

SOUTH AFRICA / JUDGMENT

P.I.L v P.E.L (5345/2017) [2020] ZAFSHC 44 (27 February 2020)

[2020] ZAFSHC 44

COURT

Free State High Court, Bloemfontein

BEFORE

Chesiwe

CASE / FILE NUMBER

5345/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case number: 5345/2017
In

the matter between: P[...]
I[....]
L[....]
Plaintiff
and
P[...]
E[....] L[....]
Defendant

CORAM: CHESIWE, J
HEARD

ON: 15, 16 & 18 OCTOBER
2019

JUDGMENT

BY: CHESIWE, J

DELIVERED ON: 27 FEBRUARY 2020

- [1] This is a divorce action instituted by the plaintiff, Mrs P[....] I[....] L[....] and the defendant is Mr P[....] E[....] L[....]. The parties were married to each other in community of property on 9 September 1994. Three children were born of the marriage. Two children are majors and one child, P[....] L[....] is still a minor, born 4 June 2004.
- [2] The plaintiff in the particulars of claim stated that the marriage was irretrievably broken down due to the defendant's conduct in committing adultery; and that the parties had personal differences; further that the parties argued frequently and there was no longer love and respect between the parties.
- [3] The plaintiff claimed for a decree of divorce; maintenance for the minor child in the amount of R10 000.00 per month; maintenance for herself in the amount of R20 000.00 per month and division of the joint estate.
- [4] The defendant filed a counter-claim and denied the allegations that he was involved in any extra-marital affair. The defendant in turn mentioned that the plaintiff was involved in an extra-marital affair. The defendant further claimed that an order be made for the forfeiture of benefits arising from the marriage in community of property on the grounds that the plaintiff has not contributed

towards the accumulation of the estate, including the immovable and movable property, as well as the Government Employees Pension Fund (GEPF).

- [5] The divorce proceedings between the parties was so acrimonious that the parties had several interlocutory applications in which the court granted various orders dated as follows: 27 March 2018 – interim court order; 23 February 2018 - Rule 43 Application and it was postponed to 21 June 2018; 3 May 2018 - rule nisi of 27 March was confirmed; 21 June 2018 – Rule 43 granted and 23 August 2018 – joint application against the Government Pension Fund (GEPF).

- [6] On the day the trial had to commence, several issues between the parties were still in contention. However, halfway through the trial the parties were able to settle some of the issues. Based on the draft order and the stated case, a partial order was granted on the issues that were no longer in contention, except for the two remaining issues in dispute between the parties.
- [7] The first issue outstanding for determination by the court is the maintenance of R5000 for the minor child, as the defendant only

offered R2500 per month. The second issue is whether the plaintiff is entitled to share in the pension interests of the defendant. In the alternative, the defendant claimed that the plaintiff be awarded only a portion of the pension benefits.

[8] Both parties testified and neither of them called any witness.

[9] In summary, the plaintiff's evidence is as follows: She has been married to the defendant in terms of the in community of property regime since 9 September 1994. Three children were born of the marriage and one of the children is still a minor. During the subsistence of the marriage she had work sporadically at different companies where she had earned various salaries ranging

between R2500 to R4500. She contributed in the maintenance of the household and the expenses of the household. She assisted in taking care of the children, as well as the defendant. She had to pay one of the children's university fees when it was in arrears. She had to use the money she got when she resigned at Lesotho Milling. The plaintiff denied the allegations that she had an extra-marital affair. The plaintiff explained that the person mentioned as her boyfriend was only a friend that she confided in when her marriage was in trouble. The Plaintiff mentioned that she contributed to the growth of the joint estate and is therefore entitled to a share.

[10] Under-cross examination the plaintiff confirmed that she paid the minor child's expenses from the money she received from the defendant. The plaintiff further mentioned that the money she received from her previous employment, as well as from the employment at Lesotho Milling, was all used for household expenses.

