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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 19279/2019

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

DATE: 05/06/2023

In the matter between:

B.R.B M[....]1 Plaintiff

and

R.K.B M[....]2 Defendant

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] Marriage is an institution that lovers decide to conclude for various reasons including the starting of a family and raising children together. In certain marriage

regimes, what is mine is yours and *vice versa*. It is open to the parties prior to the conclusion of a civil marriage to identify a marital regime that will best serve and protect their respective interests. Consequently, a marriage could be in community of property, out of community of property with accrual, or out of community of property without accrual.

[2] This is a divorce matter wherein the parties concluded a marriage in community of property. By default, the parties agreed to the share of profits and/or losses upon dissolution of the marriage.

[3] On one hand, the Plaintiff seeks an order of forfeiture of the patrimonial benefits against the Defendant on the basis that the Defendant will unduly benefit if such an order is not granted. On the other hand, the Defendant opposes this application and seeks her share of the joint estate on the grounds that her 50% share in the joint estate accrued to her because the marriage was concluded in community of property.

THE PARTIES

[4] The Plaintiff is B.R.M an adult male person residing at […..] in P[….] and he is employed as a Traffic Officer at the Tshwane Metro Police.

[5] The Defendant is R.K.M an adult female person residing at [….] in P[….] and is in the employ of the South African Police Services.

JURISDICTION

[6] The Plaintiff and the Defendant are domiciled within the jurisdiction of this Court. Therefore, this Court has the power and competency to adjudicate this matter.

THE ISSUE

[7] The issue to be determined by this Court is whether the Defendant should

forfeit her partial or all patrimonial benefits arising from the joint estate as per the laws pertaining to marriages concluded in community of property.

THE FACTS

[8] The Plaintiff and the Defendant entered into a marriage in community of property on 30 May 2001. The said marriage still subsists.

[9] There are three children that were born from the marriage namely, A, B, and C. Two of the said children (A and B) have attained the age of majority. C is a minor and resides with the Plaintiff.

[10] In May 2012, the Defendant left the common home. The Defendant left the Plaintiff with all the children in 2012. C was two years old at the time. To date, the Plaintiff and the Defendant have not been living together.

[11] The Plaintiff instituted divorce proceedings on the grounds that the Defendant *inter alia* had several extra marital relationships, and this has been a contributing factor to the irretrievable breakdown of their marriage relationship. In addition, the Plaintiff contends that during the period they lived together, the Defendant did not contribute to the maintenance and improvement of the common home, repayments of the mortgage bond, rates, and taxes, or contributed to the upbringing of their children. Consequently, the Plaintiff asks this Court to order that the Defendant forfeit her matrimonial benefits arising from the marriage in community of property.

[12] The Defendant filed a counterclaim, she contended that the Plaintiff was inter alia abusive towards her and had at one stage threatened to kill her. Consequently, she moved out of the common house for her safety. According to the Defendant, the Plaintiff has denied her access to the property nor is she able to see the children. The Defendant stood her ground and stated that household chores were shared between the parties and that where she lacked it was because of circumstances beyond her control. Furthermore, the Defendant stated that the marriage relationship

irretrievably broke down because of the Plaintiff's extra marital affairs with several women. According to the Defendant, the joint estate ought to be divided equally as per their marital regime.

COMMON FACTS BETWEEN THE PARTIES

[13] The Plaintiff and the Defendant were married to each other on 30 May 2001 in community of property and the marriage between them still subsists.

[14] The Plaintiff is to retain the primary residence and care of the minor child subject to the Defendant's rights of reasonable access. Both parties remain co-holders of full parental rights of the minor child.

[15] The issue of the maintenance of the minor child will be determined by the Maintenance Court.

[16] The marriage relationship between the parties has broken down irretrievably and there is no reasonable prospect of restoration of a normal marriage relationship.

APPLICABLE LAW

Marriage in community of property

[17] It has long been established in our law that when spouses are married in community of property, the assets that they acquired before and during the subsistence of their marriage are merged and become one joint estate.[1] As a result, the joint estate belongs to both parties in the marriage in joint undivided and equal shares.[2] They have a co-ownership of the joint estate.[3]

[18] The default position is that the consequences arising from a marriage in community of property are that upon divorce, the joint estate will be divided equally

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[1] *Ex Parte Menzies et Uxor* 1993 (3) SA 799 (C) 808.
[2] *D v D* (15402/2010) [2013] ZAGPJHC 194 at para 14. See also H R Hahlo, *The South African Law of Husband and Wife* (5th ed, 1976) at pages 157-8; *Lock v Keers* 1945 TPD 113 at 116.
[3] *Corporate Liquidators (Pty) Ltd and Another v Wiggill and Others* 2007 (2) SA 520 (T) at 526D-F.

between the parties[4] unless a forfeiture order is made either fully or partially against one of the parties to the marriage.[5]

[19] The legal position is therefore clear in that once the parties have decided to marry each other in community of property; they both have joint ownership of the estate in equal undivided shares. It does not matter who contributed a greater proportion to the joint estate, they both own the joint estate. Author Hahlo eloquently captures the position as follows:

> "Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares".[6]

[20] Furthermore, in *Engelbrecht v Engelbrecht*[7] it was held that:

> "Joint ownership of the other spouse's assets is a right that accrues to spouses married in community of property when the marriage is concluded. Unless the parties made precise equal contributions to the joint estate, the party who contributed the least during the existence of the marriage will benefit above the other when the marriage is dissolved. This is an inevitable consequence of the parties' matrimonial property regime".

[21] In light of the above, the parties also take the risk associated with the marriage in community of property in that at the dissolution of that marriage they will part ways with each taking away his or her 50% share from the joint estate regardless of their respective contributions to the joint estate. The exception to this only comes into play when one of the parties to the marriage seeks one party to forfeit his/her 50% share of the joint estate.

Forfeiture of patrimonial benefits

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[4] Supra n 2.
[5] See section 9(1) of the Divorce Act 70 of 1979.
[6] Hahlo, Supra n 2 at pages 157-8.
[7] 1989 (1) SA 597 (C) at I.

[22] The Divorce Act 70 of 1979 (Divorce Act) provides a legal framework for the forfeiture of patrimonial benefits. Section 9(1) of the Divorce Act provides that:

> "When a decree of divorce is granted on the ground of the irretrievable break-down 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 break-down 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." (own emphasis added)

[23] The above provision was clearly articulated by Van Coller AJA, as he was then, in *Wijker v Wijker*[8] when he said:

> "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".

