

SOUTH AFRICA / JUDGMENT

M.M.K v V.S.K (4324/2021) [2023] ZAFSHC 350 (7 September 2023)

[2023] ZAFSHC 350

COURT

Free State High Court, Bloemfontein

BEFORE

D.P. Mthimunye

CASE / FILE NUMBER

4324/2021

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FLYNOTES: FAMILY – Divorce – Forfeiture – Plaintiff using pension payout prior to divorce for herself and investing some of it – Behaved in a selfish and self-centred manner towards the defendant and rendered herself guilty of substantial misconduct – Only entitled to 25% of the defendant's

pension interest – From this and monies invested from her pension payout she is in position to maintain herself and pay for her own medical aid – Divorce Act 70 of 1979, s 9.

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: No

of interest to other judges: No

Circulate to Magistrates No

Case no: 4324/2021

In the matter between: M[...] M[...] K[...] (BORN M[...]) Plaintiff (ID NO: 531[...]) and V[...] S[...] K[...] Defendant (ID NO: 581[...])

CORAM:

MTHIMUNYE AJ

HEARD ON:

25, 26 and 31 JULY 2023

DELIVERED ON: 07 SEPTEMBER 2023

[1] In this divorce action, the Plaintiff prays for an order in the following terms:

- (a) A decree of divorce;
- (b) Division of the joint estate;
- (c) An order that the Defendant shall pay the Plaintiff an amount of R14 000.00 (Fourteen Thousand Rand) per month as spousal maintenance commencing on the first day of the month following the month in which a decree of divorce is granted and thereafter on or before the 1st day of each and every succeeding month; which maintenance to escalate annually by the headline inflation rate.
- (d) An order directing the Defendant to retain the Plaintiff as a beneficiary on his medical aid plan post retirement and pay for all ancillary medical costs not covered by the medical aid.
- (e) An order that the Plaintiff is entitled in terms of section 7(8)(a) of the Divorce Act 70 of 1979 as amended, to payment of 50% of the Defendant's pension interest in the Provident Fund of the University of the Free State with member number 97915 as calculated from the date of divorce.
- (f) An order that the Provident Fund of the University of the Free State

must endorse its records to the effect that the Plaintiff is entitled to 50% of the Defendant's pension interest as at the date of divorce, and pay to the Plaintiff her share of the Defendant's pension interest as referred to herein within 120 days after having been informed of how the amount must be dealt with in accordance with the Plaintiff's election.

- (g) Costs of suit.

[2] The Defendant in his plea raised a counterclaim in terms of which he prays for forfeiture in terms of Section 9 of the Divorce Act 70 of 1979 ("the Divorce Act"). Further the Defendant pleaded that he will keep the Plaintiff on his medical aid until date of retirement which is 31 December 2023, however, post retirement he will no longer be fully subsidised and as such will not be able to keep the Plaintiff on the medical aid. The Defendant further pleaded that he cannot afford the R14 000.00 per month spousal maintenance claimed by the Plaintiff.

[3] The parties were married to each other in community of property on 05 February 2000. Marriage in community of property entitles the parties to 50% of the joint estate on the dissolution of marriage. The only exception to this principle is section 9 of the Divorce Act and which enables the court to grant forfeiture when the court is satisfied that the party against whom it is sought, will be unduly benefitted if it is granted.

- [4] At the commencement of the trial, both parties recorded that they are in agreement that the marriage has irretrievably broken and therefore both seek a decree of divorce and the division of the joint estate, but for the Defendant's pension fund.
- [5] In dispute, and what this court is called upon to determine are the following issues: The forfeiture of the Defendant's pension funds by the Plaintiff, the retention of the Plaintiff as a beneficiary on the Defendant's medical aid post the Defendant's retirement, and payment of spousal maintenance of R14 000 per month by the Defendant.

Forfeiture of the Defendant's Pension Interest

- [6] The Plaintiff seeks an order entitling her to 50% of the Defendants' pension whilst the Defendant has prayed for forfeiture in terms of section 9 of the Divorce Act as stated above.
- [7] Section 9(1) of the Divorce Act provides:

"9(1) 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 of forfeiture is not made, the one party will relation to the other be unduly benefited."

