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**HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYANDOU**

CASE NO: 1478/2019

(1) REPORTABLE: YES / NO

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

(3) REVISED.

DATE: 14/12/2023

C DIEDERIKS AJ

In the matter between:

R[...] M[...] L[...]

PLAINTIFF

(BORN N[...])

(IDENTITY NUMBER: 7[...])

And

R[...] L[...] S[...]

DEFENDANT

(IDENTITY NUMBER: 6[...])

JUDGMENT

C DIEDERIKS AJ

Introduction:

1. Fairy tales promise us a happily ever after with your one true love. The fairy tale for Plaintiff and Defendant commenced when they met around 2002 - 2003 and instead of the happily ever after, Plaintiff instituted action against

Defendant seeking a divorce, division of the joint estate, and costs of suit. Defendant defended the action and sought a division of the joint estate, that Plaintiff forfeits her patrimonial benefit derived from sharing in Defendant's pension fund and that each party pay their own costs.

Factual Background:

2. In 2004 while Defendant was still resident in Pretoria, the parties welcomed their first child, and, in 2005, their second child was born. The Defendant moved to Musina to commence his employment at De Beers.
3. The parties commenced living together as husband and wife in 2008. All seemed to be well in the matrimonial home. Plaintiff tended to the children and the home, while Defendant went to work to ensure the financial stability of the family. The defendant paid Lobola in 2010, whereafter the parties decided to formalise their union and married each other in 2012 in community of property.
4. The parties, together with the children born from the marriage and their children from previous relationships, went grocery shopping together and spent the days on which Defendant worked night duty together. Plaintiff cooked and cleaned, and Defendant brought home the proverbial bacon.
5. Plaintiff worked as a domestic worker and attempted various businesses such as selling stationery, food, and petrol. Defendant paid Plaintiff's school fees at S[...] School in Louis Trichardt from which she graduated.
6. The turbulence started in June 2014 according to Defendant, during a shopping trip when the whole family went to Shoprite for provisions. When the parties entered the parking area of the Shoprite, a man greeted the Plaintiff. The defendant did not know the man. Plaintiff referred to him as her brother-in-law and the man referred to Plaintiff as his sister, and so the suspicions of an affair commenced.

7. The parties pressed on with the daily grind and, in 2016, Defendant saw Plaintiff in his neighbours' vehicle while on his way to work. Defendant, filled with suspicion, retraced the steps of Plaintiff almost to Beitbridge Border looking for her but she was nowhere to be found. This expedition of Defendant led to Defendant's discovery that Plaintiff, according to her cousin and a driver, was smuggling cement.
8. The year 2016 did not bode well for the parties and to compound the parties' already strained relationship an elder came to Defendant to apologise for his young nephew who was requested to pay for Plaintiff after a tea party between the two.
9. At the end of 2016 the parties' arguments had become heated and physical to the extent that both of them, together with two of their children, got themselves arrested. This resulted in applications for Domestic Violence Interdicts and, overall, soured the whole marriage.
10. By Christmas 2016, the parties did not share a bed. The Plaintiff would sleep in the car if Defendant attempted to share the bedroom. The writing was on the wall. The Defendant vacated the matrimonial home early in 2017.
11. Unfortunately, the parties found that their love story was brought to an end resulting in their agreement that the marriage had broken down irretrievably and that a decree of divorce ought to be granted.

The issue to be decided:

12. The only issue to be decided is the forfeiture of patrimonial benefits.

The Law:

13. Parties choosing to be married in community of property accept that 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,¹ and the joint estate should be divided equally upon divorce.

14. Section 9(1) of the Divorce Act² is an exception to the aforesaid general principle of community of property and provides that, if a divorce is granted on the ground of irretrievable breakdown of the marriage, the court may order that the patrimonial benefits be forfeited by a party if the court is satisfied that the party will be unduly benefitted, having regard to the duration of the marriage, the circumstances that gave rise to the breakdown of the marriage and any substantial misconduct by either party.
15. Rule 18(9) of the Uniform Rules of Court³ requires that a party claiming forfeiture in divorce proceedings give details of the grounds on which he or she claims that he or she is entitled to such forfeiture.

Forfeiture is a Two-Stage Enquiry:

Stage 1 - Will the party against whom the Order is sought benefit?