[24] Consequently, I do not have to say much except to endorse the aforesaid interpretation. The above provision is not peremptory. In other words, this Court has a discretion whether to grant or not to grant the order of forfeiture.[9] Further, it has the discretion to grant an order of forfeiture in respect of the entire benefit or a portion thereof. In exercising the said discretion, the court needs to ask itself whether one party would be unduly benefitted where such an order for forfeiture is not granted. In

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[8] [1993] 4 All SA 857 (AD) at para 19.
[9] *Old Mutual Life Assurance Co (SA) Ltd v Swemmer* 2004 5 SA 373 (SCA) at para 23.

addition, the factors laid down in section 9(1) of the Divorce Act are the only ones to be considered and nothing else outside those bounds.

[25] The issue of fairness also does not come into play. Therefore, a court may not simply grant a forfeiture order on the basis that one party to the marriage contributed more than the other to the joint estate.[10]

[26] Regarding the meaning of the phrase "duration of the marriage", the court in *Matyila v Matyila*[11] stated that:

> "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."

[27] In *A.J.V v M.V*[12] the court *inter alia* declined to grant an order for forfeiture where parties had been married for 11 months. In *Moodley v Moodley*[13] the court granted a forfeiture order where the parties had been married for more than 20 years due to substantial misconduct on the part of the defendant. In *C.M.M v A.M.S.M*[14] the court granted a forfeiture order where the parties had been married for more than 13 years due to the substantial misconduct on the part of the Plaintiff. In *Wijker,*[15] the court declined to grant a forfeiture order where the parties had been married for 35 years because there was no evidence to support a finding of substantial misconduct on the part of the husband.

[28] The above cases are an indication that what constitutes a long or short marriage will depend on the circumstances of each case. Further, they are an indication that substantial misconduct may play a role in deciding whether to grant an

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[10] Supra *fn 10,* at 601.
[11] 1987 3 SA 230 (WLD) at 236B-C.
[12] (3389/2017) [2020] ZAGPPHC 154.
[13] [2008] JOL 22279.
[14] (13966/2020) [2022] ZAGPPHC 713 (21 September 2022).
[15] Supra n 8.

order of forfeiture. Substantial misconduct could include anything ranging from infidelity[16] to financial deprivation.[17] For example, in *Molapo v Molapo*,[18] the defendant *inter alia* failed to take care of the family and the court found that the defendant's *"lack of care for his children and family"* were some of the factors to have constituted substantial misconduct.[19]

[29] The cases referred to herein are a signal that there are no clear-cut answers or solutions to matters of this nature. Therefore, this Court must adopt a holistic approach in line with the applicable legal principles to dispose of the legal issue.

Burden of Proof

[30] The burden of proof rests on the party seeking a forfeiture order.[20] Therefore, the Plaintiff, in this case, needs to show the nature and extent of the benefit that the Defendant stands to unduly benefit when the marriage is dissolved.

[31] I now turn to consider the circumstances of this case taking into consideration the submissions of the parties, the testimony of the witnesses, and evidence before this Court to ascertain whether this Court may order the Defendant to forfeit her patrimonial benefits (partial or in full) arising from the marriage in community of property.

EVIDENCE

[32] The Plaintiff and the Defendant were the only two witnesses who testified.

Mr. B.R.M (Plaintiff)

[33] The Plaintiff testified that he has been married to the Defendant since 30 May

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[16] *C.M.M v A.M.S.M* at para 30.
[17] *Molapo v Molapo* (4411/10) [2013] ZAFSHC 29.
[18] Ibid.
[19] Ibid at para 24.4.
[20] See *Engelbrecht* at 601 I-J; *Wijker* at 727E-728C.

2001 to date. There are three children born out of the said marriage. Two of these children have become majors. One child is still a minor and resides with the Plaintiff.

[34] The Plaintiff testified that he is employed as a Traffic Officer at the Tshwane Metro Police. His rank is that of a sergeant since July 1999. The Plaintiff testified that the Defendant is employed as a Police Officer in the South African Police Service.

[35] The Plaintiff testified that since April 2012 he and the Defendant are no longer living together. They have been living apart for a period of 11 years since the Defendant left the common household in 2012. According to the Plaintiff, the Defendant left the common home, leaving the Plaintiff with a child who was at the time 2 years old and had not returned to ascertain the welfare of the minor child.

[36] The Plaintiff's testimony is that they bought a house in 2004 but he solely paid for the mortgaged house from the beginning until the bond was paid up in full around the year 2020. According to the Plaintiff, he completed paying off the bond after the Defendant had left the common household.

[37] The Plaintiff also stated that he was a beneficiary under the Defendant's medical aid but had opted not to use it as the Defendant suffered from a chronic illness. According to him, he wanted to save the benefits for the Defendant. The Plaintiff testified that in 2014, he discovered that the Respondent had removed him as a beneficiary under her medical aid.

[38] The Plaintiff testified that there was an arrangement between him and the Defendant as to how the household expenses were to be shared. On the one hand, the Plaintiff was to pay for the bond, one child's nursery school fee and buy groceries. On the other hand, the Defendant was to pay the property rates and taxes, and one of the children's school fees. There were only two children then. The Plaintiff's testimony is that he kept to the arrangement. According to the Plaintiff, the Defendant, despite the arrangement, did not contribute anything towards property rates and taxes or the children's upbringing. The Defendant only contributed briefly to one of the children's school fees but stopped. The Defendant only bought clothes

for one child towards the end of a certain January when she had obtained her bonus from work.

[39] The Plaintiff testified that he avoided confronting the Defendant and opted to take over all the household expenses. According to him, whenever he enquired from the Defendant about how she spent her money, the Defendant would not provide answers. The Plaintiff testified that the Defendant has a passion for fashion and likes expensive clothes. The Plaintiff's testimony is that the Defendant stopped using Edgar's family clothing account and opened a Woolworths account. To this end, she would take things on credit and fail to pay them off. The Plaintiff testified that he would always step in to help her settle her debts.

[40] The Plaintiff testified that he also effected improvements towards the property such as the wall around the yard, paving, and tiles in the house. He avers that he did these alone. The Defendant only fitted an incomplete kitchen unit with a loan of about R25 000.00 that she took. However, the Plaintiff asserts that at some stage he also had to pay those who were installing the kitchen, as the Defendant was no longer able to do so.

