

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



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

CASE NO: 14861/2018

(1) REPORTABLE: YES/ NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
.....	
.....	
SIGNATURE	DATE.

In the matter between:

K W M

Plaintiff

and

P J M

Defendant

JUDGMENT

NGOBESE AJ

INTRODUCTION

1. Prior to the commencement of this trial, parties have agreed that the only issue for determination herein was the question with regard to the forfeiture of the patrimonial benefits by the defendant as prayed for by the plaintiff in her particulars of claim.
2. Despite the parties disagreeing with the reasons for the breakdown of the marriage relationship, they are *ad idem* that the marriage relationship between them has irretrievably broken down and that a decree of divorce be granted.
3. Accordingly, the issue for determination is whether, if the order for forfeiture is not made, the defendant will in relation to the plaintiff be unduly benefited.
4. The plaintiff (wife) and the defendant (husband) entered into a civil marriage in community of property 29 November 2006 at Boksburg, which marriage still subsists.
5. Two children were born out of marriage, namely, T J M (born on [...]) and O D M (born on [...]).

6. On 4 April 2018 the plaintiff instituted divorce proceedings against the defendant claiming a decree of divorce and, *inter alia*, for forfeiture of the patrimonial benefits of the marriage by the defendant, including:
 - 6.1 An immovable property situated at [...] Olive [...], Corner [...] Street, [...], Ext [...];
 - 6.2 Plaintiff's pension interests held in the government employees pension fund;
 - 6.3 The BMW 1 Series and Daihatsu Terios vehicles ("the vehicles") registered in the name of the plaintiff and currently in the possession of the plaintiff.
7. The defendant filed a plea claiming a division of the joint estate.

COMMON CAUSE

8. The following is common cause:
 - 8.1 The plaintiff bought the immovable property in 2008 and the defendant made no contributions towards the bond instalments on the property;
 - 8.2 The plaintiff was responsible for the payment of monthly instalments for the vehicles
 - 8.3 The plaintiff and the defendant lived apart from 2012 until December 2016 as she was staying in Germany with the minor children.

THE EVIDENCE

9. Both parties testified and neither of them called any witnesses. The first witness to testify was the plaintiff and her evidence in brief was the following:

9.1 She and the defendant got married on 29 November 2006. Two children were born out of marriage, namely, T and O. She is currently living with the children at [...] Olive [...], Corner, [...] Street.

9.2 She works for the State Security Agency. In 2011 she got a post to work in Germany. In 2012 she relocated to Germany with the children. The defendant refused to relocate to Germany with the plaintiff and the children.

9.3 She and the children returned to South Africa in December 2016.

9.4 The defendant stayed in the matrimonial home when she and the children were living in Germany. The house was purchased by her in 2008 and she also paid for the transfer costs for the registration of the house. She was paying for the bond, electricity, levy, municipal rates and taxes. When she relocated to Germany with the children, she continued to pay for the bond, levy, municipal rates and taxes, and the defendant was responsible for water and electricity only.

9.5 She was also responsible for the household expenses and maintenance including paying for children's school fees, transport

and clothing. The plaintiff told the court that the defendant made no contribution towards the household expenses.

9.6 During November 2009 she took a loan to purchase a BMW 1 series and she was responsible for paying the loan she took for the purpose of purchasing the BMW. In January 2017, she bought a Daihatsu Terios in cash.

9.7 The plaintiff testified that she was informed by the defendant's sister, H M and her husband, L that the defendant had extra marital affair, and had fathered a child when she was staying in Germany.

9.8 During January 2017, the plaintiff's and defendant's marital problems worsened and the defendant left the matrimonial home in February 2017 despite the plaintiff's attempts to work on the marriage.

9.9 The plaintiff denies that there was an agreement between her and the defendant that she will be responsible for the payment of the bond and, the defendant will be responsible for the grocery. The plaintiff told the court that it was a joint bond and therefore she expected the defendant to make contributions towards the bond.

9.10 She told the court that the defendant visited them twice when they were living in Germany and the defendant used concession tickets provided by the plaintiff's employer to travel to Germany.

9.11 She admits that the initial particulars of claim did not mention that the defendant had extra marital affair. She denies that she amended the particulars of claim because the defendant mentioned in his plea that the plaintiff had extra marital affair.

