



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

**CASE NO: DIV 284/13**

In the matter between:

**M. S. M.**

**PLAINTIFF**

and

**M. A. M. (born N.)**

**DEFENDANT**

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**J U D G M E N T**

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**DJAJE J**

**Introduction**

[1] This is a divorce action where the plaintiff is claiming for:

- (i) An order of divorce,

- (ii) An order for forfeiture of benefits arising from the marriage in community of property in terms of section 9 of the Divorce Act 70 of 1979,
- (iii) Costs of suit, only if defended,

[2] The defendant has filed a plea and counterclaim wherein she claims for the following:

- (i) An order of divorce,
- (ii) Division of the joint estate,
- (iii) An order that plaintiff be responsible to pay spousal maintenance towards defendant in the amount of R5000 five thousand rand) per month from the date of divorce until re-marriage, or such other time period the above honourable court may deem just,
- (iv) An order in terms of which the defendant is entitled to half (50%) of the plaintiff's pension interest or benefits from the Masakhane Provident Fund administered by Momentum Insurances, alternatively to such portion the above honourable court may deem just and equitable,
- (v) That the pension interests or benefits from the aforesaid Provident Fund be paid out to the defendant as and when they become payable to the plaintiff, alternatively after the issuing of the decree of divorce,
- (vi) That the contents of paragraph iv and v above be entered into the records of the Masakhane Provident Fund administered by Momentum Insurances,
- (vii) Cost of suit

## **Evidence**

- [3] The parties were married to each other in community of property on **26 February 2011** which marriage still subsists. There are no children born of the marriage.
- [4] The plaintiff testified that before he and the defendant got married in **2011** they had been staying together since **2009** and the defendant was performing household duties whilst he was employed at the mines. At that time the defendant was unemployed as it was difficult for her to secure employment in South Africa because she had Lesotho citizenship. It was the plaintiff's evidence that the reasons that forced them to get married was for the defendant to get citizenship in South Africa. After getting married the defendant did not find employment and the plaintiff continued to maintain her whilst she was taking care of the household duties. In **January 2013** the defendant left the common home for Carletonville. The plaintiff testified that defendant informed him that she was going to attend school and further her studies in Carletonville. Whilst in Carletonville she fell pregnant by another man and gave birth to twins.
- [5] The Plaintiff acknowledged that at the time they were living together as husband and wife the defendant assumed the role of a house wife and doing her daily household chores. In his testimony the plaintiff explained that the defendant did not contribute to the joint estate and she is the reason that their marriage broke down irretrievably as she now has children outside the marriage. It is for these reasons that the plaintiff seeks an order for forfeiture against the defendant.
- [6] The defendant testified that during the time she was staying with the

plaintiff as husband and wife she was unemployed but did some odd jobs. She received some income from her odd jobs and contributed to the joint estate by buying curtains and carpets for the house. Further that her parents assisted them financially with payment of the house when it was owed. She denied that the reason she got married to the plaintiff was purely for her obtaining South African citizenship. She testified that they were both in love with each other and that is the reason why they got married. Further that she would not have agreed to get married to the plaintiff knowing his health status. She was with the plaintiff for love only.

[7] As to the break-down of their marriage the defendant testified the plaintiff was throughout their marriage involved in extra marital affairs with various women who are known to her. It was her testimony that the plaintiff was abusing her physically and emotionally. The parents intervened but the situation did not change. During her stay with the plaintiff she fell pregnant twice by the plaintiff and had miscarriages. She could no longer stand the abuse and decided to leave the plaintiff in **January 2013**. According to the defendant she fell pregnant in **February 2014** which was a year after she had left her common home with the plaintiff.

[8] Defendant also testified that after she left the common home in **2013** she approached the maintenance court for an order against the plaintiff for her maintenance in the amount of R3000-00 per month. The order was made and the plaintiff complied until she decided to cancel the order due to insults by the plaintiff about the maintenance. In her counterclaim the defendant seeks an order of maintenance as she is

still attending school and unemployed. She further seeks an order of division of the joint estate including the plaintiff's pensions.

- [9] The issues to be decided in this matter are whether the plaintiff has made out a case for an order of forfeiture of the benefits arising from the marriage in community of property against the defendant and whether the defendant is entitled to spousal maintenance and an order for division of the joint estate.