- [8] The onus to prove that the party against whom forfeiture is sought will be unduly benefited rests on the party who seeks it. The Defendant basis his prayer for forfeiture on the following reasons: that when the Plaintiff received her pensions in January 2014, she told him that the money was for her and her children and refused to contribute meaningfully to the joint estate, instead she gave R20 000.00 to her son without discussing same with him. According the Defendant, the Plaintiff never discussed with or informed him what she has done with the rest of her money.
- [9] The Defendant further testified that despite the parties having had an agreement that she would pay off the loan they had taken to extend the house when she retires, on retirement, the Plaintiff refused to settle the loan and argued that the money was hers and her children's. Although she later on paid R30 000.00 towards the loan, this was only in 2020. At some point the son of the Plaintiff confronted the Defendant about wanting his 'mother's money' and threatened him that if that is the case, the marriage might as well end. Afterwards he apologised but the Defendant never asked about this money until the Plaintiff left the marital home in 2021.
- [10] Consequently, the Defendant argues that the Plaintiff will be unduly benefited were she to benefit from the Defendant's pension benefit whereas he did not benefit from hers. For purposes of clarity, the Plaintiff received an amount of R273 986.20 as her pension pay out on 28 January 2014. During her evidence in chief the Plaintiff counted a number of items (including paving the yard, sofas, built-in cupboards, buying a shack, paying for the daughter's wedding) she claims she paid for with her pension money and thus contributed to

the joint estate. When confronted with the Defendant's version during cross-examination, she conceded that most of these were paid for by both parties long before she got her pension pay out, some even years before. In conceding, she blamed her memory loss to diabetes.

- [11] It became clear during evidence that both parties contributed equally and according to their means during the subsistence of the marriage with the Defendant paying for the bond and municipality rates whilst the Plaintiff paid for food and upkeep of the home. After receiving her pension pay out in 2014, the Plaintiff only paid for the following items:
- (a) She settled the outstanding bond for an amount of R30 000.00 in March 2020.
 - (b) She paid for the pivot door and the aluminium kitchen door, both amounted to R14 000.00 even though this amount was disputed by the Plaintiff on the basis that the doors were not the same size and could not have caused R7 000 each.
 - (c) She paid R10 000.00 towards their car, a Chevrolet.
- [12] It is un rebutted evidence that on receipt of her own pension, the Plaintiff informed the Defendant that her pension monies belonged to her and her children. It was also clear to the court that indeed the Defendant only became aware of the fact that some monies from the Plaintiff's pension fund were invested in ABSA and Capitec from the court papers. The Defendant was a candid, reliable and credible witness, who was honest enough to confirm the truth told by the Plaintiff e.g. when asked about the sofas he said 'she is telling the truth, we bought the sofas in 2013. I remember because the R6.500 came from me. I used my bank card'. The Plaintiff on the other hand, was hell bent on painting the Defendant as an irresponsible husband who did nothing for the marriage after the 5th year of marriage and when caught out, she would blame her forgetfulness on diabetes and being tired.
- [13] The Plaintiff has argued that in terms of section 7(8)(a) of the Divorce Act 70 of 1979, as amended, she is entitled to 50% of the Defendant's pension interest from date of inception to the date of divorce. I deem it necessary to cite herein the relevant provisions of Section 7 of the Divorce Act: Section 7(7)(a) read as follows:

"(7)(a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.

(b) ...

(c) ...

"(8) Notwithstanding the provision of any other law or of the rules of any pension fund-

- (a) The court granting a decree of divorce in respect of a member of such a fund, may make an order that-

- (i) any part of the pension interest of that member which, by virtue of subsection (7), is due to or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

[14] Section 7 (7) is clear that in the determination of patrimonial benefits to which the parties in a divorce action may be entitled, pension interests are considered to be part of the assets. Section 7(8) however, contains no provision entitling a party to 50% share of the other's pension interest as claimed by the Plaintiff.

Instead, it contains two phrases which in my view, are pertinent to the decision that this court is called upon to make. These are the use of the word 'may', which in my view, points to a discretion that the court has in making such an order; and the words 'any part'. The latter phrase indicates a further discretion that the court has i.e. to decide on the percentage. In *Engelbrecht v Engelbrecht*[1], the court held that "the court has a discretion when granting a divorce on the grounds of irretrievably breakdown of the marriage or civil union to order that the patrimonial benefits of the marriage or civil union be forfeited by one party in favour of the other. The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited. The court has a wide discretion, and it may order forfeiture in respect of the whole or part only of the benefits".

[15] In *Singh v Singh*[2] it was held that a court may order that all patrimonial benefits of a marriage or a percentage of the estate be forfeited. I need no longer belabour the point on the court's discretion in this regard.

[16] The marriage between the parties had lasted 21 years when the Plaintiff left the marital home in April 2021. Both parties differ on the circumstances that led to the breakdown of the marriage, with the Plaintiff blaming the Defendant for neglect whilst the Defendant blames the Plaintiff's mental state following the death of her mother. In any event, the Defendant is not asking for forfeiture on the basis of the circumstances leading to the breakdown of the marriage but on the basis of substantial misconduct by the Plaintiff.