[11] In summary, the defendant's evidence is as follows: The defendant testified that since the inception of the marriage, he solely amassed the joint estate, including their immovable and movable property. The defendant mentioned that when the parties got married, he was already in the South African Police Service (SAPS) employ for a period of 15 years. The plaintiff said it would be fair that the plaintiff should not be awarded a share from his pensions of the 15 years prior to their marriage. He explained that he was not aware that he should have signed an ante-nuptial contract to protect the pension benefits. The defendant said since the duration of their marriage, he did not know what the plaintiff has done with the income she obtained from her various jobs. The defendant indicated that he usually would take out a loan from Old Mutual for the minor child in order to pay fees for the whole year. He testified that the parties had a domestic worker who took care of the general maintenance of the house. The defendant mentioned that he became aware of the plaintiff's extra-marital affair, when he found a letter written to this person by the plaintiff. He confronted the plaintiff about this extra-marital affair, but the plaintiff denied that such an affair ever existed. The defendant, however conceded that the plaintiff was a good mother to their children and a good wife during the duration of the marriage.

SUBMISSIONS

- [12] Counsel on behalf of the plaintiff submitted that the defendant still enjoyed the income of a monthly pension benefit, whereas the plaintiff has no income at all. He disputed that the defendant cannot tell the court that he is unable to afford to pay the R5000 maintenance towards the minor child. With regard to the forfeiture of benefit, Counsel submitted that the parties are married in community of property, by virtue of their marriage, the parties shared an equal joint estate. Counsel submitted that the defendant should have signed an ante-nuptial contract in order to protect the 15 years' service of his pension benefit. He said can the defendant argue for a partial forfeiture, as the amount of R991 000.00 has already being forfeited by the plaintiff. Counsel submitted that the plaintiff is entitled to 50% of the full pension interest which is half of the R4million.
- [13] Counsel on behalf of the defendant submitted that the maintenance amount that the plaintiff seeks on behalf of the minor child is exorbitant as the defendant is already paying for all the financial needs and extra-mural activities of the minor child. Counsel disputed that the plaintiff contributed towards the growth of the joint estate as the plaintiff spent all the money she had on herself. Counsel submitted that the defendant solely amassed the joint estate and therefore the plaintiff is not entitled to a share in the pension of the defendant, specifically the pensions of the 15 years prior to the marriage.

Maintenance of the Minor Child

- [14] Section 15(2) of the Maintenance Act 99 of 1998 provides that:

"The duty extends to such support as a child reasonably requires for his her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education."

- [15] Section 15(3) of the Act further provides that:

"(a) Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration:

- i. That the duty of supporting a child is an obligation which the parents have incurred jointly;
 - ii. That the parents' respective shares of such obligation are apportioned between them accordingly to their respective means; and
 - iii. That duty exists irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.
- (b) Any amount so determined shall be such an amount as the maintenance court may consider fair in all the circumstances of the case."

- [16] The legal principle applicable to maintenance of a minor child was stated in *Kroon v Kroon*, [1] where the court said:

“The parties are no doubt aware that in most cases persons who have become divorced will be compelled by necessity to reduce their standard of living, for when the available means of support are not adequate to maintain both according to their former scale of living, each must out of necessity scale down his or her budget. The fact of the matter is that two living together can live more cheaply than two living apart, for obvious reasons such as the need for two residence plus rates, maintenance, service charges, and all the rest of it, two cars plus the concomitant expenses; Two lots of household goods to buy and maintain; and so forth. The problem of “indivisible expenses” is a real one...”[2]

[17] Section 18(2) of the Children’s Act 38 of 2005 provides that: “The parental responsibilities and rights of the minor child, include the responsibilities and the right –

- (a) to care for the child;
- (b) to maintain contact with the child;
- (c) to act as guardians of the child, and
- (d) to contribute to the maintenance of the child.”

