

SOUTH AFRICA / JUDGMENT

M v M (4906/2016) [2018] ZAFSHC 161 (30 July 2018) [2018] ZAFSHC 161

COURT

Free State High Court, Bloemfontein

BEFORE

Nulliah

CASE / FILE NUMBER

4906/2016

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No: 4906/2016

In

the matter between

E

M Plaintiff

and

L

M Defendant

CORAM:

NULLIAH, AJ

HEARD ON:

21 FEBRUARY 2018

JUDGEMENT

BY: NULLIAH, AJ

DELIVERED ON: 30 JULY 2018

[1] On the 30 July 2018, I granted the following order in divorce proceedings.

1. That the bonds of marriage subsisting between plaintiff and defendant be and are hereby dissolved.
2. That the defendant to pay rehabilitative maintenance to the plaintiff in the amount of R8000 (EIGHT THOUSAND RAND) per month from the first day of the month following the month on which the date of divorce is granted and thereafter on or before the first day of each following month for a period of 24 months.
3. That the defendant to retain the plaintiff on his medical aid and shall be responsible for all medical, dental and ophthalmic expenses

reasonably incurred by the plaintiff, such to include but not limited to, all costs of hospitalisation, surgical treatment, spectacles,

contact lenses, prescribed medication and allied expenses for a period of 24 months from the date of the decree of divorce.

4. That the plaintiff to ensure that all chronic medication be registered as such under the applicable medical aid scheme.
5. That the plaintiff is entitled to 50% of the defendant's pension interest calculated as at the date of divorce.
6. That the defendant is ordered to ensure that an endorsement is made in terms of section 7(8) of the Divorce Act of 1979 in the records of the defendant's Pension Fund to the effect that the plaintiff is entitled to half of the pension interest of the defendant as at the date of divorce.
7. That the Pension Fund to which the defendant belongs is ordered to make payment to the plaintiff of 50 % of the defendant's pension interest calculated in accordance with the rules of the Fund, as at the date of the decree of divorce, being 30 July 2018.
8. That the plaintiff is entitled to 50% of the accrued estate of the defendant as per the marital contract (ANC with accrual) inclusive of but not limited to the matrimonial home, policies and annuities.
9. That the plaintiff's claims' insofar as they do not accord with what is contained in this order is dismissed.

10. That the defendant's counterclaim insofar as it does not accord with what is contained in this order is dismissed.
11. Each party to pay their own costs.
- [2] Subsequently, the defendant requested reasons in terms of Rule 49(1)(c) for the order granted on 30 July 2018. These are the reasons for the order.

INTRODUCTION

- [1] The parties were married to each other on the 22 October 1994, out of community of property in terms of a duly registered ante-nuptial

contract regulated by Chapter 1 of the Matrimonial Property Act of 1984 in terms whereof the accrual system is applicable to the parties' marriage, which marriage still subsists.[1]

- [2] No children were borne of this marriage. The plaintiff's son from a previous marriage was adopted by the defendant subsequent to the marriage and is presently a major and self-supporting.
- [3] During October 2016, the plaintiff vacated the matrimonial home and instituted divorce proceedings, issuing summons in this court for a decree of divorce and ancillary relief pertaining to the division of the accrued estate as per their marital regime entitling her to an amount equal to one half of the difference between the accrual of the parties respective estates as well as half of the pension interest of the defendant; permanent maintenance inclusive of the plaintiff's retention as a permanent beneficiary on the medical aid scheme of the defendant and costs for this action.
- [4] The divorce is founded on the basis that the marriage relationship between the parties has irretrievably broken down and has reached such a state of disintegration that no reasonable prospect exists for the restoration of a normal marriage relationship between the parties.[2]
- [5] In amplification of the plaintiff's claim, the plaintiff cited incessant exposure to emotional, psychological, financial abuse and threats of physical abuse which culminated in the disintegration of the marital relationship between the parties.
- [6] The defendant subsequently lodged a counterclaim for forfeiture of benefits in terms of section 9(1) of the Divorce Act[3] and founded his counterclaim for forfeiture, with allegations of the plaintiff's infidelity, her ensuing abandonment of the marriage and vacation of the matrimonial home as one of the reasons for the breakdown of the marriage. The counterclaim was subsequently altered during the trial to partial forfeiture at the instance of the defendant.
- [7] The defendant further sought to buttress his counterclaim by placing reliance on the following, namely, i) that the plaintiff

habitually burdened the accrued estate financially with her refusal to secure employment notwithstanding her ability and undertaking to do so and, ii) that the plaintiff contributed virtually nothing towards the upkeep and material growth of the accrued estate which when coupled with her delinquent attitude in the administration of finances and wasteful expenditure, often exerted undue pressure upon the defendant financially and effectively diminished the accrual of his estate.