16. The first stage is to determine whether there is a commercial benefit to be received by the party against whom forfeiture is sought.⁴ While determining the nature and extent of the benefit to be received and the contributions to the joint estate by both parties the court must consider not only the contributions by the parties when the marriage was entered into but also those contributions during the marriage.⁵ If the court is of the view that no benefit exists then the claim for forfeiture must fail and it is unnecessary to consider the second stage of the enquiry.

Stage 2 - Is an Order for Forfeiture appropriate in the circumstances?

17. Once it has been determined that there will be a benefit and what the nature and extent of the benefit is, the court must consider whether to order forfeiture whether wholly or in part, by considering the three factors set out in Section 9(1)⁶. This is a value judgment.⁷ No other factors can be considered; no factor weighs more than the others; and the factors should not be considered cumulatively. Any one factor may be sufficient to support

an order for forfeiture depending on the facts of the particular case.⁸ Fairness is not a factor.⁹

18. The purpose of a forfeiture order is not to punish the guilty spouse¹⁰, nor should it be granted simply to balance the fact that one of the spouses or partners has made a greater contribution than the other to the joint estate.¹¹

Evaluation:

19. Defendant bears the onus to prove that Plaintiff will be unduly benefitted, considering the factors in Section 9(1), if a forfeiture order is not granted.
20. Firstly, it must be determined whether there is a benefit for the Plaintiff and what the nature and extent thereof is.
21. The defendant testified that he commenced working at De Beers (his current employer) in 2006 and that the expectation is that he will work there until 2028. He produced a document dated 2 August 2022 confirming that the value of his pension fund was R973 281-44 as of 31 August 2022.
22. Defendant led evidence regarding a motor vehicle and the benefit it constituted. However, Defendant never canvassed the vehicle in his pleadings and is bound thereby. The facts and circumstances on which the party relies for a forfeiture claim must be pleaded and canvassed in evidence.¹² A court should not pronounce upon a claim or defence not raised in the pleadings and I can accordingly not grant an order that Defendant did not seek.¹³
23. The benefit that Plaintiff is to receive from sharing in Defendant's pension fund is patent. Accordingly, Plaintiff will benefit from Defendant's pension fund if a forfeiture order is not granted.
24. When considering both parties' contributions to the joint estate, the parties testified that Plaintiff's role was caretaker, cleaner, cook, and housekeeper

and Defendant's role was the breadwinner. Plaintiff worked until 2005 as a domestic worker and when Defendant took up employment, Plaintiff became a homemaker. While fulfilling her role as a homemaker Plaintiff attempted various businesses such as spaza shops, selling stationery and food. The Plaintiff did have some assistance from her younger sister and a nanny when the parties' second child was born.

25. Accordingly, from the evidence both parties contributed evenly to the joint estate, the successful management of their daily lives, and ensuring an income to cover their expenditure, and from this point of view should equally share in the spoils of their efforts.
26. No evidence was led as to why the parties waited so long to be married but by all accounts, they had been in a relationship since at least 2003 when Plaintiff fell pregnant with their firstborn around August 2003. During the approximate 14 years that the parties spent together, the parties shared trials and tribulations, they spent all their time together and tried to build a family and prosperous life. They raised 5 children together and somehow managed to stay financially afloat.
27. Counsel for Defendant argued that Plaintiff attempted to raise a defence of a customary marriage during evidence which I should not consider as it was not raised on the papers before the court as a defence to the forfeiture claim or as an aspect to be considered. She further argued that the Divorce Act does not allow me to consider the time the parties spent together before the marriage relationship was entered into. This argument has no merit. The defendant testified in examination in chief that the parties started living together as "*husband and wife*" in 2008 and that he paid lobola in 2010. This is a factual issue. The courts have considered the period of parties living together as husband and wife before the marriage to be relevant to determining the duration of the marriage when considering a forfeiture claim.¹⁴

