

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

Case Number: 11409/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 3/2/25

SIGNATURE

In the matter between:

T[...] J[...] M[...]

Plaintiff

and

K[...] J[...] M[...]

First Defendant

THE GOVERNMENT EMPLOYEES PENSION FUND

Second Defendant

***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 e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 3 March 2025.*

Summary: Divorce action. Counterclaim for forfeiture of pension benefits and immovable property. The plaintiff will benefit unduly and such is disturbingly unfair. The remaining issues in the divorce action are settled. Held: (1) The decree of divorce is granted. Held: (2) The settlement agreement marked X is made an order of Court. Held: (3) The plaintiff is to forfeit a benefit in respect

**of the pension benefits and the share of the immovable property. Held: (4)
There is no order as to costs.**

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a divorce action. Both divorcing parties are in agreement that the marriage has irretrievably broken down. Resultantly, the divorcing parties concluded a settlement agreement dealing with other issues relevant to this action. What then remained for determination was the issue of the maintenance of the minor child, which issue was abandoned during argument given the uncontested evidence that the plaintiff is currently unemployed and has no means of paying for any maintenance of the minor child, if so ordered. Given this uncontested evidence, a maintenance order would do nothing but to invite contempt proceedings. The legal duty of maintenance remains even in the situation of unemployment. When evidence of means arise, the claim for maintenance may be instituted. Following the abandonment of the maintenance claim, the only issue remaining for determination is a forfeiture claim in respect of the half share of the pension interest and the immovable property.

Background facts and evidence tendered.

[2] On 31 March 2011, the plaintiff, Mr T[...] J[...] M[...] got married to the first defendant, Mrs K[...] J[...] M[...] by civil rights¹ in community of property and that marriage subsisted as at the time of the hearing of this action. Given the issue that remain for determination, the salient facts in this action are that about 8 years ago, the plaintiff and the defendant acquired an immovable property situated at Erf 1[...] M[...] M[...] ("the property"). The property was bonded to Standard Bank of South Africa for a 20 years' period. As at 30 January 2025,

¹ A true copy of the marriage certificate was entered into evidence and marked exhibit "A".

the outstanding amount of the bond was R366 124.72. The monthly instalment as at 30 January 2025 was standing at R7 042.90.

- [3] Since the acquisition of the property, the plaintiff never paid a cent towards the monthly instalments of the bond account. The plaintiff held various employments during the subsistence of the marriage and in some of those employments, he cashed out his accumulated pension benefits without the consent and knowledge of the first defendant. Not once did the plaintiff pay any amount towards the Standard Bank loan. The loan account was serviced by the plaintiff alone for the past 8 years.
- [4] The first defendant held employment in a government department, as a result of which, she became a member of the second defendant, the Government Employees Pension Fund (GEPF) and had, at the time of this action, accumulated pension interests, the value of which was never disclosed to this Court. In his particulars of claim, other than praying for the division of the joint estate, the plaintiff prayed for an order that the GEPF be ordered by this Court to endorse that 50% or such lesser percentage of the pension interests is payable to him as contemplated in section 7 of the Divorce Act, 70 of 1979 (Divorce Act). On the contrary, the first defendant prayed for forfeiture of any percentage of the pension interest within the contemplation of section 9(1) of the Divorce Act.
- [5] Additionally, the first defendant prayed for the plaintiff to forfeit his share of the property, in terms of section 9(1) of the Divorce Act. This Court received testimony from both the plaintiff and the first defendant. The plaintiff also tendered the evidence of his nephew. The nephew's evidence was confined to the undisputed assault charges, which were subsequently withdrawn by the State Prosecutor on conditions that the parties resolve the issues through mediation.
- [6] The first defendant tendered her evidence first given the issues remaining for determination. For the purpose of this judgment, the brief testimony of the first defendant was that she is currently living with the only minor child born out of

the marriage. She has single handedly been maintaining her for a while. She and the plaintiff acquired the property 8 years ago. Since acquisition, she has been servicing the loan of Standard Bank and the plaintiff never paid a cent. The plaintiff was employed and he resigned from his employment in 2012. She does not know what the plaintiff did with his pension benefits that had been cashed out upon resignation.