- [8] The defendant resisted the plaintiff's claim for permanent maintenance including her retention as a permanent beneficiary on his medical aid scheme on the premise that, i) the plaintiff is cohabiting with and is presently being maintained by another man and, ii) the plaintiff has the requisite physical and mental disposition which when coupled with her skills, qualification and experience, enables her to secure employment and maintain herself. The defendant eventually conceded to rehabilitative maintenance and medical aid for a limited period of time given the duration of the marriage, the plaintiff's unemployment status and the absence of a pension fund.
- [9] Pending finalisation of the main action, I am informed by counsel that in terms of a Rule 43 application, the plaintiff was awarded pendente lite an amount of R6500 maintenance and the defendant was further ordered to retain the plaintiff as a beneficiary on his medical aid scheme. There is no such Rule 43 order contained in the file but counsel for both plaintiff and defendant were ad idem in this regard.
- [10] These then are the terms of engagement. This court is now required to establish and pronounce on the reasons for the breakdown for the marriage as well as determine the claim for division of the accrued estate as against the counterclaim for partial forfeiture of benefits, the claim for permanent maintenance inclusive of medical aid as against the counterclaim for rehabilitative maintenance and medical aid for a stipulated period and the issue of costs.
- [11] The plaintiff's grounds on which she founds her claims must of course be considered against the backdrop of the defendant's

grounds for resistance and forfeiture. To prove their respective cases, both parties testified and led the evidence of their respective witnesses to bolster their versions. It is considered prudent to furnish an abridged version of their individual testimonies.

MARITAL

BACKGROUND

- [12] The plaintiff had met the defendant, an accountant by profession in Bloemfontein and was employed as a bookkeeper for approximately five to six years. She had a five year old son from a previous marriage, whom the defendant subsequently adopted and whom they raised as their own. After the marriage, they moved to Wepener where they stayed for

approximately two and half years in consequence of the defendant securing another employment position. The plaintiff was however, unable to secure employment for lack of employment opportunities.

- [13] The parties then relocated to Welkom where they lived for a period of approximately twelve years. The defendant worked at a brewery and the plaintiff was employed firstly, at General Electric for a period of two (2) years and then at Beatrix Mine for a period of three (3) years, where she occupied an administrative position which included bookkeeping. That she contributed financially to the matrimonial home during this period is in dispute. The mine subsequently closed and the defendant purchased a printing business for the plaintiff to conduct.
- [14] While the business was operational, the defendant underwent a triple heart bypass and was assisted by the plaintiff who stayed at home to aid his recovery. The exact period that the plaintiff attended to the defendant is also in dispute. The defendant returned to work six weeks later while the plaintiff remained at home. The business had proven unsuccessful and a loss of approximately R185 000 was incurred by the defendant, who utilised his inheritance to cover such loss. Both parties ascribed divergent reasons for the failure of the printing business. The plaintiff started to breed birds and managed the running of the household including the garden. The extent to which the plaintiff attended to the running and cleaning of the house including the garden is also in dispute. She was employed for six out of the twelve years that they resided in Welkom.
- [15] In consequence of the plaintiff's asthma, the defendant secured a position at Albany in Sasolburg and the couple bought a home in Parys. The plaintiff worked for a period of three months on a contract basis at a property business in Parys. The plaintiff then remained at home and assisted the defendant with administrative work for the church they attended and in which the defendant occupied the position of a pastor. She also did volunteer work with cancer patients. The plaintiff remained at home up until she left the matrimonial home. The parties are ad idem that they lived a fairly good standard of life and were never truly short of anything.

THE PLAINTIFF'S VERSION

- [16] The plaintiff testified that at the end of each month and at the end of every financial year, the defendant regularly ventilated his stress and pent up frustrations on her. His aggressive attitude and threats of physical assault and harassment relentlessly continued to the extent that it negatively affected her physical, emotional and mental health and well-being. She endured constant accusations of wasteful expenditure and was abused financially. She was treated with disrespect and was persistently threatened with divorce proceedings. She was financially dependent on the defendant for maintenance and medical aid and was constantly subjected to the threat of it being discontinued. The threats and harassment prevailed to the extent that she was forced to leave the matrimonial home, institute divorce proceedings and take out a Domestic Violence Protection Order against the defendant for

fear for her safety. In consequence, she lost all regard, respect and love for the defendant and is no longer interested in continuing with the marriage.

