IN THE HIGH COURT OF SOUTH AFRICA

(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

Not reportable

DATE: 14 SEPTEMBER 2010

CASE NO: 45713/2009

In the matter between:

M R R PLAINTIFF

And

J M R RESPONDENT

JUDGMENT

PHATUDI, J

[1] The parties are married in community of property to each other on 15 November 1999. There are no children born of the marriage.

[2] I am satisfied that the marriage relationship between the parties is irretrievably broken down with no prospects of the restoration of a normal relationship.

[3] Mr Van Tonder, the plaintiff's counsel, submits in his opening statement that the plaintiff seeks

• Decree of divorce

• Division of Joint Estate

• Costs of suit.

[4] On the other hand, Ms Ferreira submits that the defendant filed counterclaim in which the following order is sought;

• Decree of divorce

• Forfeiture of the defendant pension benefits paid out by City of Tshwane Metropolitan Municipality or

• Division of the joint estate in that each party to take what is in each possession.

[5] M R R testifies that she lived with the defendant immediately after lobola was paid for during 1995. She has since lived with the defendant as husband and wife. They married each other by civil on the 15 November 1999.

[6] They continued to live together as husband and wife together with her son from her previous marriage and the defendant's two daughters from his previous marriage.

[7] She sets out what the Joint Estate is constituted of including two fully paid up immovable properties situated in Atteridgeville.

[8] She further testifies that one Sunday during September 2004, the defendant constructively chased her out of the common home. She has since lived with her son in her house.

[9] It transpired during cross examination that the parties agreed that each will maintain the house that each brought into the Joint Estate. They further agreed that each party be responsible for maintenance of children from their previous marriages.

[10] She testifies that the defendant promised her at the time she was "chased" out of the common home that they will build a house for themselves and leave the two houses for their children respectively.

[11] She testifies further that she advised defendant to pay off the houses and to build a wall fence around the house with the lump sum he received some time after 2004. She further advised him to buy MTN shares. The defendant complied.

[12] M J R testifies that he resigned, later changed to "retired" as Deputy Director in September 2009 from his employment with City of Tshwane Metropolitan Municipality.

[13] He retired at the instance of his doctor due to his highpertention and sugar diabetes conditions.

[14] He says he received a nett payout of R1, 020,000.00. He settled some of his liabilities and donated a portion to his daughters. An amount of R650, 000.00 is still available.

[15] He further testifies that the plaintiff decided on her own to leave the "common home" on the reason that she cannot live with two other women[1] under the same roof. She preferred to have a "third" house as theirs. She even requested him to bring her clothes to her house. He denies having ever agreed to buy a third house. The Plaintiff suggested that but he never agreed thereto.

[16] He further says that he maintained the municipal accounts of two houses. He

1 defendant's daughters

maintained that until these divorce summons were issued in 2009.

[17] He testifies that he visited the plaintiff regularly and even ate the food she prepared until the latest by November 2009. They at irregular intervals went out to Morula Sun. They ate out, entertained themselves and slept together overnight at the said Morula sun. The last such outing was undertaken in 2007,

[18] He acquired MTN shares at the instance and advises of the plaintiff during September 2007. He tried to reconcile from September 2007 up to and until 13 November 2009. He realised that the plaintiff was no longer interested in the relationship when she refused to be accompanied to a party scheduled to be held at Moreletta Park.

[19] He concedes under cross examination that:

19.1 He visited the plaintiff every day at her house and ate each time he found them eating.

19.2 She was with him every weekend when she was not working.

19.3 She contributed to the Joint Estate and saved him some money.

19.4 He knew that she received some lump sum which was used towards settlement of the house bond.

[20] He further concedes that the medical condition he is in made them to opt for the usage of Viagra.

[21] He testifies that he does not want to share his pension benefits with her. He intends to use the said funds for his own maintenance and once depleted, he will resort to the

government's social grants.

[22] It is trite law that a marriage concluded in the absence of an ante nuptial contract providing otherwise, creates community of property and profit and loss. Such community comes into being as soon as the marriage is concluded.[2] This is effected not only of the first but also of the second and any further marriage of a person, irrespective of whether or not there are children of a previous marriage.