28. In my view, when parties share so much of themselves for so long, and together try to build a life for themselves and their children, navigating daily life and its challenges, the marriage cannot be considered one of short duration.
29. When attempting to determine what led to the breakdown of this marriage and each party's conduct, it is much like reading a script for a soap opera. With each passing day, the drama in the relationship and accusations escalated and the truth is to be found once the hyperbole has been eliminated.
30. Neither of the parties impressed as witnesses. They contradicted themselves as to timelines and events, new information that did not form part of the papers was proffered under cross-examination or re-examination or incidents were exaggerated, and other incidents were baldly denied. Both parties were evasive under cross-examination and would continuously refuse to answer questions by either evading the question or posing their own questions in response. What was apparent and unflinching was the contempt the parties have for each other.
31. The Defendant testified that he was staying with J[...] in Pretoria, the mother of his son who was born on 28 February 2003. The defendant testified that he moved from Pretoria to Musina in 2005 to commence his employment at De Beers in 2006 and that J[...] and his son were supposed to move with him, however, J[...]’s mother refused. Plaintiff testified in cross-examination that Defendant never told her about J[...], and when she went to Pretoria in December 2003 to surprise him, she found Defendant living with J[...] and a toddler.
32. Plaintiff testified that when she fell pregnant Defendant tried to convince her to have an abortion to which Plaintiff replied that he must go kill one of his other children as that is what he was asking of her. The defendant was never asked about this incident.

33. Plaintiff confirmed that her younger sister assisted the family while she was at S[...] School in Louis Trichardt and after she graduated in 2007 and returned home, she found that her sister was having a relationship with Defendant and when Plaintiff chased her sister away, she smashed their window. Similarly, Defendant was never asked about this incident.
34. Defendant testified that on 13 June 2014 at Shoprite, a male, unknown to Defendant, greeted Plaintiff. The man asked why she was not answering his calls. When Defendant queried Plaintiff, she said that it was her brother-in-law and when Defendant later saw the man again and asked him what his relationship with Plaintiff was, he said that she was his sister. The defendant testified that he knew this man by his nickname and worked with the man's brothers. The Plaintiff denied that this incident ever happened. Under re-examination, Defendant stated that Plaintiff was now living with the man of Shoprite, which was not put to Plaintiff.
35. Plaintiff testified that in November 2015 Defendant called his daughter and told her to go to town. The Defendant introduced his daughter to J[...] R[...] M[...] and told her she was her stepmother. This woman bought a lot of clothes for the child. When Plaintiff enquired, Defendant said that vouchers were handed out at school, but when Plaintiff asked other parents, they denied it. The Plaintiff tried interrogating the child when the child told her about the meeting in November 2015. Plaintiff testified that J[...] is the person with whom Defendant is currently living. The defendant was never asked about this incident.
36. In June / July 2016, the Defendant was on his way to a training session. He saw his neighbours L[...] and K[...] who had run out of petrol. He parked behind the vehicle and was standing behind his vehicle while talking to L[...] when he saw his wife hiding in L[...]’s vehicle. By 19h00 that evening Plaintiff was not yet home, and Defendant went looking for her. Defendant drove almost to the Beitbridge border in search of the Plaintiff and Defendant’s search ended at Plaintiff’s cousin's house. Defendant testified that during this incident he was informed by the cousin and a driver that

Plaintiff was conducting a business of smuggling cement over the river to Zimbabwe. Defendant conceded that he never saw Plaintiff smuggling cement, but that Plaintiff apologised at a family meeting which he took as an admission of her conduct. The Plaintiff denies that L[...] is her neighbour and denies the incident.

37. Thereafter, Johannes Mokwena came to Defendant on behalf of a young man, only known as M[...], to apologise to Defendant as Plaintiff allegedly asked M[...] to pay for her. Under cross-examination, Defendant testified that Plaintiff and M[...] attended the ZCC together. During a visit to Plaintiff's house, Plaintiff requested M[...] to make her tea and they then promptly had sexual intercourse. The Plaintiff denied the incident but admitted to knowing M[...] from church.
38. Defendant testified that he came home on a date he could not recall when his daughter Lorane met him at the door and whispered to him not to eat the food. Defendant did not ask Lorane why and told Plaintiff that he was not hungry and that she should give the food to the children to eat. Instead of giving the food to the children Plaintiff threw it out. Defendant testified that this was an attempt by Plaintiff to poison him as she had threatened to do so in the past when they were fighting and threatened to put broken glass in his food. He testified that the children told him that the next day Plaintiff had a meeting with them and told them that he would die soon and that she would take all his money and go away. The plaintiff denied this.
39. Under re-examination, Defendant testified that somewhere in 2014 / 2016 he got home, and Plaintiff came to him with a brick wrapped in a 'doek' (cloth). This resulted in an argument at home when the SAPS arrested both Plaintiff and Defendant and two of their children. Defendant never laid a charge and Plaintiff withdrew her charge because Defendant was ill and in hospital when the matter came before Court. Plaintiff denies Defendant's version of events but admits that there was an argument, that everyone was arrested, and that she withdrew the charge.

