IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

DURBAN AND COAST LOCAL DIVISION

CASE NO: 7241/2002

In the matter between

VINNIGEN MOODLEY **Plaintiff**

and

JAGATHAMBAL MOODLEY **Defendant**

JUDGMENT

Delivered:
14 July 2008

TSHABALALA JP

Issue

[1] The Plaintiff claimed an order of divorce and an order for the division of the joint estate of the parties. In her counterclaim the Defendant, apart from also claiming an order of divorce, claimed a forfeiture order. The parties were ad item that the marriage had irretrievably broken down and the sole issue was whether or not the forfeiture order should be granted against the Plaintiff.

Background

[2] The parties were married to each other in community of property on 6 May 1982. The couple has 3 children, two daughters born in 1984 and 1986 respectively, and a son born in 1993.

When the couple married in 1982, the Plaintiff was working in Secunda as a boilermaker, and according to the Defendant she was teaching people to drive. After one to two years of marriage the couple relocated to Durban.

[3] In the mid 1980's the couple purchased property in Woodview, Phoenix. In 1984, the Defendant commenced working as a nurse in Durban and the proceeds of her income were put into the running of the household and toward payment of the bond for the Woodview property. Defendant also worked night shift in order to increase her income. In 1988, Defendant was given a senior position at a hospital in Phoenix, and that is when negotiations commenced for the purchase of the La Mercy property, situated at 36 Ahmedy Street. The La Mercy property was purchased in 1990 for a purchase price of R162 000. The current value of the property appears to be between R1.4 and R1.6 million and the bond has been paid off (see Exhibit A, pages 10-11).

[4] According to the Plaintiff, he sold the Woodview house and used the proceeds thereof as a deposit for the purchase of the La Mercy property and some of the money was used for renovations to the new house. The parties are in dispute as to when exactly the Woodview property was sold. Defendant alleges that when they purchased the La Mercy property they still owned the Woodview property, and when the Woodview property was finally sold, the Plaintiff used the money to invest in Fedsure policies. Defendant accordingly did not share in the proceeds of the sale of the Woodview property. Plaintiff strongly denied this.

[5] The parties lived in separate bedrooms since 2000 and the Plaintiff moved out of the matrimonial home in October 2002. It was the Plaintiff's evidence that since 2002 he

has not gone back to the house except for the time that he took estate agents to value the property, at which time he was denied access to the house by the tenants.

[6] In his particulars of claim the Plaintiff alleged that the reasons for the breakdown of the marriage included the parties continually arguing and no longer communicating with each other, the Defendant leaving the matrimonial home on various occasions as well as him losing all love and affection for the Defendant.

The Defendant alleged that the marriage relationship between the parties had irretrievably broken down because:[1]

- ❒ plaintiff engaged in and presently engages in an adulterous relationship with an adult female, one Shireen;
- ❒ the plaintiff assaulted the defendant and swore at her in vile language unjustifiably;
- ❒ the plaintiff did not maintain the defendant and their minor children adequately;
- ❒ plaintiff removed a substantial part of the moveable property owned by the joint estate of the parties, from the matrimonial home, without the consent of the defendant and he has failed to account to her for fifty percent of the proceeds of the sale of an immovable property situated at 8 Birchwood Close, Woodview, Phoenix, Kwa-zulu Natal which was owned by the joint estate and sold in the year 1998; and
- ❒ the plaintiff frequently traumatized the defendant emotionally and he generally

did not treat her in a manner befitting a wife.

The law

[7] The Defendant's claim for a forfeiture order is based on the provisions of 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 benefited.'*

[8] The approach to be followed by a court when dealing with a claim for a forfeiture order was stated by Van Coller AJA in *Wijker v Wijker 1993 (4) SA 720 (A)* at 727D – F:

> *'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.'*

[1] Defendant's plea to the plaintiff's particulars of claim, para 2

[9] In exercising the discretion to order forfeiture, a court is enjoined to ask itself whether one party would be unduly benefited were such an order not made. For the purpose of determining whether one party will be unduly benefited in relation to the other the Court is required to weigh three separate factors:

(a) The duration of the marriage.

(b) The circumstances which gave rise to the breakdown.

(c) Any substantial misconduct on the part of either of the parties.

The discretion is restricted to a consideration of these grounds alone. No other factors may be taken into account.

It has been held that it is not necessary for all three factors mentioned in s 9(1) and to which the court must have regard to be alleged and proved in order to grant an order of forfeiture (see *Wijker v Wijker 1993 (4) SA 720 (A)* and *Binda v Binda 1993 (2) SA 123 (W)*.

