's name. I however concur with counsel for the appellant that nowhere in his judgment does it appear that he considered these facts in determining whether the appellant would derive a benefit or otherwise.

[16] Although there is a dispute with regard to the appellant's diamond rings, I find this dispute to be immaterial. First, this is so because of the provisions of section 5(1) of the Matrimonial Property Act which provides as follows: —

“An inheritance, a legacy or a donation which accrues to a spouse during the subsistence of a marriage as well as any other asset which he acquires by virtue of his possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of such estate .

(This section clearly excludes these rings from consideration.)

[17] Second, it is common cause, as already stated, that the respondent's estate is bigger than that of the appellant with or without the said rings.

[18] As a donation from the appellant's mother, be it for engagement or for other reason, the rings should be excluded in accordance with the provisions of section 5(1) above. I however agree with the learned Regional Magistrate that not being open and frank about the value and whereabouts of the rings to some extent affects the appellant's credibility.

- [19] Counsel for the respondent submitted that where the parties are married to each other out of community of property with the inclusion of the accrual system, whether one party made contributions to the other's estate is irrelevant. An asset which is registered in the name of a party will be regarded as an asset of that party's estate for the purposes of an accrual calculation, irrespective of who made contributions towards its acquisition.
- [20] Although this argument is correct, she overlooks the fact that this position changes when divorce proceedings are instituted. It is correct that the party with a lesser accrual does not acquire ownership rights. He or she, however, acquires a right to claim against the other spouse an amount equal to half of the difference between the accrual of the respective estates in terms of section 3 of Matrimonial Property Act. The appellant's claim is based on this section of the Act. This is one of the reasons why it is imperative to determine whether the other party contributed towards the growth of the other's estate.
- [21] The appellant argues that the Regional Magistrate took into consideration factors which he should have ignored when making a determination as to whether the appellant would unduly benefit if a forfeiture order were not to be granted. He held that the only issue he should

consider was substantial misconduct as raised in the pleadings. I fail to find any misdirection on the part of the Regional Magistrate

in this regard. The factors complained about are, as submitted by counsel for the respondent, closely linked to the adulterous

relationships in which the appellant engaged. I agree fully. The adulterous relationship frustrated the children and caused emotional

suffering. It cannot be said that he over-emphasised his reliance on these factors based on the case of *Singh v Singh* 1983 (1) SA 7 (C).

- [22] Arriving at the issue of whether the appellant will be will unduly benefit should the court not grant an order of forfeiture either in part or in whole, it is without doubt correct that the Regional Magistrate based his finding on numerous adulterous relationships in which the appellant engaged. He found this to constitute substantial misconduct. Although it seems that he concluded that this factor is the sole cause of the break-down of the marriage, I differ with this sentiment in the sense that contrary to the allegations by the respondent that he was willing to forgive her and to continue to work towards mending their relationship, he admitted, reluctantly, that he rejected her efforts to reconcile, more, in particular, after his illness. It is indeed seldom that a marriage can break down solely due to the conduct of one party. Nonetheless the Regional Magistrate's finding that the conduct of the appellant amounts to substantial misconduct cannot be faulted.
- [23] In granting an order for forfeiture of benefits, in a marriage which lasted for over 26 years, the Regional Magistrate placed reliance,

among others, on the judgment of Moodley v Moodley

[2008] JOL 22279 in which the learned judge granted a forfeiture order where the parties were married for more than 20 years due to substantial misconduct on the part of the defendant. It is trite that each and every case must be approached on its own merits. In the present case, the respondent testified that the appellant was a diligent, industrious wife and mother who resigned from her employment to devote her time to their children and family. This, according to the respondent, allowed the family to prosper. Although

her contribution towards the growth of the respondent's estate was not quantified, it can reasonably be inferred that she used most, if not all of her earnings, for the period that she was employed towards the maintenance of the household.

[24] As a result, the Regional Magistrate's finding that the appellant would benefit unduly were a forfeiture order not to be granted,

cannot stand. It is, according to the learned judge Makgoka in JW v SW 2011

(1) SA 545 GNP, a well-established principle of law that a party can only benefit from an asset brought into the estate by the other party, not from his own, a fortiori, such party could not be ordered to forfeit his/her own asset. The appellant in this matter cannot forfeit the assets which came about as a result of her contributions.

