REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

Case No.: 20741/2011

Date: 14 May 2014

In the matter between:

R[...], M[...] S[...] **PLAINTIFF**

and

R[...], P[...] P[...] **FIRST DEFENDANT**

D[...], P[...] P[....] **SECOND DEFENDANT**

JUDGMENT

HIEMSTRA AJ

[1] This is a divorce action in which the plaintiff sued the first defendant for divorce, forfeiture of the patrimonial benefits arising from the marriage in community of property and relief in respect of the minor children bom from the marriage. The plaintiff also sued the second defendant for damages suffered as a result of his adultery with the first defendant.

[2] The action against the second defendant was settled and is no longer in issue. The principal issue in dispute is the plaintiffs claim for forfeiture of patrimonial benefits arising from the marriage in community of property. Also in dispute are the amount of maintenance to be paid by the first defendant in respect of the children and a minor issue relating to the second defendant's right of access to the children. These are ancillary issues and I shall deal with them at the end of the judgment.

[3] Since the second defendant is no longer a party, I shall refer to the first defendant as "the defendant", except where it is necessary to refer to both defendants in the course of the narrative.

[4] The parties were married to each other at Virginia in the Free State on 5 January 1992 in community of property. Three children were born of the marriage, all still minors. The marriage lasted for 19 years. By agreement, the children's primary residence will be with the plaintiff, subject to the defendant's rights of reasonable access and maintenance payable by the defendant in respect of the children.

[5] The marriage relationship between the parties has broken down irretrievably and there are no prospects or the restoration of the relationship.

[6] Counsel for both parties submitted substantial heads of argument, including lengthy dissertations on the basic principles of the Divorce Act, 70 of 1979, the onus of proof, the nature of the concept of community of property, the legal aspects surrounding forfeiture of benefits of a marriage in community of property and the law on maintenance of children. The heads are supported by a host of judicial precedent on these subjects. I do not propose to undertake a similar exposition of the law.

FORFEITURE OF BENEFITS

[7] In considering whether a party to a marriage in community of property should forfeit the benefits arising from such a marriage, the point of departure is section 9(1) of the Divorce Act, which reads thus:

> "**Section 9 - Forfeiture of patrimonial benefits of marriage**
>
> (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 other be unduly benefited."

[8] It was held in *Wijker v Wijker*[1] that the court should first determine whether or not the party against whom the order is sought will in fact be benefitted if the order is made. There is no doubt that the defendant would in fact benefit from the marriage in community of property, hence the plaintiffs insistence on an order for the forfeiture thereof and the defendant痴 vigorous defence against it. The question to be considered is whether the defendant would benefit unduly. The subsection spells out the factors the court must consider in deciding this question. They are tthe duration of the marriage; the circumstances which gave rise to the breakdown of the marriage and any substantial misconduct on the part of either of the parties.

[9] It is not necessary that any or all the considerations mentioned in the subsection be present before a forfeiture order may be made. The crucial question remains whether the one party would unduly benefit from the marriage regime. In order to answer the question the court must have regard to the factors mentioned.[2]

[10] The Supreme Court of Appeal said in *Beaumont v Beaumont*[3]:

> "...In many, probably the most cases, both parties will be to blame, in the sense of having contributed to the break-down of the marriage... In such cases, where there is no conspicuous disparity between the conduct of the one party, and that of the other, our Courts will not indulge in an exercise to apportion the fault of the parties, and thus nullify the advantage of the "no-fault" system of divorce."

[11] It must at all times be kept in mind that a marriage in community of property is 殿 砥niversal economic partnership of the spouses."[4] That is the marriage regime the parties had agreed to when they entered into the marriage, and like any other agreement, it should not be disturbed save for substantial and compelling reasons.[5]

[12] Both parties testified and there are numerous factual disputes, few of which can be conclusively resolved. The court can at best form a view as to the nature of the marriage relationship and the conduct of the parties and conclude from that whether grounds exist for declaring the defendant's patrimonial benefits, if any, forfeit.

[13] The plaintiff is a 52-year old man. At the time of the separation of the parties, on 27 September 1011, he was 49 years old. He is the Chief Executive Officer of Umalusi, the National Quality Assurance Authority in education. He has had a flourishing career during which he was promoted on regular basis until he reached his current position. He has a doctorate in education and is a published author of a book on the 1976 Soweto uprisings.

[14] The plaintiff is a tall imposing man. He is a devout Seventh Day Adventist, and expounds adherence to the dictates of this faith and the authority of the church elders. He is also a traditionalist, who adheres to his views of African culture in respect of the relationship between husband and wife, in particular the duty of the wife to obey her husband. As will appear below, he is an authoritarian who does not countenance defiance of his authority as a husband. It appears also from the evidence that the defendant had regularly defied him and refused to adhere to his strictures.