[10] The concept of "benefits" is properly explained by Schreiner J (as he then was) in the decision of *Smith v Smith* by stating:[2]

> "What the defendant forfeits is not his share of the common property, but only the pecuniary benefit that he would otherwise have derived from the marriage . . . It is really an order for division plus an order that the defendant is not to share in any excess that the plaintiff may have contributed over the contributions of the defendant."

A "benefit" as envisaged in http://www.mylexisnexis.co.za/nxt/gateway.dll/jilc/kilc/9uqg/nzqg/ozqg/vwrh of the

Divorce Act can take various forms, inter alia "contributions" made by one party towards the joint estate during the existence of the marriage. The court considers the salaries earned by the spouses, what they owned at the time of the marriage, what they received as inheritances, legacies and donations, and so on.

[11] However, and of the utmost importance, is the fact that the Claimant in respect of a claim for the forfeiture of benefits in a marriage in community of property must prove some kind of contribution which exceeds the contribution of the other party towards the joint estate.[3]

As to what constitutes a "contribution" towards the joint estate is a question of fact and in *Gates v Gates 1940 NPD 361* it was held that the services of the wife in managing the joint estate and caring for the children should be taken into account.

[12] The Appellate Division in *Wijker* supra further indicated that although misconduct was no longer a requirement for obtaining a forfeiture order, the introduction of no-fault divorce did not do away with fault as a factor in respect of forfeiture orders.[4] Also in the decision of *Binda* supra it was held that it is not essential for a claimant to prove substantial misconduct before a forfeiture order can be granted.

[13] Regarding the duration of a marriage, reference must be made to the decision in *Singh v Singh 1983 (1) SA 781 (C)* where the parties had been married for 22 years. During the last two years of the marriage the plaintiff husband alleged that the defendant wife

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[2] 1937 WLD 126 at 127-8
[3] Practical Guide to Patrimonial Litigation in Divorce Actions, Van Niekerk, para 5.2.2.2
[4] Cronjé and Heaton, South African Family Law, 2nd ed, para 12.4.1

had stayed away from the common home overnight on 73 occasions, had been intimate with other men, and had committed adultery with one of them. It was further alleged that she had neglected her marital duties.

According to the defendant, who denied these allegations, she had left the common house as a result of the plaintiff's treatment of her, and the adultery had been committed only later. Nevertheless, on the evidence, the court found her misconduct to be "substantial", which outweighed the fact that the marriage had lasted for 20 years. As a result, forfeiture was decreed.

[14] In *Ex parte de Beer 1952 (3) SA 288 (T)* when the Court granted the applicant a divorce in 1951 it declared that her husband, the respondent, had forfeited the benefits of the marriage which was in community of property. Among the assets in the joint estate was an immovable property acquired during the subsistence of the marriage and registered in the respondent's name. It appeared that the respondent had not contributed a penny towards the acquisition of the property nor to the payment of instalments due in respect of the capital and interest, all such payments had been made by the applicant out of her earnings. She therefore established a case for a declaration that the benefit of the property falls among the benefits forfeited by the respondent

Application to case

[15] Turning to the facts of the present case, there are many disputes between the parties and the court does not want to deal with every single allegation suffice to say that the marriage has irretrievably broken down. There can be no doubt that both parties regard the marriage as being done with and both wish it to be formally terminated.

[16] The parties did not enter into the marriage with any assets. The Plaintiff and Defendant were jointly involved in the purchase of the Woodview and La Mercy properties and for the necessary household expenses. Therefore all that the parties accumulated during their marriage was due to a joint effort.

At this juncture it must also be mentioned that the Defendant owns another piece of immovable property which she received as an inheritance from her mother (see Exhibit A, pages 45-46).

[17] Firstly it must be noted that the marriage lasted approximately 20 years before the separation in 2002, and this must be considered to be a relatively long time.

[18] Regarding the major factors that gave rise to the breakdown of the marriage, Plaintiff admitted to having physically assaulted the Defendant, but also alleged that the abuse was two sided. The couple's daughter, Ronel, was called to testify on Defendant's behalf to attest to the abuse. Mr Chadwick was quick to insinuate to Ronel that she was lying and she was taking her mother's side. Ronel was emotional when testifying and the Court is of the view that her testifying in court was no easy task. It is always difficult for a child to be torn between the parents.

Much was said about the restraining order from the Verulam Magistrates Court, but this Court does not find the need to go into details thereof suffice to say that abuse was present.

[19] Other factors include the adulterous relationship that the Plaintiff was accused of having. The Plaintiff denied that he had ever been in any adulterous relationship. Counsel for the Plaintiff made much of the fact that the Defendant did not know the other woman's surname. However, the Defendant did know where the other woman worked and lived. Defendant claimed that her son met this other woman, and although he was not called to testify, it is unlikely that the Defendant or her son would make up such a story. The probabilities favour the Defendant.