[18] The basic principles of child maintenance are the extent of the obligation based on the standard of living, income of the parents and the means of the parents. Such an obligation does not solely rest on the father, but on both parents according to their means. It does not mean if the one parent can adequately support, the other parent can avoid to contribute in the minor child’s maintenance.

[19] The plaintiff is currently unemployed with no income. The defendant is technically also unemployed, though the defendant receives a monthly income from his retirement. The plaintiff testified that she had various jobs, though the salary was minimal

she was employed at one stage or another. This means the plaintiff is able to secure employment in order to contribute towards

the minor child’s maintenance. The plaintiff indicated that whatever income she had, she contributed towards the child’s

maintenance. It therefore indicates that if she does find employment she will continue to contribute towards the minor child’s

maintenance.

[20] The defendant testified that he will still pay the child’s school fees, extra mural activities and that the child shall remain on his medical aid as a dependent. It would be unfair to burden the defendant with financial obligations of the minor child as stated already that maintenance is an obligation of both parents depending on their means. The defendant by contributing towards the child’ school fees, extra-mural activity and medical aid cannot be burdened with another huge amount of maintenance. Maintenance is and still remains an obligation on both parents. In addition to what the defendant is already paying, the defendant offered to pay R2500 maintenance towards the minor child.

- [21] Indeed it is such that both parties cannot expect to have the same standard of living now that the parties are in the process of divorce. Surely the standard of living will drop for both parties, including the standard of living of the minor child. The plaintiff does mention that when she was unemployed, she paid the expenses of the minor child with the money she received from the defendant. The plaintiff testified that she could not stay for long periods in her jobs, as the defendant accused her of having extra-marital affairs at work. Now that the parties are divorcing, the plaintiff will be able to find employment without the fear of being accused of extra-marital affairs. And that means she will be able to contribute towards the minor child's maintenance.
- [22] Any maintenance amount granted by the court should be fair and just for both parties, as it has to be within their means. It is trite that the court making a maintenance order, such an order should be just and fair.
- [23] I am of the view that the defendant is already responsible for a huge part of the minor child's maintenance. It is therefore only fair that the defendant contributes the amount he offered of R2500. The defendant should continue to contribute towards the expenses as set out in the draft order paragraph 4.2, 4.3, 4.4.

Forfeiture of Assets

- [24] Section 9(1) of the Divorce Act 70 of 1979 provides as follows:

"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, 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."

- [25] Section 9(1) specifically, deals with the following concept; the duration of the marriage, the circumstances which gave rise to the breakdown of the marriage and any substantial misconduct on the part of either party or by both spouses. It is common cause that the parties were married for 25 years and three children were born of this marriage, whereby one child is still a minor.
- [26] The parties testified and alleged against each other that they both were involved in extra marital affairs, an allegation that was denied by both in their evidence. The allegations of the extra marital affairs between the parties would be based on the old forfeiture rule in terms of common law that the person who caused the marriage to be irretrievably broken down cannot share or benefit in the joint estate. In *Swart v Swart*[3] the court held that adultery and desertion might in certain instances merely be the symptoms and not the causes of a marriage breakdown and that the conduct of the parties cannot be considered to be blameworthy.

- [27] In the matter of MC v JC,[4] the court ordered a partial forfeiture based on the wife's adultery which the court deemed as substantial misconduct. On appeal the court held that section 9 (1) infringed on the right to equality because it placed the party who committed substantial misconduct in an unfavourable position when it comes to the distribution of the patrimonial benefits of the marriage. The court further pointed out that many may feel forced to remain in an unhappy marriage for fear of losing any patrimonial benefits that accrued during the duration of the marriage.
- [28] In JW v SW,[5] the court found that substantial misconduct does not necessarily justify a forfeiture order. In the matter of Engelbrecht v Engelbrecht,[6] where the court held that it could never have been the intention of the legislature that a wife who had been married for 20 years assisted her husband faithfully should, because of adultery, forfeit the benefits of the marriage in community of property. The court in Engelbrecht was of the view that from the point of departure the parties be held to their ante-nuptial agreement. In the current matter the parties were married for 25 years without any ante-nuptial agreement. It would be expected that the defendant, not being a lay man, as when he entered into marriage with the plaintiff, he was in the police force for 15 years. The defendant had an option to enter into an ante-nuptial agreement to protect any interests he had before the marriage. Generally, human beings not being perfect, do contribute in their different forms or behaviour to the breakdown of the marriage. It therefore still remains a duty of each party that when he/she enters into any marriage regime, protect their interest by entering into an ante-nuptial agreement.
- [29] In Wijker v Wijker, [7] the court said the following:

