

SOUTH AFRICA / JUDGMENT

M.R.M v N.S.M (78893/2018) [2022] ZAGPPHC 680 (12 September 2022)

[2022] ZAGPPHC 680

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher

CASE / FILE NUMBER

78893/2018

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IN

THE HIGH OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No: 78893/2018

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

YES

Date:

12 September 2022

In

the matter between:

M[...]¹R[...]¹ M[...]²

Plaintiff

and

N[...]

S[...]

M[...]²

Defendant

JUDGMENT

NEUKIRCHER J:

- [1] This is a divorce action where the main dispute centered around whether or not the defendant was entitled to an order that the plaintiff forfeit her entitlement to 50% of the defendant's pension interest in the SALA Pension Fund. Although plaintiff had claimed maintenance for herself post-divorce, this was withdrawn just

before the trial commenced.

BACKGROUND

- [2] The parties were married in terms of civil law on 20 January 2016 in community of property and there are no children born of this marriage. At the time of their marriage, the plaintiff had been working at LocGov Health Care Associates (Pty) Ltd since 2005 and the defendant at the Transport and Roads Department of the City of Tshwane since ± 1981. It is the parties second marriage for each and each has children born from their first marriage. No children were born from this marriage.
- [3] It is common cause that their relationship terminated in November 2016, 11 months after their civil marriage. It is also common cause that they have not seen, spoken to or co-habitated with each other since then. Thus their marriage has irretrievably broken down[1] and they are ad idem that a decree of divorce must issue.
- [4] It is trite that upon divorce where parties are married in community of property, the joint estate is divided. It is not for the court, in those circumstances, to divide "the pots and pans" and it is only where the parties cannot agree on the division of assets that a court may, upon request, appoint a liquidator.
- [5] Where a party does not want an order that the joint estate be divided, he/she must ask for an order of forfeiture. In this regard, Section 9 of the Act provides the following:
- "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 for forfeiture is not made, the one party will in relation to the other be unduly benefited."*
- (2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant."

[6] Thus, Section 9 of the Act postulates 2 questions: a) will the plaintiff receive a benefit and b) if so, is this benefit is undue.[2] The answer to (a) in this matter must perforce be yes – after all the parties are married in community of property and the assets in the joint estate include the defendant’s pension interest. It is the answer to (b) that is the subject matter of this dispute as the defendant seeks an order of partial forfeiture in regards to his pension interest only.

THE ASSETS OF THE JOINT ESTATE

[7] In *Wijker v Wijker*[3] it was stated that the 3 factors mentioned in Section 9 should be considered cumulatively and therefore it is not essential for the plaintiff to prove substantial misconduct before a forfeiture order can be granted. The 3 relevant factors are:

7.1 the duration of the marriage;

7.2 the circumstances which gave rise to the breakdown thereof; and

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

[8] In asking for forfeiture, the defendant has pleaded in his counterclaim that:

8.1 the plaintiff was dishonest and deceitful towards him as she had failed to disclose her medical condition to him[4];

8.2 that plaintiff refused to comply with her treatment protocols such that he was compelled to call in the assistance of the SAPS and Ambulance Services “to convince, persuade and/or force the plaintiff to do so”;

8.3 that she was ungrateful, confrontational and generally disrespectful towards him despite the assistance and support he gave her; and

8.4 that she failed to afford him the respect to which he was entitled.

[9] In countering these allegations, the plaintiff has not only denied them, but pleaded *inter alia* that:

9.1 the parties were married by customary law on 29 December 2013;

9.2 the defendant physically assaulted her, used foul and abusive language towards her, committed adultery with his former wife, failed to contribute to the expenses of the home and deserted her in 2016.

THE ASSETS

[10] It is common cause that the main assets of the joint estate are the following:

10.1 the immovable property (registered in the plaintiff’s name) in Arcadia, Pretoria, the municipal value of which is ± R400 000[5];

10.2 the improvements brought to the plaintiff’s traditional home (a leasehold) in Limpopo[6];

10.3 the plaintiff's motor vehicle – a 2014 Ford Eco Sport – purchased in 2014 for R200 000[7];

10.4 the defendant's Ford Fortuner purchased in terms of a finance plan on which he still owes R98 066-65[8]

10.5 defendant's two Assupol policies the combined surrender value of which is R41 442-24;

10.6 the defendant pension interest the relevant values of which are:

10.6.1 at 20 January 2016: R1 467 528-55

10.6.2 at 30 November 2016: R1 674 258-06

10.6.3 at 28 July 2022: R3 420 756-03

10.7 plaintiff insurance policies which she failed to disclose either in her Financial Disclosure Form or her discovery, but the existence of which was elicited during cross-examination and appear from her discovered bank statements[9].