[41] The Plaintiff also testified that overall, he was responsible for the care of the children because the Defendant worked excessive hours. To this end, he was *inter alia* responsible for bathing the children, transporting them to and from school, cooking, and doing laundry at times.

[42] The Plaintiff testified that in 2005, the Defendant sought to purchase a vehicle but had no money. The Plaintiff came to her aid and paid for the required deposit. However, the car did not last as the Defendant upgraded it for a newer model.

[43] The Plaintiff testified that in 2006 whilst on duty patrolling the area, he saw the Defendant's car and her colleague's car parked in close proximity, the two were engaging in an extra-marital affair. According to him, the same car was used to pick up the Defendant from their house. According to the Plaintiff, the Defendant later confessed to the Plaintiff that she was having an affair with the said colleague for

approximately 4 months. The Plaintiff testified that the Defendant confessed to conducting the affair whilst at work and at times would visit the said colleague at his house.

[44] To this end, the Plaintiff took various measures including approaching the Defendant's workplace to lay a complaint of misconduct against the Defendant for having an extra marital affair in the workplace. The Defendant was eventually transferred to another working station. According to the Plaintiff, this encounter caused tension in their house, and is the root cause of the failure of their marriage. The Plaintiff testified that things were no longer well between the two parties for almost six years to the extent that they were not intimate for about 2 years. Post the 2 years, they started being intimate and the Defendant fell pregnant with their third child.

[45] Ultimately, the Plaintiff testified that the Defendant bought a television set and a music system.

Cross-examination

[46] Under cross-examination, the Plaintiff stated that he sought an order for the forfeiture of the patrimonial benefits because his contributions surpassed the Defendant's in the joint estate. When asked whether there was any discussion about financial affairs before marriage, the Plaintiff's response was that one does not marry because they are wealthy or poor.

[47] The Plaintiff agreed that the house was bought during the subsistence of the marriage and stated that the Defendant was blacklisted. In addition, the Plaintiff stated that he agreed to pay the bond because the Defendant was earning less compared to him.

[48] When asked as to why the Plaintiff complained about being removed from Defendant's medical aid as he never used it, his response was that he used his cash.

[49] It was also put to the Plaintiff that the clothing accounts opened by the Defendant were family accounts and that the Defendant had bought groceries and KFC monthly. The Plaintiff disputed this and said that Defendant did not buy any groceries but only KFC at certain times.

[50] It was further put to the Plaintiff that there is no intrinsic value for the things that he wants the forfeiture. Further, it was put to the Plaintiff that it was not possible for both parties to contribute equally because the Defendant earned less. Additionally, it was stated that from 2012 onwards, the Defendant was not paying property rates and taxes because she was not living in the property where the Plaintiff resides with the children.

[51] When questioned whether the affair was the main thing that caused the breakdown of the marriage, the Plaintiff's response was in the negative. However, he stated that many problems in the marriage were triggered by this incident.

Re-examination

[52] The Plaintiff stated that he has a work firearm but had never threatened the Defendant with it. He further stated that even though they had arguments with the Defendant, such arguments never escalated to life-threatening situations.

[53] Finally, the Plaintiff reiterated that the Defendant did not contribute to the household expenses, bond payment, rates and taxes, and the upbringing of children.

Ms R.K.M (Defendant)

[54] The Defendant testified that she is married in community of property with the Plaintiff. She stated that the reason for the breakdown of their marriage was on the basis that the Plaintiff abused her, underappreciated her, and that the Plaintiff put her life in danger as he threatened to kill her on several occasions. Furthermore, she testified that the Plaintiff accused her of having extra-marital affairs including one

with her colleague. According to the Defendant, this caused her embarrassment at work.

[55] The Defendant testified that she does not remember whether there were any agreements about the household finances between her and the Plaintiff. She further stated that there was no talk about the sharing of household expenses. The Defendant stated that she also contributed to the household in the form of buying household furniture, such as a TV stand, curtains, cutlery, a washing machine, fitting the kitchen unit, bought clothes for children and groceries. In addition, she testified that she included everyone in her medical aid.

[56] The Defendant also argued that she contributed to the marriage by bearing three children for the Plaintiff. According to the Defendant, by bearing three children, she risked her life.

[57] The Defendant stood her ground and stated that she contributed to the household expenses to a lesser extent compared to the Plaintiff because she earned less. She further stated that she took a loan for R125 000.00 and paid it for over 6 years. The said loan was used to build a kitchen unit. According to her, such a kitchen unit was built and completed.

[58] The Defendant testified to the effect that after she had left the house, she continued to buy clothes for her children. According to her, she has been employed throughout her marriage. She testified that the Plaintiff was more involved in the house because she worked shifts that were inconsistent. However, whenever she had the time, she also assisted with children and other household chores.

Cross-examination

[59] Under cross-examination, the Defendant was asked whether she used the R125 000.00 to build the kitchen unit and whether the Plaintiff was informed about such an amount. The Defendant's response was that she was not sure because this was after the year 2006.

[60] It was put to the Defendant that the Plaintiff was hearing for the first time about the loan of R125 000.00. The Defendant's response was that maybe the Plaintiff had forgotten.

[61] The Defendant was further asked whether there was a discussion or arrangement about how the household expenses would be split; her response was that there was no arrangement. However, the Defendant later stated that there were discussions about the payment of the bond and that the Defendant was prepared to pay half of the entire instalment. These discussions took place before the finalisation of the purchase of the house.

[62] The Defendant testified that she bought furniture and other things as she liked them but could not remember. The Defendant was adamant that she contributed equally to their marriage in community of property. She further stated that she also bought clothes for the Plaintiff, but the Plaintiff refused to wear them. When asked about how frequently she bought clothes, her response was that she couldn't remember.

[63] When asked about how come she left a 2-year-old baby with the Plaintiff when her testimony was to the effect that they took care of the children on an equal basis with the Plaintiff, the Defendant's answer was that the Plaintiff was the father and that she felt comfortable leaving the child with him. Further, she stated that she had asked for the child, but the Plaintiff refused.

[64] The Defendant stated that at some stage, there was a case opened against the Plaintiff but a family meeting was held to resolve their disputes. Consequently, the Defendant withdrew it from the court. The Defendant was unable to explain how the case was withdrawn.

[65] When asked about the life-threatening situation, the Defendant stated that the Plaintiff once wanted to shoot her in their bedroom, but this was never reported to law enforcement officers.

[66] When asked about having an extra marital affair with her colleague, the Defendant's response was that this was a false accusation. When prompted further whether the Plaintiff could even go to the extent of seeking her removed from one police station to another for something that did not exist, the Defendant's response was that of no comment.

