

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 20/27078

- |     |                                                                                                    |
|-----|----------------------------------------------------------------------------------------------------|
| (1) | REPORTABLE: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/>                  |
| (2) | OF INTEREST TO OTHER JUDGES: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |
| (3) | REVISED: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/>                     |

Date: 19 September 2023 WJ

In the matter between:

**N, S (BORN M)**

**PLAINTIFF**

and

**M F S**

**DEFENDANT**

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**JUDGMENT**

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**DU PLESSIS AJ**

- [1] This is an action for divorce involving two minor children, where, throughout the acrimonious run-up to the trial and thereafter, the Defendant elected to represent himself while the Plaintiff was duly represented. Before I can set out what each party claims, I must say something about the litigation history of this case.

**[1] The litigation process**

- [2] As a self-represented litigant, the Defendant has issued 12 applications against the Plaintiff. Most of the matters were either struck off the roll, or the Defendant did not take the matter further once the Plaintiff filed answering affidavits. They are also not interlocutory applications. The purpose of launching these applications, the Defendant states, is to open the Plaintiff's eyes.<sup>1</sup> As for the rest of the matters, the Plaintiff does not need to respond as they are irrelevant.
- [3] The legal processes and filing notices, affidavits and other documents may be a maze for parties seeking to represent themselves in action proceedings. There is a delicate dance between adhering strictly to the rules of the court, to ensure that the process runs smoothly and allowing some leniency towards a self-representing litigant who may not have a bird's eye view of how the law as a system operates or know about the intricate details of the law and legal processes, to ensure that both parties are genuinely heard. In this case, this dance was challenging at times.
- [4] Most court officers – from judges to advocates and attorneys, are sympathetic to bona fide self-represented litigants who litigate because they cannot afford legal representation and often do not pass the means test to qualify for free legal advice. The Defendant's attitude to this, as evident from his e-mail of 24 February 2023, is telling. He does not claim that he cannot afford or find legal representation, but he makes it clear that he will elect when and if he appoints a legal practitioner to represent him.
- [5] On the first day of the hearing, the Defendant instructed an attorney to represent him in the matter. I heard arguments on his request to postpone the matter and refused such postponement for the reasons set out below. However, I gave the Defendant my hard copy of the CaseLines file. I adjourned the court till the next day so that his attorney could prepare for that matter, and perhaps even see if the parties cannot reach a settlement agreement.

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<sup>1</sup> See correspondence on CaseLines 13-112

[6] The next day, when the court convened, the attorney was nowhere to be found. We were informed that he was on his way. The court waited for the attorney, making it clear that there was also an obligation towards the Plaintiff to ensure finality in the matter and not postpone it again for her to incur more costs. When his attorney failed to arrive an hour later, the case proceeded. I asked the Defendant to state clearly what he claims. He placed everything in dispute, including the divorce itself, and stated that he wants:

- i. Residence of the children be awarded to him;
- ii. Maintenance for him in the amount of R26 000 pm;
- iii. The Plaintiff pay maintenance for both children;
- iv. Contact be awarded to the Plaintiff;
- v. 50% of the Plaintiff's pension benefits.

[7] He agreed that a liquidator be appointed to divide the balance of the joint estate.

[8] After this, the attorney appeared, stating that the Police impounded his car, which is why he was late.<sup>2</sup> Given the history of this case, I allowed the departure from certain formalities, as I deemed the right to legal representation to be of utmost importance.

[9] After both parties gave evidence and were cross-examined, the court reserved judgment and requested the parties to send Heads of Argument by 7 August 2023. The Plaintiff duly followed the court's directive. The attorney for the Defendant did not submit Heads of Argument or a draft order. The Defendant submitted various documents (that he named "The Winner") and a draft order. The draft order stated the following:

Having read the documents, having heard evidence, and having considered the matter:

It is ordered that:

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<sup>2</sup> I requested the attorney to send my registrar proof of such impoundment. I have to date not received it.

1. A decree of divorce is not granted.
2. The parties will remain married, and the matter is referred to mediation where a third party trained in divorce will assist the disputing parties.
3. A decision may not come forth from this court as
  - 3.1 There has been a violation of the constitution.
  - 3.1 Failure to comply with procedural requirements within the Court. Court Process, Procedure and rules have fallen short.

