REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 50524/2017

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 22 MARCH 2023

E van der Schyff

In the matter between:

M[...] M[...] PLAINTIFF

and

M[...] M[...] DEFENDANT

JUDGMENT

Van der Schyff J

Introduction

[1] In this opposed divorce action, the only issue to be determined as indicated in the pleadings, is whether the defendant is entitled to a half share of the plaintiff's pension fund's proceeds. As a result, only the facts relevant to answering this question are set out.

The facts

[2] The plaintiff and the defendant were married on 7 August 2007. Their chosen matrimonial property regime is one of community of property. Their marriage relationship was turbulent. The defendant at times abused his wife, and he was in at least one extra-marital relationship. He did not deny that the plaintiff contracted HIV through him after they were married. The plaintiff left the matrimonial home during 2014, but returned in 2015 after the defendant's uncle intervened. Their relationship, however, remained strained and acrimonious. Since 2015 the defendant has failed to contribute to the parties' son's maintenance, and that responsibility fell solely on the plaintiff's shoulders. He is, however, currently paying maintenance and gradually catching up on the arrears. The parties have not lived together since 2017 when the plaintiff left the matrimonial home permanently.

[3] In 2016, whilst the plaintiff still resided in the matrimonial home, she resigned from her employment. She received a pension fund benefit that amounted to R800 000,00 after taxes. She did not inform the defendant that she received the money as they were 'fighting at the time'. She used the money, amongst others, to provide for herself and her children, to pay household expenses. She paid for herself and her daughter, of whom the defendant is not the biological father but who was also accepted into the defendant's family as per the lobola agreement, to attend a 'property course' to improve their qualifications and enhance their business skills. She also paid her daughter's tertiary education costs at UNISA and the University of the Western Cape. She assisted her daughter in setting up a business. She explained that she also used the money to pay for her HIV medication. Although the defendant testified that the plaintiff is still a beneficiary on his medical aid, her evidence in this regard was not disputed. She also used the money to pay for the rental of a flat for a period. The plaintiff testified that the amount she received as a pension benefit has since been depleted.

The plaintiff's claim pertaining to the joint estate

[4] In the particulars of claim, the plaintiff claims the division of the joint estate subject thereto that the defendant forfeits patrimonial benefits of the marriage

in community of property. During the trial, the plaintiff, however, abandoned the forfeiture claim. She only seeks a division of the joint estate, inclusive of the defendant's pension interest.

The defendant's plea and counterclaim

[5] The defendant filed a 'bare denial' regarding the plaintiff's forfeiture claim save for specifically denying that he abused the plaintiff, a fact he conceded when under oath, and pleading that the A[...] property was sold without any undue influence or force, and that there were no proceeds earned.' The defendant also pleaded that the plaintiff 'has her proceeds of pension fund benefits which the Defendant is entitled to the 50% share' (*sic*.).

[6] In his counterclaim, the defendant stated that:

> 'Plaintiff was a member of the Pension Fund Scheme and she realised her pension proceeds in 2016 without sharing with the Defendant.
> The Defendant was/is entitled to half share of the Plaintiff pension funds proceeds.'

[7] The defendant subsequently seeks a division of the joint estate 'including the Plaintiff's Pension Interest'. The plaintiff did not file a replication or a plea to the defendant's plea in reconvention.

Pre-trial minute

[8] In the pre-trial minute signed by both parties' legal representatives, it was agreed that the issues in dispute relate to the plaintiff's claim that a half share of the defendant's pension is to be awarded to her and the disputed fact that the plaintiff has no pension. The most pressing issue was identified as the division of the defendant's pension interest. The issue of the plaintiff forfeiting any claim to the defendant's pension interest is, however, not raised in the pleadings.