SUBMISSION OF THE PARTIES

[67] This section deals with the submissions of counsels in their attempt to persuade this Court to grant or not to grant an order for full or partial forfeiture of parties' patrimonial benefits.

Plaintiff

[68] Counsel for the Plaintiff referred this Court to various cases including the *Wijker* case[21] about the approach to be adopted in dealing with the case of forfeiture of patrimonial benefits. There the court held that:

> "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".[22]

[69] Relying on *KKT v MSR,*[23] counsel further submitted that the issue of whether the benefit is due or undue is associated with the duration of the marriage.

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[21] [1993] 4 All SA 857 (AD).
[22] Ibid at para 19.
[23] 2017 (1) SA.

Consequently, counsel argued that the longer the marriage was, the more it was likely that the benefit will be due and proportionate and *vice versa.* Counsel alerted this Court that the divorce was instituted in 2019. This was 7 years after the parties had separated. To this end, counsel submitted that the parties in this matter have been married to each other (and remain married) for approximately 22 years (2001 – 2023). However, counsel emphasised that the parties could be said to have only lived together as husband and wife for 11 years (2001-2012). The basis for this was that post the separation, it could not be said so as they lived separately and *"not afforded each other the traditional benefits of the married couples and having lived apart for a period more than the time they lived together…".*[24]

[70] According to counsel, the year 2012 was the time in which the irretrievable breakdown of the marriage took place. With reference to *Matyila,* wherein the court defined the meaning of marriage as a period during which parties legally remained married until divorce or at the date of institution of divorce proceedings, counsel argued that where parties lived apart for more than the period that they lived together, it could not be said that they have lived together as husband and wife. In addition, counsel contended that during the said protracted separation, it could not be said that *"one party contributed towards the other parties' progression"*.[25]

[71] Counsel further contended that given the duration that the parties lived together as husband and wife, it was not for a long period. As a result, this aspect taken together with the other factors listed in section 9 of the Divorce Act does not prevent this Court from granting an order of forfeiture. According to counsel, the marriage between the parties ended in the year 2012.

[72] Furthermore, counsel argued that precedent does not prevent this Court from granting the forfeiture order even if the marriage was for a long duration. To substantiate his submission, counsel referred this court to the case of *Swanepoel v Swanepoel*[26] where the court *inter alia* held that the marriage of spouses in

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[24] Plaintiff's heads at para 4.11.
[25] Ibid at para 4.13.
[26] *Swanepoel v Swanepoel* All SA 1996 (3).

community of property which was entered into on the 15 December 1990 and where the other spouse left the common home around the 4 June 1995 could be regarded as having lasted for a too short period.[27] Further counsel relied on *Malatji v Malatji*[28] where the court found that a marriage in community of property that was concluded in 2002 and where the defendant left the marital home in June 2003 was too short and justified a divorce and a forfeiture order. According to counsel, the courts in both decisions considered the date on which the other spouse left the common home and not the date of divorce or when summons were issued. Consequently, counsel argued that the same approach ought to be followed even in instances of marriage that lasted for a long duration.

[73] Regarding the factors listed in section 9(1) of the Divorce Act, counsel further submitted that the question to be determined by this Court is whether the three factors namely (a) the duration of the marriage, (b) the circumstances which gave rise to the break-down thereof and (3) any substantial misconduct on the part of either of the parties had to be all present or considered holistically. Counsel for the Plaintiff replied in the negative. He based his answer on *Wijker* where he stated that the court there held that *"not all three factors need to be present for the forfeiture order to be granted"*. To this end, counsel submitted that where a marriage is of a long duration, substantial misconduct becomes a major factor to be determined unlike where a marriage is of a short duration.

[74] Counsel submitted that the Plaintiff had testified about the misconduct committed by the Defendant during the subsistence of their marriage. According to counsel, the Plaintiff's evidence went unchallenged under cross-examination. Further, counsel submitted that the Defendant merely denied the allegations of misconduct. Counsel argued that the Defendant was not convincing when she denied that she did not commit serious misconduct that led the Plaintiff to shed tears during his testimony about the events that occurred 16 years ago.

[75] Counsel submitted that the Defendant could not respond to various questions

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[27] *Ibid*.
[28] [2005] ZAGPHC 142.

or issues that were put to her regarding the alleged misconduct. According to counsel, the Defendant's response was mostly made up of no comment or that she could not remember.

[76] Counsel further submitted that the Defendant used her money for her own benefit. According to counsel, the Defendant admitted to not paying property rates and taxes, and electricity as agreed upon between the parties. Counsel highlighted that, at first, the Defendant denied having discussed the issue related to household expenses with the Plaintiff. Counsel submits that the Plaintiff later changed her version of the events and stated that she had a discussion with the Defendant before they purchased the house. Based on this, counsel submitted that the Defendant's testimony could not be believed as it was given in an evasive manner and she could not remember pertinent factors. Accordingly, counsel submitted that her evidence ought to be rejected.

[77] Concerning the circumstances that gave rise to the breakdown, counsel submitted that it was the Plaintiff's version that the extra marital affair by the Defendant was a factor that triggered a dismal mood in the house until the Defendant left the common home in 2012.

[78] Counsel further submitted that the Defendant testified that she left the common home as a result of being chased away and threatened with death by the Plaintiff but failed to recall how such threats were made save for one instance where the plaintiff threatened her with a gun. According to counsel, the Defendant stated that she did not open a case but where she did, she later withdrew it. The Defendant could not recall how it was withdrawn. Counsel for the Plaintiff expressed his shock over the fact that the Defendant, being a police official, could not tell how the case was withdrawn.

[79] Concerning misconduct, counsel for the Plaintiff argued that even though substantial misconduct was not an essential requirement for forfeiture, it was found to exist in the Defendant's conduct. Counsel submitted that the Defendant's substantial misconduct ranged from failure to contribute to the household for paying

property rates and taxes, and groceries as agreed to by the parties, privately taking out a loan of R125 000.00 and only revealing R25 000.00 that was used to pay for an incomplete kitchen unit, spending her money on expensive clothes but failed to contribute towards the development of the household, desertion of a two-year baby with the Plaintiff, and never supporting the children or returning to ascertain whether the minor child was taken care of.

[80] According to the Plaintiff, the Defendant conceded that at times she bought a handful of furniture and curtains. Furthermore, it was submitted that the Defendant failed to give any evidence to support that she was a devoted mother in the household.

