

SOUTH AFRICA / JUDGMENT

T.N.M (Born L) v E.K.M (DIV56/2015) [2017] ZANWHC 98 (30 November 2017)

[2017] ZANWHC 98

COURT

North West High Court, Mafikeng

BEFORE

T DJAJE

CASE / FILE NUMBER

DIV56/2015

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: DIV 56/2015

In the matter between:

T. N. M.

PLAINTIFF

(Born L.)

(Identity Number: [...])

And

E. K. M.

DEFENDANT

J U D G M E N T

DJAJE J

Introduction

[1] These are divorce proceedings where the parties are married to each other in community of property. Plaintiff and Defendant agree that their marriage has broken down irretrievably and seek a decree of divorce. At the pre-trial meeting, the parties agreed upon the following terms:

“1.1 That the bonds of marriage subsisting between the parties dissolved

1.2 Both parties retain their full parental responsibilities and rights in terms of section 18, 19 and 20 of the Children’s Act, Act no.38 of 2005 in respect of the minor child born between the parties, subject to the provisions of paragraph 1.3 hereunder.

1.3 Care and primary residence of the minor child born between the parties is awarded to the Plaintiff, subject to the Defendant’s rights of reasonable contact, such contact to include but is not limited to the following:

1.3.1 every alternative weekend from 16h00 on Friday to 16h00 on Sunday;

1.3.2 every alternative long and short school holiday (Christmas to rotate);

1.3.3 reasonable telephonic contact at all reasonable times.

1.4 The Defendant undertakes to pay an amount of R4 000-00 (four thousand rand) per month maintenance in respect of the minor child, which maintenance shall be payable-

1.4.1 as from 1 November 2017 and thereafter on or before the 1st day of each and every successive month;

1.4.2 direct into Plaintiff’s current account at ABSA BANK LIMITED, account number .[...];

1.4.3 until such time as the minor child becomes self-supporting;

1.4.4 in addition to the maintenance payable by the Defendant in respect of the minor child as aforesaid , the Defendant undertakes to retain the minor child on his medical aid scheme at his costs;

1.4.5 either party shall be entitled to approach the relevant Maintenance court for a variation of the maintenance payable by the Defendant in respect of the minor child in terms of paragraph 1.4 above without the need of having to prove changed circumstances and/or just cause.”

- [2] The parties further agreed that the draft order be incorporated in the order of this judgment. The trial proceeded on the issues that were disputed between the parties. At the center of the dispute is the cause of the breakdown of the marriage and the division of the matrimonial property. The Plaintiff in her particulars of claim seeks an order for the division of the joint estate including the parties' pension funds. On the other hand, the Defendant seeks an order for forfeiture of the benefits of the marriage against the Plaintiff.

Evidence

- [3] Both the Plaintiff and Defendant testified before court. It came out from the evidence by both parties that they were married to each other during April 2010 by way of Customary Marriage. Thereafter on 27 March 2013 they entered into a civil marriage in community of property. There is one minor child born of the marriage between the parties who was born on 17 October 2008.
- [4] The Defendant gave evidence first as he is praying for an order of forfeiture against the Plaintiff. He is currently employed at Impala Platinum mines as an Instrument Technician and currently earning a gross salary of about R80 000-00 per month. He started working at the mine in 2003. He met the Plaintiff in 2005 and had a child together in 2008. In August 2010 they entered into a customary marriage and only started to stay together as husband and wife in 2011. On 27 March 2013 they entered into a civil marriage. It was the Defendant's evidence that the reason for the breakdown of their marriage is as a result of the Plaintiff having an adulterous relationship with a certain man called Jack since 2013. According to him, he had on several occasions seen the Plaintiff with this man and they were even communicating telephonically. He however stated that he had never seen them being intimate. During his testimony, he referred to incidents where the Plaintiff would come home late at night, drunk and that would lead to them arguing. Several meetings were held with their parents and family elders to resolve their differences but to no avail. Ultimately during November 2014 the two separated with the Plaintiff leaving the common house with the minor child.
- [5] The Defendant testified that during the subsistence of their marriage, the Plaintiff never contributed financially to their

household as she spent her money on alcohol. Further that he was the one responsible for the school fees of the minor child from 2013. He stated that he is currently paying an amount of R4 000-00 as maintenance towards the minor child as ordered following a Rule 43 application. The Defendant testified that it would not be fair for an order of division of the joint estate to be made. The reason in relation to the assets is that four of the five immovable properties are registered in his name as he solely contributed financially in buying them. The Plaintiff contributed only to the one immovable property which is registered in her name. Further that the Plaintiff is currently driving a Nissan 1.4 NP 200 bakkie which was bought without his consent. She also renovated her mother's house in May 2015 for R50 000-00 without his consent. It was his testimony that his pension funds and the Plaintiff's wedding ring should also be excluded from the joint estate

alone.