[25] As far as the issue of costs is concerned, I agree with the submissions of counsel for the appellant that the conclusion at which to arrive at is that the Regional Magistrate used a costs order to punish the appellant for her misconduct.

[26] Regarding the constitutionality of section 9(1) of the Divorce Act 70 of 1979, S D Wegener SC, counsel for the appellant, in his supplementary heads of argument submitted that the provisions of section 9 are irreconcilable with the value system of the Constitution in breaching the following rights: —

“22.1 The right to dignity as provided in section 10 of the Constitution, 1996, which implies respect for a level of autonomy of the individual, to be protected from unwarranted intrusions into a person's capacity to make choices, and thus also of the freedom to contract.

22.2 The right to dignity would also entail the right not to be punished for actions that are legally neutral (ie not unlawful), as such punishment would constitute an infringement into a person's capacity to make choices.

22.3 The right to privacy as provided for in section 14 of the Constitution, 1996, which entails that an exposé of the legally neutral and private conduct of a person to scrutiny by the court to make a moral judgment resulting in the deprivation of that person's privacy is unfounded.

22.4 The right to property as provided for in section 25 of the

Constitution, 1996, which inter alia provides that no law may permit arbitrary deprivation of property.

22.5 Section 9 of the Divorce Act, 197 provides for the arbitrary deprivation of property in the manner prescribed above, as the determination of the moral judgments referred to above are not constant.”

[27] Counsel for the respondent holds a different view.

[28] Prior to the promulgation of The Divorce Act, the grounds for divorce were malicious desertion, adultery, incurable mental illness and imprisonment for at least five years having been declared a habitual criminal. With the exception of a decree of divorce granted on the grounds of mental illness, the guilty party was punished with an order of total forfeiture of marital benefits. The logic behind this principle was that a spouse should not be allowed to benefit financially from a marriage which he or she has wrecked (see H R Hahlo The South African Law of Husband and Wife at page 430). The legislature decided to do away with fault as a ground for divorce when it enacted the Divorce Act 70 of 1979.

[29] However, with the inclusion of “the circumstances that gave rise to the break-down of the marriage and substantial misconduct” as factors to be considered when forfeiture of patrimonial benefits is considered, it would appear that fault still has a role to play in our divorce system. It is on this basis that counsel was requested to submit supplementary heads of argument. The rationale for the request was to determine whether “misconduct” is still relevant in a Constitutional era. In addressing this aspect I have decided to refer to some of the fundamental human rights which are enshrined in the Constitution of The Republic of South Africa Act 108 of 1996.

[30] Section 1 of the Constitution of The Republic of South Africa Act, 108 of 1996 provides as follows: —

“(a) The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (b) Human dignity, the achievement of equality and advancement of human rights and freedoms.
- (c) Non-racialism and non-sexism
- (d) Supremacy of the Constitution and the rule of law
- (e) Universal adult suffrage, a national voter’s roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsibility and openness.”

[31] In Minister of Finance v Van Heerden

[2004] ZACC 3; 2004 (6) SA 121 (CC), the Constitutional Court stated that the Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality and freedom.

[32] Section 9(1) of the Divorce Act, in my view, might infringe upon the rights to equality of married persons who are in a process of divorce in the following manner: —

[32.1] EQUALITY: (section 9)

With the abolition of marital power in terms of section 11 of Matrimonial Property Act, parties enter into a marriage on an equal basis. This position continues during the subsistence of their marriage. However, at the time of the dissolution of the marriage, one party, who may have committed substantial misconduct, ‘the guilty’

party, may find himself/herself in a weaker bargaining position with regard to either redistribution of property or the sharing of patrimonial benefits if the marriage is out of the community of property with the inclusion of the accrual system. This is the case, a fortiori, when the “innocent” party is the possessor of the estate. This infringes on the right to equality. This is also what transpired during the process of endeavoring to reach a settlement by the parties in this appeal. The appellant and the respondent threatened to punish each other in as far as properties are concerned.