[17] In *Wijker v Wijker*[3] the court held that factors listed in Section 9(1) of the Divorce Act need to be considered cumulatively. The presence of any one of them is sufficient for the court to make an order for forfeiture. In other

words, Defendant does not have to prove the present of all three factors in Section 9(1).

[18] In my view, taking all evidence before this court and the Plaintiff's conduct and attitude in respect of her own pension, the Plaintiff behaved in a selfish and self-centred manner towards the Defendant. This was clearly demonstrated not only by what she said to the Defendant at the time, but by how she then handled her own pension to the utter exclusion of the Defendant. It is my considered view that by behaving in this way, the Plaintiff rendered herself guilty of substantial misconduct, which is a factor this court must consider in determining whether or not it will grant forfeiture.

[19] In *Tsebe v Tsebe*[4], which Counsel for the Defendant argued that it is on all fours with this matter, Mr Tsebe used his pension money solely for himself to the exclusion of the joint estate and his wife. The court found him to have committed substantial misconduct as envisaged in Section 9(1) and granted forfeiture against him. In this case however, one must consider that although the Plaintiff excluded the Defendant

completely in her dealings with her pension money, she contributed some money into the joint estate by paying off the house loan, the car and the pivot doors (R54 000.00) in total. The rest of her money was out of bounds for the Defendant. Although Counsel for the Plaintiff was at pains to explain that the remainder of the money has been invested with Capitec (R38 029.69 as at 05 July 2023) and ABSA (R63 891.40 as at 29 June 2023) and as such still available as part of the joint estate, the point of the matter, which was very clear during evidence was that not only was the Defendant not involved in how the money should be dealt with, he only became aware of it during these proceedings. It is my considered view that the Plaintiff will benefit unduly if she were to be granted 50% of the Defendant's pension benefits. I am persuaded that considering her contribution to the joint estate with her pension money, and deducting the amount that she has invested from her own pension, she should be granted a lesser percentage than what she has asked for. In other words, the Plaintiff will partly forfeit a certain percentage of the pension benefits of the Defendant.

Spousal Maintenance and Medical Aid

[20] The Plaintiff seeks an order directing the Defendant to pay her spousal maintenance of R14 000.00 per month. During evidence, it came out that both parties never disclosed to each other what each of them earned. The Plaintiff conceded during cross-examination that he did not know how much the Defendant earned as they did not tell each other about their monies – confirming that she never informed the Defendant about how she used her pension monies. It was also clear that the prayer for an amount of R14 000 per month was made from a position of ignorance since the amount even exceeds what the Defendant would be getting on a monthly basis should he elect taking one third of his pension and monthly pay-out. She conceded that this amount would not be feasible for the Plaintiff to afford. The Plaintiff testified that during the subsistence of the marriage, she paid for food and the upkeep of the home, including the husband's daughter's school fees and clothes, whilst the

Defendant paid the mortgage bond for their home and municipality rates. It was clear to this court that both parties contributed to their livelihood and joint estate during the subsistence of the marriage.

- [21] In assessing whether to grant an order of spousal maintenance in favour a spouse, the court must consider the existing and prospective financial means and earning capacity of each spouse, their financial needs and obligations, their ages, the duration of the marriage and the standard of living during the marriage, the conduct of either party leading up to the divorce, any transfer of assets made in terms of a redistribution order and any other factor which the court believes should be considered.
- [22] The Plaintiff testified that at some point even during the subsistence of the marriage she was assisted by her son to pay for food and upkeep. After leaving the marital home three years ago, the Plaintiff went to live with her son who is a medical practitioner in Gauteng for five months and thereafter moved to Bloemenda where she is renting accommodation for R6 200.00 per month. Her son gives her R10 000.00 a month for rent and upkeep. She is unemployed and although she is 70 years old, she is not receiving a grant as she was told she was no eligible since her husband is employed. Although it was argued that the son bears no legal obligation to support the Plaintiff, this is a factor that this court has taken into consideration
- [23] The Defendant, though currently employed and earning in the region of R20 000.00 a month, he is retiring on 31 December 2023 at 65. In the event that he elects an option where her takes one third of his pension pay-out and monthly payments, those monthly payments are less than what the Plaintiff is asking. Counsel for the Plaintiff argued that regardless of which pension withdrawal option the Defendant takes, between taking all his pension out or a portion thereof with
- monthly pay-outs, he should still be able to pay for the maintenance from his lump sum either in monthly instalments or in a form of another lump sum. Further, that if the order of this court is cumbersome to the Defendant, he can vary it at a later stage.
- [24] In my view, the argument that the court can make an order to be varied at a later stage is nonsensical and grossly unfair to the Defendant. First the Plaintiff is asking for her own share of the pension fund, which she argues is 50%, and over and above that she must get bits and pieces of the Defendant's share in a form of spousal maintenance and medical aid that the Defendant cannot afford. That, in my view, goes against principles of justice and fairness. There is also sufficient evidence before this court on the exact amount the Defendant will receive. To burden him with an order that may need variation later on, will not only be burdening the varying court unnecessarily, but burdening the Defendant with additional legal costs which he must incur, from the same pension fund amount.
- [25] The Plaintiff has been and remains a beneficiary on the Defendant's medical aid since 2005. She seeks an order for her retention thereon post the Defendant's retirement as she suffers from Diabetes and High Blood pressure and is in chronic medication. During evidence, when asked what she would do should this court not grant this order, she said she would ask her son who is a Medical Practitioner to help her. The Defendant testified that currently his employer pays 100% contribution towards his medical aid but post retirement, he will only

