

SOUTH AFRICA / JUDGMENT

Z v Z (34253/2010) [2024]

ZAGPJHC 4 (10 January 2024)

[2024] ZAGPJHC 4

COURT

South Gauteng High Court, Johannesburg

BEFORE

Adams

CASE / FILE NUMBER

34253/2010

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FLYNOTES:

FAMILY

– Divorce – Forfeiture – Marriage

in community of property – Marriage of very long duration –

Substantial misconduct on husband's

part – Abusive

towards wife and children and did not contribute much to joint

estate – Was not good husband and

failed miserably to

discharge his financial duties and legal duty to support his wife

and his children – Partial forfeiture

granted in favour of

wife – Husband shall forfeit in full his entitlement to

share in wife's substantial pension

interest – But he

will retain two immovable properties – Divorce Act 70 of

1979, s 9.

REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT

OF SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

	CASE NO: 34253/2010
DATE:	10th January 2024 (1) NOT REPORTABLE (2) NOT OF INTEREST TO OTHER JUDGES In
the matter between:	Z, P G Plaintiff and Z, B B Defendant
Neutral Citation:	Z v Z (34253/2010) [2023] ZAGPJHC --- (10 January 2024)
Coram:	Adams J
Heard:	02, 04, 06 and 12 October 2023
Closing Argument:	12 October 2023
Delivered:	10 January 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 10 January 2024.
Summary:	Marriage – divorce – proprietary rights – marriage in community of property – forfeiture of patrimonial benefits of marriage – order to that effect only competent in terms of s 9 of the Divorce Act 70 of 1979 – marriage of very long duration – however, ‘substantial misconduct’ on the husband’s part – abusive towards wife and children and did not contribute much to the joint estate – forfeiture granted to a limited extend in favour of wife. ORDER (1) A decree of divorce is granted and the marriage between the plaintiff and the defendant be and is hereby dissolved. (2) In terms of section 9(1) of the Divorce Act, Act 70 of 1979 (‘the Divorce Act’), a forfeiture order is granted in favour of the plaintiff against the defendant in respect

of the plaintiff's pension interest
in the Government
Employees' Pension Fund ('the GEPF'), held under
pension number 9[...].

(3)

The defendant shall forfeit in full his
entitlement to share in the plaintiff's pension interest in the
GEPF, held under pension
number 9[...], and the said Pension Fund be
and is hereby ordered and directed to release to the plaintiff any
and/or all funds
standing to the account of the plaintiff in the said
Fund.

(4)

The defendant shall retain as his sole and
exclusive property the immovable property of the parties in Zola,
being Erf 4[...] Zola
Township, Gauteng Province ('the Zola
Property') and the defendant be and is hereby granted leave and
authorised to
have the title deed of the said property endorsed to
that effect by the Deeds Office at his own costs. Any and/or all
costs and
charges relating to the registration of the aforesaid
transfer of the property and/or the endorsement of the title deed
shall be
for the account of the defendant.

(5)

The defendant shall retain as his sole and
exclusive property the immovable property of the parties in
Meadowlands, being Erf 1[...]
Meadowlands Township, Gauteng Province,
situate at 4[...]4, Zone 9, Meadowlands West, Soweto ('the
Meadowlands Property')
and the defendant be and is hereby
granted leave and authorised to have the title deed of the said
property endorsed to that effect
by the Deeds Office at his own
costs. Any and/or all costs and charges relating to the registration
of the aforesaid transfer of
the property and/or the endorsement of
the title deed shall be for the account of the defendant.

(6)

Each party shall retain as her/his sole and
exclusive property any and/or all movable property presently in
her/his possession and
each party shall be solely responsible for any
and/or all debts incurred by her/him subsequent to 2010.

(7)

Each part shall bear her/his own costs of this
defended action.

JUDGMENT

Adams J:

[1]. The central issue to be considered in this defended divorce action, which was instituted by the plaintiff (the wife) against the defendant (the husband) as long ago as 2010, relates to the circumstances under which a party to a marriage in community of property can be ordered to forfeit the benefits arising from such a marriage. That issue arises against the following backdrop.

