

SOUTH AFRICA / JUDGMENT

S.R (born R) v N.R (CA133/2019) [2020] ZAECGHC 36 (4 May 2020)

[2020] ZAECGHC 36**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Dawood, Ntsepe

CASE / FILE NUMBER

CA133/2019

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA (EASTERN CAPE DIVISION, GRAHAMSTOWN)****CASE****NO.: CA133/2019****In**

the matter between:

S[...]
R[...] (born
R[...]) Appellant
and
N[...]
R[....] Respondent

JUDGMENT

NTSEPE AJ (Quorum: DAWOOD J, NTSEPE AJ)

1. This is an appeal against the Judgment of Magistrate V Reddy, dated 01 November 2018 wherein she made the following Order:

"1 That the bonds of marriage subsisting between the PLAINTIFF and the DEFENDANT be and are hereby dissolved.

2 Forfeiture of the benefits of the marriage in community of property which includes:

3 The defendant's pension fund held at Old Mutual Super Fund underwritten by Old Mutual by reason of the defendant's employment with Tenneco Riot Control SA (Pty) Ltd.

4 The application for rehabilitative maintenance in favour of the plaintiff is dismissed.

5 Each party to pay their own costs." (sic)

2. The grounds upon which this appeal is prosecuted are that the Magistrate erred as follows:

2.1 in making an Order that "the plaintiff forfeits the benefits in community of property, which includes the defendant's pension fund ";

2.2 "in accepting the evidence of Mrs Azel, to the effect that plaintiff made a report to her ... that she ... had adulterous affairs "

2.3 in failing to reject the defendant's version, "in light of his contradictory evidence" and in not "approaching the respective version of defendant and the plaintiff as mutually destructive versions and treat such evidence in accordance with accepted legal principals pertaining to mutually destructive versions"; and

2.4 "in not making an order for the division of the joint estate and that plaintiff is entitled to 50% of the defendant's pension interest".

3. It is common cause between the parties that the marriage has irretrievably broken down and that there are no prospects of restoring a normal marriage relationship. However, the parties are not in agreement as to the specific circumstances which led to the breakdown of the marriage.

4. The appellant cites the reasons for the irretrievable breakdown of the marriage at paragraph 5.1.1 to 5.1.2 of the Particulars of Claim as follows:

"5.1.1 The plaintiff and the defendant cannot meaningfully communicate, and

5.1.2 the defendant has left the marital home and has moved in with his ex-wife and plaintiff finds it irreconcilable with a continued marriage relationship."

5. The defendant admits that there is no meaningful communication between the parties, however, he further pleaded the following circumstances as grounds for the irretrievable breakdown of the marriage:

"5.2 There is no more love and affection between the parties;

5.3 The plaintiff stole numerous sums of the defendant's cash from the marital home.

5.4 The plaintiff financially supports a young man living in India, with the defendant's money.

5.5 The Plaintiff financially supports her adult son with the defendant's money.

5.6 The plaintiff has engaged in an affair with 'Adrian '.

5.7 After the defendant was notified of the plaintiff's affair, the plaintiff attempted suicide and was booked into Hunter's Craig Hospital."

6. The aforestated 'grounds for the irretrievable breakdown of the marriage' were encapsulated in the respondent's counterclaim for the forfeiture of the benefits of the marriage in community of property by the appellant, in particular "the defendant's pension fund held at Old Mutual Super Fund underwritten by Old Mutual by reasons of the defendant's employment with Tenneco Riot Control SA (Pty) Ltd."
7. Before this Court, Counsel for the respondent submitted that the respondent only seeks or sought forfeiture in respect of his pension interest and that the Magistrate's order was too wide in that it divested the appellant of her half share of the entire joint estate. In those circumstances, the only remaining issue for determination before this Court is forfeiture in relation to the defendant's pension interest.
8. Subsequent to the hearing of the evidence in the action for divorce before the Court *aquo* and the application for forfeiture, the appellant made application for rehabilitative maintenance which application was successfully opposed by the respondent. The dismissal of the appellant's application for rehabilitative maintenance is not challenged before this Court.

The Law:

9. This Court's approach when considering the question of forfeiture of marital benefits was stated by the Supreme Court of Appeal in *Wijker v*

Wijker 1993 SA 720 (A) at 727 D-F as follows:

"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 benefitted. That will be a purely factual issue. Once that has been established the trial court must determine, having regard to the facts mentioned in the section, whether or not a 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."

10. The three factors referred to in the above dictum are contained in section 9
- (1) of the Divorce Act 70 of 1979 (the Divorce Act), which provides as follows:
 - (2)

(J) When a decree of divorce is granted on the ground of the 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 breakdown 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 other party will in relation to the other be unduly benefitted."