[15] The defendant is the plaintiffs junior by 10 years. When the parties married, she had just made her matric. She is a feisty, attractive woman, who has also made her mark as an educator and administrator in the field of education. She ascended from her position as a teacher in a rural primary school to her current

position as Deputy Director: Artisan Development in the Department of Higher Education.

[16] It is common cause that the defendant had committed adultery with a mutual friend, the second defendant. In her pleadings and throughout pre-trial conferences the defendant steadfastly denied the adultery. She admitted it for the first time on the morning of the first day of the trial. Mr Smith SC, appearing for the plaintiff criticised her for her dishonesty in this regard. It must, however, point out that she had not denied the adultery under oath. Mr Haskins SC, appearing for the defendant referred me to E. Morris: Technique in Litigation[6] where the learned author said:

> *"If you are in doubt about an admission the natural reaction is to plead a denial. In other circumstances* a *denial may be pleaded if the defendant thinks that the plaintiff may be unable to prove a material allegation in his case, or where the pleader knows that the plaintiff will be able to prove the allegation, but prefers to deny it in order to force the plaintiff to testify. Such denials are referred to, with varying degrees of disrespect, as "tactical denials. It is, accordingly, permissible to plead a tactical denial and this must be distinguished from a denial under oath of matters which ought to be admitted."*

Despite the above, in my view the defendant's persistent denial reflects negatively on her credibility as a witness. However, it is not so scandalous as to taint all her evidence. As will appear later in this judgment, I find the testimony of both parties lacking in truthfulness in important respects.

[17] Adultery manifestly constitutes substantial misconduct within the meaning of s 9(1) of the Divorce Act. Adultery may, however, in some instances not be the cause of the breakdown of a marriage; it may be the consequence of an unhappy or abusive relationship. The defendant contended that the plaintiff had assaulted her, raped her, and mentally abused her during the marriage. If I find that the plaintiff had also committed substantial misconduct during the course of the marriage, I shall consider on all the evidence whether the defendant's misconduct outweighs the misconduct of the plaintiff to such an extent that her patrimonial benefits arising from the marriage in community of property should be declared forfeit.

The evidence

[18] The plaintiff maintained that the marriage had been a satisfactory one until about 5 years before the separation. This is, however, not borne out by the evidence. It had evidently been a deeply troubled marriage from at least one year after the marriage.

[19] The plaintiff admitted that he had assaulted the defendant as early as January 1993 barely a year after the marriage. The nature and gravity of the assault, and where it took place are disputed and I shall not attempt to resolve the factual differences. However, the nature of the disagreement that led to the assault is significant in

providing insight into the parties' relationship. The plaintiff had instructed the defendant to wear more modest pants while his father visited the couple at their home. She refused to do so. This infuriated the plaintiff. However, he did not assert his authority there and then, but assaulted her the following day, presumably to punish her for her disobedience.

[20] In June 1999 the plaintiff had to travel to Pretoria from Bloemfontein for a three-day business engagement. He had to arise at 04:00 in the morning to catch a flight. He instructed the defendant the previous evening to pack his bags for the trip. She had been watching an Oprah Winfrey show on television and told the plaintiff that she would do it after the programme. He regarded it as disobedience and he gave her a frightful beating. According to the defendant, he had pinned her down and pummelled her face. She said that he had in the process, even urged their child to slap her because she had been disobedient to him. That aspect of her evidence is not admitted and I make no finding in that regard. The plaintiff, however, admitted the assault. He also did not dispute that the defendant had sought medical assistance and that the doctor had been so concerned about her injuries that he had x-rays taken to establish whether she had sustained fractures to her facial bones. The defendant testified that it had fortunately happened at the beginning of school holidays and that she had six weeks to recuperate. The plaintiff confessed to the defendant's family that he had assaulted the defendant and sought their forgiveness. However, in his testimony he brazenly defended his actions and said that in his culture a woman had to obey her husband and that she had defied him. He regarded the incident as a normal tiff that arises in all marriages.

[21] The defendant testified about other assaults, but the plaintiff denied them, or said that he could not remember the incidents. His denials are, however, not convincing. He had been blatantly untruthful in his evidence regarding the alleged assaults. He asserted emphatically at the outset that he had assaulted her only once during the course of the marriage, but under cross-examination admitted at least one other very serious assault. Some of the alleged assaults, he said he could not remember. This makes it worse for him. It creates the impression that he had so regularly assaulted her that he could not remember each specific instance. If he had only assaulted her once or twice, he would have denied the all other assaults categorically.

