

Court: Gauteng Division, Pretoria

Case No: 46732/2011

Date(s) heard: 6 March 2014

Delivered: 2 September 2015

Judge: Tlhapi, J

DESCRIPTION

Accrual basis – Forfeiture of benefits – the court denied ordering forfeiture where apart from the wife’s extra-marital affair the parties had many other problems which could have led to the break-down of the marriage

SUMMARY

(Par 1 - 3) The plaintiff sought an order that the defendant must be ordered to pay an amount equal to one half of the difference between the accrual of the defendant’s estate and that of hers. The defendant counterclaimed that the plaintiff must forfeit her claim to the accrual on the basis that she conducted continuous adulterous extra-marital relationships during the subsistence of the marriage. It was also alleged that she absented herself from the common home without any reasons.

(Par 14) The court found that it had to take into account the following factors; the duration of the marriage, the circumstances which led to the breakdown of the marriage and any substantial misconduct on the part of either spouse. Furthermore, it held that it may only grant such order if it is satisfied that the spouse against whom the order was sought would be unduly benefited if the order is not granted (see section 9(1) of the Divorce Act, 70 of 1979 and *Wijker v Wijker 1993 (4) SA 720 (A)* at 727 D-E.

(Par 16 - 19) The court took into account the fact that the parties had decided to reconcile with each other and that the defendant had failed to provide any proofs of other extra-marital affairs that he accused the plaintiff to have committed. Furthermore, the parties had many other problems that could have led to the break-down of the marriage; they did not even share any mutual friends. Accordingly, the defendant’s counterclaim was dismissed. Each party to pay their costs.

Summarised by: Tshepo Munene (Admitted Attorney of the High Court of South Africa)



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

CASE NUMBER: 46732/2011

DATE: 02 SEPTEMBER 2015

In the matter between:

[A.....] [M.....] [S.....]

And

[P.....] [J.....] [S.....]

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The plaintiff instituted an action for divorce during August of 2011 seeking an order that the defendant pay an amount equal to one half of the difference between the accrual of the defendant's estate and the plaintiff's estate on date of divorce. In his counterclaim the defendant sought an order that the plaintiff forfeit her right to share in the accrual of their estates, alternatively payment of one half of the difference in the accrual of their respective

estates. It was agreed that he bore the onus to prove that the plaintiff would benefit from the accrual. The plaintiff did not seek any forfeiture by the defendant in her particulars of claim.

[2] The defendant instituted an action for divorce during 2008 and did not proceed with the divorce because he reconciled with the plaintiff. It was now common cause in this action that the marriage had irretrievably broken down and could not be salvaged. The basis for the counterclaim by the defendant was that the plaintiff conducted a continuous adulterous extra-marital relationships during the subsistence of the marriage with one Mr Anton Immelman ('Immelman'), one Mr Trevor Jones and a third adult male whose identity the defendant was not been able to confirm, but later identified as Mr Richard Coetzee in evidence. The defendant alleged further that the plaintiff absented herself for extended periods from the common home without any explanation to the defendant.

[3] There was an agreement between the parties that in the event that the counterclaim relating to forfeiture was not upheld, a referee be appointed to address the quantum of the accrual and the distribution of the parties estate.

[4] The trial was preceded by an objection on behalf of the plaintiff to the admission of photographs of the plaintiff. It was submitted that the photographs had been illegally obtained by the defendant and that the defendant's conduct in this regard had been an invasion to the plaintiffs right to privacy. After hearing argument I ruled that it would be impossible without hearing evidence to rule on the objection and on whether the plaintiff was prejudiced thereby. I allowed the handing in of the said photographs.

A decree of divorce was granted on 10 June 2014 and what remained was a determination of the defendants counterclaim relating to forfeiture.

BACKGROUND

[5] The plaintiff and defendant were married to each other on 12 February 2004 out of community of property, by ante-nuptial contract, which was subject to the accrual system in accordance with the Matrimonial Property Act 88 of 1984. No children were born of the marriage. The plaintiff and defendant each had daughters, [Y.....] and [J.....] respectively, who were born of previous marriages. [J.....] was born with spina bifida and both daughters initially resided with the parties. The relationship between the parties and their children was not without problems and this related partly to [J.....'s] disability and to her care and the arguments that ensued as a result. The parties disagreed on her care and upbringing. The plaintiff testified that her approach was more towards encouraging Jessica to be independent and the defendant disapproved of her inputs. The defendant alleged that plaintiff displayed no empathy towards his daughter and this extended to her daughter [Y.....]. This put a strain on the marriage relationship.

[6] During 2005 and 2006 the plaintiff moved out of the common home and leased a home for six months, but then returned to the common home and the parties agreed to put effort to save the marriage. During 2007 the plaintiff obtained a protection order against the defendant and as a result he was banished from the common bedroom. [Y.....] subsequently moved out to live in a commune. There were continued arguments and both parties in evidence accused each other of being vindictive towards each other.