- [7] The plaintiff had left the matrimonial home since July 2022. Since then, he had not been contributing anything to the joint estate in particular the costs associated with the property. As far as she knows since 2011 up until 2022, when the plaintiff left the matrimonial home, the plaintiff was unemployed. She had been paying for the rates and taxes to the municipality. Since she was not coping, the rates and taxes account is sitting in arrears of over R25 000.00. On 25 June 2022, the plaintiff assaulted her and broke a toilet window of the property. This after she demanded payment of money owed to her by the plaintiff. She presented evidence of photographs which depicted the injuries she sustained during the assault. She had laid a criminal charge for the assault which was later withdrawn.
- [8] She implored this Court to order forfeiture of the share in the pension interests since the plaintiff never contributed and she had not benefited from his pension interests when he resigned from various employments. She only heard from the children that he bought a car or was planning to buy a car. During cross-examination, it was suggested to her that the injuries depicted on the photographs were inflicted on her by another woman after she found her in bed with her husband. The first defendant vehemently disputed this suggestion and referred to that version as a “defence mechanism” employed by the plaintiff.
- [9] The plaintiff testified. Briefly, his testimony is that indeed he did not contribute a cent towards the loan owed to Standard Bank for the acquisition of the property. He confirmed that he received his pension funds pay-out from Pick N Pay. Out of the R31 000.00 of the benefits he received, he gave the first defendant an amount of R10 000.00 and the remainder of the money, he bought a car, which he later sold and bought furniture for his rented accommodation at Mamelodi.

With the salary he received from what he termed the “piece jobs”, he was buying meat and other food stuff. At some point he loaned an amount of R22 000.00 from the African Bank in order to buy a car for the family. He later sold that car for an amount of R13 000.00 without informing the first defendant or obtaining her consent. When he terminated employment with DHL in July 2023, he received an amount of R22 000.00. This amount he did not share with the first defendant. He left the matrimonial home because the first defendant chased him away. This Court interpose to mention that in respect of all the amounts received and expended by the plaintiff, not a shred of documentary evidence was presented by him. No plausible explanation was furnished by the plaintiff for this failure to provide any document. That he received and expended a specific amount is his *ipse dixit*.

- [10] He admitted, only in his evidence in chief, to have slapped the first defendant once. He however, testified that he was acting in self-defence as the first defendant had grabbed him with his private parts and he was experiencing pain at that time. He slapped her in order to ward off the painful grabbing of his private parts. He disputed that the injuries of the first defendant as depicted on the photographs were inflicted by him. On his version, the injuries were inflicted in 2016 already by a woman who found the first defendant at her home on a particular Sunday. The first defendant allegedly fled the scene of the assault and left behind a cell phone of her daughter and her own shoes. On a Monday the woman who assaulted the first defendant called him using the cell phone of the daughter and relayed to him the assault. When he confronted the first defendant about what was relayed to him she simply became dismissive and did not wish to speak about the incident any further because she was allegedly at work at that time. The assault, which he owned up to, happened on 25 June 2022 and he was arrested on 26 June 2022 for that. He appeared in Court on a Monday when the charge of assault was withdrawn. During cross-examination, he conceded that the bulk of his version was never put to the first defendant by his legal representative. He also conceded that some of the monies he received never made its way to the joint estate.

[11] The nephew of the plaintiff, Mr K[...] M[...], is a lawyer by profession. In 2022, when the assault happened, he was still a candidate attorney. He was appointed by both the first defendant and his uncle to mediate their differences. At that time, he did not observe any injuries depicted on the photographs on the first defendant, whom he met at the matrimonial home. He and the legal team of the plaintiff had agreed that since the mediation agreement is lost he will not testify in corroboration with regard to the alleged terms of the alleged agreement. He was sitting in Court throughout the testimony of his uncle. He testified that the first defendant had asked him to include in the agreement, a condition that the plaintiff should forfeit the pension interest and the property should they divorce each other. He advised her that such would have been against the law, given how the parties were married to each other. During cross-examination, he conceded that the vital portions of his testimony were never put to the first defendant when she testified.

Submissions

[12] Owing to the fact that these were action proceedings, the Court directed the parties to make oral legal submissions. Counsel for the plaintiff indicated unreadiness. After hearing oral submissions made, this Court afforded both parties a further opportunity to submit additional written submissions within a period of a week should the need arise. Nevertheless, the nub of the first defendant's argument is that the plaintiff has not contributed towards the joint estate and it will be unfair for the plaintiff to unduly benefit. On the other hand, the plaintiff, although conceding that he did not pay anything towards the property, he is entitled to benefit from the pension interests as well as the property by virtue of the type of marriage involved.

[13] It was further argued that since a single event of a common assault was involved, such does not amount to substantial misconduct within the contemplation of section 9(1) of the Divorce Act. The plaintiff's counsel later submitted further helpful written heads as permitted by this Court. Counsel for the first defendant submitted nothing further.