[17] She denied any romantic involvement with Mr D. either before or after leaving the matrimonial home and that she left the matrimonial home in consequence of any such romantic involvement. She further denied ever living with or being maintained by Mr D. and revealed that her mother assisted her with her financial shortfall. She also denied being derelict in her responsibilities to the marriage or that she squandered money and abused the medical aid. She maintained that she was never employed by Mr D. and merely assisted him with administrative work for his company without remuneration as his projects were still to take off the ground. She and the defendant had socially interacted with Mr D. since June 2016 as he was a bird breeder like them. Their relationship is purely platonic and Mr D. has been emotionally supportive of her plight.

[18] The plaintiff placed reliance on her contributions, both directly and indirectly during the subsistence of the marriage to buttress her claim for division of the accrued estate including half of the defendant's pension interest. In furtherance of her claim for permanent maintenance and medical aid, she also founded her claim on the state of her health, her age and lack of qualifications. At the time of trial, the plaintiff was 51 years old, she was on chronic medication for asthma and bronchitis, she had already suffered a stroke on the 27 October 2017 en route to Bloemfontein, her vision was not clear and four tumours were removed from her brain on 7 December 2017. She also revealed

that she had completed standard 8 and had obtained a secretarial qualification at a technical college in 1983.

[19] The plaintiff argues that in consequence of the abusive treatment meted out to her during the course of the marriage, and given the length of the existence of the marriage, her contributions during the marriage, both direct and indirect, the state of her physical health, her emotional and mental well-being coupled with the fact that she is financially dependent on the defendant presently and is not in a position to secure employment, she is entitled to the relief as claimed in her prayers, namely, a decree of divorce and ancillary relief pertaining to the division of the accrued estate as per their marital regime entitling her to an amount equal to one half of the difference between the accrual of the parties respective estates, half of the pension interest of the defendant, permanent maintenance inclusive of her retention as a permanent beneficiary on the medical aid scheme of the defendant and costs for this action.

[20] Under cross examination, she revealed that she resided at a guest house since leaving the matrimonial home until June 2017. In consequence of the interim maintenance granted to her in terms of a Rule 43 order, she was in a financial position to rent a unit and has subsequently relocated to bigger unit in the same complex. She was unable to produce the current lease when requested to do so. She admitted that she owes the Guesthouse R140 000 for the period that she resided there. She further admitted that Mr D. assisted her with a

deposit of R2000 for the guesthouse and that the invoice which was initially made out to her, was subsequently changed to the name of the company, Orego Technologies, in which Mr D. was a Director. According to the plaintiff, the guesthouse had required something more 'substantial'. Notwithstanding the name on the invoice, she resolutely maintained that she was responsible for the payment of that account. Mr D. only stood as surety but she intended to pay it after she obtained a divorce. She was however, unable to produce such account upon request by the defence.

[21] The plaintiff further admitted to the following under examination in chief and under cross examination:

- She had refused to disclose her address because she was afraid of the defendant and not with the intention of hiding the fact that she was residing with Mr D..
- She marked the dining room suite drawers with ugly words because the defendant had removed it from her mother's possession after having given it to her;
- Notwithstanding the protection order she obtained against the defendant, she stayed one night with the defendant at his request because it was too late to travel alone at night and the church was attempting to reconcile them as the defendant was at risk of losing his priesthood if he got divorced. Furthermore, the defendant told her that he would retire in two years.
- She admitted to sending him kind hearted messages as she still loved him and at that stage, she was not ready write off a relationship that had lasted 23 years. She has now made peace that their relationship is over.
- Mr D. brought her for the trial.
- The second list of expenditure submitted in furtherance of her maintenance claim was based on the anticipated expenditure of relocating to Bloemfontein, hence the difference in amounts between the initial list and the second list.
- She admitted to threatening M. M. because she and the defendant were making her life hell and M. M. was well aware since February 2017 that the plaintiff wanted to reconcile with the defendant.
- M. M. and the alleged adulterous relationship with the defendant was not cited in the summons and that she only cited the abusive conduct of the defendant.
- She denied ever taking the firearm of the defendant. The firearm was eventually found in the house of the defendant and it was because the firearm could not be found that she was accused of threatening M. M. with a pistol.
- She had lied to the defendant about being in Pretoria just after she had left him because she was scared for her safety.

[22] Mr D. testified as a witness for the plaintiff. He revealed that he is an 80 year old pensioner who receives a monthly pension of R12 500 per month and has no other source of income presently. He was previously an engineer by profession. According to Mr D., he met the plaintiff through the defendant, breeding and showing birds. The Marees' bought birds from and exchanged birds with him. The defendant used to deliver bread crumbs for the birds in exchange for birds. Mr D.'s partner, Ms V. V. also travelled daily with the defendant to Sasolburg where they were employed and at some stage he suspected an affair between the two of them. The visiting suddenly stopped but he remained friends with Mrs Maree who at a later stage approached him for employment.