9.12 The plaintiff denies that she had extra marital affairs with the person by name of Xolisa. She further denies visiting Xolisa at the hotel in South Africa and that she sent WhatsApp messages to Xolisa.

9.13 She admits that there were two contributions made by the defendant to the children after the defendant left the matrimonial home. The first contribution was in respect of children's rapid covid tests as the children were going to spend a weekend with the defendant. The total amount paid by the defendant for the test was R500.00. The second contribution was less than R1000.00.

10. In brief the evidence of the defendant is as follows:

10.1 He is currently a pastor of a church in Whiteville;

10.2 He worked as a security at the Surveillance department before he and the plaintiff got married in 2006. He was earning R1200.00 per month;

10.3 After they got married, they rented an apartment in Birch Acres. He agreed with the plaintiff that he will make a contribution to petrol and grocery since the plaintiff was earning more than him;

- 10.4 After they bought a house in 2008, he and the plaintiff agreed that the plaintiff will be responsible for paying the bond and he will be responsible for contributing towards the grocery and petrol;
- 10.5 He did not relocate to Germany with the plaintiff and children because the plaintiff was bullying and abusive towards him, however, he gave the plaintiff a blessing to relocate to Germany;
- 10.6 He used to take leave in August of each and every year to visit the plaintiff and the children in Germany. He did not visit the plaintiff and children in the last year of their stay in Germany;
- 10.7 He took care of the house and paid for electricity, water, municipal rates and taxes when the plaintiff and children were staying in Germany;
- 10.8 The plaintiff initially told him that Xolisa was her mentor. He became suspicious of the plaintiff's extra marital affair with Xolisa when the plaintiff's behaviour changed towards him after the plaintiff came back from Germany in December 2016. He saw the plaintiff's WhatsApp messages to Xolisa on the plaintiff's phone;
- 10.9 He denies having extra marital affair and a child outside the marriage;
- 10.10 He did not have access to his children for the period of three years after he left the matrimonial home until a social worker by the name of Ms. Shavha intervened;

- 10.11 He did not contribute to the children and the plaintiff financially whilst they were staying in Germany because the plaintiff's employer was taking care of them;
- 10.12 He told the court under cross examination that he contributed to the household during the period 2006 to 2012 by buying groceries and paying for the levy and petrol;
- 10.13 He received an amount of R270 000.00 from his pension fund in 2017 after he was dismissed from his work. He used R270 000.00 solely for his own benefit. He never contributed anything towards the children and household;
- 10.14 He told the court under cross examination that he left the matrimonial home in 2017 because the plaintiff was abusing him emotionally and disrespecting him, and consequently it became unbearable for him to stay in the same house with the plaintiff;
- 10.15 He is living on donations from the church. On average he receives between R200.00 and R500.00 per month;
- 10.16 He managed to have access to the children because of Ms. Shavha's intervention;
- 10.17 He saw bruises on T caused by the plaintiff when he was at the office of Ms. Shavha;
- 10.18 The plaintiff had extra marital affair with Mpho Hlubi. The plaintiff and Mpho Hlubi stayed together at the matrimonial home after he left in February 2017;

10.19 The defendant told the court that during his visits in Germany, the plaintiff would leave him and the children at their place and go and see Xolisa;

10.20 The plaintiff changed the school of the children without informing the defendant;

10.21 The plaintiff was the one who packed the defendant's bag when he was being ejected from the matrimonial home.

LEGAL FRAMEWORK

11. A claim for the forfeiture of benefits arising from a marriage is governed by section 9(1) of the Divorce Act¹ as amended, which reads as follows:

“When a degree is granted on the ground of irretrievably breakdown of the 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 or any substantial misconduct on the part of either of the parties, is satisfied that, if the order of forfeiture is not made, the one party will in relation to the other be unduly benefited.”

12. In *Engelbrecht v Engelbrecht*,² it was held that *“the court has the discretion when granting a divorce on the grounds of irretrievably breakdown of the marriage or civil union to order that the patrimonial benefits of the marriage or civil union be forfeited by one party in favour of the other. The court may order forfeiture only if it is satisfied that the one party will, in relation to the*

¹ Act 70 of 1979

² 1989 (1) SA 597 (C).

other, be unduly benefited. The court has a wide discretion, and it may order forfeiture in respect of the whole or part only of the benefits”.