[81] Attention is turned to the undue benefit, counsel for the Plaintiff argued that the Plaintiff took sole responsibility for the development and upkeep of the household when the Defendant opted to finance her lifestyle with her income. Counsel submitted that even though the Defendant was also employed, she only bought limited items and furniture. The Plaintiff solely paid for the bond from the start until it was paid off whilst the Defendant had the benefit of utilising her salary for her own purposes. Additionally, it was argued that the Defendant left the Plaintiff to look after three children 11 years ago.

[82] In addition, it was argued that the Plaintiff developed and renovated the house alone. According to counsel, this has increased the value of the property and would unduly benefit the Defendant if an order to share in the joint estate were to be ordered.

[83] With regard to the Defendant's contention that there was no evidence of the assets that the Court was required to grant a forfeiture order, counsel for the Plaintiff argued that the parties' assets are limited to only the immovable property and the pension benefits.

[84] Based on the above factors, counsel contends that the court cannot order a partial division of the joint estate under the circumstances of this case but order a

total forfeiture of benefits against the Defendant in the Plaintiff's pension fund and the immovable property.

Defendant

[85] Counsel for the Defendant submitted that in the absence of an antenuptial contract indicating how the parties' assets would be divided upon the dissolution of their marriage, the marital regime created automatically becomes one that is in community of property and of profit and loss.

[86] Counsel submitted that community of property is a universal partnership wherein the spouses' assets and liabilities are put in a joint estate and both parties hold joint equal shares. According to counsel, this is regardless of their financial contribution to the joint estate.

[87] In support of her submissions, counsel relied on a number of cases such as *Lock v Keers*[29] where it was said that marriage in community of property renders the property that was initially owned by parties separately to be owned by them jointly and in equal shares post the conclusion of the said marriage. Counsel further relied on *Thom v Worthmann VO & Another*[30] where the court said:

> "When two parties are married in community of property, the marriage creates a universal partnership between the husband and wife . . . in all property, movable and immovable, belonging to either of them before marriage, until the date of dissolution."

[88] Based on the above, counsel argued that anything that a spouse acquired before the conclusion of a marriage forms part of the joint estate post the marriage in community of property regardless of his or her contribution. In other words, the equal share in the joint estate accrues to the parties by virtue of their marriage in community of property.

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[29] 1945 TPD 113 at 116.
[30] 1962 (4) SA 83 (N) at page 88.

[89] Counsel submitted that where a forfeiture order is not granted, the joint estate would be divided equally between the parties upon divorce. To this end, counsel argued that where a marriage is dissolved on the grounds of the irretrievable breakdown, a court may in terms of section 9(1) of the Divorce Act grant an order of forfeiture, wholly or in part, of patrimonial benefits in favour of either party. In doing so, counsel submitted that the court would have to consider the duration of the marriage, the circumstances which gave rise to the breakdown, and any substantial misconduct on the part of either of the parties it is satisfied that, if an order for forfeiture is not made, the one party will in relation to the other be unduly benefitted.

[90] Counsel submitted that it was within the discretion of this Court to grant or not grant a forfeiture. She emphasised that the said order must be considered properly considering existing legal authority. Consequently, counsel relied on *Engelbrecht*[31] where the court *inter alia* declined to grant an order of forfeiture on the basis that no evidence was adduced to prove what the house was worth when divorce proceedings were instituted, and the extent of undue benefit that would have been received by the defendant. To emphasise her point, the counsel relied on the following paragraph from *Engelbrecht*[32]:

> "Joint ownership of another party's property is a right which each of the spouses acquires on concluding a marriage in community of property. Unless the parties (either before or during the marriage) make precisely equal contributions the one that contributed less shall on dissolution of the marriage be benefited above the other if forfeiture is not ordered. This is the inevitable consequence of the parties' matrimonial regime. The legislature (in section 9 of the Divorce Act 70 of 1979) does not give the greater contributor the opportunity to complain about this. He can only complain if the benefit was undue. Unless it is proved (and the burden of proof rests on the party who seeks the forfeiture order) what the nature and extent of the benefit was, the Court cannot decide if the benefit was undue or not. Only if the nature and

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[31] *Supra* at fn 7.
[32] Ibid at 601F-G.

ambit of the benefit is proved is it necessary to look to the factors, which may be brought into consideration in deciding on the inequity thereof. In this connection, it should be borne in mind that misconduct and gross unreasonableness do not always go hand in hand. Although it appears as if the Legislature wanted limit the Court's discretion as to the granting of a forfeiture order and did not intend to authorise the Court to take cognisance of the same wide-ranging considerations as those which section 7(3);(4);(5) and (6) (where parties are married out of community of property), with reference to the transfer of assets from one party to the other, permits the Legislature did not intend to elevate fault, in the granting of forfeiture order so prominently above other considerations. It could lead to the advantages of a no-fault divorce system being eroded by disputes over fault on the division of the estate".

[91] Counsel further relied on *Klerk v Klerk*[33] and submitted that it was not the intention of the legislature that substantial misconduct or any of the other factors mentioned in Section 9(1) of the Divorce Act had to be present before a court could grant an order for forfeiture. Rather, the question that the court had to ask itself was whether one party would be unduly benefitted if an order of forfeiture was not made. To answer this question, counsel submitted that the court should consider the duration of the marriage, the circumstances which led to the breakdown, and, if present, substantial misconduct on the part of one or both parties.

[92] Counsel also relied on *Beaumont v Beaumont*[34] where it was stated that:

". . . In many, probably most cases, both parties will be to blame, in the sense of having contributed to the breakdown of the marriage. . . In such cases, where there is no conspicuous disparity between the conduct of the one party, and that of the other, our Courts will not indulge in an exercise to apportion the fault of the parties, and thus nullify the advantages of the "no-fault" system of divorce".

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[33] 1991 (1) SA 265 (W).
[34] 1987 (1) SA 967 (A) at 994(i).

[93] Counsel submitted that in *Wijeker*, *"it was emphasised that sight must not be lost of what the matrimonial property system which operates in the marriage"*. Finally, counsel relied on *Bezuidenhout v Bezuidenhout*[35] which relied on the Canadian Supreme Court ruling in *Moge v Moge*[36] where the court held:

> "Fair distribution does not, however, mandate a minute detailed accounting of time, energy and dollars spent in the day-to-day life of the spouses . . . what the Act requires is a fair and equitable distribution of the resources to alleviate the economic consequences of marriage or marriage break-down for both spouses, regardless of gender. The reality, however, is that in many if not most marriage, the wife remains the economically disadvantaged partner . . . . A division of functions between the marriage partners, where the one is a wage-earner and the other remains at home or always invariably create an economic need in one spouse during marriages . . . Woman have tended to suffer economic disadvantages and hardships from marriage or its break-down because of the traditional division of labour within that institution".