[7] The plaintiff admitted to leaving the common home for periods. In the beginning she did this over the weekends or when she accompanied friends on holiday. She testified that the defendant was not an easy person to live with and they did not share common friends. She was working and studying at the time. Furthermore she needed some relief from the stress and tensions in the home caused by their arguments over [J.....] and the state of

cleanliness In Jessica's room which had an uncomfortable smell. The plaintiff would absent herself from the home at weekends to visit family, sometimes to go out with friends. The defendant testified that she never consulted him during these outings and he had no idea where she had been and she was unwilling to divulge information on her return. During cross examination the plaintiff testified that the defendant also used to go out weekends without consulting her and sometimes took his daughter on trips or to visit family. The defendant testified that he tried to salvage the marriage, they first consulted his minister at church and later went for counselling. The plaintiff attended only two of the sessions of counselling and he was left to go alone for the remainder of the sessions. This intervention did not yield improvement in their relationship.

[8] During 2008 the plaintiff found employment in Hectorspruit which caused her to be away from home and she only came home weekends. The defendant was not pleased with her taking up this employment. At Hectorspruit she shared a residence with other male co-employees and had her own bedroom. She also worked from the residence because she was also the housekeeper. Although the position was for a period of six months she stayed longer after the defendant instituted divorce proceedings. The defendant testified that he did not approve of her absences and he was disturbed by the information he obtained from the plaintiff's sisters. There was objection to this hearsay and it was put in cross examination that defendant would give testimony and bring evidence in this regard. Her sisters were not called as witnesses and he did not take the matter any further. However, the defendant testified that it was as a result of this information and her absences that resulted in him contemplating a divorce. Divorce proceedings were instituted towards the end 2007 or beginning 2008. The plaintiff was served with the divorce papers during June 2008.

[9] The plaintiff did not defend the action. She testified that it was during this time that she got involved in a relationship with Immelman. He was a manager of one of the companies she worked for. The relationship with Mr Immelman lasted for several months.

The defendant testified that around Easter 2009 there were discussions to reconcile and he consulted his church minister and psychiatrist and he withdrew the divorce action. They visited

the plaintiffs family on two occasions and defendant testified that they were enjoyable visits. They also travelled to Badplaas for the weekend to celebrate their wedding anniversary. The defendant testified that despite such effort the relationship did not improve.

[10] The plaintiff testified that the defendant was aware of her relationship with Immelman. They discussed it and she had informed him when it ended. The fact that she had been involved with Immelman did not constitute an impediment to their making an effort to reconciled again. She underwent surgery to have a sling inserted and to correct a vaginal tear. This condition was as a result of injuries sustained to these parts during sexual intercourse with the defendant. She moved back into the common home after her operation towards the end of 2009 or beginning of January 2010. The defendant allowed her use of his trailer to move her belongings back to the common home. The defendant on the other hand denied that the plaintiff had admitted the relationship or that he had condoned her conduct. He brought up correspondence on the subject exchanged on email. The plaintiff was not confronted with the content of these emails during cross examination.

[11] The plaintiff testified further that the photographs the defendant sought to rely upon as proving her extra marital relationships were obtained from a flash disc or CD left in her vehicle which was being used by the defendant. She had not given the plaintiff permission to access them. The defendant testified that he found them in the sewing room during 2011 after the plaintiff had moved out of the common home. The plaintiff testified that the photos were of the river rafting outing in the Eastern Cape; the wedding in Nelspruit; the trip to Mozambique and the trip to Hermanus. Mr Immelman and Mr Coetzee featured in some of these photographs. She attended a wedding in Nelspruit with her friends and they were being naughty when photographs were taken of her in her underwear. The photographs featuring Immelman and her mother were taken in Hermanus. She explained that she had accompanied her mother to Hermanus and that Immelman had gone to a Golf outing at Fencourt and that he came to see them. The pictures were taken when they had gone out for a meal. These photographs were taken during 2007 and 2008 as shown by the dates on the copies.

With regard to Trevor Jones she testified that she was not romantically linked to him . She

met him when she was twenty-one years old. They reconnected again after about 30 years via facebook and that the incident he referred to in his message related to what occurred many years before her marriage.

[12] The defendant testified that they reconciled around April 2010. Almost immediately thereafter she took up employment in Malawi. According to plaintiff the defendant had no objection to this employment, the defendant denied such fact. It is from about April to November 2010 where the defendant used to transport plaintiff to the airport and on her return he would pick her up. The defendant testified that she would be away for four weeks and on her return stay home for two weeks. During August they both travelled to Switzerland to attend a friend's wedding and the defendant testified that during this time they conducted a normal relationship and had sexual relations. He however also testified that it was while they were in Switzerland that he decided to end the marriage. No reasons were given for this decision.

