

SOUTH AFRICA / JUDGMENT

V.R v V.R (4939/2020) [2023] ZAFSHC 68 (1 March 2023)

[2023] ZAFSHC 68

COURT

Free State High Court, Bloemfontein

BEFORE

AK Ramlal

CASE / FILE NUMBER

4939/2020

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Policy

FLYNOTES:

FORFEITURE OF BENEFITS

FAMILY

– Divorce – Forfeiture – Misconduct –

Relatively short marriage – Appearing that much younger wife

married to advance her financial position and place in political arena – Found that attitude of wife towards the husband

caused the break-down of the marriage – Her disloyalty and conduct consonant with that of misconduct and substantially so –

Forfeiting benefits of marriage.

IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No.: 4939/2020

Reportable: YES/NO
Of
Interest to other Judges: YES/NO
Circulate
to Magistrates: YES/NO
In
the matter between: B
[....] M [....] K [....]- V [....] R
[....]
Plaintiff
And
C
[....] J [....] V [....] R [....]
Defendant

JUDGMENT

BY: AK RAMLAL, AJ

HEARD ON:

20 SEPTEMBER 2022

DELIVERED ON: 1 MARCH 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 1 March 2023.

- [1] The plaintiff, Mrs B [....] M [....] V [....] R [....] instituted a divorce action against her husband, C [....] J [....] V [....] R [....], whom she married in of community of property, on 11 October 2019, at Kimberley in the Northern Cape. The parties have one minor child, a boy, who was born out of their relationship with each other prior to their marriage. The child was born on 27 August 2015.
- [2] In this divorce action both the plaintiff and the defendant have claimed dissolution of the marriage.
- [3] It is common cause between the parties that:
- 3.1 the marriage relationship between the parties has irretrievably broken down;
- 3.2 the parties share equal rights in terms of parental rights and responsibilities regarding guardianship of the minor child;
- 3.3 the plaintiff must be awarded primary care and permanent residency of the minor child; and

3.4 the defendant's contact rights be awarded in the manner as set out in prayer 8.9 of the Plaintiff's amended particulars of claim

[4] At issue are:

4.1 the reasons for the breakdown of the marriage;

4.2 the quantum of maintenance payable for the minor child;

4.3 division of the joint estate of the parties/forfeiture of the benefits and

4.4 costs of the trial

[5] It is not necessary to recount all the details of the relationship between the parties. I will confine myself to the relevant facts pertaining to the issues to be determined.

Plaintiff's Evidence:

[6] The Plaintiff testified in detail about the relationship between herself and the defendant before their marriage to each other in

2019. She explained that they met each other in the year 2012 whilst she was a political science student and the defendant was a high-ranking member of the Provincial Legislature in the Free State. During 2014 the parties were engaged to each other and a few months later their relationship ended. They resumed their relationship again towards the end of 2014. In early 2015 the parties leased premises in an upmarket suburb in Bloemfontein. The defendant paid the deposit for the property and the plaintiff paid the monthly rental for the duration of the lease. Their child was born in August 2015. The defendant paid all the birthing expenses and he maintained the child.

[7] In April 2017, the plaintiff purchased a property in her own name. The plaintiff explained that although they were meant to be living together at the property that she purchased, they were often estranged from each other. There was a mutual understanding between them that whenever they did not live together, the defendant contributed financially towards the maintenance of the minor child. When they lived together, the defendant took care of the needs of the child without giving a monetary contribution to the plaintiff. The plaintiff was directly responsible for the bond payment of the property that she had purchased together with the costs for the utilities and all incidental costs associated with the upkeep of the property.

[8] At the time when the plaintiff purchased the property in her name, she was aware that the defendant had at least three other properties registered in his name.

[9] At the end of June 2019, the plaintiff and the defendant were in a more definite relationship with each other. The plaintiff testified that they had a short discussion about how they would get married although they did not specifically agree that they would be married in community of property. As a result of her busy schedule, they would register the marriage and then have a marriage ceremony/celebration at a later stage. The parties registered their

marriage in Kimberley on the 11 October 2019. They then lived separately until January 2020 when the plaintiff and the child moved into property where the defendant resided on the suggestion of the defendant that they would be able to reduce their expenses if they lived together. The plaintiff was not happy to live at the premises of the defendant as she owned a luxury stand-alone house and the premises where the defendant lived was a unit in a group of residences. The plaintiff and the child moved back to the property that the plaintiff owned on 5 November 2020.