EVALUATION OF EVIDENCE AND SUBMISSIONS

[94] The next step is for this Court is to make a value judgment in light of the facts falling within the ambit of section 9(1) of the Divorce Act. It is not a requirement that all the factors mentioned in the above provision should be present before a court can grant an order of forfeiture.[37] If one of the factors is found to be present, it follows that this Court may grant a partial or entire forfeiture order.

[95] Regarding the duration of the marriage, it was never disputed between the parties that legally they remain married to each other until their union has been dissolved by a competent court. However, the Plaintiff contended that since the parties got married in 2001 and separated in the year 2012, the year 2012 should be considered as the year in which the parties ceased to live together as husband and

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[35] 2005 (2) SA 187 SCA.
[36] 1992 (3) SCR 813.
[37] *Binda v Binda* 1993 (2) SA 123 (W) at 127C – D). *Klerck case* at 268B – 269G.

wife.

[96] In other words, the parties lived together as husband and wife for 11 years. The Defendant never challenged this proposition. In *Matyila,*[38] the court *inter alia* stated that the duration of the marriage refers to the time that it still subsists from a legal point of view or the date of institution of divorce proceedings. I agree with the interpretation found in *Matyila*, I am of the view that in the context of this case, the duration of the marriage should be considered within the period in which the parties remained married regardless of whether they lived together as husband and wife. It cannot be said that during the 11 years of the parties living apart and not supporting each other in any form, they were not living as husband and wife. A marriage remains a legal institution whether or not the parties live together with all legal consequences sustaining.

[97] This Court is not persuaded by the Plaintiff's submissions that in the context of this case, the parties lived together as husband and wife for 11 years and that their marriage was of short duration. The parties' marriage remains valid. They have been married for 22 years. A period of 22 years is in my view long. Accordingly, this marriage could be safely classified as one that lasted for a long duration. The fact that the marriage is for a long time is not solely dispositive of whether forfeiture should not be granted. This court is required to adopt a holistic approach as per the provisions of section 9(1) of the Divorce Act to determine whether an order of forfeiture should be granted or not.

[98] Regarding substantial misconduct, there is no one known factor that could be regarded as substantial misconduct, this will vary from case to case. For example, if a spouse withdraws pension funds and utilises them for his or her benefit without the knowledge of the other spouse this may constitute substantial misconduct.[39] In this case, I deal with two aspects namely, financial deprivation and extra marital affair.

[98.1] Regarding the financial deprivation, the Plaintiff testified at length about

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[38] *Supra* at fn 11, at 236B-C
[39] *M v M* (14861/2018) [2023] ZAGPPHC 48 para 32.

their financial arrangements after they had bought a house. This included that the Plaintiff would pay for the bond and the Defendant would pay for the property rates and taxes, and pre-school fees for the children. The Plaintiff adhered to his undertaking. However, the Defendant failed to do so. When the Plaintiff asked the Defendant about what she was doing with her money, she would become aggressive. In fear of the lights being switched off by the local municipality, the Plaintiff took on extra responsibilities to run the household affairs including paying the property rates and taxes, and children's school fees. The Defendant was described as someone who had good taste for fashion and spent her money on designer clothes. She would fall into arrears and the Plaintiff would rescue her.

[98.2] Furthermore, the Defendant was labelled as someone who liked cars and would change from one car to another within a short space of time, yet she earned less. The Plaintiff had once assisted her with a deposit to buy one of the vehicles. At times, she changed the vehicles without the knowledge of the Plaintiff.

[98.3] The Defendant did not dispute the said testimony save to indicate that she also contributed financially to the household affairs. To this end, she mentioned that she used to buy groceries as well as KFC, and had bought curtains including a television stand. Additionally, she stated that she contributed to the marriage by giving birth to three children. Initially, the Defendant denied that there was any arrangement about splitting financial responsibilities. However, under cross-examination, she admitted that there was such a discussion about finances. When asked about other contributions, the Defendant's answers were that she could not remember and/or that she had forgotten. At no stage did the Defendant mention payment of property rates and taxes or children's school fees.

[98.4] Although the Defendant tried to paint a picture of being a responsible mother, when asked about how she could leave the Plaintiff with a two-and-a-half-old child and never try to ascertain whether such child was being well taken care of in the 11 years since her departure, her answer was that the Plaintiff was also a father. Again, the Defendant did not try to challenge the testimony that since she left the common house 11 years ago, she has not contributed anything including

taking care of the children save for one occasion where she bought shoes for one child. Indeed, the Plaintiff is the father of the children and is duty-bound to take care of them.

[98.5] I find the case of *Molapo v Molapo*[40], relevant and applicable in the present matter. There, the court there found that the defendant's *"lack of care for his [her] children and family"* were some of the factors found to have constituted substantial misconduct.[41] Consequently, I am of the view that the Defendant in this matter financially deprived the Plaintiff and their children of support during their 11 years of staying together in the common household. The same financial deprivation continued for another 11 years after the Defendant had left the common household as she continued to spend her money for her sole benefit and lifestyle. This in my view, in the context of this case, constitutes substantial misconduct.

[98.6] Regarding the extra marital affair, another substantial misconduct alleged by the Plaintiff is that he caught the Defendant red-handed with her colleague in an extra marital affair. After this encounter, the Defendant confessed that she has been seeing her colleague for approximately 4 months. In her testimony, the Defendant brushed this off and claimed that it was not true. However, when pressed under cross-examination as to whether it was possible for the Plaintiff to merely approach her employer and up to the office of the Public Protector to report her affair in the workplace with a colleague and ask her to be transferred to another station for no reasons, her response was that of no comment. The no comment in allegations such as these was in my view not adequate. Even though the Defendant in her pleadings has also accused the Plaintiff of extra marital affairs, nothing was said about these claims in her testimony. The credibility of the Plaintiff weighs more weight compared to that of the Defendant. In my view, the Defendant further committed a substantial misconduct in the form of an extra marital affair.

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[40] [2013] ZAFSHC 29

[41] Ibid at para 24.4.

