

SOUTH AFRICA / JUDGMENT

M.D.M v M.J.M (122/2021) [2023]

ZAFSHC 168 (12 May 2023)

[2023] ZAFSHC 168

COURT

Free State High Court, Bloemfontein

BEFORE

N.M. Mbhele

CASE / FILE NUMBER

122/2021

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 122/2021

In the matter between: -

M[...] D[...] M[...]

Plaintiff

(ID: 6[...])

and

M[...] J[...] M[...] (Nee: R[...])

Defendant

CORAM:

N. M. MBHELE, DJP

HEARD ON:

25 & 26 OCTOBER 2022 & 31 JANUARY 2023

DELIVERED ON: 12 MAY 2023

[1] Plaintiff and Defendant got married to each other in community of property on 21 September

1990. The plaintiff instituted an action against the defendant seeking a decree of divorce and an order for the division of the parties' joint estate including an order that the Government Employees Pension Fund, of which the defendant is a member, be ordered to pay to the plaintiff an assigned portion of the interest held by the Defendant in the said pension fund scheme.

[2] The parties are in agreement that their marriage has broken down irretrievably with no prospects of restoring same to a normal marriage relationship albeit for different reasons. The defendant, in her counterclaim, prays that the plaintiff forfeit his share in specific properties forming part of the joint estate. Owing to the defendant's claim of patrimonial benefits, I ruled that the defendant had a duty to begin in as far as the presentation of evidence is concerned.

[3] I am asked to determine whether the defendant has made out a case for forfeiture of patrimonial benefits. In the counterclaim the defendant sets out the reasons for the breakdown of the parties' marriage as follows:

3.1 The parties no longer consort or enjoy conjugal rights in terms of the marital relationship;

3.2 The parties are no longer able to communicate with one another constructively;

3.3 The Plaintiff abused the Defendant psychologically, spiritually and physically to such an extent that she has had a protection order;

3.4 The Plaintiff entered into adulterous relationships and squandered money, which conduct the Defendant finds unacceptable and humiliating;

3.5 Before instituting the divorce, the Plaintiff had become cold, distant and aloof towards the Defendant;

3.6 The Plaintiff has, during the subsistence of the party's marriage, utilized his salary and the proceeds from his taxi operations for his own benefit, to the detriment of the joint estate, and in particular, of the Defendant;

3.7 The Plaintiff has relinquished assets belonging to the joint estate without the Defendant's knowledge and consent; and

3.8 The Plaintiff has failed over the years to adequately maintain the Defendant and to contribute meaningfully to the establishment and creation of the estate of the parties.

[4] The reasons for the breakdown of their marriage as set out by the plaintiff are as follows in his particulars of claim:

4.1 The Plaintiff and Defendant have started living their own lives without including each other respectively therein;

4.2 The Plaintiff and Defendant have no more care for each other and agree to proceed with a decree of divorce;

4.3 The Plaintiff and Defendant cannot communicate effectively anymore;

4.4 The Plaintiff and Defendant have attempted at restoring a normal marital relationship, however all such attempts have been unsuccessful.

4.5 The Defendant does not support the Plaintiff emotionally and financially.

- [5] The defendant testified as follows: When the parties got married the plaintiff was not employed. Early in their marriage the plaintiff resorted to violence whenever they had quarrels. He would physically assault her and use profane language towards her. She could remember about 5 occasions in which she was physically assaulted by the plaintiff.
- [6] During the subsistence of the parties' marriage the defendant purchased a motor vehicle, Audi A4 with registration letters and numbers CZV 5[...] (Audi CZV) through vehicle finance. She later replaced it with a new model of Audi which bears registration letters and numbers F[...]. The plaintiff sold Audi CZV without the knowledge and consent of the defendant. The plaintiff simply took the vehicle and never returned it home. The defendant discovered later that the vehicle was actually sold to someone residing in Kimberley. She later bought an Audi A5 bearing registration letters and numbers H[...]. The vehicle is still under vehicle finance.
- [7] In 2009 the parties bought a Toyota Quantum mini bus which was operated as a taxi. Defendant paid a deposit towards the purchase of this vehicle. The aim was to help plaintiff start his own business as a taxi operator. They later purchased a Volkswagen caravelle microbus which the plaintiff used as scholar transport.
- [8] Sometime in 2019 the Toyota Quantum disappeared and upon inquiry of its whereabouts the plaintiff told the defendant that it went for repairs. The vehicle never returned home until the defendant saw it carrying passengers somewhere in Botshabelo. When the defendant asked the plaintiff whether the vehicle had started operating the plaintiff responded that he allowed one Mr. Nthapo to keep it with him for some time. The vehicle never returned home. It emerged under cross examination that the plaintiff sold it to Mr. Nthapo.
- [9] Later on he informed the defendant that he intends selling the Volkswagen Caravelle microbus. He sold the vehicle for R80 000. 00 and the defendant does not know what he did with the proceeds of the said sale.
- [10] He later bought another Toyota Quantum minibus. It, like the first one, disappeared and the defendant learned from their neighbour that the vehicle was no longer operating as a taxi. She enquired from the plaintiff of its whereabouts and the plaintiff informed her that one of his drivers transported passengers to Queenstown and it was impounded by traffic authorities for transporting passengers without a valid permit.
- [11] The plaintiff had multiple extra marital affairs, some with Church members. The two Church members that he had love affairs with were one Sonja from Kimberly and one Emily from Gauteng. He openly had another love affair with one Nthabiseng whom he was