13. Accordingly, the court, when considering whether one party will be unduly benefited as stated in section 9(1) of the Divorce Act takes the following factors into account:³

13.1 The duration of the marriage;

13.2 The circumstances that gave rise to the breakdown of the marriage;

13.3 Any substantial misconduct on the part of either of the parties and that undue benefit may accrue to the one party in relation to the other, if an order of forfeiture is not granted.

14. In *Wijker v Wijker*,⁴ the court held the following when it considered whether proof of substantial misconduct was an essential requirement for a forfeiture order *“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 be 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 in made. Although the second determination is a value judgment, it is made by that court after having considered the facts falling the compass of the three factors mentioned in the section.”*

³ *Klerck v Klerck* 1991 (1) SA 265 (W).

⁴ 1993 (4) SA 720 (A) at 727 D-F.

15. In *Botha v Botha*,⁵ Van Heerden JA held that the trial court may not have regard to any factors other than those listed in section 9(1) of the Divorce Act in determining whether or not the spouse against whom the forfeiture order is claimed will, in relation to the other spouse, be unduly benefited if such an order is not made.
16. A court may order that all the patrimonial benefits from the marriage or a percentage of the estate be forfeited.⁶
17. The onus is on the party seeking forfeiture to demonstrate that in the event an order of forfeiture is not granted the party against whom the order is sought will, in relation to the other, be unduly benefited if the order is not made.⁷
18. In *Wijker's* case, the court held that the factors mentioned in section 9(1) of the Divorce Act need to be considered cumulatively. The presence of anyone of them is sufficient for the court to make an order for forfeiture in terms of section 9(1).

EVALUATION OF EVIDENCE

19. It bears to mention that the plaintiff impressed me as a candid witness whose evidence was credible and reliable in that she remained steadfast in her evidence on all aspects.
20. I cannot however say the same for the defendant – he was not a reliable witness. The defendant was evasive and tends to exaggerate his evidence. The defendant's counsel failed to put to the plaintiff during the cross examination the defendant's version relating to the evidence mentioned in

⁵ 2006 (4) SA 144 (SCA).

⁶ *Singh v Singh* 1983(1) SA 781 (C); *Steenberg v Steenberg* 1963(4) SA 870 (C).

⁷ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C).

paragraphs 10.16 – 10.21 above to allow the plaintiff to comment and respond, neither was the plaintiff quizzed during the cross examination by the defendant's counsel with regard to the aforesaid evidence.

21. I must mention that the defendant's failure to put the above mentioned version to the plaintiff, or at least quizzed the plaintiff on it during cross examination compels me to reject the above mentioned evidence and that the defendant agreed with the plaintiff that he will be responsible for petrol and grocery only. I also reject the evidence of the defendant that he was responsible for paying rates and taxes when the plaintiff was staying in Germany with the children considering that the defendant did not know the difference between the levy and municipal rates and taxes, and how much did he pay for the rates and taxes. Furthermore, no documents were furnished to the court by the defendant to confirm that he paid for the municipal rates and taxes.

Circumstances that led to the breakdown

22. The parties testified and alleged against each other that they both were involved in extra marital affairs. The allegations of extra marital affairs between the parties would be based on the old forfeiture rule in terms of common law that the person who caused the marriage to be irretrievably broken down cannot share or benefit in the joint estate. In *Swart v Swart*⁸, the court held that adultery and desertion might in certain instances merely be the symptoms and not the cause of a marriage breakdown and that the conduct of the parties cannot be considered to be blameworthy.
23. In the *Wijker* case, *supra* it was held, that adultery may support an allegation on the breakdown of the marriage, but it is not necessarily 'substantial

⁸ 1980 (4) SA 364 (O).

misconduct' for the purposes of a forfeiture order. It 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.⁹

24. In any event, neither of the parties is asking the court to grant forfeiture order on the basis of the extra marital affairs. The plaintiff is asking for forfeiture on the basis that the defendant failed to contribute to the household and therefore if the court does not grant forfeiture, the defendant would be unduly benefited. The defendant on the other hand prays for the division of the joint estate. And, further the evidence before me does not demonstrate that both parties had extra marital affairs.