[99] Concerning the circumstances that led to the breakdown, the Plaintiff testified that their marriage challenges started from the time he discovered that the Defendant had engaged in an extra marital affair, and thereafter things were never the same. Under cross-examination, the Plaintiff was asked whether he regarded this as the main factor that contributed to the breakdown of the marriage, his response was no. However, the Plaintiff was adamant that this was the root cause of their marital problems. I am persuaded in this case that just like in *C.M.C v A.M.S.M*.[42] infidelity by the Defendant triggered the breakdown of the marriage.

[100] The fact that I have found that the Defendant has committed substantial misconduct in the form of financial deprivation and having an extra marital affair does not on its own end this matter. The question that remains to be answered is whether there will be an undue benefit for the Defendant if an order of forfeiture is not granted.[43] I have already indicated that that a forfeiture order may not be granted for the purposes of balancing the fact that one of the spouses made a greater contribution than the other to the joint estate. In addition, the issue of fairness does not come into play when deciding whether to grant an order of forfeiture. The factors to be considered remain only those that are set forth in section 9(1) of the Divorce Act.

[101] Undue benefit is broad and does not have a precise meaning. There are many factors that one needs to consider to arrive at a conclusion of whether a benefit is undue. For example, cashing out pension benefits individually and misusing them without the knowledge of the other spouse, or secretly selling assets from a joint estate,[44] and at the same time expecting to receive a 50% share upon the dissolution of the marriage would in my view constitute an undue benefit.

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[42] (13966/2020) [2022] ZAGPPHC 713 at para 29.
[43] *Klerck v Klerck* 1991 1 SA 265 (W) para 268 c-g. For a detailed discussion on the concept of "undue" benefit, see inter alia *TF Phajane* Substantial misconduct as a factor in the determination of forfeiture of patrimonial benefits at divorce in South Africa (LLM thesis NWU, 2002) at 39-47; CM Marumogae "The regime of forfeiture of patrimonial benefits in South Africa and a critical analysis of the concept of unduly benefited" (2014) *De Jure* at 95-99.
[44] See *M v M* (14861/2018) [2023] ZAGPPHC 48 at para 7.

[102] In dealing with an undue benefit, it is necessary for this Court to consider the contributions made by the parties in the joint estate. During their stay together for the first 11 years, I have already found that Defendant used her money towards her own lifestyle whereas the Plaintiff contributed to the joint estate such as upgrading and renovating the house including single-headedly raising the children. The only contribution that she apparently made was a kitchen unit that she had built with a loan amounting to approximately R25 000.00. The Plaintiff refuted the state of completion of the said kitchen unit. However, during her testimony, it transpired that the Defendant had in fact taken out a loan of R125 000.00 the expenditure of which she could not adequately account for.

[103] The Defendant's contributions to the common household during the 11 years since leaving the common household were non-existent. In *C.M.M v A.M.S.M*[45], Makhoba J found that:

> "The plaintiff in this matter cannot forfeit any assets because she did not bring any tangible asset into the marriage. She did not even contribute to the upbringing of the two daughters until they completed their studies. She can only benefit from the dissolution of the marriage. The question is therefore will she benefit unduly if she is given 50% (fifty percent) of the assets accumulated during the subsistence of the marriage".

[104] Largely, the facts of the above case are similar to the present one as far as they relate to the contribution of the parties and the upbringing of the children during the subsistence of the marriage. The building of a kitchen unit is in my view insignificant compared to financially supporting and raising three children alone for a 22-year-long marriage. I am mindful that the Defendant has been residing with one of the major children since the year 2020. The minor child was left with the Plaintiff at the age of two years. The Plaintiff paid the mortgage bond payments from the start-up to completion, property rates, and taxes. The Plaintiff in this case fully supported his wife, and children although they were both employed. He cooked, bathed the

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[45] [2022] ZAGPPHC 713.

children, took them to school, and washed all their clothes despite them both having jobs outside of the home. He was the primary financial provider in the home and the primary caregiver to the children for a majority of their stay together. Even when the Defendant left him with the children, he continued to fulfil his parental obligations to the extent that he is still in arrears with school fees for two the children. He was left alone to build their common assets including his pension fund and raising their three children. The Defendant did not challenge this.

[105] Even if this Court were to find that the Defendant made some contributions during the first 11 years of living in the common household, such as buying groceries and clothes for everyone, the other 11 years of her absence and leaving three children with the Plaintiff, payment of a bond up to completion, and the day-to-day upbringing of children weigh against her. All these above factors taken together lead me to one conclusion, the Defendant made no tangible contribution to her marriage.

[106] The Defendant in my view cannot forfeit any assets because she did not bring any tangible assets into the joint estate.[46] She did not contribute to the upbringing and education of the three children. Her benefit stands to come only from the dissolution of the marriage. Counsel for the Defendant argued that the Plaintiff did not prove the nature and extent (value of the house and pension) of any patrimonial benefit capable of being forfeited and therefore his claim had to fail. I disagree. In *C.M.M v A.M.S.M* it was held that:

> "It is not a requirement that the defendant must prove the correct financial value of the house or property including the pension fund for which to succeed in his claim".[47]

[107] To this end, the Plaintiff has described the house that he seeks an order of forfeiture as [….] where he stays with their two children. Furthermore, the Plaintiff has indicated no desire to tap into the Defendant's pension, as he has never benefitted from her money during their stay together and post their living together.

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[46] See also *M[…] v M[…]* (022/2022) [2023] ZASCA 75 (26 May 2023) at paras 39-40.
[47] *Supra* at para 27.

Therefore, the Defendant will unduly benefit if an order of forfeiture is not granted against her as she would walk away with 50% of the joint assets (immovable property and pension) accumulated during the subsistence of the marriage that she did not contribute any tangible thing to it.

[108] This Court is alive to the fact that Defendant worked long hours and earned less. However, even if one earns less, they could still contribute in whatever form within their means. The testimony of the Defendant to the effect that she constantly upgraded vehicles was never contested. I find the evidence of the Defendant in claiming that she contributed less because of her salary insincere for the reasons that I have already stated.

[109] Furthermore, this Court is not persuaded that the Defendant left the common household because she feared for her life. The Defendant is a police officer and could have in my view reported the incidents of domestic violence to the relevant authorities. According to the Defendant's testimony, she reported the domestic violence and opened a case against the Plaintiff but later withdrew it upon the intervention of their two families. However, when asked about how the case was withdrawn under cross-examination, she struggled to provide an answer. I am sensitive to the complex factors that result in the high attrition rate in cases relating to domestic violence in our country, including secondary victimisation from family members.[48] Nonetheless, in these proceedings, the Defendant did not take the court into her confidence to demonstrate how these, or other relevant factors hindered her from seeking protection from the courts when she could have done so.

