

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

17/10/2013  
DATE

SIGNATURE

17/10/2013

CASE NO: 59191/2009

IN THE MATTER BETWEEN

**SAMUEL THINE**

**PLAINTIFF**

**AND**

**ZANELE PATRICIA MABUZA**

**DEFENDANT**

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**JUDGMENT**

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**LEDWABA, DJP:**

[1] The plaintiff and the defendant entered into a customary marriage on 28 April 2007 and they have no children. The parties are domiciled within the area of Jurisdiction of this court.

[2] Both parties agree that the marriage relationship between them has irretrievably broken down and there are no prospects of a reconciliation. Their evidence in court confirms the same.

[3] The disputes raised by both Counsel are whether an order of forfeiture under section 9 (1) of the Divorce Act 70 of 1979 (The Act) should be granted in favour of the plaintiff and whether the defendant is entitled to be paid maintenance by the plaintiff.

[4] In paragraph 7 of the particulars of claim the plaintiff stated the following:

*" 7.1 Having regard to the duration of the marriage relationship between the parties, the circumstances which gave rise to the breakdown thereof and the Defendant's gross misconduct as set out above, the Defendant will in relation to the Plaintiff be unduly benefitted should an order that the Defendant forfeit the entire patrimonial benefits arising out of the marriage In Community of Property not be granted in favour of the Plaintiff.*

*7.2 The joint estate of the parties is the owner of an immovable property situated at 8 JA HOFMAN STREET, PHILLIP NEL PARK, PRETORIA*

*WEST, which immovable property is registered in the name of the plaintiff and which immovable property is the subject of a mortgage bond in favour of Nedbank Limited.*

*7.3 In order to give effect to the provisions of paragraph 7.2 supra, it may be necessary for the Defendant to be ordered to transfer her half share of the immovable property into the name of the Plaintiff the Plaintiff's costs and for the Defendant to be ordered to sign all necessary documentation on demand for this purpose failing which the sheriff for the District of Pretoria Central be authorized to sign same on the Defendant's behalf on the basis that the Plaintiff shall be liable for the payment of the outstanding amount payable to Nedbank Limited in respect of the aforesaid mortgage bond."*

[5] The order sought by the plaintiff in respect of the forfeiture of the benefits arising out of the marriage reads as follows:

*" That the Defendant forfeit the benefits arising out of the marriage In Community of Property in favour of the Plaintiff and to give effect to the aforesaid and for insofar as same may be necessary, that the Defendant transfer the Defendant's 50 % interest in the aforesaid immovable property into the name of the plaintiff at the Plaintiff's costs and that the Defendant sign all necessary documentation on demand for this purpose failing which the sheriff for the District of Pretoria Central, be authorized to sign same on*

*the Defendant's behalf on the basis that the Plaintiff shall be liable for the payment of the outstanding amount payable to Nedbank Limited in respect of the aforesaid mortgage bond."*

[6] The defendant in her plea denies that the plaintiff is entitled to an order of forfeiture in his favour. In her counter claim she alleged that the plaintiff is a member of the Governmental Employees Pension Fund and in terms of section 7(7) of Act 70 of 1979 she is entitled to half of the value of the Plaintiff's interest in the said Pension Fund as at the date of divorce. The necessary endorsement is to be made in the record of the Pension Fund.

[7] The defendant in addition to a decree of divorce seeks the following:

*" 2. Division of the joint estate;*

*3. The Defendant is entitled to 50% of the Plaintiff's right in the GOVERNMENT EMPLOYEES PENSION FUND calculated on the date of the divorce and the Defendant shall be entitled to payment when the benefits accrue to the Plaintiff;*

*4. An endorsement is to be made against the records of the Pension Fund to give effect to the provisions of par 3;*

*5. The Plaintiff to pay maintenance for the Defendant in the amount of R1000-00 per month;*

*6. Cost of suits."*

[7] In respect of the defendant's allegation in the counter claim that she is entitled to half of the Plaintiff's Interest in the Pension Fund the Plaintiff pleaded as follows:

*" Save as to aver that the Plaintiff is praying that the above Honourable Court ought orders the Defendant to forfeit the patrimonial benefits arising out of the marriage in Community of Property more specifically regard being had to the duration of the marriage relationship which exists between the parties, the reason which gave rise to the brakedown thereof and the Defendant's willful misconduct as more fully set out in the Plaintiff's Particulars of Claim and that the Plaintiff's pensionable interest is a benefit arising out of the marriage in Community of Property and as such each and every allegation as contained herein is denied as if specifically traversed and the Defendant is put to the proof thereof."*

[8] The Plaintiff further denies that the Defendant is entitled to be paid any maintenance.

#### FORFEITURE OF PATRIMONIAL BENEFITS

[9] Section 9 (1) of the Act reads as follows:

*" (1) When a decree of divorce is granted on the ground of the irretrievable break-down 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, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the order be unduly benefited."*

[10] It is trite that the factors which the court should take into account when deciding whether the party against whom forfeiture is sought would be unduly benefited or not are the following:

- (i) The duration of the marriage;
- (ii) Circumstances that gave rise to the break-down of the marriage and
- (iii) Any substantial misconduct on the part of either of the parties.

[11] It is common cause that the date of the marriage is the 28 April 2007, the Plaintiff left the common house in December 2008, and he issued divorce summons in September 2009.

#### PLAINTIFF'S EVIDENCE

[12] When the Plaintiff testified he stated that the defendant was quarrelsome and aggressive towards him. In 2008 she assaulted him and threatened to pour boiling water on him and he was forced to report the incident to the South African Police Service.

