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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 26016/2017

- (1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED.
DATE: 15/11/22

In the matter between:

M[....] P[....] M[....]1

PLAINTIFF

and

G[....] P[....] M[....]2

DEFENDANT

JUDGMENT

MANAMELA AJ

INTRODUCTION

[1] This is an opposed divorce, both parties seek a decree of divorce against each other based on the grounds of irretrievable breakdown of marriage, with a claim for

forfeiture of the patrimonial benefits, either wholly or in part, in terms of section 9(1) of the Divorce Act¹ (herein after "the Act").

[2] The plaintiff's claim for forfeiture was abandon during trial and substituted with a claim for equal division of the joint estate.

FACTUAL BACKGROUND

[3] The following is common cause between the parties: the marriage relationship has broken down irretrievably; the plaintiff instituted divorce proceedings around 2017; the parties are married in community of property and of profit and loss which marriage still subsists; and, one minor child was born out of the marriage, born on 19 November 2004.

[4] The plaintiff is employed as Chief Security Officer at the Department of International Relations and Co-operations, and the defendant is employed as an educator, under the Mpumalanga Provincial Department of Education.

[5] The main assets in the joint estate are the immovable property situated at [...] J[...] C[...] S[...], Pretoria as well as the pension interests held by Government Employees Pension Fund, for both the plaintiff and the defendant.

[6] There is not much value in the movable assets in the form of furniture and household effects, the two motor vehicles, being a Ford Bantam, used by the plaintiff, and a Mercedes Benz which was stripped off some parts by the plaintiff, and which was previously used by the defendant.

ISSUES OF DETERMINATION

[8] The issue to be determined is whether or not an order in terms of section 9(1) of the Act is justifiable or simply put whether one party would unduly benefit should an order for forfeiture not granted.

¹ Act 70 of 1979 as amended.

LEGAL PRINCIPLES

[9] Forfeiture of patrimonial benefits is legislated in terms of section 9(1) the Act, which states as follows:

"(1) When a decree of divorce is granted on the ground of the irretrievable break-down of 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."

[10] 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.

[11] In *Gillingham v Gilfingham*², Innes, CJ stated that:

"When two persons are married in community of property a universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the Court to divide the estate, and the Court has power to appoint some person to effect the division on its behalf."

² 1904 TS 609 at p. 613.

[12] It is a choice to enter into a marriage in community of property in South Africa, and there are options before and during the marriage to enter into an antenuptial or prenuptial contract, thus clients are advised, whether already married or not, to seriously consider how they would like to share in each other's assets and liabilities, so as to avoid having to share their entire estates upon the dissolution of the marriage.

[13] In *Gillingham*³ the court held that:

"Under the general powers which the Court has to appoint curators it may nominate and empower someone (whether he is called liquidator, receiver, or curator - perhaps curator is the better word) to collect, realise, and divide the estate. And that that has been the practice in South African courts is clear."

[14] Section 9(1) of the Act gives the court a discretion⁴ to 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.

[15] In *Wijker v Wijker*⁵ the Appeal Court set out the following approach to be adopted in hearing of a forfeiture claim:

"It is obvious from the wording of the section. that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be purely a factual issue. Once that has been established the trial court must determine, having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefited if a forfeiture order is not made. Although the second determination is a value

³ Ibid.

⁴ *Old Mutual Life Assurance Co (SA) Ltd v Swemmer* 2004 (5) SA 373 (SCA) at [23].

⁵ 1993 (4) SA 720 (A) at 727D.

judgment, it is made by the trial court after having considered the facts falling within the compass of the three factors mentioned in the section."

[16] In *KT v MR*⁶ Kollapen, J in reference to *Wijker* found that:

It is apparent and it was not disputed that, absent an order for forfeiture, the plaintiff will in fact be benefitted. This is a factual issue and, when one has regard to the undisputed evidence that the defendant acquired all of the assets of the joint estate from his own resources and most of them even before the conclusion of the marriage in May 2011, the conclusion that, factually, the plaintiff will be benefitted in the event of a division is inescapable.