Duration of the marriage

25. In *Matyila v Matyila*¹⁰, the court stated the following *"The meaning of the words 'duration of the marriage' as appearing in s9(1) aforesaid is clear. It means no more nor less than the period during which the marriage has, from the legal point of view, subsisted, namely from the date of marriage to the date of divorce or, at the very least, to the date of institution of divorce proceedings. This is in accordance with the primary rule of interpretation that words should be understood in their ordinary meaning."*
26. In this regard, I consider the marriage of the parties to have lasted for 10 years before the separation in February 2017. However, the fact that the marriage is of a long period is not solely dispositive of whether forfeiture should not be granted. The court is required to review each matter on a case to case basis, taking into account the merits and applying its discretion to determine if the length of the marriage supports the forfeiture claim.

⁹ Singh v Singh 1983 (1) SA 787 (C) at 788H.

¹⁰ 1987(3) SA 230 (W) at page 236 B-C.

27. In other words, the court is empowered to order forfeiture if it transpired that the party against whom the forfeiture is sought has committed substantial misconduct for the purpose of a forfeiture order and, the court is satisfied that the one party will, in relation to the other, be unduly benefited if the order of forfeiture is not granted¹¹. In *Singh v Singh*, *supra* the court granted forfeiture despite the fact that the marriage lasted for 20 years.
28. Taking into account that the parties in this case lived separately in 2012 - 2016, I am not persuaded that I should reject the plaintiff's claim for forfeiture.

Substantial misconduct

29. The defendant received approximately R270 000.00 from his pension fund in 2017. He used it solely for his own benefit. He conceded that he never contributed anything towards the children and household.
30. In *Z v Z*¹², Legodi J when he was dealing with the word "undue benefit" in terms of section 9(1) of the Divorce Act, stated the following:

"[6] Cumulative consideration of all relevant factors seem to be at play in terms of subsection (1), and the court will make an order only when is satisfied that, if an order for forfeiture is not made, the one party ("guilty party") will unduly be benefited in relation to the other party ("the innocent party"). It is an exercise of discretion guided by consideration of the duration of marriage, the circumstances which gave rise to the breakdown and any substantial misconduct on the part of either of the parties.

¹¹ *Wijker v Wijker*, *supra* at 727 C-F.

¹² *Z v Z* (43745/13) [2015] ZAGPPHC 940 (18 September 2015).

[7] *It is clear from the wording that of the subsection that to qualify for forfeiture, based on misconduct, such misconduct be “substantial”. I understand this to mean that, it must not only be a misconduct which does not accord with the marriage relationship, but also that the misconduct must be serious. Undue benefit in my view, is also a relative terms. Benefiting from one spouse’s sweat, in my view, would not necessarily amount to undue benefits. To come to the conclusion of undue benefit, one would be guided by a number of factors for example, refusal to work when it is possible to do so, squandering of money and other assets of one’s estate and other factors on the handling of the estate which is prejudicial to the other spouse.”*

31. In *Tsebe v Tsebe*¹³, the court found that Mr. T committed substantial misconduct as envisaged in section 9(1) of the Divorce Act in that he used the pension solely for himself to the exclusion of the joint estate and his wife.
32. From the foregoing, I find the defendant to have committed substantial misconduct as envisaged in section 9(1) of the Divorce Act in view of the fact that he utilised his pension fund for his own benefit and to the prejudice of the joint estate and, he will be unduly benefited in relation to the plaintiff if the order of forfeiture is not granted.
33. In the result the following order is made:
 1. A decree of divorce is granted;
 2. The plaintiff shall retain:
 - 2.1 The immovable property situated at [...] Olive [...], Corner [...] Street, [...], Ext [...];

¹³ *Tsebe v Tsebe* (39138/2014) [2016] ZAGPPHC 575 (24 June 2016).

- 2.2 The BMW 1 Series and Daihatsu Terios.
3. The defendant is to forfeit his claim to 50% of the plaintiff's pension interest held in the Government Employees Pension Fund;
4. Each party pay his or her own costs.

I. P. NGOBESE
ACTING JUDGE
GAUTENG DIVISION
PRETORIA HIGH COURT

Date of hearing: 2 and 3 November 2022

Date of Judgment: 31 January 2023

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