[23] The basic concept of a marriage in 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 their financial contributions hold equal shares[3]

[24 All assets that belonged to the spouse before marriage and those acquired by them during marriage, form part of the Joint Estate unless excluded by a third party who bequeaths to one of the spouses with that specific provisions.[4]

[25] It is appropriate to order equal division of Joint Estate on dissolution of the marriage in community of property or 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 is satisfied that if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."[5]

[26] Section 9(1) of the Divorce Act 70 of 1979 states that; "when a decree of divorce is granted on the grounds of the irretrievable break down of a marriage the court may

2 Even under Recognition of Customary Marriage Act. 120 of 1998
3 Defendant's HOA. Mrs Ferreira
4 P 164 Husband and Wife Hahlo
5 Section 9(1) of Divorce Act 70 of 1979

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 duration of the marriage, the circumstances which gave rise to the break down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the other be unduly benefited:'

[27] Mr Van Tonder submits that there is no gross misconduct on the part of the plaintiff that warrants forfeiture of matrimonial benefits in favour of the defendant. He further submits that with no evidence led as to the value of the Joint Estate, it will not be equitable to order that each party to keep what each is in possession. He further thereto refers me to Wijker v Wijker[6] and placed on record what the court set out.[7]

[28] Mrs Ferreira submits that the test applied in terms of Section 9(1) is not "gross-misconduct" but "substantial misconduct". When I analyse Section 9(1), I find the wording "the court may..." if the court... is satisfied..." grants the court with discretionary power to order forfeiture of matrimonial benefits.

[29] Either of the following may however be considered in exercising the said discretion;

29.1 The duration of the marriage

29.2 Circumstances which gave rise to its breakdown

29.3 Any substantial misconduct on the part of either of the parties

[30] These factors have been considered in Wijker v Wijker[8] and followed in Botha v Botha[9] where the court held that these factors are not intended to be considered

6 1993 (4) SA 720 (A)
7 Head note at page 721 — I —J
8 1993 (4) SA 720 A at 727 E_F
9 2006(4) SA 144 SC A

cumulatively.[10]

[31] On the plaintiff's version the defendant paid lobola in 1995 and has since then lived together as husband and wife at the defendant's house. This was not contested. The defendant concede save for payment of lobola. Subsequent thereto a civil marriage was concluded in 1999.They continued to live together under one roof until one Sunday in September 2004.

[32] Mrs Ferreira submits that a 5 year[11] period of parties' marriage is to an extent so short warranting an order of partial forfeiture in favour of the defendant. She further submits that even if the period is calculated up to the year 2009,[12] the period is still short justifying an order of partial forfeiture in favour of the defendant.

[33] In evaluating the evidence tendered and the submissions made, I find the parties being married since 1995 when they lived together as husband and wife. The marriage was putative if accepted that lobola was not paid. The marriage still subsists. I, in the result, find their marriage as being that of 15 years. The said period cannot be said to be so "short" justifying forfeiture as submitted by Mrs Ferreira.

[34] On the issue of circumstances which gave rise to the break-down of the marriage, the plaintiff testified that one Sunday during September 2004, the defendant approached her while at work and informed her not to come back to the common home after work. She says the defendant advanced "not going along with his daughters" as reasons to let her go. On the other hand, the defendant testified that the plaintiff requested to move out of the common home on the same point.

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10 Page 146 para [8]

11 Calculated from 1999-2004

12 When summons were issued

[35] In evaluating the said evidence, I am of the view, notwithstanding how the plaintiff left the common home that the "not going along with the daughters" is not one of the elements that led to the irretrievable break down of the marriage.

[36] I find the challenge the plaintiff had with the defendants' daughters fits like a glove in the hand with a Northern Sotho proverb that state: **“Kqomo ga e amushi namane ya kqomo ye nnqwe"**.[13] It is however, an unusual situation where the woman would leave her house to live with a man and his children. There is no evidence as to what happened to the mother of the defendant daughters.

[37] There is no evidence led to prove that the challenge the plaintiff had with the defendants' daughters or vice versa, is a substantial misconduct that led to the breakdown of the marriage.

[38] The circumstances that led to the break down of the marriage are in fact, in my view, the sexual impairment due to defendants' medical condition.

[39] The plaintiff testified that she was always there for the defendant. She as a nurse, knows that a person with such medical condition often have difficulty with erection. She informed the defendant and supported him all the time. When testifying, the defendant kept on saying "she suggested..." and would immediately change to "we suggested to the usage of Viagra" to overcome the erection problem. It is difficult for the parties to come out on this issue.

13 A cow does not breast feed a calf of other cow. Loosely translated to mean; "No woman can breast feed another woman's baby."

[40] I understand their predicament of hanging their sexual impairment freely and openly in this court room. This conduct cannot, in my view, be attributed to the plaintiff. I accept her testimony of being there for him. The plaintiff impressed on me as a credible witness. The defendant, on his version, "visited" the plaintiff everyday and would even eat with her if food was at that time prepared.