THE WITH PREJUDICE TENDER

[11] At commencement of the trial, the defendant made the following with prejudice tender to the plaintiff in regard to the patrimonial claims:

11.1 that she could keep all her assets, including the value of the improvements on her traditional family home;

11.2 he would pay her 50% of the growth of the value of his pension interest from the date of the civil marriage until the end of November 2016 ie

R1 674 258-06 (value at 20 January 2016)

- R1 467 528-55

(value at 30 November 2016)

R 206 729-51

50% = R103 364-75

[12] The trial proceeded on this basis and only the plaintiff and defendant testified.

THE CONSPECTUS OF THE EVIDENCE

[13] There were 5 main threads of the evidence and cross-examination which related to the issue of forfeiture and costs:

13.1 was there a customary marriage between the parties?

13.2 was there substantial misconduct by plaintiff (or defendant for that matter)[10]?

13.3 the fact that the plaintiff only abandoned her maintenance claim at the doors of the court;

13.4 the fact that plaintiff had failed to make a full and frank disclosure of her assets;

13.5 the parties' financial contribution towards living expenses.

THE CUSTOMARY MARRIAGE

[14] The following is common cause: the parties had been in a relationship since 2012 and during 2013 they went to see the plaintiff's

family[11] where the defendant introduced himself and discussed his intention to marry plaintiff. He gave them an amount of R5 000 to show his intent to marry her and they informed him that the lobolo price was R20 000 which would be paid over when he married her.

[15] According to defendant, the persons present were plaintiff, defendant, plaintiff's brother and her younger sister. There was no-one from his family present. His Pedi tradition requires a meeting of both families where plaintiff's family would give defendant's family a list of gifts that would be required. Once the list was agreed upon, 3 members of each family would sign the list. A feast would then be held at which a sheep would be slaughtered and the gifts handed over. The defendant stated that there was no meeting of the families, no list, no handing over of gifts, no sheep slaughtered, no feast and the lobolo (as demanded by plaintiff's family) was not paid in full. Thus, says defendant, no customary union was concluded.

[16] According to the plaintiff a) at the introduction in 2013, the defendant brought his sister and uncle with and she was represented by her sister, her cousin and her uncle, b) the parties had lived together since 2012 and as husband and wife since 29 December 2013, c) they visited each other's families as husband and wife[12]

- this was plaintiff's version as put to defendant in cross-examination which defendant denied. In plaintiff's evidence-in-chief she testified that at the alleged negotiations, she was represented by her brother and her sister and that defendant was represented by his sister and his cousin, that he introduced her at his family home as "makoti" ie his bride, and when he visited her family he referred to himself as the "son-in-law" and that no ceremony was held because he said he couldn't

afford one. In cross-examination she stated that when the 2 families met in 2013, a list was signed by the families but that she couldn't find it. This was never put to defendant in cross-examination. In addition to the other facts stated supra, the plaintiff admitted that the full lobolo price of R20 000 was never paid, nor were any gifts handed over.

THE SUBSTANTIAL MISCONDUCT

[17] According to the defendant, this has to do with the fact that plaintiff withheld vital medical information from him which he only discovered during July/August 2016 after going through the plaintiff's medical records whilst she was in hospital[13]. According to him, shortly after their civil marriage, the plaintiff became ill, she was "out of her senses", delusional and hearing voices. She was admitted to several hospitals where she was in ICU and then High Care. As a result of this he couldn't

sleep and he and the plaintiff's daughter would alternate taking care of her. But she was irrational – she refused to eat a cooked meal as she insisted he had poisoned it[14], she would fight with him; she would refuse to take prescribed medication and on several occasions he called SAPS and an ambulance

to assist him to force her to take the medication. Eventually in November 2016 plaintiff sent her daughter to tell him that she wanted him to vacate the matrimonial home and he hasn't seen or heard from her since. He stated that, had he been aware of plaintiff's medical condition, he would not have married her in 2016.

[18] He adamantly denied all plaintiff allegations including the assaults, the adultery and the foul language. The issue of the financial contributions is dealt with in paragraphs 28 to 31 below.