transporting daily to work with the corsa bakkie that the defendant bought and paid for. The corsa bakkie was initially intended to be used for a business of transporting goods for people at Botshabelo Industrial area. The plaintiff failed to contribute financially towards the day to day basic needs of the common household. He instead used his money to buy clothes and Brazilian hair extensions for his girlfriends.

[12] He did not contribute towards the education of their daughter from grade 1 until she attained PHD. The plaintiff utilized his salary and proceeds from his taxi operations for his own benefit with total disregard for the growth of the joint estate. He never paid school fees nor paid for her transport to school. She single - handedly contributed towards their daughter's education. The plaintiff moved out of the parties' shared bedroom in 2020 and they have not been communicating ever since. She admits that the plaintiff made a minimal contributions towards the building of their matrimonial home way back when he started working as a taxi driver.

[13] When the defendant got tired of seeing the plaintiff ferrying his many girlfriends with the vehicles that she bought and paid for single- handedly she stopped him from further driving the other vehicles except the corsa bakkie. The plaintiff

reacted by saying that the only way he can have access to money is if he filed for divorce so he can claim form the defendant's pension and have sole control of some assets in the estate.

[14] The plaintiff confirmed that they were married in community of property. He confirmed that they bought a Toyota Quantum and Caravelle minibuses operating a taxi business. He attributes the breakdown of their marriage to the defendant's cheating habit. A matter that was not raised in the summons. He agreed that he had an extramarital affair with Nthabiseng. He is unemployed and dependent on the social security grant and the income generated from renting out his taxi operating licence to Mr. Nthapo

[15] The defendant submits that the plaintiff will be unduly benefitted should I not order that the latter forfeits the benefits arising from the joint estate in respect of the following assets:

15.1 His claim to 50% of the Defendant's pension interest held in the GEPPF;

15.2. His interest in an immovable property situated at Erf 1[...], B[...]-T, D[...] Thaba Nchu, Province Free State as held under Deed of Grant G0[...]/1988;

15.3. His share in all the moveable assets kept at Erf 2[...], Section H, B[...]; and

15.4. His share in the following motor vehicles:

(I) An Audi A4 bearing registration number: C[...];

(II) An Audi A5 bearing registration number: H[...];

(III) A Kia Rio bearing registration number: F[...];

(IV) An Opel Corsa bearing registration number: D[...].

[16] The general rule governing marriage in community of property is that it is an agreement in terms of which parties undertook to share equally in the proceeds of their marriage. The point of departure would be for parties to share assets of the joint estate equally upon divorce. This stems from the doctrine of *pacta sunt servanda* which protects the sanctity of contracts.

[17] Courts are however empowered to deviate from the general rule applicable to matrimonial property upon divorce where the court is satisfied that the enforcement of the rule would result in a party against whom an order of forfeiture is sought being unduly benefited in relation to the other. Section 9(1) of The Divorce Act[1] provides 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.’

[18] In *Wijker v Wijker*[2] the court held as follows when it dealt with the question of forfeiture of benefits

‘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.

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. In dealing with the manner in which an appeal in an unfair labour practice dispute should be approached, *E M Grosskopf JA* made the following remarks in *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* [1992] ZASCA 149; 1992

(4) SA 791 (A) at 800CG:

‘However, as I stated above, the word discretion is used here in a wide G sense. Henning "Diskresieuitoefening" in 1968 THRHR 155 at 158 quotes the following observation concerning discretionary powers:

“(A) truly discretionary power is characterised by the fact that a number of courses are available to the repository of the power’ (*Rubinstein Jurisdiction and Illegality* (1956) at 16).”