[13] It was during November 2010, after the plaintiff's birthday and on the day that the defendant was transporting plaintiff to the airport for her trip back to Malawi when he announced that he no longer had the desire to continue with the marriage relationship. The defendant testified that after informing the plaintiff she kissed him on the cheek and left for Malawi. It was common cause that when the plaintiff instituted divorce proceedings during 2011 the marriage relationship had irretrievably broken down and that the plaintiff had vacated the common home.

THE LAW

[14] In determining whether or not to order a total or partial forfeiture of the patrimonial benefits the court is restricted in the exercise of its discretion to take into account the following factors being, the duration of the marriage, the circumstances which led to the breakdown of the marriage and any substantial misconduct on the part of either spouse.

In this determination the court may only grant such order if it is satisfied that the spouse against whom the order is sought would unduly benefit if the order is not made, **section 9(1)** of the **Divorce Act No. 70 of 1979** ("the Act"), ***Wijker v Wijker 1993 (4) SA 720 (A) at 727 D-E.***

[15] It was submitted for the defendant that the principles applied in ***Singh v Singh 1983 (1)***

781 (C) at 791 C-D were applicable and that the plaintiff's adulterous misconduct was a substantial factor which warranted that a forfeiture be ordered. Also taken into account in *Singh supra* was the absence from the matrimonial home by the accused spouse who blamed it on mistreatment by the other spouse, she had also admitted the adultery. In **V v V (10/13906) [2014] ZAGPJHC 328** the substantial misconduct was not the extra marital relationship which the plaintiff apparently condoned but it was defendant's participation in the attempted murder of the plaintiff. In both matters the courts found that proof of a substantial misconduct, the guilty party should not be entitled to share in the accrual of the innocent party.

[16] I find the facts in *Singh and VvV supra* to be distinguishable. In this matter the parties decided to reconcile with each other and talks towards this end on the defendant's version commenced during February 2009. On the plaintiff's version, although denied by the defendant there were discussions relating to her relationship with Immelman. I am persuaded that such discussions took place before the 2010 reconciliation because although Immelman's name is not mentioned in the emails it is evident that the discussions related to a relationship he suspected was still continuing. I do not find that the suspected extramarital relationships with either Mr Coetzee or Mr Trevor Jones were the subject of the discussion because the defendant conceded that he had found no evidence to substantiate his suspicions regarding them.

[17] Finally it really did not matter who initiated the reconciliation. Both parties admitted to a troubled marriage which came to the fore very early. There were problems with Jessica; they did not share common friends; there were allegations of assault, of arguments and disrespect against each other; of each absenting themselves from the common home without consulting each other. What is important is that they discussed their problems and both agreed to resume their marriage relationship. I am also not persuaded that the defendant objected to the plaintiff taking up employment in Hectorspruit or Malawi or that he still remained suspicious of the plaintiff's involvement an extra marital relationship or a continuation of such relationship with Immelman. His willingness to resume reconciliation talks in February 2009, the cancellation of the divorce action and his relationship with the plaintiff from April to November 2010 disentitled

him from relying on the allegations in his counter claim as warranting a forfeiture. After April 2010 they resumed had a normal sexual relationship, they travelled to Switzerland, he transported the plaintiff to and from the airport and when she came home she spent two weeks at a time with him in the common home. In cross examination the defendant indicated that he understood reconciliation to mean forgiveness. I can only conclude that by resuming a normal marriage relationship that forgiveness was reciprocal because each party contributed towards the problems and break down in the marriage

[18] The substantial misconduct complained about related to a period that preceded their reconciliation and the plaintiffs move back to the common home during 2010. In my view, the discovery during 2011 of the photographs taken in 2007 and 2008 do not serve to prove any of the suspected extra marital relationships. The version of the plaintiff relating to the circumstances under which the photographs were taken was probable and should be accepted. What should count in my view was that there was a mutual intention to resume a normal relationship. Any misconduct relating to the period prior to 2010 had been forgiven. Having regard to the above and duration of the marriage which ended on 10 June 2014 I am of the view that the defendant has failed to prove any substantial misconduct after the reconciliation. The defendant also failed prove that that the plaintiff would be unduly benefited if an order for forfeiture was not made.

[19] In the result the following order is given:

1. The defendant's counterclaim is dismissed;
2. The parties are ordered to appoint a referee as agreed to address the quantum of the accrual and the distribution of the parties estate;
3. Each party is to pay to their own costs;

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON

06 MARCH 2014

JUDGMENT RESERVED ON

11 JUNE 2014

ATTORNEYS FOR THE PLAINTIFF

ERASMUS INC.

ATTORNEYS FOR THE DEFENDANT

MARAI STEPHENS ATT.