Discussion

[9] When the trial commenced, the parties' legal representatives were at loggerheads regarding the defendant's counterclaim. Plaintiff's counsel submitted that the defendant's claim in reconvention did not contain the necessary averments to establish a claim for forfeiture of patrimonial benefits of the marriage in community of property. Defendant's counsel contended that it is clear from the particulars of claim that the relief the defendant seeks is forfeiture of patrimonial benefits in that half of the value of the pension benefit the plaintiff must be allocated to the defendant before the remainder of the joint estate is divided – and this effectively amounts to forfeiture. Counsel for the defendant further contended that the plaintiff's failure to file a replication and a plea in reconvention caused the averments relating to the defendant's interest to the 50% share of the plaintiff's pension interest raised in the plea and counterclaim to stand uncontested.

i. Plaintiff's failure to replicate or file a plea to the counterclaim

[10] The parties are married in community of property. Upon marriage, the spouses' separate estates automatically merged into one estate for the duration of the marriage, and the spouses became tied co-owners in undivided and indivisible half-shares of all the assets and liabilities they had at the time of the marriage as well as the assets and liabilities they acquired during the marriage.[1]

[11] It is trite that anything that has monetary value for the person who holds a right, title or interest in it, is an asset.[2] Examples of assets are membership interests in close corporations and 'pension benefits that have already

[1] This trite principle is succinctly explained by Heaton J and Kruger H in *South African Family Law* 4th ed Lexis Nexis 62. See, amongst others, *Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388, *De Wet v Jurgens* 1970 (3) SA 38 (A), *Du Plessis v Pienaar* 2003 (1) SA 671 (SCA). The exceptions that exist do not find application in the current factual setting.
[2] Heaton and Kruger, supra, 63.

accrued to one of the spouses.'[3] Where pension benefits have not yet accrued to the spouse s 7(7) and (8) of the Divorce Act 70 of 1979 (the Divorce Act) applies if the marriage is terminated by divorce. As a result, a party's pension interest shall, subject to s (7)(b) and (c), be deemed to be part of the party's assets.

[12] One of the legal consequences of this matrimonial property regime for the parties before this court, is that when the plaintiff's pension benefit was paid out in 2016, the money that was paid out immediately and automatically accumulated to the joint estate. It did not vest in a separate estate. This legal consequence of the parties' chosen matrimonial property regime renders the plaintiff's failure to file a replication or plea to the counterclaim nugatory. Cognisance must also be had to rule 25(2) of the Uniform Rules of Court where it is provided that no replication which would be a bare denial of allegations in the previous pleading shall be necessary. Although the defendant might be of the view that he has not benefitted from the plaintiff's pension interest because he did not factually receive any money in his hands, the joint estate received the benefit. As a result, I agree with the plaintiff's submission that the fact that the plaintiff did not replicate to the plea, or filed a plea in reconvention to the counterclaim, is of no consequence due to the factual context of the dispute and the prevailing principles of law.

ii. Did the defendant make out a case for forfeiture on the pleadings?

[13] As for the defendant's counsel's submission that the counterclaim contains the essential averments to establish a claim for forfeiture, I disagree. Section 9 of the Divorce Act 70 of 1979, provides for the forfeiture of patrimonial benefits of marriage. Section 9(1) provides as follows:

> '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

[3] Ibid.

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.'

[14] Two important aspects are brought to the fore in s 9(1). The first is that s 9(1) provides for the forfeiture of a 'patrimonial benefit'. A patrimonial benefit, is a benefit that accrues to a party because of the marriage. That which a party contributed to the joint estate is not a benefit received by that party, and as a result, it cannot be forfeited. Since the defendant did not make out a case on the pleadings that the plaintiff must forfeit her interest in his pension interest, the defendant's counterclaim fails on this ground alone.