[23] The plaintiff had approached him at a stage and informed him that she could not continue with her marriage and that she required

accommodation. He took pity on her and assisted her with securing accommodation at a bed and breakfast that was known to him. The plaintiff was responsible for payment of the account as she had indicated to them she was getting a divorce. He did however, assist the plaintiff in paying a R2000 deposit as she had no money. The invoice was made in the name of his company as the owners of the guesthouse wanted some guarantee for payment. They were prepared to let the plaintiff stay in consequence of the deal he was presently involved in and his company would stand as guarantor. However, the money never came in. He resolutely denied residing with the plaintiff or maintaining her.

[24] He ended his relationship with Ms V. V. in December 2017. In consequence of an altercation with his son, he moved out of the house in which he had resided with Ms V. and presently rents a room on a farm for R1500 per month. Mrs Maree assisted him with administrative work for the company and discharged her duties on a computer, diligently and efficiently. He and the plaintiff have developed a friendship and even though he wanted more from the relationship, the plaintiff remains adamant that she will only consider such a relationship after her divorce. According to him, the plaintiff has other boyfriends. He visits the plaintiff often at her place and they often have lunch together.

THE DEFENDANT'S VERSION:

[25] The evidence of Ms Lindi Loubsher, the owner of the guesthouse where the plaintiff resided, testified as a witness for the defendant and her testimony bears relevance to the following extent: The plaintiff resided at the guest house from 20 October 2016 up until June 2017. The outstanding balance on the account is R140 000. Mr D. had approached them for accommodation for the plaintiff on the understanding that the business, Orego Technologies in which he occupied the position of Director would be responsible for payment of the account every month. No payment was received and Mr D. subsequently indicated that the defendant was liable for the account. No agreement had been concluded with the plaintiff or the defendant for payment of the account nor was it mentioned to her as the owner of the guesthouse that Mr D. would only be standing as guarantor.

[26] In an attempt to secure payment for the outstanding amount, the guesthouse issued summons against the plaintiff. The plaintiff became angry and maintained that the defendant was not liable and insisted that Mr D. settle the account. According to Ms Loubsher, the plaintiff was employed by Orego Technologies and she indicated her intention to resign. After four to five months of staying at the guesthouse, the plaintiff asked her to change the names on the invoice from Orego Technologies to an account in her personal name. She confirmed that at no stage did Mr D. stay over at the guest house with the plaintiff. However, she witnessed them hugging and kissing each other and felt it was more than a mere friendship.

[27] The second defence witness was Mrs V. V. who testified that she had been in a relationship with Mr D. which ended in December 2017 at his instance. Mr D. had informed her that he had found another woman who shared his interest in birds. His withdrawal from her started in March or April 2016 and she witnessed a distinct change of attitude during May or June 2016. He also started contributing less financially, the birds were no longer a priority for him, and towards the end of their relationship she was supporting him financially. She also confirmed that up until the end of their relationship, Mr D. returned home every evening.

[28] The defendant elected to testify and from the onset founded his counterclaim for forfeiture on the alleged breach of the plaintiff's

moral obligation to him in that the plaintiff engaged in an adulterous relationship with Mr D., resulting in the deterioration of the marriage and eventually precipitated the plaintiff's abandonment of the marriage and vacation of the matrimonial home.

His suspicions were further buttressed by the information he received from the owner of the bird seed store that the plaintiff had left the store with an old white haired gentleman on the very same day that she vacated the matrimonial home.

[29] The defendant maintained that he was in fact the recipient of financial abuse during the marriage when confronted with the

allegations of abuse against the plaintiff. He admitted that finances were a regular source of contention in their marriage. The defendant denied that the plaintiff contributed to the accrual of his estate. Rather, the plaintiff was guilty of burdening his estate and exerted undue financial pressure on him and cited various examples to buttress his stance. The defendant readily admitted controlling and administering the finances and disbursing amounts of money to the plaintiff to run the household and ascribed the need for this arrangement to the delinquency of the plaintiff in her past management of their finances. He revealed that when they resided in Welkom, the plaintiff in fact controlled the finances and had full access and use of his cards. Instead of paying their utility bills, the money was squandered and their electricity was consequently disconnected. He averred that she would purchase unnecessary items and could not account as to how she had utilised their money. In consequence, he removed the control of the finances away from the plaintiff.