### **Submissions**

- [10] On the issue of spousal maintenance the plaintiff argued that the defendant has failed to make out a case in that from the testimony of the defendant it is clear that she is currently able to survive without the assistance of the plaintiff. The defendant testified that she is currently a student at Botswana University and fully financed by the government of Lesotho. Further that on her own she abandoned her maintenance order against the plaintiff during the year **2013** and has since not reinstated it. It was submitted that the court in deciding on whether to award spousal maintenance may consider factors such as age, qualification, children, employment, health and duration of the marriage.
- [11] The argument by the plaintiff was that the defendant is still young at 30 years old, healthy and in the process of obtaining her university qualification. She has no children with the plaintiff and the duration of their marriage was short. It is for these stated factors that the plaintiff argued that the defendant has not made out a case for spousal maintenance against the plaintiff.

- [12] On the issue of forfeiture of matrimonial benefits the argument for the plaintiff was that he made all the contributions to the joint estate including to his pension fund. Further that there are factors to be considered in deciding whether the defendant's benefit in the matrimonial estate will be undue. The factors referred to by the plaintiff are duration of the marriage, cause of the irretrievable breakdown of the marriage and substantial misconduct. On the version of the plaintiff the defendant was the cause of the irretrievable breakdown of the marriage because of her infidelity and desertion of the plaintiff and as such will be unduly benefitted if an order for forfeiture is not made.
- [13] The submission on behalf of the defendant pertaining to forfeiture of matrimonial benefits was that the parties decided to marry in community of property and should therefore share the joint estate equally. It is argued that although the parties' marriage was from **2011** and they separated in **2013**, they had been staying together for three years before marriage with the defendant assuming housewife roles. Therefore, the period that should be taken into consideration when calculating the duration of the marriage should include the one before they got married.
- [14] It is the defendant's case that she did not commit any substantial misconduct that led to the breakdown of the marriage. It was her submission that she was pushed out of the marital home by the plaintiff as she was exposed to assaults and other hazardous factors caused by the extra marital affairs of the plaintiff. It was argued that the defendant did not fall pregnant when she was staying with the plaintiff at their matrimonial home.

- [15] On the issue of spousal maintenance the defendant argued that she had been maintained by the plaintiff throughout the duration of their marriage as she never had any formal employment. Further that she is currently unemployed and still pursuing her studies.

## Law

- [16] In a marriage in community of property division of the joint estate of the parties follows, except where forfeiture is granted. In this matter the defendant's claim is based on section 9(1) of the Divorce Act 70 of 1979 which reads as follows:

*"When a decree of divorce is granted on the ground of the irretrievable breakdown 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 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 benefitted."*

- [17] In the case of **Klerck v Klerck 1991 (1) SA 265 (W)** Kriegler J decided that all factors mentioned in section 9(1) need not be present, for example misconduct on the part of the parties. At page 267G-H he stated that the principal factor to be considered by the court is if one party will be unduly benefitted if forfeiture is not granted. Whether one party will be unduly benefitted at the expense of another is a value judgment to be made by the court. The learned judge further went on to state that in determining whether the one party will be unduly benefitted at the expense of the other party, the three factors referred to in section

9(1) should be considered individually or collectively in coming to a decision.

- [18] The comments by Van Coller AJA in **Wijker v Wijker 1993 (4) SA 720 (A)** at 727D – F as follows should be considered:

*"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 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."*

- [19] The head-note in **Engelbrecht v Engelbrecht 1989 (1) SA 597 (C)** reads in part as follows:

*"Joint ownership of another'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 regime. The Legislature (in section 9 of the Divorce Act 70 of 1979) does not give the greater contributor the opportunity to complain about this. He can only complain if the benefit was undue..."*

The party seeking forfeiture of benefits has to prove the nature and extent of the benefit.

## Analysis



- [20] The parties herein got married in **2011** and finally got separated in **2013** when the defendant moved out of the house. It was not disputed that the duration of the marriage wherein parties stayed together as husband and wife was two years. It was also not disputed that before marriage the parties were staying together from **2009**, this makes it two years before marriage which period cannot be ignored. All in all the period that the parties were staying together was four years. I do find that this is a short period of the parties staying together as husband and wife.
- [21] However as stated in the case of **Klerck v Klerck (*supra*)** the three factors referred to in section 9 of the Divorce Act can be decided on, individually or collectively . I will decide on the factors referred to in section 9 collectively.
- [22] In relation to the misconduct factor, there is a dispute as to who caused the breakdown of the marriage between the parties. The plaintiff submitted that it was the defendant who had extra marital affairs and eventually fell pregnant by another man whilst married to him. The defendant on the other hand argued that she was pushed out of the house by the assaults and the numerous extra marital affairs that the plaintiff had whilst they were staying together as husband and wife. The plaintiff further testified that he was pressured to marry the defendant so that she could get South African citizenship and be able to look for employment. During cross examination he stated that he was not forced to marry the defendant. The defendant disputed this and testified that she married the plaintiff for love and not for citizenship. She further stated that in order to obtain citizenship she had to stay married to the

plaintiff for five years. Further that, knowing the plaintiff's state of health she would not have married him only for citizenship. This version of the defendant as to why they got married with the plaintiff is more probable.