[6] During cross examination the Defendant could not explain why he chose to stay married to the Plaintiff despite the alleged adulterous

relationship she had with Jack. It was put to him that the said adulterous relationship was a fabrication as he had no proof thereof.

Further that the breakdown of the marriage was as a result of his abusive nature towards the Plaintiff.

[7] The Plaintiff testified that after the conclusion of the customary marriage in 2010, she was taken to the Defendant's house by her elders and they started staying together as husband and wife and not in 2011 as stated by the Defendant. It was her testimony that the reason for the breakdown of the marriage was as a result of the Defendant being aggressive, possessive and abusing her physically. She referred to incidents where the Defendant was aggressive and abused her physically and had to consult a doctor as a result of injuries sustained. As a result she applied for a protection order against the Defendant which was set aside in 2015 as the parties were no longer staying together. She testified that it was the Defendant who was having an adulterous relationship with one lady called Pholoso and not her.

[8] According to the Plaintiff she is also employed at the mine as a safety officer since 2005 and currently earning R23 000-00 per month. She stated that when they got married there was an agreement that they buy a family car which she would be responsible for paying. Despite paying for the car, she was still able to contribute to the household by buying groceries and taking care of the needs of the minor child. She also contributed R13 000-00 to have a wall built around their house from her leave gratuity. Further that when the Defendant bought one of the four properties in his name, she assisted with payment of the deposit. It was her evidence that she always supported and advised the Defendant in acquiring the immovable properties and that on his own he could not have been able to finance them. As a result, it would not be fair that she does not get to share in the four immovable properties which are in the Defendant's name. She confirmed that one immovable property is in her name as they agreed with the Defendant to get soft loans from the mine and acquire properties in their own names.

[9] Plaintiff stated in her testimony that during November 2015 she was forced to leave her house by the Defendant and his police friends after they had a fight. She and the minor child had to move in with her mother. She confirmed having contributed to renovations at her mother's house to add a bedroom and a bathroom for her and the minor child. Her contribution was R30 000-00 which she had borrowed from Nedbank. She testified that the renovations were necessary as they benefitted her and the minor child.

- [10] The sister to the Plaintiff, L., testified that indeed the Defendant was aggressive and abusive towards the Plaintiff. She referred to an incident in November 2014 where the Defendant came to her mother's house in the morning and threatened the Plaintiff with death. She rushed to check the Plaintiff and found her severely bruised and told her that she was assaulted by the Defendant. She testified that she does not know of any love relationship between the Plaintiff and Jack who is known to her as a family friend.
- [11] In a marriage in community of property division of the joint estate of the parties follows, except where forfeiture is granted. In this matter the Defendant's claim is based on section 9(1) of the Divorce Act 70 of 1979 which reads as follows:

"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 one party will in relation to the other be unduly benefitted."

[12] In the case of *Klerck v Klerck* 1991

- (1) SA 265 (W) Kriegler J decided that all factors mentioned in section 9(1) need not be present, for example misconduct on the part of the parties. At page 267G-H he stated that the principal factor to be considered by the court is if one party will be unduly benefitted if forfeiture is not granted. Whether one party will be unduly benefitted at the expense of another is a value judgment to be made by the court. The learned judge further went on to state that in determining whether the one party will be unduly benefitted at the expense of the other party, the three factors referred to in section 9(1) should be considered individually or collectively in coming to a decision.

Duration of the marriage

- [13] The parties both testified that they entered into a customary marriage in August 2010. The Defendant's version is that they only started to live together in 2011 whereas the Plaintiff testified that immediately after the lobola was paid, they started living together as husband and wife, and this was not disputed by the Defendant. Both are in agreement that they separated in November 2014. In total the parties lived together as husband and wife for a period of four years. The parties herein have a minor child who was born in 2008. This means that they had been involved in joint decision making in relation to their child and the Plaintiff testified that she is the one who advised the Defendant to start buying immovable property instead of renting a flat. The period that the parties have been staying together as husband and wife cannot be ignored.