- [10] The plaintiff's account of what led to the breakdown of the marriage is that there was a lack of communication and intimacy between them. The plaintiff believes that the defendant made unilateral financial decisions in that he continued to maintain his ex-wife and he assisted his children and grandchildren as and when they requested him so to do. The plaintiff feels that the defendant failed to honour promises that he made to her, amongst others, to have a second child.
- [11] In respect of the maintenance award claimed by the plaintiff for the minor child, the plaintiff claims an amount of thirteen thousand rand (R13000-00) per month as she believes that this an amount that the defendant can afford.

Defendants' Evidence

- [12] The defendant testified that although he intended to have an ante nuptial contract registered no such marital contract was ever entered into between him and the plaintiff. He confirms that their marriage is one that is in community of property. Despite this, both parties administered their own estates, but the defendant supported the plaintiff and the child financially.
- [13] The age difference between the plaintiff and the defendant and their differing interests are cited as factors that contributed to the breakdown of the marriage according to the testimony of the defendant. He maintains that immediately after the conclusion of his marriage to the plaintiff, she failed to be intimate with him.
- [14] His further testimony is that he believes that the plaintiff entered a marriage relationship with him to enhance her financial position. The demands made on him by the plaintiff were extravagant and beyond his financial capability.
- [15] The evidence of the defendant in respect of the duration of the relationship between the parties is as stated by the plaintiff. It is therefore not necessary to repeat the timeline of their relationship.

- [16] With regard to the maintenance of the minor child, the defendant testified that he has always maintained the child financially and he devoted his time and he continues to spend time and interacts meaningfully with the minor child. The defendant is willing and able to continue to maintain the minor child financially in accordance with the needs of the child as determined by the court. He currently pays an amount of six thousand and seven hundred rand (R6700-00) towards the maintenance of his child.
- [17] The defendant does not deny that he supports his ex-wife as he is obliged to do so in terms of a divorce order. He also assists his son and his grandchild as and when they require his assistance and if it is within his means. The defendant further explained that he has strong family ties and he used to get assistance from his sister who prepared meals for him when he was living on his own.
- [18] The defendant declared that he built up his estate before the parties got married to each other and that even in the short duration of their marriage, the plaintiff did not contribute towards the joint estate, thus if the plaintiff's benefit is not forfeited, she will unduly benefit therefrom.

The defendant's claim for a forfeiture of patrimonial benefits:

- [19] The law relating to a claim for a forfeiture of patrimonial benefits of a marriage in community of property upon divorce is settled. In brief, the position is as follows:

- [19.1] Section 9(1) of the Divorce Act, 70 of 1979 (the Divorce Act) provides 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 break-down thereof, and any substantial misconduct on the part of either of the parties, it is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefitted."

- [19.2] In the seminal authority on the issue, *Wijker v Wijker* 1993 (4) SA 720 (A), at 727E, the court said the following of Section 9 of the Divorce Act:

- [19.3] The enquiry is, accordingly, a two-stage process. The first entails an assessment of the nature and extent of the alleged benefit, whilst the second entails an assessment of whether the benefit is undue. It follows that the second enquiry is only necessary if the first one has been positively established. The value judgment that is entailed by the assessment of whether or not the benefit is undue may not be clouded by considerations of fairness. The matter is not about achieving fairness between the parties, it is about the application of a legal principle.

- [20] In the present case, the defendant bears the onus of persuading the court that there ought to be a deviation from the legal consequences that flow from a marriage in community of property in relation to the division of the estate on the terms that he suggests.

The First Enquiry: Establishing Whether the Plaintiff will be Benefited

- [21] The factual enquiry here calls for an assessment of the respective contributions made by the parties at the commencement of the marriage and during the course of the marriage. The purpose of the enquiry is to determine ultimately whether any commercial benefit is available to the plaintiff. If, for instance, the joint estate is insolvent there can be no benefit that will be established in compliance with the first requirement of Section 9(1). As the enquiry relates to that of patrimonial benefits gained in the marriage, it is purely an assessment of the commercial values associated with these gains.
- [22] Although the plaintiff sought an order for the division of the joint estate of the parties, much of the focus was on the defendant's capital sum of his living annuity and there was scant mention of the other three properties that the defendant owns. The plaintiff focussed on the value of the living annuity to the exclusion of the rest of the estate. Upon a narrow consideration of this asset alone, clearly, it was established that the plaintiff would benefit by an equal division of this asset.
- [23] Upon a proper construction of the provisions of Section 9 of the Divorce Act, no distinction is drawn between an assessment of whether there will be a benefit, when a partial forfeiture is sought as opposed to a total forfeiture. The court is not required to confine itself to the value of the asset being sought to be forfeited in deciding whether there will be a benefit, it is required to consider the value of the estate as a whole.
- [24] Both parties to this marriage had immovable property registered in their names at the time of the commencement of this marriage and both had motor vehicles registered in their names. The defendant also has a capital sum of five million rand (R5 000 000) which is his living annuity. The plaintiff has investments, shares and savings which total approximately one hundred thousand rand (R100 000).
- [25] A proper consideration of forfeiture claims, nevertheless, requires that account be taken not only of the respective contributions made at the commencement of a marriage, but also of the contributions made to the joint estate during the marriage as a result of a party's "industry or thrift". (See *Smith v Smith* 1937 WLD 126). The respective parties' contributions during the marriage are, accordingly, relevant in the assessment of the question whether, in the present case, the plaintiff will be benefited.
- [26] It is difficult to ascertain when the parties had a common household as they both lived in separate residences and the defendant has always made a financial contribution towards the plaintiff and the child when he did not live with them. The plaintiff was gainfully employed for the duration of the marriage. She retained full control of her finances. The defendant was not privy to how she spent her money. The plaintiff explained that except for his basic personal expenses, most of his income was directed towards the expenses of the plaintiff and his minor child. The plaintiff could offer nothing of substance to suggest otherwise.