[23] Both parties are in agreement that the defendant left the house in **January 2013** and that at the time she fell pregnant by another man they were no longer staying together as husband and wife. It was not disputed that the defendant whilst staying with the plaintiff had two miscarriages and that was the reason the two had no children born of their marriage. The defendant's pregnancy was not the reason why she left the house in **January 2013**. The plaintiff stated that she left to Carletonville to attend school but not giving details of where she would be staying and who was paying for her fees. The defendant on the other hand stated that she left due to the continuing abuse by the plaintiff and the extra marital affairs he was having with numerous women. It can be concluded from the evidence that at the time the defendant left the house the marriage relationship had broken down and not that the defendant was impregnated by another man. In my view the plaintiff has not been able to make out a case of substantial misconduct by the defendant that led to the breakdown of the marriage.

[24] Despite the reasons for their marriage the parties chose to get married in community of property. The plaintiff was employed and continued to buy a house which became part of the joint estate. He had further been contributing to a pension fund prior to getting married to the defendant. At the time the parties got married the defendant was unemployed and the plaintiff in his evidence stated that he did not have a problem with that as he understood why the defendant was not able to secure

employment in South Africa. The plaintiff had no problem with taking care of the defendant financially and also contributing to the matrimonial property. On the other hand the plaintiff admitted that the defendant was playing her role as a housewife and doing all the household chores. At the time the parties started staying together as husband and wife the defendant was twenty two years old and had not completed her studies. The defendant was aware of this and was supporting her. As a result of being a married woman and expected to perform her duties as a wife, she could not continue with her studies. This commitment to studying is evidenced by her choice of studying currently at the University of Botswana.

[25] It is not disputed that the plaintiff financially contributed to the joint estate and the defendant on the other hand was taking care of the household and the plaintiff. It can therefore not be argued that the defendant did not make any contribution in the marriage. The plaintiff knew at the time they were together that the defendant was unemployed and had not completed her studies. He knew why she could not secure employment and that she was not in a position to contribute financially to the marriage. It cannot be argued that the defendant chose not to be employed and not contribute financially to the marriage. She played her role as a wife to the plaintiff until they were no longer staying together.

[26] The value of the property at the date of the marriage and at the date of dissolution has not been established. It was only submitted that before the commencement of marriage and whilst the parties were staying together the plaintiff bought a house which he is still paying off through

a mortgage bond. Further that there is furniture and a motor vehicle that forms part of the joint estate. As far as the plaintiff's pension is concerned it forms part of the joint estate.

[27] It was not disputed that the defendant only claimed maintenance from the plaintiff in **2013** for a period of three months. Thereafter she decided to stop the maintenance order against the plaintiff. No evidence was led before court on how the defendant survived without the financial assistance from the plaintiff. All that the defendant testified about is the financial assistance that she receives from the government of Lesotho for her studies which covers all her needs including money for food and travelling. The defendant was not able to make out a case of her need for spousal maintenance and her claim for spousal maintenance stands to be dismissed.

[28] The plaintiff has not succeeded to prove that any benefit receivable by the defendant from the matrimonial property would be undue. Both parties have contributed to the matrimonial property. In my view and based on the evidence presented, the plaintiff has not been able to show that there was substantial misconduct by the defendant that led to the break-down of the marriage. Accordingly, I cannot conclude that the defendant would be unduly benefitted if forfeiture was not ordered and I cannot, therefore, grant the plaintiff's claim for forfeiture.

## **Costs**

[29] The issue of costs is in the discretion of court. Section 10 of the Divorce Act 70 of 1979 provides that:

*"In a 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 their 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.”*

[30] In the present matter I have considered whether costs should follow the result and can find no justification for it. The trial was not drawn out and did not drag on for too long. It will be just if each party pays its own costs.

## **ORDER**

[31] In the result I make the following order:

1. An order of divorce;
2. Division of the joint estate of the parties;
3. Each party to pay debts incurred by them during the duration of the marriage;
4. Each party to pay its own cost.

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**J T DJAJE**  
**JUDGE OF NORTH WEST HIGH COURT**

## **APPEARANCES**

DATE OF HEARING	:	31 JULY 2017
DATE OF JUDGMENT	:	07 SEPTEMBER 2017
COUNSEL FOR PLAINTIFF	:	ADV SWART
COUNSEL FOR DEFENDANT	:	ADV RAKATANE TV