[30] He admitted that he purchased material for the plaintiff who, together with her mother would fashion and sew clothes until three in the morning as this was cheaper option. He further admitted to buying the plaintiff a dress once a year for the annual church meeting. He incurred a huge financial loss of R185 000 which he covered with the money from his inheritance when the printing business he bought for the plaintiff went under. The remaining items from the business were sold and the plaintiff pocketed the money.

[31] He maintained that they moved from Welkom to Parys because the plaintiff was asthmatic. The plaintiff insisted that they

purchase the house in Parys and promised to secure employment and contribute financially but she only worked for a period of six

months. She further insisted on extra security services and again undertook to pay for it but he eventually fitted the bill. The defendant was financially burdened yet the plaintiff continued to do charity work for cancer patients. She barely cooked and while she did the washing, she never ironed his clothes. Her contribution to the household was minimal as he often bought food over the weekend and 'hungered' up during the week; he had garden services twice a week and he assisted with vacuuming and household chores on the weekend.

[32] The defendant testified that in September 2016, he became so enraged about the fact that the savings plan of his medical aid was depleted, that he threatened to leave the plaintiff. He also testified that there was an ongoing build up to that moment. The plaintiff abused the medical aid in that she had a penchant for obtaining and collecting medication but was delinquent in the use of her medication. He also repeatedly asked the plaintiff to secure a doctor's script to ensure her asthmatic medication fell under chronic medication as opposed to paying R500 each time from their savings plan. The plaintiff was aware that he wanted to utilise the medical aid for the repair of his teeth. She never attended to the chronic medication and instead saw fit to attend to her eyes, effectively depleting their savings. He admitted threatening to leave the plaintiff during that fight. However, he denied ever showing her disrespect, threatening to divorce her or threatening to remove her as a dependant from his medical aid.

[33] He further resisted the plaintiff's claim for permanent maintenance and unrestricted medical aid on the ground that the

plaintiff was presently cohabiting with and being maintained by Mr D.. The defendant elucidated that the manner in which the plaintiff

had left him led him to believe she was living with another man. Her refusal to disclose her residence coupled with the fact that she simultaneously obtained a Protection Order precluding him from contacting her, effectively prevented him from finding out where she was living. He further maintained that the plaintiff, by her own account had the necessary physical and mental disposition to work. The defendant furthermore maintained that when he retires, he will no longer be on a medical aid fund and he will not be able to contribute to the medical aid of the

plaintiff.

[34] The defendant acknowledged that if he succeeds in obtaining an order that the plaintiff forfeits her right share in the accrual, she will be destitute and this was not his wish after twenty four years of marriage. The defendant thus conceded in examination in chief on the third day of the trial that the plaintiff is entitled to some benefit and that there should only be partial forfeiture. While under cross examination he was unable to provide a percentage of the accrual that should be forfeited, in closing arguments it was conceded that the plaintiff should be entitled to 25% percent of the accrued estate albeit half of what she claimed. He maintained that the plaintiff would be unduly benefitted if a partial forfeiture order was not

granted.

[35] He was also constrained to agree that he had also resisted the claim for permanent maintenance and unrestricted medical aid on the premise that the plaintiff was living with and being maintained by Mr D. . The main reasons advanced by the defendant for his subsequent accession to partial forfeiture included that they were married for 24 years, the plaintiff was presently unemployed and therefore not in a position to maintain herself and she did not possess a pension. However, he remained adamant that the plaintiff was not entitled to half of the accrual or his pension interest. He stated that for the most part of the marriage, he maintained the plaintiff, her sister and even her mother stayed with them. He had even adopted her son.

[36] His mother in law sometimes gave him R600 or R700 while she lived with them. The arrangement with the plaintiff's mother when she moved on her own was that she had the use of the dining room suite and once she was settled, the dining room suite would go to their son that he adopted.

[37] After the plaintiff abandoned the matrimonial home, she wanted to reconcile and would plays songs on the radio and sent him 'whatsapp' messages until September 2017. The plaintiff was an obsessively jealous wife and he witnessed the plaintiff threaten M. M. in church. Her behaviour was often aggressive and uncontrollable.

[38] The testimony of Ms M. M. invites no criticism and is relevant to the extent that there were attempts between the parties to reconcile and that the plaintiff exhibited jealous behaviour even after she left the defendant. Ms M. M. testified that the plaintiff pointed her fingers at her like she was holding a firearm and told her that she will take her out; the plaintiff told her that she will "wetter" her and the plaintiff also bumped her hat from her head in church. On the 19th February 2017, the plaintiff visited her and she revealed to her that she was scared of the defendant. M. M. explained how her relationship with the defendant developed and approximately May or June 2017, they became more affectionate. She denied that the defendant moved in with her and maintained that they each have their own home. She had volunteered to make food for him and to do his washing.