11. The value judgment is therefore strictly governed by (a) the duration of the marriage; (b) the circumstances which gave rise to the breakdown of the marriage; and (c) any substantial misconduct on the part of either of the parties.
12. It is trite law that the section 9 (1) triad of factors are not intended or required to be considered cumulatively. (See Wijker *supra*).

Discussion and evaluation:

13. The judgment of the Court *aqua* sets out the factual background of this matter and the evidence extensively, it is therefore not necessary to repeat same herein. What stands to be decided is whether the Magistrate erred in making an order encapsulating the order that the appellant forfeits 50% of the respondent's pension interest. This of course will be determined in the context of the appellant's grounds of appeal as set out at paragraphs 2.2 and 2.3 above. It is worth noting that the issues raised by the appellant in his grounds of appeal set out in paragraphs 2.1 and 2.4 above have been correctly conceded on behalf of the respondent.
14. In making the order for the forfeiture of benefits, the Magistrate stated the following:

" .. .from. the above facts and the conduct of the plaintiff, during the marriage, the court is satisfied that the defendant has discharged the onus that the plaintiff will be unduly benefitted if the court does not grant the forfeiture order sought by the defendant" (sic) (own emphasis)
15. The "above facts" referred to by the Magistrate in the above extract from the judgment are the duration of the marriage and the circumstances leading to the irretrievable break-down of the marriage. The Magistrate evaluated the evidence and made significant credibility findings against the appellant, referring to the appellant as "untruthful" and rejected her version on the extramarital affairs as improbable. The appellant contends that the Magistrate erred in accepting Ms Azel 's evidence on the affairs and failed to treat the versions of the parties as mutually destructive. Contrary to these submissions, the Magistrate's judgment illustrates that the parties' versions on the appellant's affairs and otherwise were correctly considered, evaluated, and ultimately rejected as false and improbable.
16. Although the Magistrate erred in finding that the appellant made no contribution to the joint estate such finding alone is not a

misdirection warranting this court's interference with the order forfeiting the appellant's claim to 50 % of the respondent's pension

interest on the factual background and the circumstances of this case.

17. Importantly, the evidence demonstrates that the appellant would be unduly benefited, in relation to the respondent, if an order for the forfeiture of the defendant's pension fund is not made.
18. The parties were married for seventeen years (17) however they only lived as man and wife for the first 6 years of the marriage. No kids were born of the marriage. The appellant had three minor children which she raised with the respondent. It is common cause that the respondent left the marital home following an argument relating to the respondent's sister's visit to their

home. The appellant alleged that the respondent left the marital home, whereas the respondent contends that he was kicked out of

the marital home. In the appellant's heads of arguments before this Court it is submitted that "The consortium between the parties ended when the Appellant asked the Respondent to leave the home.." It is therefore common cause that the respondent did not voluntarily leave the marital home but left at the appellant's instance. Apparently, the argument leading to the appellant asking the respondent to leave the marital home was the immediate cause of the separation of the parties however; the irretrievable breakdown was occasioned by various factors referred to below.

19. The first issue being the adulterous affairs that the appellant was involved in. It was correctly accepted by the Court aquo that the appellant was involved in adulterous relationships with one P[...] A[...] F[...], who is referred to as "P[...]" in the judgment of the Court aquo and D[...].
20. The respondent's evidence that he was phoned by the said P[...]/A[...] is not contested. In fact, the respondent's evidence relating to P[...]'s call fits hand in glove with A[...] and N[...]'s evidence that P[...] had threatened to call the respondent and tell him that he was having an affair with his wife. The respondent further confronted the appellant about the call in the presence of A[...], which is common cause.
21. The Court aqua correctly relied on A[...]'s evidence whose evidence was consistent with all the objective facts contrary to the appellant, who was correctly found to be untruthful. The appellant lied about the lump sum payments that she received from the respondent, initially denying the payments, and later, under cross examination admitting same in contradiction of her version as put to the respondent and the witnesses called on the respondent's behalf. She abused the respondent's hard-earned financial contributions to the joint estate and downplayed the extend of the renovations made by the respondent to the marital home.
22. Regarding her dealings with A[...] and D[...]. The appellant conveniently reports that she sought an interdict against

A[...] because he was "getting nasty". Why was he getting nasty, about what was he getting nasty, when did he start getting nasty, why did she not report this to her husband, why did she approach this "nasty" man at his residential address? These questions demonstrate that the Magistrate correctly rejected the appellant's versions as false and improbable because had the appellant, for instance, felt threatened or intimidated by a man with whom she had no relationship, she would not have requested her best friend to accompany her to the man's house or not inform her husband of such threats and request him to approach the man. In fact the probabilities favour A[...]s version that she had accompanied the appellant to A[...]s house to dissuade him from pursuing the affair further and from divulging the affair to the appellant's husband. When A[...] did not concede, they proceeded to obtain an interdict. Which brings be back to the point that the appellant's conduct is inconsistent with a threatened person but fits lland in glove with A[...]s testimony.