[27] There is nothing to gainsay the version of the defendant that the plaintiff will benefit from the division of the joint estate if the forfeiture order is not granted. The defendant has thus discharged this burden.

The Second Enquiry: Whether the benefit to the Plaintiff will be Undue?

[28] The second leg of the enquiry is whether the plaintiff will benefit unduly if the forfeiture order in relation to the capital sum of the living annuity of the defendant is not granted. This enquiry entails a consideration of the three factors stated in Section 9(1) of the Divorce Act.

[29] The parties appear to have cohabited sporadically with each other from 2014 to 2017 until they were married on 11 October 2019. They separated in early November 2020. As the marriage still subsists, it is a three-year marriage. Effectively, it was really a fourteen-month marriage, having ended in November 2020 for all intents and purposes. Even if the full three years are considered, it can be inferred to be a marriage of a short duration. A longer marriage generally entails a greater commitment and contributions to the joint estate by the respective spouses.

[30] For the duration of the time that the parties lived together and whilst they were married to each other, the evidence placed before the court demonstrates that the only shared expenses that they had was in relation to the minor child. They acted independently of each other and managed their separate estates. This factor, therefore, tends to support the defendant in the assessment.

(ii) Factors that Led to the Breakdown of the Marriage:

[31] The defendant stated that the reasons for the breakdown of the marriage was the age gap between him and the plaintiff. There is a thirty-nine-year age gap between them. In addition, he felt that the plaintiff married him to secure financial wealth for herself, advance herself in political arena by using his influence and to benefit from his estate.

[32] He further elaborated that once they were married, the plaintiff only engaged in intimate intercourse once with him during the duration of the marriage and not even on their so-called honeymoon.

[33] The defendant testified that the plaintiff's showed no love or respect towards him and he got the distinct impression that she was embarrassed to be seen with him in public.

[34] Although the plaintiff claims that the defendant failed to honour his promises, for example, to have a second child with her, the defendant testified that they never agreed to this. He always maintained that he was too old and not in a financial position to raise more children.

[35] The defendant states that he was unable to maintain the extravagant lifestyle that the plaintiff wanted to live. The plaintiff was under the mistaken impression that he had a lifestyle of luxury because he travelled overseas, ate at restaurants and owned several properties. The factual position is that his overseas travel and going out to eateries where he met influential people were as a result of the work that he did, and those expenses were

covered by his employer. Not all the properties that he owns are registered solely in his name as some form part of a family trust in which he has a nominal share.

[36] The court, having observed the parties when they testified and having considered the content of their testimony, must agree that the plaintiff was young and impressionable. She appeared to be image conscious and ambitious and wanted to assert herself as being financially and emotionally independent, whilst utilising the resource that she had in the defendant to assist her to accelerate her progress. The defendant was candid in his testimony and he portrayed himself as being a doting father who has the best interests of his minor child always at the forefront.

[37] This factor, therefore, supports the defendant.

(iii) Any Substantial Misconduct on the part of either Party:

[38] The reasons for the breakdown of the marriage are inextricably linked to the substantial misconduct enquiry. The attitude of the plaintiff towards the defendant in my view caused the break-down of the marriage. This court is satisfied that the defendant gave his testimony in a clear and direct manner. The evidence of the defendant was not challenged under cross-examination.

The court accepts his testimony as the truth. The plaintiff's testimony is unreliable and riddled with improbabilities and

inconsistencies. The disloyalty of the plaintiff and her conduct is consonant with that of misconduct and substantially so.

[39] This factor, therefore, also supports the defendant.