[19] The plaintiff's version, over and above that pleaded, is that she became ill and delusional because defendant forced her to overdose on her prescribed medication as he refused to believe she had already taken it. She testified that she only found out about her medical condition in June 2016 when she had a rash on her body and consulted a Dr van Zyl who did tests and informed both parties (together) of the outcome. According to plaintiff, the defendant abandoned her and the marriage once he knew of her illness.

THE PLAINTIFF MAINTENANCE CLAIM

[20] As stated, the plaintiff originally claimed life-long maintenance for herself. In the pre-trial minute of 4 May 2022, the defendant posed the following question to the plaintiff:

"14.3 In the event that plaintiff admits her employment and income, does the plaintiff persist[s] with her claim for maintenance in regard of herself?"

[21] On 5 August 2022 ie 6 court days prior to trial, the plaintiff insisted that she would persist with this claim thus necessitating preparation by the defendant and his counsel on this issue. As the claim was not persisted with at trial, those costs were completely unnecessary. However, this issue does not end there as cross-examination of plaintiff revealed several important aspects pertaining to plaintiff's finances.

THE PLAINTIFF'S FINANCIAL DISCLOSURE FORM (FDF)

[22] This is an important document which is placed before a court and in which a party is required to make a full and frank disclosure of his/her assets, liabilities, income and expenses. It is of such importance that it is made under oath. It states as a preamble the following:

“TO THE JUDGE:

- A SUMMARY OF ASSETS AND LIABILITIES APPEARS ON PAGE 19
- A SUMMARY OF INCOME APPEARS ON PAGE 19
- A SUMMARY OF MONTHLY EXPENDITURE APPEARS ON PAGES 20 TO 23

Party making financial disclosure: M[....]1 M[....]2

- Please fill in this form fully and accurately. Where any box is not applicable, write “N/A”.
- You have a duty to the court to give full, frank and clear disclosure of all your financial and other relevant circumstances.
- A failure to give full and accurate disclosure may result in an adverse court order.

If you are found to have been deliberately untruthful, criminal proceedings may be brought against you for perjury and/or fraud.

- The information given in this form must be confirmed under oath or affirmation. Proceedings for contempt of court may be brought against a person who makes or causes to be made, a false statement in a document verified under oath or affirmation.
- When the form is delivered to other parties to the application or action, it must be accompanied by all supporting documents mentioned in the body of the form and any other you wish to attach. NO supporting documents must be filed in court.
- If there is not enough room on the form for any particular piece of information, you may continue on an attached sheet of paper.”

[23] As cross-examination clearly revealed, the plaintiff failed to make a “full, frank and clear disclosure” of all her financial and other relevant circumstances: she failed to frankly disclose her income and she failed to disclose all of her assets[15] and/or their values[16].

[24] Mrs Fabricius’ objection that it was only incumbent upon plaintiff to disclose insurance policies that have a surrender value is clearly incorrect as paragraph 2.5 of the FDF states:

“Details of all life insurance and endowment policies that you had or have in interest in. Include details of those that do not have a surrender value.”

[25] The plaintiff also over-inflated her liabilities.

[26] Insofar as the FDF requires plaintiff to give details of earned income from her employment, this was also left blank and it took a subpoena duces tecum before the extent of plaintiff's income was revealed to defendant: she earns a gross salary of R14 430 + an ad hoc travelling allowance of R1 600 = R16 030. Her deductions are R3 030 leaving a nett salary of R13 000. Her bank statements reveal that this amount is paid to her monthly and that she receives several smaller payments in a month which average out at ± R1 000 extra per month.

FINANCIAL CONTRIBUTIONS

[27] According to defendant, parties only lived together after their civil marriage – prior to that he would visit plaintiff at her flat. The plaintiff version is that they resided together from 2012.

[28] The thrust of defendant's evidence was that he received R2 000 per month in cash from the plaintiff's employer which he gave to her and he provided her with access to his ABSA bank account and credit card. In cross-examination it was put to defendant that whilst plaintiff admitted receipt of R2 000 per month she would use

that to pay defendant's accounts, she would deny that she had access to the defendant's bank account and credit card, and that she paid the household expenses including the groceries and water and lights.