[10] The Plaintiff set out what she claims in her heads of argument. She seeks:

- i. Residence of the minor children to be awarded to her;
- ii. That the Defendant pay maintenance of R2 500pm per child;
- iii. That the Defendant pay 50% of all items listed as the minor children's requirements as set out in the amended particulars of claim;
- iv. That in terms of s 9(1) of the Divorce Act the Defendant forfeits his right to his share of the pension interest of the Transnet Retirement Fund of which the Plaintiff is a member;
- v. That the pension fund of which the Defendant is a member be directed to pay 50% of the pension interest in that fund to the Plaintiff;
- vi. That the Defendant pays the costs of the divorce action as he had ample opportunity to settle the matter amicably on various occasions, including during March 2023 and on 24 July 2023, when the Plaintiff proposed a settlement agreement, which the Defendant did not respond to as indicated by his legal representative that a response would be submitted by 15:30 on 24 July 2023.

[11] The Plaintiff clarified that she does not wish to continue the marriage. Thus, the issues for this court to determine are:

- i. To whom the residence of the two children will be awarded;
- ii. The contact which should be awarded to the party with whom the children do not reside;

- iii. Maintenance payable by the party with whom the minor children do not reside;
- iv. Whether the Defendant should forfeit his right to claim any part of the pension interest in Transnet Retirement Fund of which the Plaintiff is a member;
- v. The division of the properties and the joint estate;
- vi. Which party should pay the costs of the divorce action.

[12] These issues will be addressed after I have dealt with why I dismissed the application for postponement.

**[2] Notice of removal (postponement)**

[13] The Defendant filed a notice "for the matter to be removed from the roll" on 20 July 2023, four days before the trial date. This is because "[i]n the interest of justice, equality, and access to courts; [t]he respondent has not yet found the use of counsel to represent him at trial dated for 24 July 2023". He wants counsel "with the same fire power" as the counsel of the Plaintiff, due to what he described as various prejudices and lack of equality experienced so far, including during the Rule 43 application instituted by the Plaintiff (there was no financial disclosure from the respondent and the judge thus made a ruling on hearsay evidence); that the interlocutory motion to compel the respondent to sign pre-trial minutes does not reflect what was discussed, and an unopposed application that was successful even if the matter was opposed.

[14] During all these applications, the Defendant felt that the judges were more lenient to their "Colleagues/equals/advocates/friends". The Defendant did not deem the matter trial-ready, as there are no practice notes, he did not yet discover the issues in dispute, and various cases before the court relating to the matter must still be finalised.

- [15] Moreover, in this notice, which he also sent to various people in the judiciary, Department of Justice and Constitutional Development and the Presidency, he deems the use of CaseLines unconstitutional seen in the light of access to the courts and equality in the courts. He states that because he was only added late to this file on CaseLines, this infringes on his right to a fair trial.
- [16] He raises various other concerns about CaseLines and access to justice, including the question of whether a self-represented litigant will have adequate knowledge to manoeuvre around CaseLines, whether non-English users are accommodated and the problem of access for people who cannot adequately use a computer (due to age and computer literacy). He raises human rights concerns about access to court, equality in courts and the costs of proceedings where a litigant represents themselves.
- [17] The Plaintiff's attorney filed an affidavit opposing the application for postponement, asking it to be dismissed. He made the following submissions:
- i. The Defendant is highly educated, holding a master's degree in engineering management, tutoring students in mathematics, being employed as an engineer in various capacities, and created an app for child maintenance planning explaining parents' duty to pay maintenance referring to the Children's Act with regard to parents' parental responsibilities, amongst other things.
  - ii. He personally served a notice of intention to defend on 7 December 2020 and has always been representing himself. He prepared his own papers and appeared in person in an urgent application, a Rule 43 application, and interlocutory applications.
  - iii. He was informed in a letter from the Plaintiff's attorneys on 8 December 2021 to obtain the services of an attorney to assist in a roundtable meeting.
  - iv. When Plaintiff's attorneys tried to settle the matter amicably on 20 February 2023, the Defendant replied that he will forward the settlement proposal to

his attorneys and reply on 24 March 2023. The Plaintiff's attorneys requested that his attorneys place themselves on record, to which the Defendant responded that he would "hand over [his] file to an attorney just before trial if [they] don't settle" and that this can be two months, 1 month or 2 weeks before trial.<sup>3</sup> After the letter was sent to him, however, he stated that due to this premature letter, he will no longer seek any advice, nor will he respond by 24 March 2023.