[2]. The plaintiff and the defendant were married to each other in community of property on the 16th of November 1983. The marriage was solemnised at Johannesburg. There were four children born of the marriage, all of whom had attained the age of majority by the time the matter came before me on trial during October 2023. The parties have not been living together as husband and wife since during or about 2010 and they are agreed that the marriage relationship between them had irretrievably broken down a long time ago and that there are no prospects – none whatsoever – of their marriage relationship being restored. It was therefore common cause between the parties that a decree of divorce should be granted and that their marriage relationship should be dissolved. The only real issue between the parties related to the distribution of the assets owned by their joint estate, which included the plaintiff's interest in a Pension Fund, worth a fairly substantial sum of money exceeding R7 million.

[3]. It is the case of the plaintiff that the defendant should be ordered to forfeit the benefits arising from their marriage in community of property in relation to her interest in her Pension Fund. As regards the balance of the community property, notably two immovable properties in Soweto, the plaintiff asks in her particulars of claim that those be divided between them equally. These properties are, for all intents and purposes, occupied by the defendant and members of his immediate family. The plaintiff claims a forfeiture of the benefits, in relation to her Pension Fund interest, primarily on the basis that the defendant, during the twenty-seven or so years subsistence of their marriage, had grossly misconducted himself, in addition to making very little contribution to the community estate. She therefore avers that, if forfeiture is not ordered, the defendant would unfairly benefit.

[4]. The defendant contends that there should be a division of the joint estate, including the plaintiff's Pension Interest in her Pension Fund. He denies that he misconducted himself during the marriage and he fiercely disputes that he made little to no contribution to the joint estate.

[5]. In support of her case, the plaintiff herself gave evidence during the trial. She also led the evidence of all four of her adult children, whose evidence was unchallenged and uncontested by the defendant, who indicated, through his Counsel, Ms Britz, that he would not be cross-examining them, as he thought it inappropriate to have his children subjected to the indignity of cross-examination in a fight between him and his wife. The fact that his wife involved their children in their fray, so the contention on behalf of the defendant went, was in bad taste.

[6]. All the same, the evidence painted a picture of the defendant as a bad father and an even worse husband, who treated his wife with little respect and his children with absolute disdain. The plaintiff, who was sixty-six years old by the time she gave evidence on 02 October 2023, testified that she was employed as a professional nurse

at the Chris Hani Baragwanath Hospital until her retirement during

2021. She gave evidence that she got married to the defendant during 1983 and at that stage they lived in the home of the defendant's family in Zola, Soweto. This property subsequently became the property of the defendant and the plaintiff, presumably as a donation or an inheritance from the defendant's mother, and is one of the immovable properties referred to supra. During 1988, so the evidence of the plaintiff went, she wanted her own house, and they purchased their second property in Meadowlands.

[7]. Importantly, the plaintiff's evidence was to the effect that the defendant, even though he was employed full time by Waltons up to 2002, made very little to no contribution to the joint estate. He spent most, if not all of his monies on his church, in which he was an ordained Pastor. She was the one who had to pay for the food and

other household necessities, including the children's school fees and their spending. The foregoing was confirmed by the children when they gave evidence, which, as I have already indicated, was uncontested and unchallenged, and therefore stands to be accepted by me. By all accounts, the defendant did not pull his weight from a financial point of view, and he clearly did not make much of a contribution to the joint estate. It is however so that, when he was retrenched from his employment at Waltons during 2002, he used a substantial portion of his retrenchment package (approximately R118 000) to settle the amount owing on the bond over the property in Meadowlands (about R43 000). Other than that, the evidence suggests that it was indeed, as claimed by the plaintiff, that he made very little contribution to the joint estate.