[15] The second significant aspect that flows from s 9(1) is that the question as to whether a court will grant forfeiture, depends solely on whether one party will, as against the other, be unduly benefitted if the forfeiture is not granted. In *Engelbrecht v Engelbrecht,*[4] a full court of the Cape Provincial Division explained that joint ownership of the other spouse's assets is a right that accrues to spouses married in community of property when the marriage is concluded. Unless the parties made precise equal contributions to the joint estate, the party who contributed the least during the existence of the marriage will benefit above the other when the marriage is dissolved. This is an inevitable consequence of the parties' matrimonial property regime. The legislature did not through s 9 of the Divorce Act provide an opportunity to the greater contributor to complain about this. Unless it is proved (and the burden of proof rests on the spouse seeking a forfeiture order) what the nature and extent of the benefit is that the other spouse stands to receive when the marriage is dissolved, the court cannot determine whether the benefit that will accrue to the other party is undue. It only becomes necessary to consider the

[4] 1989 (1) SA 597 (C).

factors set out in s 9 (1) when the nature and extent of the benefit is established.

[16] *In casu*, the nature and extent of the benefits that the plaintiff stands to receive when the marriage is dissolved were not canvassed in the pleadings or the evidence. As a result, it cannot be determined whether any benefit that will accrue to her is undue. The defendant did not make out a case that the plaintiff is to forfeit any benefit of the marriage in community of property.

iii. The divorce

[17] As for the divorce, the parties agree that their marriage has irretrievably broken down, and that the issue of the minor child's maintenance be referred to mediation or the maintenance court. The existing order regarding child maintenance remains in place. The plaintiff did not persist with her claim for rehabilitative spousal maintenance and confirmed that she is now aware of the fact that if she does not claim maintenance during the divorce proceedings, she will not be able to claim maintenance from the defendant.

[18] Although the plaintiff is the successful party in the narrow issue before the court, the plaintiff initially sought an order that the defendant forfeits the patrimonial benefits of the marriage in community of property. The defendant retaliated with his own forfeiture claim. It is not evident at what time the plaintiff decided to desist from continuing with her forfeiture claim and merely sought the division of the joint estate, inclusive of the defendant's pension interest, which interest is statutorily deemed to form part of the defendant's assets and consequently the joint estate. As far as costs are concerned, I am of the view that it is fair and just in these circumstances that the parties are liable for their own costs.

ORDER

In the result, the following order is granted:

1. A decree of divorce is granted;

2. The joint estate is divided in equal shares;

3. The plaintiff is entitled to 50% of the defendant's pension interest from date of marriage to date of divorce;

4. Full parental rights and responsibilities in respect of the minor child as set out in section 18(2) of the Children's Act 38 of 2005, are granted to the plaintiff and the defendant, subject thereto that the plaintiff is awarded the right to provide primary care and place of residence to the minor child.

5. Specific parental rights and responsibilities as set out in section 18(2)(b) and (3) of the Children's Act, and in particular to act as joint guardian and to exercise contact to the minor child is awarded to the defendant, which contact includes, but is not limited to the following:

    5.1. Every alternative weekend from 17:00 on Friday to 17:00 on Sunday, or as arranged between the parties;

    5.2. Reasonable telephonic contact on weekdays between 18:00 and 18h30;

    5.3. Every alternative short school holiday and every alternative long school holiday, Christmas to rotate between the parties, unless otherwise agreed to between the parties;

    5.4. Every birthday of the defendant and on Father's day;

6. The defendant is to continue to make payment towards the maintenance of the minor child in accordance with the existing court order in the amount of R2500.00 per month with an annual escalation of 10% from the date of this order, and an amount of R1000.00 per month for arrear maintenance. Either party may approach the maintenance court for a variation of the existing order;

7. The defendant is to retain the minor child on his medical aid until the minor child attains the age of majority or self-independence, whichever is last;

8. The parties are liable in equal shares for the education of the minor child;

9. Each party is to pay its own costs incurred in the divorce action.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the plaintiff:	A Kissoon
Instructed by:	Alan Kissoon Attorneys
For the defendant:	Adv. T Kgomo
Instructed by:	Dube N. Attorneys
Date of the hearing:	1 March 2023
Date of judgment:	22 March 2023