[20] Another factor, according to the Plaintiff, was that the Defendant left the home on numerous occasions. Plaintiff even went to the extent of making crosses on a calendar to represent the dates that the Defendant was not at home (see Exhibit C). According to his crossings on the calendar it appears that the Defendant was hardly ever at home. If this was the situation, why did Plaintiff find the need to leave the house? Surely if

the Defendant was never around Plaintiff would be living peacefully in the house, all alone.

In the premises, there were many factors that gave rise to the breakdown of the parties' marriage.

[21] It must be briefly mentioned that Mr Chadwick, during cross-examination of the Defendant, put it to her that she chose to defend herself in Court and she should have taken a bond on the Merebank property that she owns to pay for her legal fees. Defendant, however, pointed out that she was not willing to burden that property as her siblings also owned shares in the property. The Plaintiff on the other hand is currently running expensive legal bills which form part of the liabilities of the joint estate. What this does prove is that the Defendant did not want to incur expenses and chose to defend herself.

Mr Chadwick did however advise the Court that the Plaintiff's attitude, insofar as the assets and liabilities which have accrued since the separation, each party should be responsible for their own and keep their own.[5]

[22] Since the Plaintiff left the matrimonial home in 2002 the Defendant has been responsible for maintaining the property, paying the rates, paying the household expenses as well as providing for the kids. The Plaintiff, after he left the matrimonial home, failed to contribute his fair share towards the support and maintenance of the property. Whilst the Plaintiff may have been paying maintenance, the Defendant was the one who was taking care of the childrens day to day needs and she carried the main burden of supporting the children. Defendant had to provide financially for the daughters who were studying. Plaintiff left the home leaving to fend for her and the children.

[23] Plaintiff wants the house to be sold, and he has not for one moment thought of what would happen to the family. The family will have to uproot their lives and find alternate accommodation. This does not seem fair, but the mere fact that Plaintiff last saw his son in December 2005, and does not even know what his daughters are doing indicates that he does not seem to care. Plaintiff has no contact with his children. It is really a sad day when children and parents live this way.

[24] The Plaintiff is currently employed as a draughtsman, and is consulting for a company

[5] See record of proceedings, page 105

called BNA Mechanical Engineering. He does not earn a set salary, but according to his evidence he earns at least R15 000 – R18 000 per month. Defendant is employed as a Public Relations Officer by SANBS. The son and second daughter are currently still dependants, with the Defendant having to provide for them.

[25] I find on a balance of probabilities that if a forfeiture order is not made, the Plaintiff will be unduly benefited. He will share in the La Mercy property even though he has not contributed anything to the property's maintenance, rates and utility expenses since 2002. It is not good enough for him to say that since he is no longer staying there that he should not pay the rates etc. It is the Plaintiff who decided to leave the matrimonial home, not the Defendant. One of Plaintiff's arguments was that he has not enjoyed any benefit from the property since he left the matrimonial home, and makes specific reference to the Defendant receiving a rental from the tenants. Although the Defendant may have been receiving a rental from the tenants, according to her evidence, the reason for getting the tenants was a protection measure. Defendant stated in her letter to Shepstone & Wylie,

> "…by us having the tenants live with myself and the children was a way of safeguarding ourselves."[6]

Thus, it must be said that although the Defendant was receiving rental from the property, she was forced to do it.

[26] On an overall conspectus of the evidence, Plaintiff's contribution over the last 6 years has been minimal. Plaintiff's conduct during the marriage cannot be ignored, his conduct must be considered in the context of the circumstances which led to the breakdown of the marriage.

Applying the *Wijker* and *Binda* decisions it must be held that given the circumstances of this case the Defendant is clearly entitled to the forfeiture order sought.

Award

[27] The court makes the following order:

1. A decree of divorce is granted.

[6] Exhibit A, Page 14

2. An order awarding custody of the minor child Riolyn to the Defendant.

3. An order directing the Plaintiff to pay the Defendant maintenance for Riolyn in the sum of R2000 per month until he attains majority or becomes self supporting, whichever should occur the sooner. Plaintiff is also to pay all reasonable medical costs and half of the educational costs in respect of the said minor child.

4. The Plaintiff forfeits his fifty percent in the joint estate of the parties arising from the marriage in community of property.

5. Each party to pay their own costs.

TSHABALALA JP _____

Dates of Hearing:	28th & 29th May 2008
Date of Judgment:	14 July 2008
For Plaintiff:	Mr. A.I.J. Chadwick
Instructed by:	Shepstone & Wylie
For Defendant	In Person