Evaluation

- [14] With regard to the remaining issue, section 9(1) of the Divorce Act and its applicability is of cardinal importance. As indicated, the issue of maintenance of the minor child was abandoned since there was undisputed evidence that the plaintiff remained unemployed since his termination of employment with the DHL.
- [15] The default legal position is that where parties are married in community of property, upon divorce, the parties will share equally from the joint estate. However, section 9(1) of the Divorce Act empowers a Court, when granting a decree of divorce on the ground of the irretrievable breakdown of a marriage, to order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other. The pleaded case of the first defendant is that the plaintiff must forfeit the 50% pension interest and the half share in the property. This Court was not appraised of what the joint estate is comprised of as a whole. It was suggested to the first defendant's counsel that the case pleaded and made is that of partial as opposed to the whole forfeiture.
- [16] In action proceedings too, a party is confined to the relief sought in the pleadings. The counter-claim of the first defendant is confined to the 50% of pension interests and the half share of the property. This is the case the plaintiff was to meet and met, regard had to the evidence of the first defendant. As such, her claim cannot be enlarged during submission to include forfeiture of the whole estate. In order to make an order of forfeiture a Court must have regard to (a) the duration of the marriage; (b) the circumstances which gave rise to the breakdown thereof; (c) any substantial misconduct on the part of either of the parties; (d) satisfaction by the Court that if an order for forfeiture is not made, the one party will in relation to the other be unduly benefited.
- [17] In *Wijker v Wijker (Wijker)*², it was held that the question whether a person will unduly benefit a two-stage enquiry is involved. Firstly, whether a person will indeed benefit, a factual question. Secondly, whether the benefit is undue, a question involving value judgment, taking into account all the facts and the

² 1993 (4) SA 720 (A)

duration of the marriage; the circumstances of the breakdown; and any substantial misconduct. In *Molapo v Molapo (Molapo)*³, it was held that undue could be described as something disturbingly unfair.

[18] Starting with the duration of the marriage factor, the marriage involved herein endured for 14 years as at the time of the divorce action. This could be classified as a long duration. This neutral factor is considered in order to make an assumption that both spouses have made contributions to the joint estate. Contrary to the submission of the plaintiff's counsel, this factor is unhelpful to this Court because there is overwhelming evidence that the plaintiff did not make any contributions to the costs associated with the acquisition of the property. During the subsistence of the marriage, he cashed out his pension benefits and never deployed all or a portion of those benefits to the growth of the joint estate, particularly the property. This Court has already remarked that what he cashed out is not supported by any documentary evidence.

[19] With regard to the circumstances giving rise to the breakdown of the marriage, it is common cause that since June 2022, the parties did not live together as husband and wife. It was at this time that the marriage began to brake down. It is also common cause that at that time, the plaintiff had assaulted the first defendant. Undoubtedly, the assault gave rise to the breakdown of the marriage and the separation of the couple. On the issue of the separation, the first defendant testified that she suggested that the plaintiff must be away from the matrimonial home for six months in order to deal with his anger issues. He left and never returned after six months. The plaintiff corroborates the six months separation but gives a different reason – until the heart of the first defendant settles, as he testified.

[20] The plaintiff gave unreliable evidence with regard to the happening of the assault. During cross-examination of the first defendant, a version was put by his counsel that he never assaulted the first defendant. The first defendant was assaulted by a woman who found her in bed with her husband, so it was put to

³ (4411/10) 2013 (14 March 2013).

the first defendant. When he testified in chief, this version changed and he unreliably testified that the assault by that woman took place on a Sunday of 2016. He only admitted to having slapped the first defendant once whilst acting in self-defence. The evidence of the plaintiff on this score is rejected as being false and a recent fabrication. The plaintiff did not struck the Court as a reliable and honest witness. His demeanour in the witness box was observably unimpressive. It was clear by mere observation of his demeanour that he manufactured versions as he went along.