Circumstances leading to breakdown of marriage

[14] The Defendant alleged that Plaintiff's abuse of alcohol and infidelity led to the breakdown of the marriage. On the other hand the Plaintiff alleged that the Defendant abused her emotionally and physically to an extent that she obtained an interim protection

order. Further that the Defendant had an extra marital affair with another woman. The Plaintiff and her sister testified about an assault on the Plaintiff by the Defendant that left her with bruises and she consulted a medical doctor. Both parties have testified about incidents where there was arguing and violence and parents were called in either by the Plaintiff or the Defendant. This clearly indicates that the marriage between the parties was not without challenges experienced from both Plaintiff and Defendant.

[15] It was the Defendant's evidence that the Plaintiff did not contribute financially in their marriage, and that should be seen as substantial misconduct giving rise to an order for forfeiture. It was not disputed that both parties are employed at Impala mine since 2005. They both bought immovable property which forms part of the joint estate. The Plaintiff testified that there was an agreement that she buys a family car and pay for it which was used by and for the benefit of both parties. It was not disputed that she contributed to the deposit of one of the immovable properties bought by the Defendant and further contributed in building a wall around their

house.

[16] Contribution by a spouse towards the household needs and creation of an estate is guided by each spouse's income and utilization thereof. The nature of the misconduct will be on the utilization of one spouse's income. The Defendant alleged that Plaintiff was using her income on alcohol but was not able to give exact figures on how much she spent on alcohol. The Plaintiff testified that she was contributing by buying groceries although limited. To find in favour of the Defendant and grant an order for forfeiture there must be finding of substantial misconduct in the handling of the Plaintiff's income. In my view the evidence presented in this matter does establish any substantial misconduct by the Plaintiff in respect of her income.

Undue Benefit

[17] The comments by Van Coller AJA in *Wijker v Wijker* 1993

(4) SA 720 (A) at 727D – F as follows should be considered:

"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 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."

[18] The head-note in *Engelbrecht v Engelbrecht* 1989

(1) SA 597 (C) reads in part as follows:

"Joint ownership of another's property is a right which each of the spouses acquires on concluding a marriage in community of property. Unless the parties (either before or during the marriage) make precisely equal contributions the one that contributed less shall on dissolution of the marriage be benefited above the other if forfeiture is not ordered. This is the inevitable consequence of the parties matrimonial regime. The Legislature (in section 9 of the Divorce Act 70 of 1979) does not give the greater contributor the opportunity to complain about this. He can only complain if the benefit was undue..."

The party seeking forfeiture of benefits has to prove the nature and extent of the benefit.

[19] The Defendant testified that the Plaintiff will be unduly benefitted if an order for forfeiture is not ordered. The reasons for this were stated as Plaintiff's burdening the estate with debts by having applied for a loan to do renovations at her mother's house for R30 000-00. On the issue of the renovations, the Plaintiff testified that after she and the minor child were forced to leave their home, she was forced to go and stay with her mother in a four roomed house with no inside bathroom. The Defendant on the other hand was staying in their house with a bathroom inside the house which the minor child was already used to. The Defendant did not concern himself about the suitability of accommodation that the Plaintiff had to acquire for herself and the minor child. It was Plaintiff's evidence that the renovations were for her and the minor child so as to make them comfortable and not having to share a bedroom with her siblings. I find that the renovations that the Plaintiff contributed to at her mother's house were necessary and for the benefit of her and the minor child. The Defendant himself also has debts that will affect the estate as all the properties he purchased in his name are still bonded.

[20] The parties got married in community of property and at the time of marriage the Defendant was well aware of the financial status of the Plaintiff that she was earning much less than him. As a result, Defendant was able to acquire more immovable properties than the Plaintiff. The Plaintiff did also contribute to building the estate by herself purchasing immovable property. In her testimony, she openly gave account of her income and that she was not in a position to purchase more immovable property as she had to pay for the family car that the parties had agreed on. The Defendant argued that an order for forfeiture should be ordered as he contributed more to the estate. Forfeiture cannot be ordered merely because one party contributed more than the other. In this matter, from inception the Defendant was aware that he was in a position to contribute more to the estate but chose to marry the Plaintiff in community of property with the consequence that the estate would be divided equally amongst them. The Defendant has not established that the benefit that the Plaintiff will receive is undue considering the contributions she made and her financial position throughout the duration of the marriage.