Determination

in Relation to the Defendant's claim for a Forfeiture of Patrimonial Benefits:

[40] All three factors in relation to the second stage of the enquiry favour the defendant. The defendant succeeded in establishing the existence of the benefit envisaged in the first stage of the enquiry. The defendant's counterclaim must succeed.

Maintenance for the Minor Child

[41] The plaintiff claims an amount of thirteen thousand rand (R13 000-00) per month as maintenance for the minor child. Her assertion is that since the defendant has generally contributed Ten Thousand Rand (R10 000-00) per month towards the maintenance of the child, he should be ordered to continue.

[42] Section 15 of the Maintenance Act, 99 of 1998 provides:

“(3)(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 according to their respective means; and
 - (iii) that the 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 amount as the maintenance court may consider fair in all the circumstances of the case”

[43] Both parties hereto accept and appreciate that they have an obligation to maintain the minor child and that that duty to maintain the minor child extends beyond a financial contribution. The apportionment of that financial obligation, however, is what is in dispute.

[44] The plaintiff is of the view that the total expenses in respect of the minor child amounts to eighteen thousand

rand (R18 000-00) and that the defendant should be responsible for the payment of thirteen thousand rand (R13 000-00) thereof whilst the defendant is of the view that the defendant has been contributing an amount of six thousand seven hundred rand (R6700-00) and since the plaintiff has not been able to show that this amount is inadequate to maintain the minor child, the plaintiff should be ordered to continue to pay this amount.

[46] The plaintiff provided a list of the minor child’s expenses, mostly without any supporting documentation. An in-depth interrogation of these expenses was conducted during the trial. This interrogation resulted in the determination of the child’s expenses being reduced by the defendant to an amount of R12 783.

[47] It is difficult to determine the exact needs of the child without the corresponding documentation to support the claims. The list provided by the plaintiff does however provide a guide from which to make the determination. I have factored in that both parents have incidental expenses that have not been listed. For example, the defendant incurs additional expenditure in relation to travel and money spent on outings with the child that has not been listed and the plaintiff has unplanned expenses that are called for ad hoc from school fund raising events. These were mentioned during the enquiry, but no amounts were suggested. The total needs of the child are assessed to be R13 900 per month.

[48] Once the needs of the child have been determined the court must consider the contribution of the respective parents. The plaintiff is employed and earns a nett income of R35 000-00 per month. The Defendant is retired and receives a nett amount of almost R35 00-00 per month from his living annuity. It is not necessary to conduct an enquiry into whether the defendant has the ability to pay his pro rata contribution as it is his evidence that he is willing to pay an amount that the court deems necessary for the maintenance of the child.

[49] In the result the following order is made:

1. A decree of divorce is granted;
2. The plaintiff forfeits the benefits of the marriage in community of property;
3. The Parental Rights and Responsibilities of the primary care and permanent residency of the minor child (as contemplated in Section 18(2)(a) of the Children's Act 38 of 2005), born of the relationship between the parties, is awarded to the plaintiff;
4. The specific Parental Rights and Responsibilities with regard to contact of the minor child is awarded as follows:
 - 4.1 Short holidays to alternate between the parties and long school holidays to be shared equally;
 - 4.2 Public holidays to alternate between the parties;
 - 4.3 Weekends to alternate between the parties;
 - 4.4 Contact with the minor child on his birthdays between 17h00 and 19h00 if the birthday falls on a weekday and between 09h00 and 13h00 if the birthday falls on a weekend during which the defendant is not entitled to exercise contact with the minor child;
 - 4.5 Contact with the minor child on the defendant's birthday between 09h00 and 15h00 if it falls on a weekend during which the defendant is not entitled to exercise contact with the minor child;
 - 4.6 Contact with the minor child on Father's Day;
 - 4.7 Reasonable telephonic contact: subject to the minor child's reasonable scholastic, religious, sporting and cultural activities.
5. The Parental Rights and Responsibilities with regard to guardianship of the minor child born prior to the marriage of the parties (as contemplated in Section 18(2)(c) and 18(3) of the Children's Act 38 of 2005), is awarded to the parties jointly.
6. The defendant is ordered to pay maintenance in respect of the minor child:
 - 6.1 in the sum of Seven thousand Rand (R7000-00) per month;

6.2 the maintenance for the minor child is to be increased in accordance with the inflation rate and the Consumer Price Index for the average of the preceding twelve months on annual basis, commencing on the anniversary of the date of the divorce.

7. Each party to pay his or her own costs.

A.K RAMLAL, AJ

On behalf of the Plaintiff : Adv. A Coetzee

Instructed by : Pedzisai-Pion Attorneys

BLOEMFONTEIN

On behalf of the Respondent : Adv E G Lubbe

Instructed by : Honey Attorneys

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