[22] The defendant further testified that the plaintiff had forced himself sexually on her on several occasions. The plaintiff's response to this allegation is ambiguous. He denied that he had raped her, but on the other hand defended his actions by saying that she had been cold and aloof towards him, and that he had pleaded with her for sexual relations. I can, however, not make a categorical finding on this allegation.

[23] The defendant testified that the plaintiff had in general been aggressive, moody, quarrelsome, belittling, bombastic and humiliating towards her. He tried to dictate her clothing and hairstyle, when and how to smile and where she may go and where not to go. He even disapproved of the music she liked to listen to and insisted that she rather listen to Gospel music. My impression is, however, that she mostly defied him,

sometimes openly and sometimes times surreptitiously. The plaintiff found a compact disk on which she had written the names of gospel songs. However, it contained popular secular music.

[24] The plaintiffs evidence is that since about 5 years before the separation the defendant had become cold, distant and aloof towards him. He said that she arrived home late from work in the evenings with dubious excuses as to her whereabouts. He suspected her of having an affair with someone else, but could not prove it at the time. I accept that there is truth in these contentions.

[25] The plaintiff and the defendant had been close friends with the second defendant and his wife. They visited each other regularly and held vacations together. Unbeknown to the plaintiff, the first and second defendant had started an adulterous relationship. On 5 March 2011 the second defendant's wife intercepted an sms message from the second defendant to the first defendant in which he used endearing terms such as "sweetheart - mokapelo", "my love" and "miss you baby". The plaintiff immediately called a meeting with the defendant's family in Virginia and confronted the defendant with the evidence in front of her parents and siblings. The defendant admitted that she had an adulterous relationship with the second defendant. They met with the plaintiffs family thereafter and she again admitted it. The plaintiff insisted on knowing when it had started and where they had conducted their relationship. The defendant was not forthcoming with these facts and it embittered the plaintiff.

[26] The plaintiff thereafter sought the intervention of their pastor, the church elders and a psychologist. The defendant at first refused to participate in these meetings, later participated reluctantly and eventually withdrew again. She said that the plaintiff had put her on trial before all these people.

Section 9(1) of the Divorce Act

[27] This brings me back to the provisions of section 9 of the Divorce Act and the factors that must be considered in deciding whether or not to declare the defendant's patrimonial benefits from the marriage in community of property forfeit. They are:

1. the duration of the marriage,

2. the circumstances which gave rise to the break-down of the marriage and

3. any substantial misconduct on the part of either of the parties.

The duration of the marriage

[28] The marriage lasted for 19 years, which is substantial. The plaintiff conceded that the defendant had been a satisfactory wife for most of the duration of the marriage. She had supported him in his career and

followed him to wherever his promotions took him. She was a good mother and was an adequate housekeeper. Although the plaintiff created the impression during his evidence-in-chief that the defendant had made no or little contribution to the household expenses, he was constrained to admit under cross-examination that she indeed contributed.

The circumstances which gave rise to the breakdown of the marriage

[29] The plaintiff maintained that the defendant's adultery was the sole cause of the breakdown of the marriage. He said under cross-examination that had it not been for the adultery, he would not have sued the defendant for divorce. Not even her alleged bad behaviour during the last five years of marriage had been so serious that it caused the marriage to break down. He does not believe that his behaviour, even the assaults during the marriage, had contributed to the breakdown. He seems to regard adultery as the ultimate outrage in a marriage and that no circumstances could mitigate the gravity thereof.

[30] The plaintiff regards himself as the head of the family and that his wife and children owe him unreserved obedience. He is mistaken. The husband痴 role as 塗ead of the family・ was abolished by the s30 of the General Law Fourth Amendment Act, which amended s 13 of the Matrimonial Property Act[7]. In any event, such a view conflicts with the equality provisions of the Constitution. The Constitution states that it applies to 殿ll law・. It also binds private persons, 妬f and, to the extent that it is applicable, taking into account the nature of the right and of any duty imposed by the right.・ Every person is guaranteed equality before the law and the equal protection of the law. If it is so that in African culture a woman is unequal in a marriage relationship and subservient to her husband, then it is in conflict with the Constitution and it cannot be sustained. Most importantly, it cannot be enforced through violence.