[17] It is clear that the courts take the granting of forfeiture orders very seriously and that it takes more than an allegation of adultery of: one spouse alone causing the breakdown of the marriage, to be successful in a claim for forfeiture of the patrimonial benefits of the marriage.

DISCUSSION

[18] The second determination is a value judgment and this enquiry is the most significant which must take into account the irretrievable breakdown of marriage, namely, 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.

[19] Our court has previously relied on the guilty party principle, in the determination of these elements, under common law. The Act does set- out what circumstances may be considered by the courts in assessing what led to the breakdown of the marriage. Based on discretion given to the court, the analysis of these factors can only be made on a case-to- case basis, as there is no closed list of factors, which may be taken into consideration.

⁶ 2017 (1) SA 97 (GP).

[20] Matyila v Matyila⁷, Van Zyl J was of the view that:

"...on a proper interpretation of this section it would appear that all three factors should in fact be both alleged and proved. There is no indication that the Court may have reference to only the one or the other. Had the section read differently insofar as there was a reference to 'any other factor which may be relevant' or had the word 'or' or some similar word indicating alternative possibilities been used, then Wepener's argument may hold water".

[21] In Matyila, Wepener argued that all these factors did not have to be pleaded or proved when an order was sought. His submission was that it would be sufficient to prove only one or two.

[22] What appears to be common between the parties as a point of contention is the demonstrate of contribution or lack thereof towards the joint estate, as the main reason for. the claim of forfeiture.

[23] A forfeiture order may not be granted simply to balance the fact that one of the spouses has made a greater contribution than the other to the joint estate.

[24] In V v V⁸, the wife claimed forfeiture because her husband never contributed to her pension fund or the bond on her property. She contested that the husband would be unduly benefited if forfeiture was not granted based on his misconduct during the marriage. It was held that fault on the part of any of the parties is of no consequence for purposes of a determination concerning forfeiture of the marital benefits as provided in terms of Section 9(1) of the Act. The wife made several bold statements against the husband, alleging misconduct on his part. However, she failed to prove the misconduct on his part. All she did was raise issue and incidents that took place, which must have contributed to the irretrievable breakdown of the marriage. However, the breakdown of the marriage was proven to be attributable to both the wife and husband.

⁷ 1987 (3) SA 230 (WLD) at 234G.

⁸ [2020] ZAGPPHC 154.

It was held further that the relatively short period of time over which the marriage subsisted did not constitute a reason to grant an order for forfeiture. The fact that the husband did not contribute to the pension fund or bond account did not mean he would be unduly enriched at the expense of the wife if the order was not granted. Thus, the wife failed to prove her claim and the order for forfeiture was not granted. The fact that the husband would benefit by the division of the joint estate is a natural consequence of a marriage in community of property, which both parties willingly contracted into.

[25] It was held in *Engelbrecht v Engelbrecht*⁹ that ownership of another party'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 property regime.

DURATION OF THE MARRIAGE

[26] By illustration of the duration of marriage, the plaintiff testified that he left the matrimonial home around 2017 in response to a number of domestic violence restraint orders that the defendant sought against him. The duration of the marriage subsisted for a period of... Due to the persistence problems and the inability of the parties to resolve them, it lead to the breakdown of the marriage.

THE CIRCUMSTANCES THAT GAVE RISE TO THE BREAKDOWN

[27] The plaintiff testifies that there was an agreement between him and the defendant, in terms of which they allocated household responsibilities to each other from the inception their marriage, in terms of which the plaintiff was responsible for mortgage bond repayment, school fees and purchasing and maintenance of vehicles.

⁹ 1944 NPD 186.

[28] The plaintiff further testifies that he encountered financial constraints as a result of having to repay government subsidy amount(s) which were erroneously allocated by the employer to the defendant and himself, instead of one of them. The other reason was that he had to pay medical bills relating to the minor child's psychological treatment, which led to arrears on the bond repayments. The plaintiff further testifies that he never stopped maintaining the minor child, and never stopped paying the school fees, which is disputed by the defendant.