[41] Considering both the circumstances which gave rise to the break down and substantial misconduct on the part of either of the parties, I find neither parties' state of health as a factor to be considered when determining whether either party will be unduly benefited if no forfeiture order is made.

[42] Hahlo & Sinclair in The Reform of the South African Law of Divorce- 4th Edition states that: "No mention is made of misconduct which has, directly or indirectly, substantially diminished the family fortunes, such as extravagance on the part of the wife or reckless gambling by the husband."[14] The learned author refers to the New Zealand Matrimonial Property Act 166 of 1976 which set out the type of misconduct to be considered as the one that "significantly affects the extent or value of the matrimonial property."[15]

[43] In assessing the conduct of the plaintiff, I find no misconduct that "significantly affects the extent or value of the matrimonial property".

[44] In Botha v Botha[16]the court stated that " Conspicuously absent from Section 9 is a catch-all phrase, permitting the court, in addition to the factors listed, to have regard to 'any other factor'. The court gives a directive to compare the section with the wording of

14 Page 52
15 Page 52
16 Op Cit para [ ] supra para 8

Section 7(2) of the Divorce Act.[17]

[45] Section 7(2) provides for '...their conduct in so far as it may be relevant to the break-down of the marriage' where as Section 9(1) provides for 'substantial[18] misconduct.

[46] The misconduct on the part of a party against whom forfeiture of matrimonial benefits is sought, must be of such a great magnitude. The misconduct must be far more than an ordinary raking of minute domestic grievance.

[47] I do not agree with Mrs Ferreira submission that "not going along" between the plaintiff and the defendant's daughters as misconduct that led to the break-down of the parties marriage, which, if the order for forfeiture is not made, the plaintiff will in relation to the defendant pension benefits, be unduly benefited.

[48] I, as a result, find the defendant's forfeiture claim stands to be dismissed. Failing a forfeiture order, the joint estate, as a matter of law, must, after deducting the debts and or liabilities of the joint estate, is divided equally between the parties.

[49] Mrs Ferreira's contention that the joint estate be divided as at date of marriage holds no water. I already have eluded that as a matter of law, all assets brought into marriage in community of property is deemed to form part of the joint estate.

[50] The defendant's pension benefit does not fall within any of the exceptions to assets forming the joint estate. The pension benefits fall within the ambit of assets that form

17 70 of 1979
18 Defined as "of great size"

part of the joint estate. Each party is entitled to half share of the pension benefit of the other. The defendant is entitled to claim the plaintiffs' pension benefits which must be paid within 60 days of this court order.

[51] I, in my final analysis, find the division of the joint estate as an appropriate order.

[52] Section 10[19] provides that "in 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 either 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."

[53] The costs in divorce action do not necessarily follow the event. The costs order may be made in favour of an unsuccessful party due to the other party's conduct in so far as it may be relevant.

[54] Mrs Ferreira submits that the plaintiff

54.1 Abandoned her claim for forfeiture on the day of trial by 'amending orally' in court.

54.2 Has still not replied to the defendants notice in terms of Rule 35 (3) of the Uniform rules of this court.

54.3 She further submits that there is no prayer for division of the joint estate in the Plaintiffs pleadings.

[55] She lastly submits that the Plaintiff be mulcted with costs.

[56] Mr Van Tonder submits in rebuttal thereto that in the event I find against the plaintiff

19 Divorce Act 70 of 1979

in respect of costs, I must order the plaintiff to pay defendant's costs of 3 days from Friday 10 September 2010, occasioned by "oral amendment" though not opposed by the defendant.

[57] Considering counsel submissions, I find a no order as to costs to be appropriate orders save for costs of 3 days from Friday 10 September 2010 to be borne by the plaintiff.

[58] I in the result make the following order.

58.1 A decree of divorce is granted

58.2 The joint estate of the parties is divided equally

58.3 The defendant is entitled to payment of 50% of the plaintiff's nett pension interest held at Mediclinic Pension Fund, calculated as at date of divorce and payable in terms of section 37D of the Pension Fund Act.

58.4 The plaintiff pays the defendant taxed costs for the trial of 10, 13 and 14 September 2010

58.5 Save for sub paragraph 4 above, each party shall pay his or her own costs in respect of the action.

AML PHATUDI

JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on: 10-13 SEPTEMBER 2010

For the Appellant: Adv VAN TONDER

Instructed by: Messrs SHAPIRO & SHAPIRO INC

For the Respondent- Adv FERREIRA

Instructed by: Messrs CHARL LOCHNER ATTORNEYS

Date of Judgment: 14 SEPTEMBER 2010