The essence of a discretion in this narrower sense is that, if the H repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a

different course among those available to him. I do not think the power to determine that certain facts constitute an unfair labour practice is discretionary in that sense. Such a determination is a judgment made by a I Court in the light of all relevant considerations. It does not involve a choice between permissible alternatives. In respect of such a judgment a Court of appeal may, in principle, well come to a different conclusion from that reached by the Court a quo on the merits of the matter.'

These remarks are in my view of equal application in this matter. To determine whether a party would be unduly benefited, a trial Court would certainly not be exercising a discretion in the narrower sense. Here too no choice between permissible alternatives is involved. In considering the appeal this Court is therefore not limited by the principles set out in *Ex parte Neethling* (supra) and it may differ from the Court a quo on the merits. It is only after the Court has concluded that a party would be unduly benefited that it is empowered to order a forfeiture of benefits, and in making this decision it exercises a discretion in the narrower sense. It is difficult to visualise circumstances where a Court would then decide not to grant a forfeiture order. This discretionary power may be more apparent than real but it is not an issue in this appeal and no more need be said about it.'

- [19] The Court has to ask itself whether one party would be unduly benefited if an order of forfeiture is not made and in order to answer that question regard should be had to the duration of the marriage, the circumstances in which it broke up and, if present, substantial misconduct on the part of one or both parties. It is not a pre requisite that all factors must be present. See *Klerck v Klerck*[3]
- [20] The forfeiture order is restricted to patrimonial benefits, under section 9(1) the court cannot order a redistribution of capital and property. See (Singh 788E – F; *Hahlo*, *The South African Law of Husband and Wife*, 5th Ed (1985) 376.) The benefits that the other party must forfeit are those that flow from the marriage between the parties not those that the party contributed to the joint estate.
- [21] The plaintiff failed to adduce evidence that would support the grounds set out in his particulars of claim. He tried to strengthen his case by advancing new grounds for divorce during his testimony wherein he said that the defendant's extra marital affair was the direct cause of the breakdown of their marriage and that he was verbally abused and assaulted by the defendant. These were never pleaded, they came as an afterthought during his testimony. He did not dispute crucial evidence brought by the defendant. He sought to establish a different case from what he pleaded. A bulk of his testimony was not put to the defendant in cross examination. He further did not dispute most of what the defendant testified about. His evidence is unreliable and falls to be rejected.
- [22] The parties are not able to communicate constructively with one another. The undisputed evidence shows that

the plaintiff abused the defendant physically and emotionally. The defendant had to endure assault and profanities from the plaintiff.

He had extra marital affairs and used monies that he had to contribute towards the growth of the joint estate to buy gifts for

his girlfriends. He treated the defendant with disdain to a point of openly conducting his love affairs in her full view.

[23] He sold assets belonging to the joint estate even those that were aimed at creating a sustainable income for him and used proceeds thereof for his own benefit to the exclusion of the defendant. He failed to contribute to the growth of the joint estate and the parties' household when he still earned income from his taxi business. His conduct diminished the joint estate in many respects. It worked against the growth and maintenance of the parties' joint estate. The evidence shows that he had means to contribute towards the growth of the joint estate but he simply did not do it because he was not invested in it. He invested his energies somewhere else. Defendant was solely responsible for the education of their only daughter. Plaintiff never contributed meaningfully to the assets in respect of which the forfeiture order is sought.

[24] The plaintiff's substantial misconduct as alluded above and the fact that he made no meaningful contribution

towards the purchase of the relevant assets disqualifies him from having an equal share in the joint estate. He worked tirelessly to recklessly squander the joint estate and sabotage its growth. He has no moral entitlement to the aforementioned assets. The defendant succeeds in her counterclaim.

[25] I make the following order in favour of the defendant.

1. A decree of divorce

1.1 The plaintiff forfeits the following benefits of the marriage in community of property:

1.2 His claim to 50% of the Defendant's pension interest held in the GEPPF;

1.3 His interest in an immovable property situated at Erf 1[...], B[...]-T, D[...] Thaba Nchu, Province Free State as held under Deed of Grant G0[...]/1988;

1.4 His share in all the moveable assets kept at Erf 2[...], Section H, B[...]; and

1.5 His share in the following motor vehicles:

N.M. MBHELE, DJP

Appearances:

For the Plaintiff: Mr Venter Instructed by Jacobs Fourie Inc. Bloemfontein For the Defendant:
Adv.Mazibuko Instructed by Amade & Company Inc. Bloemfontein

- [1] The Divorce Act 70 of 1979
- [2] *Wijker v Wijker* 1993 (4) SA 720 (A)
- [3] *Klerck v Klerck* 1991 (1) SA 265 (W)
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