23. Similarly, with D [...], the appellant corroborates Ms A[...] that D[...] visited the house; she however denies that D[...] visited during the night. The appellant's version is proven to be false when one asks why Ms A[...] would, if her intention was to falsely implicate the appellant, not exaggerate the extent of D[...] and the appellant's involvement. A[...] testifies that she became aware of the affair when the appellant told her of same and she also saw D[...]s car at the appellant's house during the night, when the respondent was working nightshift. If A[...] sought to falsely implicate the appellant she would undoubtedly not settle on such scant details. Surely, she would have and could have testified that she caught them in bed together, but because her testimony was limited to that which had occurred and that which she was told by the appellant. Her version reflects the truth and was correctly accepted by the Magistrate. There is no direct evidence regarding the affairs but from the accepted facts, the

only reasonably inference that can be drawn is that she indeed had these affairs.

24. And whilst the affairs where on going, the appellant was misappropriating monies from the respondent's accounts through cash back withdrawals and gambling. The appellant initially denied that she gambles and attempted to water down her gambling by referring to it as a 'game' that she played. It is only when the trial court intervened and probed more about the 'game' that it was established

that the appellant gambled as testified to by her daughter.

25. Although the true marriage was short, the respondent's devotion to the appellant and to her children continued for the duration of the marriage which spanned over 17 years. To the contrary, the appellant attended to the household chores for the first 6 years of marriage, where after, the respondent had to work nightshift, get home and attend to chores without assistance from the appellant.

26. Much was made by the appellant's attorney, before the Court aqua, about the appellant's employment history. The attorney was emphatic that whether the appellant worked for an hour a week, she was none the less employed. I agree that any work history is a relevant consideration in matters of this nature, however there must also be evidence which establishes how that employment contributed to the joint estate. In this matter, although

the appellant persisted that she held employment and earned a salary she was unable to state how any income that she may have derived was used in the joint estate. She baldly stated that the kids were still in school at the time, seemingly implying that she may have used some of her earnings towards the kids schooling. This is irreconcilable with her evidence that the respondent has financially provided for her and her children in every way throughout the marriage. It would seem to me that whatever income the appellant derived from her jobs was not used for the joint estate or ploughed back in the joint estate. Even if the appellant had contributed her earnings to the joint estate, on the evidence before the Court aquo, the value and extent thereof was not established but were seemingly insubstantial.

27. Although the appellant made non-financial contribution to the joint estate in the first 6 years of the marriage,

the circumstances leading to the breakdown of the marriage or the duration of the marriage between the parties render the benefit to the appellant undue in relation to the respondent. The appellant's non-financial contribution includes her management of the joint business venture Wire a Tire which was run from the garage of the parties' marital home. There are scant details on when this business venture was undertaken by the parties or how many hours in a day, for instance, the appellant devoted to the business. It was however not disputed that the business generated no income. Even this "contribution" by the appellant does not tilt the scales in her favour in the absence of full particulars in relation thereto.

28. Notwithstanding the above circumstances, the appellant persisted that she was entitled to 50% of the respondent's pension interest relying on *Kristen S Moodley vs Kubeshni Moodley* (CA312/2017) [2019] ZAECDC (05 November 2019), a decision of this Court. Similarly, in the Moodley matter the husband (Mr Moodley) sought forfeiture of his pension interest against his wife (Mrs Moodley) on ground that she had committed substantial misconduct by having an adulterous relationship with another man.

29. Moodley is significantly distinguishable on the facts from the instant matter. In the instant matter, the husband was proven

to be a support base to the appellant and her children since the appellant's kids were of school going age until they reached age of majority and even after attainment of majority, the appellant's kids were supported by the respondent. In the Moodley case, Mr Moodley perpetrated acts of domestic violence against Mrs Moodley and was abusive.

30. Mr Moodley abused the finances of the joint estate by gambling. In the instant matter, the respondent has worked hard, working night shift for approximately 17 years and ploughed all his hard-earned income into the joint estate giving the appellant full access to accounts, supported all of the appellant's cause's including providing for a poor man the appellant met on social media, when the appellant wanted excessively expensive cook ware, although she was not assisting the respondent with cooking and other house chores, the respondent bought the cookware. Instead, it was the appellant who gambled with monies that she secretly withdrew from a bank account held in the respondent's name.