“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 as 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.”[8]

- [30] As early as in the 1940's in the Gates v Gates[9] matter, the court expressed the opinion that the wife's domestic contributions should be taken into account in the

determination

of the respective contributions to the joint estate, by virtue of the fact that these are cost-saving exercises for the benefit of the earning spouse.

- [31] The court in *Bezuidenhout v Bezuidenhout*,^[10] emphasised that the traditional role of a housewife, mother and homemaker should not be under-valued because it is not measurable in terms of money. The plaintiff testified that she entered into the marriage with the best intentions. She had obtained employment in different companies, although sporadic. When she resigned at Lesotho Milling, she used her pension benefit to pay the outstanding fees of one of the children who was at Potchefstroom University. The plaintiff for obvious reasons was unable to build a huge pension benefit compared to that of the defendant. The money she earned she spent in the marital home. The inferences drawn are that had the plaintiff been employed in a stable work environment, she surely would have had a reasonable pension fund to sustain herself. However, she continued to support and assist the defendant. She continued to take care of the children. She cannot be denied to share in the pension of the defendant. As stated in *Bezuidenhout supra*, the role of a housewife and mother cannot be measurable in terms of money.
- [32] The defendant on the other hand had a stable job. He was in the SAPS before the marriage and stayed in this employment throughout the duration of the marriage. Unlike the plaintiff, she had to skip from job to job as she testified that at one security company, she had to resign due to the defendant's allegations that she had extra-marital affairs at work. The plaintiff for the sake of the marriage resigned in order to avoid conflict in the marriage.
- [33] In spite of the few jobs she had, the plaintiff made her contribution towards the joint estate. If the defendant wished to protect his interests before the marriage and during the marriage, an anti-nuptial agreement would have resolved the unnecessary conflict of dividing the joint estate. However, that position cannot be reversed now as the parties have been married for a long period including the mentioned 15 years of the defendant's contribution towards his pension, which became part of the joint estate. The court has to apply and uphold the law with regard to the party's' marriage regime. Therefore the fact that the parties are married in community of property cannot be ignored, and has to be taken into consideration.
- [34] The plaintiff indeed was a homemaker, a mother, a wife, took care of the children and the defendant. The defendant also in his testimony confirmed that the plaintiff is a good mother and was a good wife. Indeed, it could never have been the legislature's intention that a wife who assisted and contributed in her marriage faithfully, diligently and with good intentions, and has been in the marriage for 25 years, should forfeit any benefits of a joint estate, whether partially or wholly. Section 9 of the Divorce Act does not deal or provide for principles of fairness or penal sanction for a party's misconduct. A plaintiff or defendant cannot forfeit what he or she has contributed towards the marriage as a consequence of misconduct. The court must uphold and apply the law and not make moral or emotional judgments. Considering the role that women play as housewives and homemakers, Section 9 (1)^[11] is clearly aimed at creating some equality for women and not necessarily to recreate the "no-fault" system of divorce.

