

SOUTH AFRICA / JUDGMENT

M.G.M v S.M.M (Born J) (772/2021) [2023] ZAMPMHC 36 (17 October 2023)

[2023] ZAMPMHC 36

COURT

Middelburg High Court, Mpumalanga

BEFORE

MBG Langa

CASE / FILE NUMBER

772/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION (MIDDELBURG LOCAL SEAT)

CASE

NO. 772/2021

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE:

17/10/2023

SIGNATURE

In

the matter between: M[...]
G[...] M[...]
PLAINTIFF
And
S[...]
M[...] M[...] (Born
J[...])
DEFENDANT

JUDGMENT

LANGA J:

Introduction and facts

[1] This is a simple action for divorce between the parties who were married on 03 June 2011 in community of property, which marriage still subsists. No children were born of the marriage. In the summons, in addition to the costs of the suit, the Plaintiff seeks the dissolution of the marriage as well as an order in the following terms.

1.1. the granting of a decree of divorce;

1.2. the division of the joint estate;

1.3. an order that 50% of his Pension interest held at Government Employees Pension Fund 9[...] be paid to the Defendant within a period of 60 days of receipt of the decree of divorce;

1.4. an endorsement to be made against the records of such fund;

1.5. an order that 50% of the Defendant's pension fund held at Sentinel Pension Fund Z[...] to be paid to the Plaintiff within 60 days of the decree of divorce;

[2] The Defendant defended the action and also filed a counterclaim which included a prayer for the forfeiture of patrimonial benefits against the Plaintiff. In her claim the Defendant seeks an order in the following terms:

2.1. A decree of divorce;

2.2 Forfeiture of patrimonial benefits, particularly the immovable property situated at No. 4[...] R[...] Street, Ackerville, Witbank, Mpumalanga, as well as the pension and/ or provident fund interest;

2.3 An order for primary care and residence of the minor child;

2.4 Maintenance of R4 000.00 in respect of the child.

Common cause issues

- [3] It is common cause that the parties have been married in community of property and that the marriage has broken down irretrievably and with no prospects of the restoration thereof. The parties further agreed that any debt incurred by each one of them during the subsistence of the marriage shall be borne by the party who originally incurred the debt and if both parties incurred the debt, then each shall be liable for half of the total debt incurred. The Defendant has also abandoned the claim for the maintenance of the child who was actually her deceased sister's child who was not yet legally adopted by the parties.

Issues

in dispute

- [4] The main issue in dispute is therefore the forfeiture claim by the Defendant. The question is whether a normal order for the division of the joint estate should be made or whether the court should make a forfeiture order against the Plaintiff in respect of the patrimonial benefits and mainly in respect the common home/house and the pension benefits. The court is consequently called upon to decide whether the Plaintiff will have unduly benefited if an order for the division of the joint estate is granted.

Evaluation and analysis

- [5] It is trite that where the parties are married in community of property, upon the dissolution of their marriage the parties are entitled to an equal share of the joint estate in line with this type of marriage regime. This essentially means that each party shall be entitled to equal share of the joint estate. In terms of Section 1 of the Matrimonial Property Act of 1984 a joint estate means the joint estate of a husband and wife married in community of property. "Community of property is a universal economic partnership of the spouses. All the assets and liabilities are merged in the joint estate in which both spouses, irrespective of the value of their financial contributions, hold equal shares". See Hahlo in the South African Law of Husband and Wife 5th Edition. Joint estate includes a spouse's pension benefits. See Section 7(7) and 7(8) of the Divorce Act 70 of 1979, ("The

Act").

- [6] Section 9(1) of the Act which deals with the forfeiture of marriage benefits provides that when a decree of divorce is granted on the grounds 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. In this determination the court will have regard to inter alia 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. If it is satisfied that if the order for forfeiture is not made, the one party in relation to the other will be unduly benefitted, the court will make a forfeiture order.

- [7] So it is clear from the above that under normal circumstances each party would be entitled to an equal share in the joint estate. In *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) the court held that joint ownership of another party's property is a right, which each of the spouses acquires on concluding a marriage in community of property. However, in terms of section 9 of the Act, when a marriage is dissolved on the grounds of the irretrievable breakdown of the marriage, the court can order that one of the parties partially or completely forfeits whatever benefit is due to them. The court will make such an order if satisfied the one party will be unduly benefitted if such an order is not made. See also *Mashola v Mashola* (022/2022) [2023] ZASCA 75 (26 May 2023).
- [8] In *Botha v Botha* [2006] ZASCA 6; 2006 (4) SA 144 (SCA), the Supreme Court of Appeal confirmed that only the factors in s 9(1) should be accorded consideration in the determination of whether forfeiture order should be granted. The Court further went on to point out that the catch-all phrase, permitting the court, in addition to the factors listed, to have regard to 'any other factor' was conspicuously absent from s 9. It further held that s 9(1) should be construed within the context of the evidence tendered by the parties in court.
- [9] It is trite that the spouse seeking forfeiture of patrimonial benefits, bears the onus to demonstrate, on a balance of probabilities, that in the event an order of forfeiture is not granted the party against whom the order is sought will, in relation to him/her be unduly benefitted. In *V v V* (3389/2017) 2020 the court stated the following in respect of forfeiture of benefits.
- "The court may order forfeiture only if it is satisfied that one party will, in relation to the other be unduly benefitted. A party claiming forfeiture must plead the necessary facts in the pleading to define that the nature of the relief sought. Thus the onus is on the application for a forfeiture order to prove the nature and the ambit of the benefit to be forfeited, and in so doing, the applicant must prove the extent to which it is an undue benefit. Similarly, the allegation of undue benefit must be pleaded and proven. It would not be enough simply to refer to the acquisition of an asset and then make the allegation that the party against whom forfeiture is claimed will be unduly enriched at the expense of the other if forfeiture is not granted".*
- [10] In this case the Defendant advanced two reasons why a forfeiture order should be made against the Plaintiff. She confirmed that her main reason is that the Plaintiff was involved in an extra marital affair which apparently led to the breakdown of the marriage. The second relates to the house which she contended belonged to her alone as she bought it before the marriage. Although she stated that she bought it for her orphaned niece, she however, also conceded that the niece in question was not yet orphaned when she bought the house. She further conceded that the house was registered in the names of both

spouses during the course of the marriage.