[39] The following appears to be common cause:

- a) The marriage between the plaintiff and the defendant has irretrievably broken down and has reached such a state of disintegration that there is no possibility of the restoration of a normal marriage relationship between the parties;
- b) The parties had duly registered an ante-nuptial contract and declared that the nett values of their respective estates at the commencement of their marriage were 'nil';
- c) The estate of the defendant has shown an accrual in respect of various assets, inclusive of the matrimonial home and two vehicles, one of which is presently in the possession of the plaintiff which the defendant purchased and paid for, his pension interest and various insurance policies and annuities and is valued collectively at approximately R3 million rand;
- d) The estate of the plaintiff has not shown any accrual during the marriage;
- e) The plaintiff is presently unemployed, does not possess a pension fund and is financially dependent on the defendant inclusive of the medical aid;
- f) The plaintiff suffers from chronic asthma and bronchitis, she also suffered a stroke and had recently undergone surgery and removed four tumours from her brain;
- g) The pension interest of the defendant calculated at the date of decree of divorce forms part of the accrued estate for the purpose of determining the parties' patrimonial benefits.

[40] The following was found to be in dispute:

- a) The plaintiff was involved in a romantic relationship with Mr D. which led to a breakdown of the marriage and caused the plaintiff to abandon the marriage and vacate the matrimonial home;
- b) The plaintiff is presently residing with and is being maintained by Mr D.;
- c) The plaintiff is incapable of future employment and therefore not able to maintain herself inclusive of medical aid;
- d) The plaintiff habitually burdened the accrued estate and contributed virtually nothing to the estate.

PLAINTIFF'S CLOSING ARGUMENTS:

- [41] Advocate van Aswegen on the counterclaim for forfeiture essentially placed reliance on the fact that the defendant's case amounted to no more than conjecture and speculation and he had not adduced any cogent evidence for this court to conclude that the plaintiff had committed adultery and abandoned the marriage and vacated the matrimonial home in consequence. He argued that the examples of alleged financial abuse advanced by the defendant to buttress his case for partial forfeiture and rehabilitative maintenance, correctly contextualised, were trivial in nature and deficient in sustaining such an allegation. He further argued that the plaintiff's contribution in the running of the household was no less

valuable than a financial contribution. Accordingly, the defendant failed to prove that plaintiff would unduly benefit if a forfeiture order was not given.

- [42] Advocate Van Aswegen was resolute that while the accrual claim only arises when the decree of divorce is granted, this court was not empowered to make such an order given the request of the parties. He elaborated that the issue of accrual was not properly ventilated in these pleadings and there was insufficient evidence to conclude a percentage amount. He further contended that notwithstanding the plaintiff's concession that she would relinquish her claim for maintenance if she received a sufficient capital amount, the plaintiff nor the court is aware of what the accrual amount. He argued that to the extent that the defendant wishes to capitalise on this concession, it is noteworthy that the defendant himself seeks forfeiture.
- [43] Regarding the plaintiff's claim for permanent maintenance and medical aid, Advocate Van Aswegen pointed out that the defendant eventually conceded that he had failed to prove that the plaintiff was indeed residing with and being maintained by Mr D.. Regard being had to the evidence before court of the monthly nett income of the defendant coupled with the fact that the plaintiff is unemployed and financially dependent on the defendant, he maintained that the plaintiff had indeed made out a proper case that she is entitled to maintenance post-divorce. He conceded that the plaintiff indeed vacillated in her prayers in terms of the amount she requested for permanent maintenance and further conceded that the amount requested by the plaintiff was not a viable amount given the income of the defendant. Notwithstanding, he maintained that the defendant enjoys a healthy bank balance and is in a financial position to pay more than the interim month payment of R6500 to the plaintiff in addition to her monthly medical aid contribution. The defendant, by his own account was financially able to meet the temporary excess medical fees incurred in respect of the plaintiff in the amount of R5000 per month, he was able to make his monthly church contribution of R2700 and he utilised approximately R1000 per month to sustain his bird breeding hobby, the bulk of which can be channelled towards the plaintiff's maintenance. He argued that the defendant has at least R13 500 per month of disposable income to pay towards the plaintiff's maintenance.
- [44] Advocate Van Aswegen further contended that the plaintiff's medical expenses forms merely one of the components embraced in the general concepts of the duty of support. Given the plaintiff's health, it is vitally important for her medical aid expenses to be taken care of. While he conceded that there is no expert medical evidence before court, he maintained that there is no evidence that the plaintiff would be able to secure and maintain employment which would allow her to maintain herself entirely from her own earnings. He argued that the prospects of the plaintiff becoming self-sufficient if she is granted rehabilitative maintenance are slim given her age, health, her outdated qualification and her limited exposure in the open labour market. Furthermore, her disclosure of her medical history would make it virtually impossible to obtain stable employment.