[35] In *Wijker v Wijker*,^[12] the court in respect of forfeiture stated the following:

“It is obvious from the wording of section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefitted. 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 benefitted 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.”^[13]

[36] In *Botha v Botha*,^[14] Van Heerden JA held that:

“the trial court may therefore not have regard to any other factors other than those listed in section 9 (1) in determining whether or not the spouse against whom the forfeiture order is claimed will, in relation to the other spouse, be unduly benefitted if such an order is not made.”^[15]

[37] It is trite that were parties are married in community of property the pension interests of the spouses will form part of the parties' joint estate and the non-member spouse will be entitled to claim 50% of the pension interest of the member. Having considered the parties' marriage regime, the plaintiff is entitled to share in the pension interest of the defendant and entitled to claim 50% of the R4 million that is currently the remaining interests.

[38] The defendant has already received an amount of R991 000.00, which amount the plaintiff has forfeited. The plaintiff is therefore left with a claim against the remaining R4 million. In my view the plaintiff has already had a partial forfeiture on the R991 000,00.

[39] Furthermore there is no sufficient evidence to declare forfeiture of benefits in terms of section 9 of the Divorce Act, whether it be partially or wholly. As stated above in paragraph [37] the plaintiff has voluntarily forfeited the amount of R991 000.00. It cannot be fair and just that the plaintiff forfeits more of the pension interest.

Costs

[40] Section 10 of the Divorce Act provides that:

“In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such an order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.”

[41] The parties are currently both unemployed, although the defendant is receiving a monthly pension income. The immovable property will be sold and the proceeds will be shared equally. The movable assets are shared equally, as well as the pension interest. Therefore the sharing of all the assets puts the plaintiff on an equal financial position as that of the defendant.

- [42] In exercising my discretion in respect of the costs issue between the parties, I considered ordering that the costs be apportioned between the parties and that some applications, each party shall pay his or her own costs, having regard to the nature of the dispute rather than ordering that costs follow the event. Therefore, the costs for the Rule 43 application shall be paid by the defendant. The costs of the Rule 43 (6) shall be paid by the defendant. The joint application and the divorce action, each party shall pay their own costs.
- [43] A draft order was handed up marked “X”, and parts of the draft order was made an order of court except the part of maintenance of the minor child and the forfeiture of benefits. The said draft order is still part of my judgement, excluding the amendments relating to costs.
- [44] Consequently I make the following order:
1. The defendant shall pay maintenance to the plaintiff in respect of the minor child at the amount of R2500.00 per month, the first payment within seven (7) days of the date of divorce and thereafter on or before the 7th day of each and every consecutive month.
 2. The plaintiff to receive 50% of the defendant’s total pension interest in the Fund, as defined in the Divorce Act 70 of 1979 (Divorce Act) as calculated at the date of the decree of divorce as contemplated in section 7 (7) and 7(8) of the Divorce Act.
- [1] Kroon v Kroon 1986
- (4) SA 616 (E)
- [2] Ibid at 637B-D
- [3] Swart v Swart 1980
- (4) SA 364 (O)
- [4] MC v JC 2016
- (2) SA 227 (GP).
- [5] JW v SW 2011 (1) SA 545 (GNP)
- [6] Engelbrecht v Engelbrecht 1989 (1) SA 597 (K)
- [7] Wijker v Wijker 1993 (4) SA 720 (A).
- [8] Ibid at 727D-F
- [9] Gates v Gates 1940 NPD 361 at 365 – 366.
- [10] Bezuidenhout v Bezuidenhout 2005
- (2) SA 187 SCA.

[11] Cases influential in the development of Section 9(1) *Singh v Singh* 1983 (1) SA 781 (C), *Engelbrecht v Engelbrech* 1989 (1) SA 587 (C), *Wijker v Wijker* 1993 (4) SA 720 (A), *Binda v Binda* 1993 (2) SA 123 (W).

[12] *Wijker v Wijker* 1993

(4) SA 720 (A)

[13] *Ibid* at 727D – F.

[14] *Botha v Botha* (393/04)

[2006] ZASCA 6; 2006 (4) SA 144 (SCA); [2006] 2 All SA 221 (SCA) (9 March 2006)

[15] *Ibid* at 147B

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