[11] It has however not been denied that during the course of the marriage, the Plaintiff also contributed directly and indirectly towards the subsistence of the family and the growth of the joint estate. The Plaintiff's evidence that he even assisted the Defendant by securing numerous personal loans to inter alia, prevent the foreclosure of the disputed property and to renovate it was not denied by the Defendant. In fact, the Defendant confirmed

that he did get a loan of R85 0000 in his names to assist her with a business which was registered in her name. She only seemed to suggest that it was the Plaintiff's business who was a silent partner even though it was registered in her names as well. The Plaintiff gave further evidence that he contributed towards the household by providing medical aid and supporting the children and the Defendant during her difficult times of depression and generally took care of the household.

[12] As stated above the court has to consider the following factors in determining the issue of forfeiture.

14.1 duration of the marriage,

14.2 the circumstances which gave rise to the breakdown thereof and

14.3 any substantial misconduct on the part of either of the parties.

[13] Regarding the first, it is common cause that the parties were married in community of property for a period of 12 years. The long period of the existence of the marriage does not support the Defendant's claim for forfeiture. On the contrary it makes out a case for the Plaintiff to benefit from the joint estate to which he has contributed substantially during the 12 years.

[14] I will next consider the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties. It is common cause that the parties have made counter allegations of infidelity during the marriage. While the Defendant accused the Plaintiff of being unfaithful, she also half-heartedly conceded that she was involved in an affair with her former boyfriend. She confirmed that she made a confession to this effect to the Plaintiff but stated that it was made under duress as the Plaintiff apparently had a firearm with him during their discussion of a reconciliation when she made the confession. It is important to note that even though she claims to have been under duress, after the said reconciliation discussion the two of them even had sexual intercourse in the motor vehicle in the parking of a shopping mall where they had met. This was apparently in celebration of the reconciliation. The Defendant's version that she admitted to infidelity because of duress does not add up.

[15] Another aspect of her evidence relating to this is that when the Plaintiff in his evidence reluctantly revealed that the Defendant became HIV positive during the course of the marriage, she admitted this but stated that she probably contracted the virus from her niece who she was caring for. However, in the heads of argument it was argued on her behalf that she might have been infected by the Plaintiff. Be that as it may be, the evidence by the

Plaintiff that he has up to now tested HIV negative was not challenged by the Defendant. The Defendant's explanation in this regard is also not a reasonable and plausible one. I must state that the Defendant did not impress as a witness and her credibility was very shaky to say the least.

- [16] While the court has to consider the counter allegations of misconduct made by the parties, it is however, clear that, considering her own misconduct, the Defendant has not proven that the Plaintiff has committed a substantial misconduct justifying the forfeiture order prayed for. Even if the court accepts that she has proven the Plaintiff's misconduct in the form of infidelity, that would in my view not be enough to justify a forfeiture order especially when one considers what was said in Engelbrecht, above. It was held that it could never have been the intention of the legislature that a wife, who had for 20 years assisted her husband faithfully should, because of her adultery, forfeit the benefits of the marriage in community of property. I agree with this holding which is relevant in this case.
- [17] However, in addition the Defendant further failed to establish the specific benefits the Plaintiff would derive if an order is not made. For instance, she failed to prove the nature and extent of the benefit such as the value of the house. She did not place the court in a position to grant a forfeiture order against the Plaintiff for unduly benefiting from the dissolution of the marriage and no determination of the extent of the benefit can therefore be made by the court.

Conclusion

- [18] It is clear from the evidence that the Plaintiff contributed substantially towards the growth of the joint estate and is therefore entitled to his half share upon dissolution of the marriage. Having regard for the factors the court has to consider before granting a forfeiture order, the reasons proffered by the Defendant for a forfeiture order do not meet the criteria required for the court to arrive at a decision that the Plaintiff would be unduly benefited if such an order was not granted. I therefore conclude that the Defendant did not establish sufficient grounds for the making of an order for forfeiture as prayed for. Taking into account all the relevant factors, such as the fact that the parties spent 12 years in this marriage in community of property and that the Plaintiff has contributed towards the subsistence of the marriage as well as the fact that he did make himself guilty of any substantial misconduct, the most appropriate and fair order would be the division of the joint property equally between the parties.

Order

- [19] In the result I make the following order;
1. The decree of divorce is granted and the bonds of marriage between the parties are dissolved;
 2. The joint estate be divided equally between the parties;

3. 50% of the Plaintiff's pension fund held in Government Employees Pension Fund number 9[...] be paid to the Defendant within 60 days of the decree of divorce being granted and that an endorsement to this effect be made against the record of the said pension fund;
4. 50% of the Defendant's pension fund held in the Sentinel Retirement Fund number Z[...] be paid to the Plaintiff within 60 days of the granting of the decree of divorce and that an endorsement to this effect be made against the record of the said pension fund; and
5. The Defendant to pay the costs of the suit.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Advocate A Cassiem For the Defendant: Advocate K Khosa Date of hearing: 09 October and 11 October 2023 Date of judgment: 17 October 2023

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 17 October 23 at 14h00.

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Prepared on 9 October 2026 · Esheria