[45] In closing, he maintained that a divorce order must be granted on the ground that the marriage had broken down irretrievably and that the probabilities favoured the plaintiff's version for the breakdown of the marriage and her claim for permanent maintenance inclusive of medical aid.

DEFENDANT'S CLOSING ARGUMENT

[46] Advocate Heymans for the defendant maintained that the extramarital relationship between the plaintiff and Mr D. led to a breakdown of trust which culminated in the breakdown of the marriage and the ensuing divorce. He further contended that the plaintiff's

infidelity coupled with her mismanagement of the parties' finances and abuse of their medical aid should be considered as

material misconduct justifying a partial forfeiture order. He argued that incriminating evidence had been led that the plaintiff

was in fact residing with and being maintained by Mr D. and cited various reasons to buttress the defendant's resistance,

including, the continued reluctance of the plaintiff to disclose her residential address, the obtaining of protection order forbidding any contact effectively precluding the defendant from ascertaining such address and revealing who she was residing with, the invoice of the guesthouse which was on Mr D.'s name, the evidence that the defendant was informed that the plaintiff left with a white haired gentleman on the day she left the matrimonial home, the fact that the plaintiff has worked for Mr D. without remuneration for a lengthy period of time and the absence of her current lease which would have revealed the name of the lessee had it been made available to court notwithstanding repeated requests for it.

[47] Advocate Heymans further contended that the plaintiff proved to be an unreliable, aggressive and a dishonest witness. Her entire demeanour was misleading to the court and she was often contemptuous. He argued that contrary to being a victim, the plaintiff often proved aggressive and cheeky. He submitted that the testimony of the plaintiff coupled with Mr D.'s refusal to pay for the guesthouse clearly evinces Mr D.'s inability to look after the plaintiff and their willingness to manipulate the defendant financially. The testimony of Mr D. that he encouraged the plaintiff to secure a capital settlement in the divorce so that she can start a B & B business is also illustrative of the influence Mr D. exerts on the plaintiff regarding her expenditure and her finances.

[48] Advocate Heymans maintained that the plaintiff's testimony during the trial further revealed her as being opportunistic and abusive. By her own account, she did not hesitate to damage the furniture that was removed from her mother and was patently not afraid of the defendant as she constantly professed to be. In fact, the plaintiff was even so bold as to kick the furniture twice in front of the defendant when the furniture was removed, effectively refuting any allegation that she feared for her safety.

Notwithstanding the plaintiff's rejection of the reconciliation arranged by the church, her subsequent attempts at reconciliation

coincide with the fact that she needed her account at the guesthouse to be paid by the defendant and clearly evinced that she did not fear the defendant or considered her safety to be at risk. He further argued that it was only during the trial that the plaintiff made allegations of the defendant's infidelity.

- [49] Advocate Heymans further maintained that the defendant has indeed conceded that the plaintiff is entitled to a certain percentage of the accrued estate given the length of their marriage. In the same breadth, the defendant has further indicated that he is desirous to have a clean break and have no further financial links with the plaintiff. By the plaintiff's account, this in accordance with her wishes. Advocate Heymans however, contended that it would be grossly unfair to the defendant if this court granted an order entitling the plaintiff to her half share of the whole accrual in view of the evidence tendered in respect of the counterclaim. In cross examination, plaintiff agreed that the total estate is approximately plus minus R 3 million. This was clearly evidenced in the financial documents discovered by the defendant. With due regard to the evidence tendered, he argued that the plaintiff should only be entitled to 25% of her right to share in the accrual of the estate. The defendant also argued that both parties indeed made concessions during the trial and vacillated in terms of their prayers and justice requires that the parties pay their own legal costs.
- [50] The defendant while resisting the claim for permanent maintenance and medical aid, offered rehabilitative maintenance and medical aid for a limited period. Advocate Heymans argued that there exist no expert medical reports or testimony verifying that the plaintiff has indeed suffered an impairment, to what extent she has recovered and what will be the long term and short term effects of the brain operation. Nor is there any expert medical and related evidence confirming that the plaintiff is indeed unable to work in the open labour market. The absence of such critical evidence patently negates her claim for permanent maintenance and her need for unlimited medical assistance. Her decision not to work in consequence of her medical history lacks substance and was not properly canvassed by the plaintiff either in terms of the labour market or with the medical doctors.
- [51] Advocate Heymans further contended that during the trial, the plaintiff was emphatic that if she gets a capital settlement, she does not require maintenance. He argued that while the defendant's means presently far exceeds that of the plaintiff, in approximately two years, the defendant will retire, his income will seriously decline and he will be reliant on his pension. The defendant will also have to fund his own medical fund and pay his own medical expenses. There is indeed evidence before court that the plaintiff has performed administrative duties for a lengthy period and by all accounts, she discharged them competently and efficiently. Further, the plaintiff possesses numerous skills and talents and has the potential to secure employment and earn a salary to support herself which when coupled with what she will receive from the accrued estate constitutes ample income to enable her to become self-sufficient. Advocate Heymans argued that the tender of a fixed