[110] In addition, I find the Defendant's testimony that she was refused access to her child unsustainable. The Defendant could have explored legal avenues to have access to her child. In fact, in her counterclaim, she had initially sought custody of the minor child. She could have taken this route 11 years ago when she left the minor child in the hands of the Plaintiff.

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[48] South African Human Rights Commission 'Unpacking the gaps and challenges in addressing gender- based violence in South Africa' (2018) at 13-4 https://www.sahrc.org.za/home/21/files/SAHRC%20GBV%20Research%20Brief%20Publication.pdf (accessed 26 May 2023).

[111] In light of the above exposition, the Plaintiff impressed me as a candid witness whose evidence was clear, credible, and reliable in all respects. There is no basis for this Court not to accept his testimony as the truth. However, I cannot say the same for the Defendant. She was not a reliable witness and contradicted herself on one or more aspects under cross-examination. The Defendant was evasive in her answers and mostly could not remember the things that she contributed to their house. The Defendant's testimony is unreliable and riddled with improbabilities. Accordingly, her evidence falls to be rejected.

[112] The reliance by the Defendant on *Bezuidenhout*[49], which cited *Moge*,[50] is misplaced. Counsel for the Defendant is cheery-picking paragraphs that are sympathetic to the Defendant but exclude context. *Moge* is distinguishable from the current matter in many respects. In *Moge*, the wife was not employed for 16 years after the parties' separation. In this case, the Defendant has a full-time job as a police officer. In *Moge case*, the mother cared for the house and their three children. At no stage did she neglect them. She was responsible for the day-to-day affairs of the house. This was not the case with the Defendant. The Defendant left the children including a 2-year-old child with the Plaintiff for 11 years during which she contributed nothing towards the minor's care. She also did not contribute anything tangible during her 11 years on staying together in the common household.

[113] Furthermore, in *Moge*, after the parties' separation, the wife was awarded custody of the children and received financial support from the husband. In this case, the Defendant left the Plaintiff with the children and did not seek custody of the minor child. It was only on one occasion during her 11 years of absence that she bought shoes for one child. Overall, in no way was the Defendant economically disadvantaged. To the contrary, the Plaintiff testified that he is in arrears in respect of school fees for two children because he had to cover other household necessities. The Defendant has not tendered any responsibilities relating to her minor child or the household where the child resides and at no stage did she testify that she was experiencing financial

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[49] *Supra* at fn 35.
[50] [1992] 3 SCR 813.

difficulties. I need not say more about *Moge* save to indicate that the reliance on it by the Defendant is self-defeating.

[114] The Defendant's submission to the effect that the court in *Wijeker "…emphasised that sight must not be lost of what the matrimonial property system which operates in the marriage"* is correct. However, it must be pointed out that there was no misconduct that was found against the appellant to justify an order for forfeiture. The trial court based its forfeiture order through reliance on the principle of fairness. These two factors distinguish *Wijeker* from the current matter, and do not assist the Defendant in any way.

[115] Finally, the reliance by counsel for the Defendant on *Beaumont* is also misplaced because counsel applied selective reading. Counsel quoted the paragraph where it was stated:

> ". . . In many, probably most cases, both parties will be to blame, in the sense of having contributed to the breakdown of the marriage. . . In such cases, where there is no conspicuous disparity between the conduct of the one party, and that of the other, our Courts will not indulge in an exercise to apportion the fault of the parties, and thus nullify the advantages of the "no-fault" system of divorce". [51]

[116] Interestingly, counsel omitted a further sentence from the aforesaid paragraph which reads *"but in the present case the misconduct was found to have existed on the part of the appellant only…".* The *Beaumont case* too, is in my view distinct from the present one as substantial misconduct (financial deprivation and extra marital affair) have been found to exist only on the part of the Defendant.

[117] Ultimately, this Court as the upper guardian of all minor children[52] is alive to the fact that the Defendant has played no role at all in so far as the minor child is concerned since she left him with the Plaintiff at his infancy stage 11 years ago.

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[51] *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC) at para 15.

[52] *L.K.M and Another v N.F.M and Others* (16859/22) [2022] ZAGPPHC 269 at para 10.

However, this Court is of the view that the Defendant should be afforded an opportunity to be part of her minor child's upbringing by participating in the day-to-day parental decisions and responsibilities. The report of the Family Advocate also highlights that the Defendant is now part of the minor child's life. This Court is prepared to give her the benefit of the doubt that she is now willing to be part of her children's lives and make up for the time that she has been an absent mother. It is in the best interests of the minor child that the Plaintiff and the Defendant work together in this co-parenting journey. I, therefore, do not agree with the Plaintiff's proposition that the day-to-day parental decisions and responsibilities be those of the Plaintiff in the upbringing of the minor child to the exclusion of the Defendant.

COSTS

[118] The general rule is that the costs should follow the results.[53] However, in a divorce action the court is not bound to make an order for costs in favour of the successful party.[54] It will consider the conduct of the parties and their financial means amongst other factors.

[119] I do not find any untoward conduct between any of the parties as they sought to claim or defend what they both considered their legal entitlement in terms of their marriage regime.

ORDER

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

(a) A decree of divorce is granted dissolving the bonds of marriage between the Plaintiff and the Defendant.

(b) The report of the family advocate is endorsed about the parental responsibilities, rights, and guardianship in respect of the minor child born of their

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53 *Van Zyl v Steyn* (83856/15) [2022] ZAGPPHC 302 at para 2.
54 Section 10 of the Divorce Act.

marriage.

(c)The Defendant's counterclaim is dismissed.

(d) The Defendant is ordered to forfeit her 50% benefits in the immovable property situated at No. [….], and the said property to become the sole and absolute property of the Plaintiff.

(e) The Defendant is ordered to forfeit her 50% pension fund benefits held in the Plaintiff's pension fund in the Government Employees Pension Fund.

(f) Each party is to pay its own costs.

PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 05 June 2023.

APPEARANCES:

Counsel for the Plaintiff:	Adv R Masipa
Instructed by:	Rammutla-At-Law INC
Counsel for the Defendant:	Adv M Fabricius

Instructed by:	Shapiro & Ledwaba INC
Date of Hearing:	13 April 2023
Date of Judgment:	05 June 2023