40. Plaintiff testified that she found out in 2016 that Defendant was selling a stand and arranged for the money to be paid into his daughter's account. The defendant was never asked about this.
41. Defendant further testified that Plaintiff chased his children away from the matrimonial home at the end of 2016 when he came home to find the children at the bus stop with bags. Defendant approached the Musina Magistrates Court for a protection order prohibiting Plaintiff from ejecting the children from the matrimonial home and insulting Defendant, which was not granted. The matter seems to have been resolved during a mediation session.
42. Soon after the aforesaid incident, Defendant testified that he vacated the matrimonial home and went to stay with a friend and thereafter with the woman with whom he is now living.
43. Defendant testified that Plaintiff burnt down the house of the employer of the woman he has been residing with since 2017 and that there was some of his clothing in the house at the time of the fire. Under re-examination, the Defendant testified that he had moved from the matrimonial home because he wanted to protect himself from incarceration. Plaintiff initially testified that she burnt the house down because Defendant took Plaintiff to the Marooi farm, left with his girlfriend, and left Plaintiff there, locked out of the house, in the cold until midnight. She got angry. Later, however, she testified that she did it for revenge. The plaintiff testified that she wanted to commit suicide after this event.
44. Defendant testified that he believed that Plaintiff trapped him as there was never peace in the house and "*her mind is full of money*". He was asked why Plaintiff should not share in his pension fund and he responded that she did not keep to her agreements, she did not do enough at home, she could have caused him to be arrested with her smuggling endeavours, and she had affairs.

45. From the screenplay set out above, the following is apparent:
- 45.1. There is no evidence of infidelity on the part of Plaintiff save for unconfirmed suspicions, whereas Defendant admitted his infidelity which happened on more than one occasion.
 - 45.2. There is no evidence that Plaintiff smuggled cement or poisoned Defendant. There is a lot of speculation and suspicion.
 - 45.3. Neither party called any witnesses while being able to identify the witnesses, or the children to testify. Most of the adverse allegations are based on hearsay.
 - 45.4. Plaintiff did set a house on fire that could have caused untold damage not only to Defendant and the woman he is living with but to the community and innocent lives if the fire had spread. The plaintiff admitted that she did so out of revenge.
 - 45.5. The marriage had been turbulent since at least 2014 and with each passing year, the disagreements, physical arguments, and contempt escalated from both sides.
 - 45.6. Both parties failed to conduct themselves as supportive and respectful marital partners and seemed to fuel the fire of acrimony.
 - 45.7. While all of this was happening, neither party put the children first, and tellingly Defendant testified that he had to vacate the matrimonial home to avoid incarceration but left his children there.
46. Both parties are guilty of conduct that is not conducive to a healthy marriage, which conduct led to the breakdown of the marriage. I cannot find that any one party's conduct gave rise to the breakdown of the marriage.

47. The last factor to be considered is whether Plaintiff was guilty of substantial misconduct. It is trite that the conduct complained of must be so obvious and gross that it will be repugnant to justice to let the guilty spouse get away with the spoils of the marriage.¹⁵ Substantial misconduct may include conduct that has nothing to do with the breakdown of a marriage and may for that and other reasons have been included as a separate factor. Too much importance should, however, not be attached to misconduct that is not serious.¹⁶
48. Substantial misconduct has been found to include adultery, domestic violence, cashing out a pension and not sharing it with the spouse, disloyalty, squandering assets belonging to the joint estate, failing to contribute financially to the joint estate despite having the means to do so, using funds from the joint estate to finance a mistress, abandoning the family, forging the other party's signature on financial documents, and entering into further marriages without the first spouse's consent.
49. Taking into account the transgressions of both parties, it is impossible to say that one party outdid the other. The only conduct of Plaintiff that comes close to being substantial misconduct under the circumstances, in my view, is the fact that Plaintiff burnt down the house and immediately brings to mind the adage "*hell hath no fury as a woman scorned.*"
50. However, I must weigh this conduct against the Defendant's own conduct during the marriage. The burning down of the house did not cause the breakdown of the marriage. The conduct did not cause any prejudice to the joint estate. Plaintiff admitted guilt in the criminal proceedings, (neither party informed this court what sentence was imposed on Plaintiff, if any). The Plaintiff submits that the Defendant's conduct and affinity for extramarital affairs is what most likely led to the incident. It is not this Court's duty to punish a spouse or to order what it believes to be fair and just in the circumstances.