[18] Other than that, the notice of set down was served on the Defendant on 1 December 2022. On 21 June 2023, the Defendant enquired about the trial date from the Plaintiff's attorney, asking who the registrar and judge would be. On 23 June 2023, the attorney replied that the matter was set down for 24 July 2023, and they will only know who the judge is once the trial roll for the day has been released. The Defendant confirmed receipt of the letter on 27 June 2023. Despite this, the Defendant elected not to employ the services of an attorney or counsel, notwithstanding advice from the court and the attorneys through correspondence.

[19] The main complaint by the Defendant, which he also raised in the court, is that he only received access to CaseLines on 19 July 2023. The Plaintiff stated that they were unaware of this, and that the confusion, in all probability, emanates from the various legal processes on different CaseLines profiles. Still, all notices, pleadings and applications uploaded on CaseLines have been served on the Defendant, and all the pleadings and notices served by the Defendant have been uploaded onto CaseLines. The Defendant thus had access to all the documentation on CaseLines, and, as such, does not suffer prejudice.

[20] They explain the application to compel the delivery of a financial disclosure form came after the Rule 43 was issued, where they asked the Defendant for a financial disclosure form followed by a letter of demand to serve it, failing which they will have to bring an application to compel, which will include a cost order against him. Eventually, a financial disclosure form that was not commissioned and without supporting documents was filed.

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<sup>3</sup> Email dated 24 February 2023, caselines 21-43.

[21] As for the application to compel the delivery of a discovery affidavit, the Plaintiff points out that Judge Malindi did appraise himself with the facts of the application and the attempts by the Plaintiff to ensure that the Defendant complied with Rule 35(1). There was proper notice of the application. The Defendant knew.

[22] The compulsion to sign the pre-trial minutes was after Judge Swanepoel heard the Defendant. He then ordered the Defendant to deliver signed pre-trial minutes. The judge likewise advised the Defendant to seek the services of a legal practitioner. The Plaintiff states that "the defendant only complies with the rules of any directive when he is compelled to do so by court order".<sup>4</sup>

[23] Furthermore, during a pre-trial meeting, the Defendant listed issues he believed to be in dispute. After that, he was presented with a joint practice note but elected not to comply with the directive. There is thus no prejudice, they state, due to his failure to file the practice note and that he could still present his case.

[24] I found the arguments of the Respondent/Plaintiff convincing. Thus, after hearing both parties on the matter, I decided not to remove the matter from the roll and to proceed the next day. I was specifically satisfied that the Defendant had access to all the documentation uploaded onto CaseLines.

**[3] The duration and the breakdown of the marriage**

[25] The parties were married to each other in a civil marriage in community of property on 19 December 2015 in Pretoria, which marriage still subsists. Two children were born out of the marriage: J N O S, born [...] May [...], and J M S, born [...] December [...]. The parties did not initially live together from the date of marriage, as the Defendant worked in Centurion. He would stay over with the Plaintiff and her mother and sister in a home in Danville.

[26] They eventually moved in together at the end of 2019, into the property being built in Rayton. The parties permanently separated around 29 May 2020. Their

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<sup>4</sup> Caselines 21-19.



marriage was of short duration – less than five years – and the parties lived together for a very short period.

[27] The Plaintiff states that the parties would argue frequently, that there was no meaningful communication between the parties, that the parties are incompatible, and that the Defendant admitted to infidelity with various women during their marriage. All this means that the Plaintiff finds it irreconcilable with a continued marriage relationship. She simply does not trust the Defendant. Moreover, he shouts at her and uses foul and abusive language in the presence of the two minor children. The Plaintiff can no longer tolerate the emotional abuse.

[28] In between, a protection order was granted, a fraud charge was laid because the Defendant allegedly forged the Plaintiff's signature on bank documents, a charge of intimidation was laid when the Defendant sent threatening WhatsApp messages to the Plaintiff, and a charge of violation of a court order was opened. He responded by throwing stones at the windows of the Danville house.

[29] The Plaintiff also testified, including under cross-examination, that the Defendant told her of 22 extramarital affairs. He sent her pictures during and after the separation of the girlfriends. The Defendant, however, denied this, stating that he did not send the pictures from the cell phone number he always had.

[30] The Plaintiff does not wish to continue with the marriage for all these reasons. The Defendant, however, does not want to get divorced. He wants the church to mediate the marital issues and to meet with the Plaintiff's uncle to see if they can resolve their issues. This is as far as the "breakdown of the marriage" is concerned.