31. Mrs Moodley, for the duration of her approximately 26 years of marriage, contributed to the marital home extensively by working and

paying her full salary into Mr Moodley's bank account, she cooked, cleaned, ironed, bought clothing and took care of their son and his needs. In the instant matter, no children were born of the marriage but, as indicated above, the respondent none the less took care of the appellant's children even when the children reached age of majority, the respondent supported them. The respondent went as far as renting an apartment for one of the appellant's sons when the appellant kicked him out of the house. Whereas the appellant only cooked and cleaned for the first 6 years of the marriage where after the respondent attended to himself. The appellant's daughter testified that she would get home and find no food or meal prepared. Her boyfriend would have to buy her take ways. The appellant worked part time, her testimony on her income is scant and she was unable to account for any income or how that income was used in the joint estate.

32. The above factors illustrate that the facts of this matter are materially distinguishable from those in Moodley where there was wrongdoing on the part of the husband. In addition, there was also substantive contribution by the wife to the joint estate both in financial and in non-pecuniary terms.

33. Furthermore, the grounds for forfeiture in Moodley were limited to whether the adulterous affair amounted to substantial misconduct and warranted forfeiture of the marital benefits by Mrs Moodley. The Court in *lvfoodley* did not grant forfeiture of Mr Moodley's pension benefit against Mrs Moodley on the finding that the affair was not substantial misconduct having regard to the circumstances of that case.

34. In this matter, the Court aqou was not limit to the determination of substantial misconduct but correctly had regard to the duration of the marriage and the circumstances leading to the irretrievable break down of the marriage in arriving at the forfeiture order albeit too wide, it was correct in respect of the respondent's pension interestr. The judgment is silent on whether the affairs amounted to substantial misconduct or not, the Magistrate's focus was the duration of the marriage and the circumstances leading to the breakdown of the marriage and the affairs were obviously an integral part of those circumstances.

35. The Court aquo was not required to look at the section 9 triad of factors cumulatively and having regard to the duration of the marriage and the circumstances leading to the irretrievable breakdown of the marriage it correctly found that the appellant would be unduly benefited, in relation to the respondent, if an order for the forfeiture of the respondent's pension interest by the appellant is not made. The affairs and the misuse or abuse of the funds of the joint estate together with the other conduct of the appellant already alluded to herein above would in any event amount to substantial misconduct in the circumstances of this case.
36. The impugned pension interest amounts to Three Million, Four Hundred Thousand Rand (R3 400 000.00) and in the event that a forfeiture order is not made in respect of same against the appellant, the appellant will be entitled to receive One Million Seven Hundred Thousand Rand (R1 700 000.00), being 50% thereof.
37. The appellant is unemployed and was at all material times financially dependent on the respondent. An award of R 1 700 000.00 will without doubt benefit her, particularly in light of the fact that the appellant only worked part time at various times, made no meaningful financial contribution to the joint estate if at all, any non-financial contribution that she made seized some six years into the marriages and she misused the finances of the joint estate by gambling. These factors, which form part of the circumstances that lead to the irretrievable breakdown of the marriage, do not only demonstrate that the appellant would be benefited but that such benefit would be undue in relation to the respondent.
38. Although the respondent conceded before this Court that the order of the Magistrate was too wide, he nonetheless took no steps to

mitigate the costs by abandoning part of the judgment or order which went beyond what he sought. The respondent appreciated that the Magistrate's stripped the appellant of all the assets of the joint estate. The respondent ought to have immediately, upon receipt of the judgment of the Court aqua or upon the institution of these proceeding, abandoned that which he belatedly submits ought to not have been awarded by the Magistrate. In those circumstances the appellant has been partly successful. However because the issues upon which the appellant has succeeded are substantial she is entitled to the costs of the appeal.

39. In the result the following order is made:

39.1 The appeal upheld in part.

39.2 Paragraphs (1), (4) and (5) of the order made by Magistrate V Reddy in the Regional Court for the Regional Division of the Eastern Cape, Port Elizabeth on 01 November 2018 are confirmed.

39.3 Paragraph

- (2) and (3) are hereby set aside and substituted with the following:

- (3) There shall be a division of the assets of the joint estate save for the respondent's pension interest.
- (4) The appellant/plaintiff shall only forfeit the marital benefits of the marriage in community of property in and to the respondent's/ defendant's pension interest underwritten by Old Mutual by reason of the respondent's/defendant's employment with Tenneco Riot Control SA (Pty) Ltd.

39.4 The respondent is directed to pay the appellant's costs of the appeal.

39.5

N NTSEPE

Acting Judge of the High Court of South Africa

DAWOOD J: I AGREE

DAWOODJ

Judge of the High Court of South Africa

Appearances:

For Appellant: Mr De La Harpe, instructed by Swartz Attorneys c/o N N Dullabh & Co.

For Respondent: Ms L Crouse SC, instructed by Kuban Chetty Inc.

Date Heard: 15 November 2019

Judgment

Delivered: 04 May 2020

This judgment was handed down electronically by circulation to the parties' legal representatives by email and will be published and released by the Registrar if so required or necessary. The date and time for hand down of this judgment is deemed to be 14:00 pm on 04 May 2020.

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