51. Accordingly, in my view, the Plaintiff's conduct does not equate to substantial misconduct within the marriage concerning the question of forfeiture.

Conclusion:

52. Plaintiff does stand to benefit from sharing in Defendant's pension fund if a forfeiture order is not granted.
53. Both parties contributed to the joint estate in equal measure.
54. The marriage was not of short duration.
55. The circumstances that gave rise to the breakdown of the marriage are the parties' conduct and equal contribution to the breakdown of the marriage.
56. Defendant failed to prove that Plaintiff was guilty of substantial misconduct.
57. The defendant had to discharge the onus to prove that at least one of the factors listed in Section 9(1) was in favour of a finding that Plaintiff would be unduly benefitted if forfeiture is not granted, which he has failed to do.
58. Considering the parties' equal contributions to the joint estate and that none of the factors listed in Section 9(1) was found to be present, I find that the benefit accruing to Plaintiff is not an undue benefit and accordingly find no reason why the joint estate should not be divided equally.

Costs

59. Section 10 of the Divorce Act¹⁷ provides that 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 insofar 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.
60. The Plaintiff was the successful party and should be awarded costs. However, taking into account Plaintiff's conduct, the means of the parties,

and Defendant's relief sought in this regard, I consider it just that each party pays their own costs.

Order:

On the 28th of November 2023, after both parties closed their cases, I made the following order:

1. A final decree of divorce is granted.
2. Judgment on the division of the joint estate and costs were reserved.
3. Parties to submit heads of argument, if any, by 4 December 2023.

On the issues reserved for judgment, I make the following order:

1. The joint estate is to be divided equally between the parties.
2. Each party is to pay their own costs.

C DIEDERIKS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYAN[...]

APPEARANCE

APPEARANCES

1. For the Plaintiff : Mr S Matenzhe
Instructed by : Selamolela Att.
Thohoyandou
2. For the Defendant : Erwee Attorneys

c/o Coxwell, Steyn, Vise & Naude
Attorneys
Thohoyand

¹ HR Hahlo in *South African Law of Husband and Wife*, 5th ed, p 157 – 159.

² Divorce Act, Act 70 of 1979.

³ High Court and Superior Courts Act 10 of 2013, Uniform Rules of Court

⁴ *Wijker v Wijker* 1993 (4) SA 720 (A) at p 727 D to F

⁵ *BK v CV* 2023 JDR 0873 (FB) par 21 p 7

⁶ Divorce Act, *supra*

⁷ *Wijker v Wijker supra* at p 727 E to F

⁸ *Binda v Binda* 1993 (2) SA 123 (W) at p 127C; *Wijker supra* at p 729 D to G

⁹ *Botha v Botha* 2006 (4) SA 144 (SCA) at p 147 B - C

¹⁰ Divorce Act *supra*

¹¹ *V v V* (3389/2017) [2020] ZAGPPHC 154 (4 March 2020) at para 17 p 7

¹² *Koza v Koza* 1982 (3) SA 462 (T) at 465H, *V v V supra* at para 12 p 4 - 5

¹³ *MM v TM* 2023 JDR 1736 (SCA) at par 33 p 13

¹⁴ *Matyila v Matyila* 1987 (3) SA 230 (W) at p 236 D to G; *PP v JP* (A3007/20) [2020] ZAGPJHC 281 (2 November 2020) at par 37 – 39 p 9

¹⁵ *Singh v Singh* 1983 (1) SA 787 (C) at p 788H

¹⁶ *Wijker v Wijker supra* at p 729 I to 730 B

¹⁷ Divorce Act *supra*