#### **[4] Assets and income**

##### **(i) Financial disclosure form**

[31] The Plaintiff's financial disclosure form (FDF) shows that she is a member of the Transnet Retirement Fund.<sup>5</sup> When the action was instituted, the Defendant was a

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<sup>5</sup> Policy No 6411167264 reference no BSTMR/125554.

member of the RFS Umbrella Pension Fund.<sup>6</sup> However, the Defendant cashed in the pension fund and utilised the funds for his own benefit without informing the Plaintiff. The Defendant does not dispute this but states (without providing evidence) that he spent the money on the Rayton property. He did not pay the Plaintiff her half share from the pension fund. At some stage during the proceedings, he demanded an 80% share in her pension fund.

[32] The Defendant's FDF starts with five pages of various passages from the Bible. He states that he is unemployed. He indicates that he opened several court cases at SAPS but does not elaborate on it. He lists the Danville and Rayton properties; he does not list the Loerie Park property (see below). He does not state whether he has investments, loans recoverable, cash, or personal belongings. He does list his 100% shareholding in his business, Prodade (Pty) Ltd, with a value of R442,65. He confirmed this interest during cross-examination but indicated that he derives no income from it. He has hopes of selling it for R5 million, which he later denied this, indicating that it is "Complete B\*llsh\*t", and stating that it is the building of the app that would cost R5 million. He receives R4 000 pm rental income from the Loerie Park property that he utilises for himself.

[33] During the hearing he uploaded many documents to CaseLines, purporting to be documents relating to the FDF. There is, however, little context to the documents. When the same documents were uploaded on various "pockets" on CaseLines, I requested the attorney of the Plaintiff to clean up CaseLines into neat folders because it was challenging to navigate. The attorney created three pockets with all the Defendant's photos and documents uploaded there. The Defendant stated during the hearing that the attorney removed the documents and sent a complaint to the Deputy Judge President's secretary for fraud. After the hearing he continued to upload documents onto CaseLines, again without context.

## **(ii) The immovable properties**

[34] There are three immovable properties in the joint estate.

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<sup>6</sup> Registration no RS14431 employee number 11071.

**a. The Danville property**

[35] 50% of the property situated at 154 Taita Falcon Street, Danville Ext 16, is owned by the joint estate, and the Plaintiff's mother owns the other 50%. The current value of the undivided share is R452 051.<sup>7</sup>

[36] The property has been paid off with monies from the home loan of the Rayton property. The Defendant requested that the property be sold, although he later stated that the property should not be sold. The Plaintiff does not agree that the property should be sold, as her mother owns 50% of the property. She wishes to retain the property for herself and for the Defendant to keep the Loerie Park property.

**b. The Rayton property**

[37] The joint estate owns 100% of the property situated at [...] R[...] Avenue [Erf [...]], Rayton. The property's market value is R1 116 667, with an outstanding loan to Standard Bank secured by a mortgage bond of R1 858 648,29.<sup>8</sup> The monthly instalment is R25 000.

[38] Initially it was agreed that the Plaintiff would pay 50% of the bond repayment into the account of the Defendant. However, when the Defendant did not pay maintenance towards the children, the Plaintiff could no longer afford to make the payments.

[39] The Plaintiff has testified that, through the notifications on the Standard Bank App she noticed that the Defendant has been paying the Standard Bank bond in instalments between R16 000 to R18 000 towards the Rayton property. The Defendant denied this during cross-examination but provided no bank statements to dispute this. He later uploaded a statement, without placing it in context or explaining its relevance. He stated that he stopped paying the bond altogether, and

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<sup>7</sup> As per updated FDF, CaseLines 06-6.

<sup>8</sup> As per updated FDF, CaseLines 06-3.

that the overdue amount is R153 000. There is thus no clarity about the outstanding amount.

[40] The Plaintiff suggests that the Defendant keep the Rayton property, including the responsibility to pay the bond. Alternatively, she proposes that the property be sold with profit and loss shared equally between the parties. The Defendant asks for the property to be sold and the net proceeds to be paid to him.

### **c. The Loeries Park Property**

[41] 100% of Unit 13, Loeries Park, Anzac, Ext 2 belongs to the joint estate. The current market value is R380 933. The loan due to Standard Bank secured by a mortgage bond is R1 536.43.<sup>9</sup> The Defendant receives rental income of R4 500 for this property that he does not share with the Plaintiff.