[21] With regard to substantial misconduct, it is undisputed that the plaintiff assaulted the first defendant. Additionally, the first defendant testified at length about the emotional abuse that the plaintiff had put her through. That evidence remained unchallenged. In the Court's view, it is emotional and financial abuse for the plaintiff to expend his pension benefits and leave the first defendant to her own devices, with regard to the costs associated with the property. Such conduct on its own constitute substantial misconduct. Although evidence was not led as to when and by whom were the pictures depicting the injuries taken, there is an admission that the plaintiff did in fact assault the first defendant. His version that he slapped the first defendant, who on his version, if it is accepted, was inflicting excruciating and unbearable pain, only once in order to ward off what was undoubtedly a vicious attack is hard to believe. Given vacillating versions on this aspect, this Court finds the version of the plaintiff to be improbable when compared to that of the first defendant. The fact that the State prosecutor decided to allege a charge of common assault does not in of itself suggest that in a common assault a visible injury cannot be inflicted. The evidence of the nephew that there were no visible injuries must be treated with extreme caution. He was present in Court when his uncle admitted to a one slap. Given his familial relations to the plaintiff he is prone to tailoring his testimony in order to suit that of his uncle. Accordingly, this Court rejects his version as being unreliable and untrue. There can be no doubt that assault of a person does constitute an act of misconduct. It encroaches on the dignity of a person. The preamble of the Domestic Violence Act, 116 of 1998 states that domestic violence is a social evil. Section 1 of the Domestic Violence Act, defines domestic violence to mean amongst others physical abuse. There can

be no doubt that an assault is a form of physical abuse. Accordingly, this Court concludes that the plaintiff misconducted himself substantially. The argument that the assault was not repetitive, thus not constituting a substantial misconduct, is rejected. Even in a sexual harassment instances a single event of harassment is sufficient and serious enough to constitute a punishable misconduct. Nevertheless, this Court does accept that substantial misconduct alone does not lead to a forfeiture order. However, in *casu*, it is coupled with dearth of contribution on the part of the plaintiff to the augmentation of the joint estate. The plaintiff was, on the available evidence, in a financial position to contribute, yet he, for reasons unknown to this Court, found it befitting for him to ignore, as it were, the financial obligations towards the costs associated with the property. It is perspicuous that had the first defendant also ignored her financial obligations, the property could have long been foreclosed. Over a period of time the plaintiff had received a lump sum of over R50 000.00, albeit not supported by any document. Yet he paid not even a single cent towards the bond repayments.

- [22] Although the value of the pension interest is unknown at this stage, the plaintiff will certainly benefit 50% of that possible substantial value of the pension interest, in the circumstances where all his pension benefits were enjoyed by him alone. His evidence that he gave the first defendant R10 000.00 must be regarded as false and a recent fabrication. When the first defendant testified in chief that he received nothing from his pension benefits, the version that he paid her R10 000.00 was never put to her during cross-examination dexterously conducted by his counsel. As held in *President of the Republic of South Africa v South African Rugby Football Union (SARFU)*⁴ a cross-examiner has a duty to put a differing version before it can be argued that the challenged witness is not being truthful.⁵ The plaintiff was ably represented by an advocate. Failure to put versions was fatal to the case of the plaintiff.

⁴ 2000 (1) SA 1 (CC)

⁵ See also *Absa Brokers (Pty) Ltd v Moshwana NO and others* [2005] 10 BLLR 939 (LAC) at para 39-41.

[23] In the circumstances, it is disturbingly unfair for the plaintiff to benefit from the property and the pension interest. He left the property almost three years ago and used the proceeds of his own pension benefits to acquire other assets outside the matrimonial home. He received his own pension benefits and not used it to augment the value of the joint estate. Such a benefit for the half share of the property is certainly undue. Although the conduct of the plaintiff in encumbering the joint estate without consent and disposing the assets of the joint assets without consent has not been pleaded as forms of substantial misconduct, when value judgment is exercised by this Court, as it should, if forfeiture is not ordered, the plaintiff will be unduly benefited.

[24] For all the above reason, this Court is satisfied that if forfeiture of the 50% of the pension interests and the half share of the property is not ordered, the plaintiff will, in relation to the first defendant be unduly benefited.

Order

1. **The decree of divorce is granted and the marriage between the plaintiff and the first defendant is hereby dissolved.**
2. **The settlement agreement marked X is hereby made an order of Court.**
3. **The plaintiff is ordered to forfeit 50% of the pension interest held by the first defendant at Government Employees Pension Fund (GEPF) as defined in section 1(1) of the Pension Fund Act 24 of 1996 as well as his 50% share in the property situated at Erf 1[...] M[...] M[...], in terms of section 9(1) of the Divorce Act.**
4. **There is no order as to costs.**

**GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

For the Plaintiff:

Mr T Mokgoatsane

Instructed by:

GN Sibuyi Attorneys, Pretoria

For the 1st Defendant:

Mr M Marweshe of Marweshe Attorneys

Date of the hearing:

20-21 February 2025

Date of judgment:

03 March 2025