[29] But that was in fact not quite plaintiff's evidence – she stated that:

29.1 the R2 000 was used to pay the defendant's account such as Woolworths, Markhams and Truworths and that she would then use these accounts to make purchases;

29.2 that defendant gave her access to his ABSA bank account but usually there was only ± R300 available and she'd use that to buy food eg Nando's;

29.3 that sometimes the defendant would pay the water and light's account.

[30] Thus the impression given in cross-examination that the defendant made no contribution to the parties' living expenses, was not borne out by plaintiff's own evidence.

[31] It was also not disputed that whilst they lived together, the plaintiff was a beneficiary on the defendant's medical aid and he paid the monthly contribution and expenses.

EVALUATION OF THE WITNESSES

[32] Although the defendant evidence was not without its issues, I cannot find that he was an unreliable witness. Whilst he became slightly obstinate during cross-examination on the issue of how he found out about plaintiff's illness[17] and whether or not the lobolo amount had been agreed,[18] he remained steadfast in his evidence on all the other aspects.

- [33] I cannot however say the same for the plaintiff – she was not a reliable witness. She failed to fully and honestly disclose her financial position to the court, her version about the customary marriage fluctuated[19] and her version fluctuated as regards defendants contribution to their living expenses. Her version cannot thus be accepted.
- [34] It was argued by Ms Fabricius with reference to *Tsambo v Sengadi*[20] that it is not necessary for all the elements of a customary marriage to be finalised before the court may conclude that a valid marriage is in existence eg the lobolo price does not need to be paid in full, and where the parties are already living together, the handing over of the bride is simply symbolic of the bride leaving her family for defendant's home.
- [35] Whilst this is so, it is glaring that in *Tsambo* a) the two families met at the respondent's family home, b) a lobola agreement was concluded, reduced to writing and signed,
- c) the parties changed into their wedding attire and a celebration took place – none of this occurred here.
- [36] Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 provides:
- “3. (1) For a customary marriage entered into after the commencement of this Act to be valid-*
- (a) the prospective spouses
- (i) must both be above the age of 18 years; and
- (ii) must both consent to be married to each other under customary law: and
- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.”
- [37] During trial the plaintiff provided no evidence that the customary edits regarding marriages as testified by defendant were not those stated by him. And in my view, whilst it is so that part-payment of lobola does not per se prove that no customary union was entered into, at the very least there must be substantial compliance with the customary laws regulating the conclusion of a customary union. Had plaintiff proven that in fact, there was a lobola agreement which had been reduced to writing and signed, or that the list of gifts had in fact been reduced to writing and signed, this would have gone a long way to prove her allegations - but she called no further witnesses and produced no documentary evidence.
- [38] A valid customary union would simply be demonstrative of the fact that, according to plaintiff, the parties' relationship endured 2 years and 11 months (according to plaintiff) and not solely the 11 months of the civil marriage. It is thus one of the elements a court would consider in weighing up whether forfeiture should be granted[21], but in this the plaintiff was unsuccessful. In my view, their marriage was concluded on 20 January 2016 and their cohabitation ended in November 2016.

- [39] The plaintiff argues that that aside, given that a marriage only terminates on death or divorce, the marriage has not terminated until this court grants the decree and therefore the marriage has lasted 6½ years. But this argument, whilst factually correct, loses sight of the fact that it is common cause that the marriage relationship terminated in November 2016 and since then the parties have had no contact with each other, they have made no contribution towards each other's maintenance and on the facts, the defendant is the only one who has contributed to the growth of the joint estate. These are all factors which I have taken into accounting granting the order in paragraph 46 below.
- [40] Whilst I was not impressed with plaintiff's evidence, I cannot on defendant's evidence find that her conduct alone led to the breakdown of the marriage. It appears from the concessions made by defendant during cross-examination that he and plaintiff found out about plaintiff medical condition during their civil marriage – on his own version that was during July/August 2016. It appears that this was the beginning of the end for their marriage and according to him, the final straw was when plaintiff sent her daughter to tell him he was “no longer wanted at the flat”. Thus I am of the view that it was both parties conduct that led to the end of the marriage relationship.
- [41] The fact that a marriage is short-lived is not solely dispositive of whether forfeiture should be granted and for as many cases as such an order was granted so are there others where one was not:
- 41.1 in *KT v MR*[22] a partial forfeiture of benefits was ordered in a short-lived marriage of 3 years;
- 41.2 in *V v V*[23] the parties lived together for 2 years prior to their short-lived marriage. The court granted a partial forfeiture but only in circumstances where the plaintiff indicated his willingness to forfeit his right to share in the plaintiff's pension fund. The court found that, on its own, a short marriage does not constitute a reason to grant forfeiture and that the fact that plaintiff had not contributed to defendant pension fund did not mean that he was unduly benefited;
- 41.3 in *M v M*[24] the court granted a complete forfeiture order after a short-lived marriage of 9½ months where it was found that the fact that the defendant had deliberately hidden her HIV positive status from plaintiff (despite his enquiries) constituted substantial misconduct.
- [42] Thus, there is no hard-and-fast rule to be applied. The considerations that a court takes into account are fact driven and each case must be evaluated on its own facts. It is also important to note that considerations of equity play no role in the determination of whether or not forfeiture should be granted.