[29] The defendant's case is that the plaintiff was physically and emotionally abusive, and never contributed towards the joint estate. The defendant claims to have paid for the mortgage bond as far back as 2009, until around 2016 when the plaintiff offered to take over the bond on condition that the defendant vacated the matrimonial property, which he left in arrears.

[30] With regards to maintenance of the minor child, the defendant testified that she was forced to seek an emolument attachment order against the plaintiff, as a result of non-payment, which is currently in force.

[31] The defendant's testimony was that the plaintiff had to contribute 50% of the bond repayment in the amount of R3000 into the defendant's account for only 3 years. During 2016, the plaintiff offered to take over the bond repayments on condition that the defendant moves out of the matrimonial home. The plaintiff caused arrears of over 6 months, which the defendant settled over some time.

[32] The plaintiff and the defendant are the registered owners of an immovable property which was purchased on 05 November 2007 for R690,000.00.

[33] As a result of the arrears on the bond account, the balance on the bond as at 23 June 2022, is R520,009.01.

SUBSTANTIAL MISCONDUCT.

[34] The Defendant testified that the reason she wants the plaintiff to forfeit the benefits is that he failed to contribute towards the bond despite the Defendant having

taken over the entire household expenses. The Parties agreed to nominate the Defendant's bank account as primary account wherein bond repayment will be deducted, the Plaintiff failed to contribute towards the bond and the Defendant continued to make her contribution to protect her name against bad credit record and for the property to be repossessed. The Plaintiff failed to provide this court with any shred of evidence and/or any valid reasons regarding his failed contribution towards the joint estate.

[35] The Defendant further testified that the Plaintiff lied about paying tertiary education fees for his child while there is no child of the Plaintiff who attended tertiary education. The Defendant further testified that she had to negotiate with the school not to chase the child from school and further that she took out loans to settle the arrears.

[36] The Plaintiff's selfish stance of pocketing money to himself while the Defendant was struggling to meet their household financial obligations tantamount to substantial misconduct which cannot be overlooked.

[37] The Defendant had to force the plaintiff to contribute towards the maintenance of the child through the Maintenance Court.

[38] Substantial misconduct must be a case in point before an order can be issued in terms of this section that one party forfeits a portion of that to which he/she would normally be entitled. The Plaintiff was generally abusive towards the Defendant, both physically, emotionally as well as financially. This goes further to include the extra-marital affairs that the Defendant had to endure.

CONCLUSION

[36] I am convinced that there are valid reasons for forfeiture of benefits by the plaintiff. So often, a party in a divorce is so aggrieved and upset by their spouse's behaviour during the marriage, and rightfully so, that they cannot fathom having to give up an asset or let their spouse benefit in any way, upon divorce. We have had numerous spouses wanting us to apply for forfeiture of the benefits of the marriage

based on the other spouse's bad behaviour during the marriage. This is such a case and I do not see why the plaintiff should still receive any share of the matrimonial property.

[37] In so far-as the pension interests are concerned, I find it reasonable for the defendant to retain her full pension interest and with a full claim of 50% against the plaintiff's pension interest to compensate for the financial constraint she was put under over the years.

ORDER-

The following order is order-

- (a) The decree of divorce is granted.
- (b) Full forfeiture of benefits against the Plaintiff.
- (c) Parental rights and responsibility with regards to the minor child is awarded to both parties, permanent residence of the child is awarded to the defendant, and the plaintiff is granted reasonable rights of contact;
- (d) The plaintiff's pension administrator, the Government Employers pension Fund is ordered to pay the defendant an amount of 50% of the plaintiff's pension interest which will accrue to the defendant as at the date of this order, which pension interest shall be payable to the defendant within sixty (60) days from the date of this order.

P N MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 12 August 2022

Judgment delivered: 15 November 2022

APPEARANCES:

Counsel for the Plaintiff:	Mr M S Masilela
Attorneys for the Plaintiff:	Ramafoko Attorneys

Counsels for the Defendant:	Adv. K Ramarumo
Attorneys for the Defendant:	Noko Ramaboya Attorneys