[8]. It was not just the financial abuse of the plaintiff by the defendant. The verbal, psychological and emotional abuse was even worse. As confirmed by the evidence of the children of the parties, the defendant's emotional abuse of the plaintiff was unending. He constantly accused her of sleeping with other men and the plaintiff was unhappy every single minute of the day. As was testified to by the youngest child, their son, it was surprising that the plaintiff had stayed in the marriage for so long. However, things came to a head in 2010, when the plaintiff suffered a heart attack which she believed to have been as a result of the stress and the abuse she was subjected in her marriage. During her subsequent hospitalisation she received no support from the defendant, who, so the plaintiff's evidence went, in fact mocked her and implied that she was not really sick. This was the finally straw for the plaintiff, who, shortly after her discharge from hospital, decided to leave her husband and the matrimonial home with her kids. Later that year she also caused a divorce summons to be issued against the defendant.

[9]. After the plaintiff left the matrimonial home, the financial abuse intensified. The defendant refused to maintain and support their last born, who was still a minor then and still at school. He also refused point blank to allow the plaintiff to return to the matrimonial home and made her 'fend for herself' for a period of about thirteen years from 2010 to date.

[10]. In sum, if regard is had to the evidence as a whole, including the defendant's testimony, the defendant was not a good husband. He failed miserably to discharge his financial duties and his legal duty to support his wife and his children during the marriage. Moreover, he was abusive towards his wife and his children. So, for example, their eldest daughter, who was forty-one years old when she gave evidence, told the court that the defendant used to beat her up with a sjambok when she was growing up. He often told her that she was not his child, implying that the plaintiff had conceived her with another

man. The abuse was ongoing and persistent, and it clearly had a lasting effect on the psyche of the children. The eldest daughter,

when giving her evidence, broke down on at least one occasion. The trauma she suffered as a result of the abuse was clear for the court to see. The plaintiff herself became extremely emotional on at least one occasion whilst testifying. As I have already indicated, the evidence before me painted a picture of a husband and a father who misconducted himself in the unkindest manner possible towards his family, who ended up living in a cold and loveless household.

[11]. The question remains whether all of the foregoing entitles the plaintiff to a forfeiture order against the defendant. In that regard, the plaintiff indicated during the hearing of the matter that she would be prepared to forego any entitlement to any claims in respect of the immovable properties in Zola and Meadowlands in Soweto.

[12]. The question to be considered is this: should an order of forfeiture or partial forfeiture be granted in favour of the plaintiff against the defendant? In that regard, section 9 of the Divorce Act 70 of 1979 ('the 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 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 benefited.'

[13]. Community of property is described in *The South African Law of Husband and Wife* by H R Hahlo, 5th edition, as follows:

'Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of the financial contributions, hold equal shares.'

[14]. As was said in *Engelbrecht v Engelbrecht*[1], 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 is undue.

[15]. In *Wijker v Wijker*[2] it was held that the court should first determine whether or not the party against whom the order of forfeiture is sought will in fact be benefited if the order is not made. Once it is determined that that party will benefit, the next enquiry is whether such benefit will be an undue one.

[16]. In *Engelbrecht* (supra) the Full Court emphasised that a party who seeks a forfeiture order must first establish what the nature and extent of the benefit was. Unless that is proved the court cannot decide if the benefit was undue or not. Only if the nature and ambit of the benefit is proved is it necessary to look to the three factors which may be brought into consideration in deciding on the inequity thereof.

[17]. The trial court in *Engelbrecht* was satisfied that, if forfeiture order was not made, the defendant would be unduly benefited in comparison to the plaintiff. The

plaintiff and the defendant were married in community of property in

1980. The plaintiff brought into the joint estate an erf which he bought for R3000 in 1975. He used the proceeds of a life policy on the life of his first wife to pay for it. He took a bond of R14 000 and built a house on the erf. The parties thereafter married. There was no proof of what the house was worth when summons was issued. On appeal the Full Court found that the plaintiff had not proved the nature and extent of the defendant's benefit at the dissolution of the marriage: A fortiori he had not proved that such benefit was undue.