be receiving 22% subsidy and the rest must come from his pocket. Much as he has kept the Plaintiff as a beneficiary even after she left the marital home in 2021, he does not mind keeping the Plaintiff on until retirement on 31 December 2023, beyond his retirement however, he would not be able to afford it.

- [26] He explained that he has two options to cashing out his pension benefits. The first is to take all the money at once (a 100% cash out), and the second is to take only one-third and have the rest paid out to him in monthly payments. He has not made the election yet but upon inquiry he was informed by Sanlam that if he chooses the latter option he will get approximately R9 000.00 per month whilst Old Mutual estimated R12 000.00 per month. Looking at the figures, he will not be able to make a contribution towards medical aid and keep the Plaintiff thereon.
- [27] I am of the view that the same test that applies to spousal maintenance should apply herein. That the Defendant should have the ability to pay for the medical aid, both for himself and the Plaintiff. I will not repeat the evidence before this court but in the absence of a subsidy from his employer, the Defendant made it clear that he would not be able to afford the medical aid. It follows therefore that this court cannot burden the Defendant with an order he cannot afford. In view of the lumpsum that the Plaintiff stands to receive from the Defendant's pension payout and the monies she has invested in ABSA and Capitec, I am of the view that she will be in a position to maintain herself and pay for her own medical aid. For this reason, the relief sought by the Plaintiff in respect of spousal maintenance and medical aid has to fail.

Costs

- [28] The granting and refusal of costs by the courts is governed by two principles: First that unless expressly otherwise enacted, costs fall within the discretion of the court and secondly that generally, costs follow the results i.e. they are awarded in favour of the successful litigant. Section 10 of the Divorce Act however provides that in a divorce action, a court is not bound to make an order for costs in favour of a successful party, but having regard to the means of the parties and their conduct in so far as it may be relevant make such order as it considers just, which may even be that costs be apportioned between the parties. Having taken all the evidence before me, I am not persuaded that the Plaintiff should be awarded costs of suit as prayed for.

Consequently, I make the following Order:

1. The decree of divorce is granted and the marriage is dissolved.
2. Division of the joint estate.

3. The Plaintiff is entitled in terms of Section 7(8)(a) of the Divorce Act, 70 of 1979, as amended to payment of 25% (twenty-five percent) of the Defendant's pension interest in the Provident Fund of the University of the Free State with member number / employee number 97915 as calculated on the date of divorce.
4. The Pension Fund of the University of the Free State must endorse its records to the effect that the Plaintiff is entitled to 25% (twenty-five percent) of the Defendant's pension interest as at the date of divorce, and pay to the Plaintiff her share of the Defendant's pension interest as referred to herein within 120 (One Hundred and Twenty) days after having been informed of how the amount must be dealt with in accordance with the Plaintiff's election.
5. Each party to pay his / her own costs.

D.P. MTHIMUNYE

Appearances: For the Plaintiff : Adv I Macakati Instructed by Phatshoane Henney Attorneys Bloemfontein For the Respondent: Adv T Mogwera Instructed by Fixane Attorneys Bloemfontein

- [1] 1989 (1) SA 597 (C)
- [2] 1983(1) SA 781 (C)
- [3] 1983(4)SA 720 (A) at 727 D-F
- [4] (39138/2014) [2016] ZAGPPHC 575 (24 June 2016)

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