[42] The Defendant requested to keep the property. The Plaintiff agrees.

### **(iii) Movable property**

[43] There are various movable properties, including furniture and cars. The Plaintiff has a care valued at R51 925. It is not clear what the value of the Defendant's car is. The Plaintiff requested that a liquidator be appointed to divide the balance of the joint estate, including the movable property. The Defendant agreed to this, although in his heads of argument he states that he cannot remember if he did agree to this.

### **(iv) Life insurance**

[44] The Plaintiff has life insurance and endowment policy in favour of the two children with Old Mutual Life Cover.

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<sup>9</sup> As per updated FDF, CaseLines 06-4.

**(v) Pension interest**

[45] The current value of the Plaintiff's retirement fund is R774 375.<sup>10</sup> The Plaintiff submitted that the Defendant did not contribute towards the monthly payments of her pension fund, and that the full amount was deducted directly from her salary. The Plaintiff seeks that the Defendant forfeit his 50% share in her pension. The Defendant claims an 80% share in the Plaintiff's pension.

[46] The Defendant says it is unfair to forfeit the pension as he used his first pension fund to pay Lobola and spent it on the children. As for the second pension payout, he received a R148 000 pay-out on his provident fund when he was retrenched. He says he used to complete the Rayton property (along with the R48 000 severance package). He did not submit proof in his FDF, although he did upload pictures of renovating the house. It is, however, not proof that these funds were used to complete the property or how much was spent on the property.

**(vi) Income**

[47] The Plaintiff's income for the last financial year was R472 259 with an annual bonus of R27 954,69, earning a net salary of R33 000 per month, with both children on her medical aid. Her estimated net income for the following 12 months amounts to R342 360.

[48] As per her FDF, the Plaintiff states that she requires maintenance of R2500 per month per child, and 50% of all the children's expenses be shared by the parties.

[49] The Defendant is unemployed, stating that he struggles to get a job while criminal cases are pending against him. The Defendant claims R26 000 pm maintenance without providing reasons why. He receives money from his family from time to time. Other than that, not much is known about his income.

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<sup>10</sup> As per updated FDF CaseLines 06-11.

**[5] The care of the children**

[50] The Plaintiff testified that she takes care of the children on a daily basis, dropping them at school and picking them up after sports. She testified that they lived with her mother in Danville during the marriage but had to move out when the Defendant quarrelled with her mother and sister. However, when they moved in with the Defendant's mother, the situation got worse. They decided to finish the Rayton property and move there with the children. However, the Defendant only stayed in that house during the week and moved in with his mother during the weekend due to the troublesome relationship between the parties.

[51] The Covid-19 lockdown seems to have been the breaking point as far as the children's care is concerned, when the Defendant took the children to his mother's house, prompting the Plaintiff to look for the children. At one such occasion the Defendant drove into the Plaintiff's vehicle and damaged it, causing the Plaintiff to move out of the Rayton property and back to her mother in Danville, where she still resides with the children.

[52] The Defendant later the year disappeared with the children, forcing the Plaintiff to obtain an urgent court order on 17 December 2020 for the return of the children. In July 2021 a Rule 43 court order was granted against the Defendant to, among other things, pay maintenance, which he has not done. He states that he cannot afford the maintenance ordered in the R43. He uploaded various pictures of groceries he bought and till slips to prove his contribution. It is, however, not clear how often this occurred.

[53] The Defendant did not have contact with the children for 11 months during 2022, despite being awarded contact every second weekend. He states that this is due to the Plaintiff preventing him from visiting the children by using the legal system. He saw them twice during 2023. He took the children from December 2022 to January 2023 for the school holidays and brought them back late for their first school day. During the R43 hearings, he requested a paternity test to be done as he did not see his children.

[54] The Plaintiff states that it is in the best interest that the children reside with the Plaintiff, with contact awarded to the Defendant.

[55] The Plaintiff paid R21 736 and R15 860 for the children's 2023 school fees. She also pays R1 840 per month for the children's aftercare. She states that the monthly expense for the children ranges between R8 000 – R9 000. She asks for monthly maintenance of R2500 per child and that the Defendant contribute 50% of their other expenses listed in the particulars of claim.