[18]. In the present case the plaintiff and the defendant started off with nothing – both of them owned no property of significant value and together they built up for themselves and their children an asset base, consisting in the main of the matrimonial home, another property in Zola and the plaintiff's pension interest in her provident fund, which interest as and at 2021 was in excess of R7 million. The value of their properties at present is approximately R1.5 million. This therefore means that their estate had increased by a total sum of about R8.5 million and that the defendant stands to benefit by an amount equivalent to half of that sum on the dissolution of the marriage. If one is to consider only the interest of the pension in her pension fund, then the extent of such benefit would amount to approximately R3.7 million.

[19]. For the reasons mentioned hereinbefore, and, in particular the substantial misconduct on the part of the defendant during the subsistence of the marriage and his lack of any meaningful contribution to the joint estate, I am of the view that such a benefit receivable by the defendant would be undue. Accordingly, he cannot be allowed to unduly benefit from the marriage in

community of property, and forfeiture should be ordered. Conversely, it is so that the marriage did endure for a period of about forty years if one is to disregard the period from 2010 to date during which the parties were no longer. If not, then it can be said that the marriage endured for twenty-seven years, which is still a substantial period. This is a consideration which can and should be taken care of by a partial forfeiture, as against full forfeiture, in that the defendant should be ordered to forfeit his fifty percent portion of the plaintiff's pension interest, but he is to retain the two immovable properties as his sole and exclusive properties. The net effect of this would be that the forfeiture would be for an amount equivalent to R3.7 million (50% of the Pension Interest), less R1.5 million (the approximate value of the immovable property) = R2.5 million.

[20]. Therefore, in the exercise of my discretion, I intend awarding in favour of the plaintiff against the defendant a partial forfeiture to that effect. The simple point being that partial forfeiture should be ordered if the factors mentioned in section 9(1) of the Act are taken into account, that being the very long duration of the marriage and the substantial misconduct on the part of the defendant. As for factors that led to the break-down of the marriage, there is no doubt in my mind that the marriage relationship between the parties broke down as a result of the abuse by the defendant of his wife and his children.

[21]. Moreover, the plaintiff, in addition to being the one who quite clearly made the bigger contribution to the joint estate, also had to fulfil the traditional role of a housewife, mother and homemaker, which, as pointed out in *Bezuidenhout v Bezuidenhout*[3], should not be undervalued because it is not measurable in terms of money. The defendant's misconduct, assessed with all the other circumstances, leads me to the conclusion that an order for partial forfeiture is not appropriate in the circumstances.

[22]. For all these reasons, I am of the view that the partial forfeiture order should be granted.

Costs

[19] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. In casu, we are dealing with the distribution of assets in a joint estate and such a distribution should be kept as simple as possible.

[20] That purpose can and would be achieved by an order that each party should bear her/his own costs of this action.

Order

[21] Accordingly, I make the following order: -

(5) The defendant shall retain as his sole and exclusive property the immovable property of the parties in Meadowlands, being Erf 1[...] Meadowlands Township, Gauteng Province, situate at 4[...]4, Zone [...], Meadowlands West, Soweto ('the Meadowlands Property') and the defendant be and is hereby granted leave and authorised to have the title deed of the said

property endorsed to that effect by the Deeds Office at his own costs. Any and/or all costs and charges relating to the registration of the aforesaid transfer of the property and/or the endorsement of the title deed shall be for the account of the defendant.

L R ADAMS

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON: 2nd, 4th, 5th and 12th October 2023 CLOSING ARGUMENT ON: 12th October 2023

JUDGMENT DATE: 10th January 2024 – judgment handed down electronically FOR THE

PLAINTIFF: Advocate Jason Govender INSTRUCTED BY: Smith Van der Watt Incorporated,

Monument, Krugersdorp FOR THE DEFENDANT: Advocate Charlene Britz INSTRUCTED BY: Hein Bezuidenhout Incorporated, Bruma, Johannesburg

[1] Engelbrecht v Engelbrecht 1989

(1) SA 597 (C).

[2] Wijker v Wijker 1993

(4) SA 720 (A).

[3] Bezuidenhout v Bezuidenhout 2005

(2) SA 187 (SCA).

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