- [43] It goes without saying that the defendant's pension interest is an asset in the joint estate in which the plaintiff is entitled to share solely by virtue of the marriage and without making any contributions to the joint estate since the parties' relationship ended in November 2016. Given this I find on a balance of probabilities, that were a forfeiture order not made the plaintiff will be unduly benefitted. However, given that the defendant has tendered a portion of his pension interest to plaintiff, that order will be granted.
- [44] Other than this, it is not appropriate for a court to get involved in the manner in which the joint estate is divided. The defendant has made a tender on record and has not withdrawn it.
- [45] I am of the view that given that plaintiff caused unnecessary preparation to be done in regard of her maintenance claim which was withdrawn at the doors of the court, her unsatisfactory evidence, her lack of candour in completing her FDF, her failure to prove the customary marriage and the defendant's success in proving his forfeiture claim, plaintiff should pay the costs of suit.

THE ORDER

[46] The order I thus make is the following:

1. A decree of divorce is granted.
2. The defendant is ordered to pay the plaintiff 50% of the value of the increase in his pension benefit in his SALA Pension Fund with Policy Number [...] calculated as follows:

Value as at 20 January 2016 : R1 467 528-55

Value as at 30 November 2016 : R1 674 258-06

Total R 206 729-51

50% R 103 364-75

3. The amount of R103 364-75 is payable to the plaintiff when such pension benefit accrues to the defendant.
4. The SALA Pension Fund shall make an annotation in its records that this portion of defendant's pension interest in regard to his SALA Pension Fund with Policy Number [...], is so payable to the plaintiff.
5. Other than the orders set out in paragraphs 2, 3 and 4 supra, an order is granted for the division of the joint estate.
6. The plaintiff shall pay the defendant's costs of suit.

NEUKIRCHER J

JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 September 2022.

Appearances:

For the plaintiff

: Adv M Fabricius

Instructed by

: Shapiro & Ledwaba Inc

For the defendant

: Adv G Kyriazis

Instructed by

: F van Wyk Incorporated

Date of hearing

: 16 to 17 August 2022

[1] Section (2)(a) of the Divorce Act 70 of 1979 (the Act)

[2] KT v MR 2017 (1) SA 97 (GP)

[3] 1993

(4) SA 720 (A)

[4] The exact extent of the plaintiff's diagnosis is not disclosed in this judgment although it is stated in the papers. Suffice to say that it is serious

[5] No market or updated value was provided

[6] No value of the improvements was provided

[7] No updated or trade-in value was provided

[8] No trade-in value was provided

[9] As no details of these policies were provided, their values were also not disclosed by plaintiff

[10] This on the basis that his substantial misconduct would disentitle him to forfeiture

[11] Both parties' parents were deceased at that time

[12] Which would not have been proper had they not been married

- [13] According to him plaintiff was hospitalized on more than one occasion
- [14] Which was not pleaded
- [15] Her insurance policies
- [16] The value of the Arcadia flat and her insurance policies
- [17] ie whether he read it in plaintiff's medical records at hospital or whether Dr van Zyl told him
- [18] As opposed to him simply being informed of what the amount was
- [19] Who was present for each family and the issue as to the list of gifts which suddenly materialized in her evidence in chief and her version was never put to defendant during his cross-examination
- [20] (244/19)
- [2020] ZASCA 46 (20/4/2020)
- [21] Section 9(1) of the Act relating specifically to the duration of the marriage
- [22] 2017 (1) SA 97 (GP)
- [23] 3389/2017 [2020] ZAGPPHC 154 (4/3/2020)
- [24] (12436/15) [2017] ZAGPPHC 1109 (1/12/2017)

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