[13] He further said the defendant accused him of having an extra marital relationship and insisted that he must test for HIV but she refused to undergo the said test.

[14] He denied having extramarital affairs and admitted that he has a child, who was born in January 2008, with another woman with whom that he had an intimate relationship with before he entered into a marriage relationship with the defendant.

[15] The Plaintiff also intimated that he was made uncomfortable in the marriage by the fact that the defendant did not disclose her correct date of birth to him and he later discovered that she was about six years older than him.

[16] The plaintiff has been employed by the SAPS from 1988.

#### DEFENDANT'S EVIDENCE

[17] The Defendant testified that the intimate relationship between him and the plaintiff started in July 1992 and the plaintiff paid *lobolo* for her in the year 2002. They have been staying together since July 1998.

[18] The fact that the plaintiff had a child with another woman was not an issue to her.

[19] She said during the marriage the plaintiff had an adulterous relationship with the mother of his child.

[20] She further said she use to work from 2006 – 2007 and was earning R1200 per month. She supported the plaintiff emotionally and brought some furniture with part of the monies she earned.

[21] She is now doing piece jobs twice per week and is earning about R100 per day.

[22] She went to school up to grade 10. It is difficult for her to be gainfully employable.

#### EVALUATION OF THE EVIDENCE

[23] It is clear that the parties are blaming each other for the breaking-down of their marriage.

[24] Marriage is not a bed of roses and has its ups and downs. The parties must build it on strong foundations of love so that when the storms of life come

they can withstand them. Parties should be able to have meaningful communications and solve their problems in a mature manner.

[25] In my evaluation of the evidence the assaults and threats, the accusations by the defendant that he has extramarital relationships and the fact that it later, transpired that the defendant is about six years older than him made him to lose interest in the marriage. He left the common house in December 2008.

[26] The defendant testified that she did not have a problem with the fact that the plaintiff had a child out of the marriage but her concern was the fact that he had an adulterous relationship with the mother of his child. The defendant could not corroborate her evidence regarding the said relationship.

[27] It is clear that the main issues between the parties could not be resolved. The fact that the plaintiff has a child with another woman means that they would continue communicating and/or seeing each other. The fact that the defendant is older than the plaintiff cannot be reversed.

[28] I think in consideration whether forfeiture should be granted or not, a party against whom forfeiture is sought must have committed a substantial misconduct and continued to do so, to some extent, with the aim of pushing the other party out of the marriage.

[29] The plaintiff moved out of the house in December 2008 and the defendant has been benefitting by occupying the house. The benefit arose out of the marriage. Even though the defendant was sometimes temporarily employed I cannot find that she would be unduly benefited if division of the joint estate is granted. Forfeiture order should not be simply granted to balance the fact the one of the spouses has made a greater contribution than the other to the joint estate.

[30] The plaintiff has not in my view shown that the defendant would be unduly benefited if an order of forfeiture in respect of the house is not made. See *Wijker v Wijker* 1993 (4) SA 720 A at 731 C-H.



[31] A party claiming forfeiture must plead the necessary facts to support the said claim and clearly mention the assets the other party is to forfeit. The plaintiff did not specify in his particulars of claim that the defendant is to forfeit the Pension Benefits.

[32] In my view, a non-member becomes entitled to a share of pension interests as the court may assign in terms of section 7(8) of the Act.

[33] The plaintiff has been contributing to his pension fund for about 19 years before the parties entered into a marriage contract.

[34] The parties actually stayed together for about one year eight months. I am alive to the fact that I did find that I cannot find that either the plaintiff or the defendant's substantial misconduct led to the break-down of the marriage. Both parties failed to resolve the issues between them and that led to the irretrievable breaking down of their marriage.

[35] Section 7(7)(a) of the Act reads as follows:

*"(7) (a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets."*

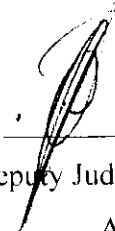
[36] In terms of section 7(8) of the Act the court has a discretion to assign a share that it deems just. In *casu* I think the Pension Interest of the Plaintiff should be deemed to be part of the assets of the joint estate, however, especially considering the time when the plaintiff started contributing and the fact that the parties only stayed together for about one year eight months it will not be fair and just to order that the defendant should be entitled to 50% of the plaintiff's pension fund.

[37] The plaintiff has been paying the defendant maintenance since 2009 . Considering the benefits that the defendant is to get from the marriage in Community of Property the period of maintenance for the defendant should be limited to two years after the granting of the decree of divorce.

[38] I have seriously considered the issue of costs and in exercising my judicial discretion each party should pay its own costs.

[39] I therefor make the following order:

1. A decree of divorce is granted.
2. Plaintiff's claim for forfeiture of the marriage benefits in his favour against the defendant is dismissed.
3. Division of the joint estate.
4. The Defendant is entitled to 20% of the value of the plaintiff's right in the Government Employees Pension Fund (Plaintiff salary number 6215050, member no 96202070 ID 6712075594089) calculated on the date of divorce.
5. An endorsement is to be made against the records of the Pension Fund to give effect to the provisions of paragraph 4.
6. The plaintiff to continue paying maintenance for the defendant in the amount of R1000.00 per month for 2 years from the date of this divorce.
7. Each party to pay its own costs.



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Deputy Judge President  
A P Ledwaba

HEARD ON: 17 September 2013

FOR THE PLAINTIFF: Adv J A van Tonder

INSTRUCTED BY: Shapiro & Shapiro Attorneys, Pretoria

FOR THE DEFENDANT:

INSTRUCTED BY: Justice Centre Legal Aid, Pretoria