## [6] The law

### (i) Decree of divorce

[56] S 3 of the Divorce Act<sup>11</sup> sets out the grounds for divorce, namely that

A marriage may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are: (a) the irretrievable breakdown of marriage as contemplated in section 4;

[57] S 4(1) of the Divorce Act<sup>12</sup> states that a court may grant the divorce order based on the irretrievable breakdown of the marriage-

if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

[58] A court should dissolve a marriage that has broken down and where there is no reasonable prospect of restoration of a normal marital relationship. A court will have regard to what has happened in the past, as well as the present attitude of the parties to the marriage relationship in determining this.<sup>13</sup> A normal marriage relationship should be understood with reference to the *consortium omnis vitae*, and where one or both spouses act in a way that undermines the consortium, the marriage relationship is no longer normal. Examples include committing adultery, deserting the common household maliciously, and acting in an abusive manner. These objective factors should be considered together with the subjective wishes

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<sup>11</sup> 70 of 1979.

<sup>12</sup> 70 of 1979.

<sup>13</sup> *Schwartz v Schwartz* 1984 (4) SA 467 (A).

of one or both spouses to terminate the marriage relationship.<sup>14</sup> If only one spouse wants to end the marriage relationship, the court is obliged to grant the decree of divorce since it is not possible to repair the marriage relationship without the cooperation of both marriage partners.<sup>15</sup>

[59] The authorities are clear on this. Where one spouse wants to end the marriage relationship, the court is obliged to grant the decree of divorce. In this instance, the Plaintiff has made it clear that she wants to end the marriage relationship, despite the Defendant's claim that the marriage can be solved by church mediation or taking to the uncles. A decree of divorce is thus granted.

## **(ii) Maintenance**

[60] S 7(2) of the Divorce Act<sup>16</sup> sets out clearly what the court must consider when deciding whether a party must pay maintenance after divorce, and the amount of maintenance to be paid. These factors are the existing or prospective means of the parties, their earning capacities, the financial needs and obligations, the age, the duration of the marriage, the standard of living, and the conduct of each party in so far as it may be relevant to the breakdown of the marriage, a redistribution order and any other factor which the court thinks should be taken into account.

[61] In this case, the Defendant asks for maintenance from the Plaintiff, in the sum of R26 000 pm. However, the Plaintiff testified that she has a net salary of about R33 000 pm. The expenses for the children range from R8 000pm to R9 000. She currently also pays for their school fees.

[62] The Defendant can earn a salary should he find employment. During testimony, he stated that the only obstacle to him being employed was the various criminal cases that the Plaintiff opened against him. She subsequently withdrew the charges, and he obtained a clearance. On his evidence, he should be employed relatively soon.

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<sup>14</sup> *Schwartz v Schwartz* 1984 (4) SA 467 (A).

<sup>15</sup> See Belinda van Heerden, et al. *Family Law in South Africa* Second Edition. Oxford University Press Southern Africa, 2021 chapter 8.3.2.1.

<sup>16</sup> 70 of 1979.



During the divorce proceedings, he has not indicated how he got to R26 000, or how the Plaintiff will be able to afford that. In light of the parties' relatively equal earning capacities, their needs and obligations, and their age, I make no order as to spousal maintenance.

**(iii) Division of the joint estate**

- [63] The general principle states that on divorce, a spouse married in community of property can claim half of the net joint estate. A court can either incorporate an agreement into the decree of divorce or make an order as to the joint estate. This can include appointing a liquidator to divide the assets or the estate.<sup>17</sup>
- [64] Having considered the submissions made by both parties, the joint estate owns 50% of the Danville property that is paid off. The current value of the share is R452 051. The Plaintiff stays in the house with her mother and the children and requested that she retain the property. The Defendant can then keep the Loerie Park property worth R380 933.
- [65] As for the Rayton property, the Plaintiff asked that the property either be sold, with profit and loss shared between the parties, or for the Defendant to retain the property (including the responsibility to pay the bond). The Defendant asked that the property be sold with all the proceeds paid to him. A fair order in this regard is to order the property to be sold, with profit and loss shared between the parties. Both parties must cooperate to get the house in a condition to be sold.
- [66] Regarding the division of the pension interest, in terms of ss 7(7) and (8) of the Divorce Act,<sup>18</sup> a spouse's pension interest is regarded as part of their assets. This interest must, therefore, also be considered when determining the patrimonial benefits to which the parties to the divorce action may be entitled on the termination of the marriage through divorce.

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<sup>17</sup> P v P [2016] ZAFSHC 13.

<sup>18</sup> 70 of 1979.