Pension Funds

[21] The Defendant testified that the Plaintiff cannot share in his pension funds as she is also contributing to her own pension fund. In terms of section 7 of the Divorce Act 70 of 1979 a party's pension interest shall be deemed to be part of his assets. The Defendant seem to be hanging on to the issue of having contributed more to his pension fund. This reasoning cannot be sustained for the reasons given above that forfeiture cannot be ordered merely because one party contributed more. I am not satisfied that the Plaintiff will benefit unduly if forfeiture is not ordered in respect of the pension interests. The Defendant will also be entitled to share in the pension interest of the Plaintiff.

The Ring

[22] It was the Defendant's evidence that the Plaintiff on her own decided not to wear her wedding ring and gave it to him. As a result, he argued that the Plaintiff cannot be allowed to share in the value of the ring. In contention, the Plaintiff's evidence was that as a sign of aggression the Defendant twisted her wrist and pulled the ring off her finger. The Defendant was not able to explain why he continued being married to the Plaintiff when she on her own took off her ring as a sign that she was no longer interested in the marriage. His evidence seem to be improbable on this aspect and cannot be sustained. Although the value of the ring was not proven, it is an asset that adds value to the estate and should be shared as part of the joint estate. This would then similarly apply to the Defendant's ring as well.

[23] The Defendant has not succeeded to prove that any benefit receivable by the Plaintiff from the matrimonial property would be undue. Both parties have contributed to the matrimonial property. In my view and based on the evidence presented, the Defendant has not been able to show that there was substantial misconduct by the Plaintiff that led to the break-down of the marriage. Contribution by either of the parties married in community of property irrespective of how insignificant it may seem amounts to a contribution by that party. Accordingly, I cannot conclude that the Plaintiff would be unduly benefitted if forfeiture was not ordered and I cannot, therefore, grant the Defendant's claim for forfeiture.

Costs

[24] The issue of costs is in the discretion of court. Section 10 of the Divorce Act 70 of 1979 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 order as it considers just and the court may order that the costs of the proceedings be apportioned between the parties."

[30] In the present matter I have considered whether costs should follow the result and can find no justification for it. The trial was not drawn out and did not drag on for too long. It will be just if each party pays its own costs.

ORDER

[31] In the result I make the following order:

1. An order of divorce;
2. Division of the joint estate of the parties;
3. Both parties retain their full parental responsibilities and rights in terms of section 18, 19 and 20 of the Children's Act, Act no.38 of 2005 in respect of the minor child born between the parties, subject to the provisions of paragraph 1.3 hereunder.
4. Care and primary residence of the minor child born between the parties is awarded to the Plaintiff, subject to the Defendant's rights of reasonable contact, such contact to include but is not limited to the following:
 - 4.1 every alternative weekend from 16h00 on Friday to 16h00 on Sunday;
 - 4.2 every alternative long and short school holiday (Christmas to rotate);
 - 4.3 reasonable telephonic contact at all reasonable times.
5. The Defendant to pay an amount of R4 000-00 (four thousand rand) per month maintenance in respect of the minor child, which maintenance shall be payable:-
 - 5.1 as from 1 November 2017 and thereafter on or before the 1st day of each and every successive month;
 - 5.2 direct into Plaintiff's current account at ABSA BANK LIMITED, account number [...];
 - 5.3 until such time as the minor child becomes self-supporting;
 - 5.4 in addition to the maintenance payable by the Defendant in respect of the minor child as aforesaid , the Defendant is to retain the minor child on his medical aid scheme at his costs;
 - 5.6 either party shall be entitled to approach the relevant Maintenance court for a variation of the maintenance payable by the Defendant in respect of the minor child in terms of paragraph 5 above without the need of having to prove changed circumstances and/or just cause."
6. Both parties are entitled to 50% of the other's pension interest;
7. Each party to pay its own cost.

J T DJAJE

JUDGE OF NORTH WEST HIGH COURT

APPEARANCES

DATE OF HEARING

: 9, 10 & 11 OCTOBER 2017

DATE OF JUDGMENT

: 30 NOVEMBER 2017

COUNSEL FOR THE PLAINTIFF : ADV FABRICIOUS

COUNSEL FOR THE DEFENDANR : ADV STANDER

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