Substantial misconduct on the part of either of the parties

[31] Both parties misconducted themselves during the marriage. The defendant committed adultery and the plaintiff committed physical violence against a defenceless woman. Physical violence is the act of cowardice. He is unable to assert himself through the power of his personality and therefore resorts to violence enforce his will or to vent his anger. This ranks with adultery as substantial misconduct within the meaning of s 9(1) of the Act. The moral blameworthiness of adultery may be mitigated by the circumstances, but serious assault cannot be condoned. Mitigating circumstances for adultery include mental and physical abuse. It is evident that the plaintiff had physically abused the defendant. It is also apparent from the evidence that the plaintiff had behaved in an oppressive and overbearing manner towards her.

[32] Without condoning adultery, I find that the defendant's adultery did not cause the breakdown of the marriage. The defendant was deeply unhappy in her marriage. She is a sprightly woman caught in a marriage

with an overbearing man who stifled her with his conservative and pious outlook on life.

[33] I shall therefore not make and order for the forfeiture of the defendant's patrimonial benefits arising from the marriage in community of property.

DEFENDANT'S ACCESS TO THE CHILDREN

[34] As I have said, the issue of the primary residence of the children and the defendant's rights of contact have been settled but for one minor aspect. The defendant contends that the children should reside with her whenever the plaintiff is away from home on business. The plaintiff travels outside Pretoria from time to town and once or twice per year abroad.

[35] I find it unnecessary to make a ruling in this regard. It may be disruptive of the children's routines if they have to move to the defendant's home every time the plaintiff is away. The plaintiff has made adequate arrangements for the care of the children when he is away. If he goes away for long periods, it may be in the children's interests to stay with the defendant. This is a detail that the parties must regulate amongst themselves. The defendant has reasonable access to the children and such reasonable access includes the right in appropriate circumstances to have the children with her when plaintiff is away for home for extended periods. It is, however, not advisable for the court to involve itself in these details. The court can only hope that the parties will approach these matters with maturity and mutual respect.

MAINTENANCE

[36] The defendant was ordered in a Rule 43 application to pay maintenance in respect of the children in the amount of R250 per child per month. She failed to do so without providing any satisfactory explanation. She is in contempt of court. The plaintiff now claims a contribution from the defendant of R 2 000 per month per child.

[37] I have considered the financial positions of both parties. Both have substantial incomes and substantial debts. Both struggle to meet their monthly obligations.

[38] It is apparent from the defendant's evidence that she is reckless with her money and inclined to incur huge unnecessary debts. She has squandered a pension payout of R209 193.62 which she received on 2 December 2013 and was dismally incapable of explaining under cross-examination what she had done with it. She may find it difficult to pay R6 000 per month for the children, but with responsible management of her finances, she should be able to afford it. The plaintiff should not solely bear the financial burden of the children and a substantial contribution from the defendant is justified.

In the result I make the following order:

1. A decree of divorce is granted to the plaintiff;

2. Both the plaintiff and the defendant will retain parental responsibilities and rights in respect of the three minor children, subject thereto that the primary residence of the said children shall be with the plaintiff, subject to the defendant's right of reasonable access;

3. The defendant's rights of contact shall be the following:

3.1 Alternate weekends from 17:00 on Fridays to 18:00 on Sundays, such alternative weekends to be arranged in such a fashion that the children shall be with the plaintiff on the weekend of Father's Day and the with the first defendant on the weekend of Mother's Day;

3.2 Alternative long weekends, the first defendant to have the children from 17:00 at the commencement of the long weekend up to 18:009 at the end thereof;

3.3 Alternate public holidays not forming part of a weekend from 17:00 on the day preceding the public holiday until 18:00 on the public holiday;

3.4 Alternative short school holidays to rotate on an annual basis;

3.5 One half of every long school holiday, being the June/July and December/January school holidays on the basis that the December/January school holiday shall be divided in such a fashion that the minor children shall be with one or the other parent on an alternative basis for Christmas and New Year inclusive;

3.6 Reasonable telephonic contact at all reasonable times.

4. The first defendant shall contribute an amount of R2 000.00 per month per child to the minor children's maintenance, which amount is to be paid directly to the plaintiff into such bank account as may be determined by him;

5. The arrear monthly maintenance payments of the first defendant in terms of the Rule 43 Court Order, dated 2 August 2013, shall be paid forthwith;

6. Each party shall pay his or her own costs.

J. HIEMSTRA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date heard: 26 - 28 March 2014

Date of judgment: 9 May 2014

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1 1993 (4) SA 720 (A)

2 *Klerk v Klerk* 1991 (1) SA 265 (W)

3 1987 (1)SA 967 (A) at 994

4 H. R. Hahlo, *The South African Law of Husband and Wife,* Fifth edition at 157-158

5 See *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) at 601

6 6th Edition by J. Mullins & C. da Silva at page 94

7 88 of 1984