[67] However, s 9(1) of the Divorce Act<sup>19</sup> enables a court to order the forfeiture of patrimonial benefits that a party obtains from marriage, which they would not otherwise have had. When a court makes such an order, it must be satisfied that the one spouse will be unduly benefited in relation to the other. When considering forfeiture, the court can take into account the duration of the marriage, the reasons for the breakdown of the marriage, and substantial misconduct on the part of either of the parties.<sup>20</sup>

[68] Based on the facts as set out above, namely the short marriage, the Defendant cashing out his provident fund and not explaining what he did with it, forging the signature of the Plaintiff on her bank statements, and damaging her vehicle, I am of the opinion that the Defendant should forfeit his 50% in the Plaintiff's pension.

#### **(iv) The children**

[69] When considering the position of the children, I am guided by the principle of the child's best interest. S7 of the Children's Act<sup>21</sup> has codified a list of factors to consider when determining what is in the best interest of the children as far as care and contact are concerned.

[70] Based on the factors in s 7, the following observation is made: the children have been residing with the Plaintiff, who is caring for their daily needs. The Plaintiff is supported in the caregiving task by her mother and sister. The Plaintiff pays for the school fees, even if the Defendant does not pay any maintenance. The Defendant does have contact with them from time to time. Still, nothing that was presented to the court convinced me that he could take care of the children on a day-to-day basis or that the children should reside with him. Such an arrangement would also pose challenges as far as the schooling of the children is concerned.

[71] Nevertheless, the Plaintiff regarded the Defendant as a good father and proposed contact with the children every other weekend and during school holidays, as well

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<sup>19</sup> 70 of 1979.

<sup>20</sup> See M v M [2023] ZASCA 75 for how these factors are applied.

<sup>21</sup> 38 of 2005.

as reasonable telephonic contact. This is reasonable, also given the relatively young age of the children.

[72] As far as the maintenance of the children is concerned, the Plaintiff set out their maintenance needs. So far, she has borne almost all the responsibility to maintain them financially. She sets out their needs to range between R8 000 – R9 000. She claims R2 500 per child, per month, which was not really contested by the Defendant, and seems reasonable. She also asks that the Defendant pay 50% of all items listed as their requirements, as set out in the particulars of claim. This seems reasonable.

#### **[7] Costs**

[73] The Defendant had numerous opportunities to enter into a settlement with the Plaintiff but has refused to do so. On the Monday when the court adjourned, the Defendant's attorney indicated they were amenable to a settlement, but never contacted the Plaintiff's attorney. The conduct of the Defendant at times was highly questionable and obstructive. Not only were numerous applications filed that forced the Plaintiff to respond, but the Defendant also hardly ever took it further once an answering affidavit was filed. The Plaintiff's requests were not unreasonable. The Plaintiff should not bear the full brunt of the costs.

#### **[8] Order**

[74] I, therefore, make the following order:

1. A decree of divorce is granted.
2. The parties will remain joint co-holders of full parental responsibilities and rights of the children born of their marriage, namely J N O S and J M S ("the children");
3. The children will reside with the Plaintiff;
4. Specific parental responsibilities and rights with regard to contact with the children are awarded to the Defendant as contemplated in Section 18(2)(b) of the Children's Act, having regard to the children's social, educational, religious and health requirements and where appropriate the views and wishes of the children as follows:

- 4.1. Every alternate weekend from a Friday when the Defendant will collect the children from the Plaintiff's residence at 18:00 until Sunday when the Defendant will return the children to the Plaintiff's residence at 18:00;
- 4.2. Alternate public holidays;
- 4.3. Alternate Christmas day commencing in 2024;
- 4.4. Alternate Easter holidays;
- 4.5. The first half of each short school holiday;
- 4.6. As from 2023 one half of each long school holiday, subject to the Defendant having the children:
  - 4.6.1. for the first half of such holidays in 2023 and thereafter in every alternate year;
  - 4.6.2. for the second half of such holidays in 2024 and thereafter every alternate year;
- 4.7. Telephonically, cellphone, webcam, SMS, e-mail, WhatsApp, electronically and any other similar method of communication every day at all reasonable times;
5. The Defendant is directed to contribute towards the children's maintenance as follows by paying to the Plaintiff the following in respect of the children:
  - 5.1. R2 500,00 per month per child, which is to escalate on the anniversary date of the divorce at the rate equivalent to the Consumer Price Index published by the Department of Statistics;
  - 5.2. 50% of the children's school fees at a government school;
  - 5.3. 50% of the children's aftercare fees at a government school;
  - 5.4. 50% of the children's schoolbooks, stationery and uniforms;
  - 5.5. 50% of the children's extra lessons;
  - 5.6. 50% of the children's extramural fees;
  - 5.7. 50% of outfitting and equipment in respect of the children's extramural activities;
  - 5.8. 50% of the children's school excursions;
  - 5.9. 50% of the children's medical aid premiums in respect of the Plaintiff's medical aid scheme on which the children are dependants;
  - 5.10. 50% of the children's medical, dental, hospital, surgical, ophthalmic, orthodontic, psychological and prescribed pharmaceutical expenses not covered by the Plaintiff's medical aid scheme on which the children are dependants;
6. The Defendant is directed to forfeit the following patrimonial benefit of the marriage in community of property in favour of the Plaintiff, namely Transnet Retirement Fund, Policy No. 6411167264, with reference number BSTMR/125554;
7. The Plaintiff is to retain the 50% share in the property situated at [...] Taita [...] Street, Danville Ext [...];

8. The Defendant is to retain the 100% share in Unit 12, Lo[...] Park, A[...], ext [...];
9. An insolvency practitioner is to be nominated by the President of the South African Council for the Property Valuers Profession and, failing him, by the chairperson of SARIPA (the South African Restructuring and Insolvency Association) be appointed as a liquidator who will have the following powers and duties in dividing the remainder of the parties' joint estate:
  - 9.1. To take possession of all the assets of the joint estate, save for the Plaintiff's pension interest referred to in paragraph 6 above ("the joint estate");
  - 9.2. To collect all debts, monies or income due to the joint estate and to discharge the liabilities thereof;
  - 9.3. To make all investigations necessary and, in particular, to obtain from the parties all information with regard to the assets comprising the joint estate;
  - 9.4. To obtain information regarding the parties' financial affairs as at the date of divorce from bank managers, managers of other financial institutions, auditors of companies, trustees of trusts in respect whereof the parties are trustees and/or beneficiaries, personal accountants of the parties and any other party who he/she deems necessary of a true and correct account of any portion of the assets of the parties, including those in the possession of the parties or dealt with by them since the date of the divorce and payment or delivery of any balance or assets still in his/her hands or under his/her control;
  - 9.5. To demand from the parties the true and correct account of any portion of the said assets taken possession of or dealt with by either of the parties since the date of the decree of divorce, and payment or delivery of any balance or assets still in his or her hands;
  - 9.6. To inspect the personal bank statements and personal statements of affairs and liabilities of the parties;
  - 9.7. To determine the nett value of the assets of the joint estate, whether movable or immovable, including the property situated at Railway Avenue, Rayton;
  - 9.8. To prepare a final account between the parties;
  - 9.9. To divide the assets equally between the parties or to sell them by public auction or by private treaty, with the leave of both parties to bid or to divide the proceeds where a division cannot conveniently or advantageously be effected after deducting all the costs of suit payable by the Defendant to the Plaintiff in terms of all the orders granted against the Defendant to date and the arrear maintenance payable by the Defendant to the Plaintiff in terms of the Rule 43 order from the Defendant's portion and allocating such costs and arrear maintenance to the Plaintiff;
  - 9.10. To sign and execute any documents, deeds or other papers that may be necessary to effect the transfer of any of the said assets, to whomsoever may acquire same from the liquidator;
  - 9.11. To apply to the above Honourable Court for a special direction in the event of the liquidator not being satisfied with the information supplied by either of the parties as to the assets of the joint estate or in the case of any special difficulty arising;

9.12. To deduct his charges from the proceeds of the assets in the joint estate before the distribution thereof;

10. The Defendant is directed to pay 50% of the Plaintiff's costs of suit.

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**WJ DU PLESSIS**

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by e-mail.

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|----------------------------|-------------------------------------------------------------------------------------|
| Counsel for the plaintiff: | Ms N Rambachan-Nadio                                                                |
| Instructed by:             | Houghton Harper Inc                                                                 |
| Counsel for the defendant: | Self-represented, during trial assisted by<br>Mr A Shipalana of Shipalana Attorneys |
| Date of the hearing:       | 24 & 25 July 2023                                                                   |
| Date of judgment:          | 19 September 2023                                                                   |