[32.2] REPRODUCTION RIGHT

In their book, Constitutional Law of South Africa, second Edition Volume 3, Woolman et al at 37.1, the authors state that “whilst reproductive rights protect the health and wellbeing of both men and women, reproductive

rights are of fundamental importance to women. Only when armed with such rights, can women effectively exercise the rest of the rights enshrined in chapter 2 of the final Constitution and become full and equal members of South African Society”.

There are many instances when these rights are exercised within a marriage relationship, which may lead to divorce on the basis of irreconcilable differences. For instance, for fear of divorce, a woman may to secretly terminate her pregnancy. (Many

reasons

may push a woman into choosing abortion, inter alia, health, finances, etc.). This may be viewed as unfaithfulness which goes to the core of the nature of a marriage, i.e trust. Armed with this, the other spouse may approach the court with divorce proceedings and successfully acquire an order for forfeiture.

This will obviously breach a woman’s right to reproduction.

[32.3] THE RIGHT TO DIGNITY FREEDOM AND SECURITY OF PERSONS: (section 12)

Being forced to remain in an unhappy marriage relationship for fear of losing patrimonial benefits may deprive a spouse of the rights to dignity. If the acrimony caused by violence, for example, within a relationship, the victim may be deprived of the right to freedom and security of person. The above are but a few examples where a person may be prejudiced by the application of

section 9(1) of the Divorce Act read with section 9 of Matrimonial Property Act 88 of 1984 in respect of one's fundamental rights as set out in the Constitution.

[33] It would appear that the argument raised by counsel for the appellant that section 9(1) is wholly outdated, within the constitutional

context, may have merit- particularly in that it punishes a party for "substantial misconduct" by depriving him/her of patrimonial benefits of the marriage in the absence of proof of how such conduct may have impacted on the estate.-see: RH v DE 2014 (6) SA 456 (SCA) at par 41 and DE v RH (CCT 182/14 [2015] ZACC 18 (19 June 2015).

[34] The appellant, as the party arguing for the invalidity of the concept of forfeiture, is required to follow the procedure laid down in the Uniform Rules of Court and hence the following order is proposed: —

[35] That in terms of Rule 16A (1)(a) and 16A (1) (b) the appellant is required to give notice to the registrar containing a clear and succinct description of the constitutional issue concerned within fifteen days of this court order, and the registrar is ordered to take the steps set out in Rule 16A (c) and 16A (d).

[36] Any interested party in the constitutional issue raised in the proceeding should be given the opportunity, with the written consent of the parties given not later than twenty days after this court order, to be admitted as an amicus curiae upon such terms and conditions as may be agreed upon – Rule 16A(2).

[37] The written consent contemplated in subrule 16A(2) shall, within five days of its having been obtained, be lodged with the registrar and the amicus curiae shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.

[38] The terms and conditions agreed upon in terms of subrule 16A(2) may be amended by the court.

[39] If the interested party contemplated in subrule 16A(2) is unable to obtain the written consent as contemplated therein, he or she may, within five days of the expiry of the 20-day period after the grant of this order, apply to the court to be admitted as an amicus curiae in the proceedings.

[40] An application contemplated in subrule 16A(5) shall: —

(a) briefly describe the interest of the amicus curiae in the proceedings;

- (b) clearly and succinctly set out the submissions which will be advanced by the amicus curiae, the relevance thereof to the proceedings and his or her reasons for believing that the submissions will assist the court and are different from those of the other parties; and
- (c) be served upon all parties to the proceedings.
- [41] (a) Any party to the proceedings who wishes to oppose an application to be admitted as an amicus curiae, shall file an answering affidavit in terms of sub-rule 16A (7)(a) within five days of the service of such application upon such party.
- (b) The answering affidavit shall clearly and succinctly set out the grounds of such opposition.
- [42] The appellant in this matter must join the Minister of Justice and Correctional Services as the executive authority responsible for the administration of the Divorce Act – Rule 10A.
- [43] The Speaker of Parliament, as the legislative body, must also be joined.
- [44] Unless the above procedure is followed this court is not empowered to declare the provisions of section 9 invalid for inconsistency with the Constitution.

JUDGE OF THE HIGH COURT

I agree and it is so ordered.

JANSEN J

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