contribution of R 6500 as rehabilitative maintenance and R2500 for her medical aid until the defendant retires was considered a reasonable and fair concession.

ISSUE

- [52] The issues for determination are patrimonial in nature and involves firstly, a consideration of the patrimonial claim of the plaintiff in accordance with the accrual system inclusive of the claim for permanent maintenance and medical aid; and secondly, the defendant's counterclaim for partial forfeiture of benefits of a marriage out of community of property but subject to the accrual system as contemplated by section 9 of the Divorce Act of 1979 and whether each of the parties have discharged the onus of proving such entitlement on a preponderance of probabilities.

APPLICABLE LAW

- [53] It is patent that the disputes are more patrimonial in nature. It is thus considered prudent to sketch the legal backdrop against which the case falls to be decided regarding the claim for an award of the division of the accrued estate on divorce, the counterclaim for forfeiture of benefits and the claim for spousal maintenance and medical benefits on a permanent basis. It is well established that where the court is confronted with conflicting versions which cannot be reconciled and which will ultimately inform the determination of such disputes, it adopts a holistic approach to the matter and has regard to the probabilities amongst others.
[4]
- [54] The Divorce Act 70 of 1979 regulates the division of assets, maintenance[5]and forfeiture of benefits on divorce.[6] In terms of section 7 of the Divorce Act, the court granting a decree of divorce may make an order with regard to the division of assets of the parties, forfeiture of benefits or the payment of maintenance by one party to the other. While the court is not restricted to a consideration of the division of the accrued estate before considering and award for maintenance, it is considered sagacious to deal with the division the accrued estate and the counterclaim for partial forfeiture before interrogating the claim for permanent maintenance on the basis of fairness and equity with a view of how justice may best be achieved between the parties in relations to the means, obligations and needs of the parties and all other relevant factors.[7]
- [55] Section 3(1) and section 4(1)(a) of the Matrimonial Property Act 88 of 1984 also has application. Section 3(1) provides that at the dissolution of the marriage subject to the accrual system the spouse whose estate shows a smaller accrual than the estate of the other spouse acquires a claim against the other spouse for an amount equal to half of the difference between the accrual of their respective estates. Section 4 (1) (a) of the same Act provides that the accrual of the estate of a spouse is the amount by which the nett value of his estate at the dissolution of his marriage exceeds the nett value of his estate at the commencement of the marriage.[8]

[56] It is putative that a pension interest of any party to a divorce action is deemed to be an asset of such a person's estate for the purpose of determining patrimonial benefits[9]and that a court granting a divorce is empowered to order 'that any part of the pension interest of such a member spouse is due or assigned to the non-member spouse when such an interest accrues in respect of the member spouse'[10]. It is also well established that the date of accrual of the pension interest is deemed to be the date of divorce. [11]

[57] The court in *Brookstein v Brookstein* (20808/14) [2016] ZASCA 40 (24 March 2016), finally resolved the issue that the date of determination of the right to share in the accrual is on the date of dissolution of the marriage which is the date of divorce. It is trite that accrual only takes place only after the decree of divorce is granted and is in accordance with the prayers contained in the summons of the plaintiff. This is also has the effect of buttressing the clean break principle.

[58] Initially this court was confronted with a counterclaim for forfeiture of benefits which was subsequently altered to partial

forfeiture of the plaintiff's right to share in the accrual of the defendant's estate.[12] In order to decide whether the plaintiff will be improperly advantaged if partial forfeiture is not ordered, the factors

mentioned in section 9 (1), namely the duration of the marriage, the circumstances that gave rise to the breakdown thereof and any material misconduct on the part of either party is to be taken into account.

[59] It is also well established that the reciprocal duty of support, an invariable consequence of marriage terminates when the marriage comes to an. However, section 7(2) of the Divorce Act [13]confers a discretion upon the court granting a decree of divorce to make a maintenance order which it finds just, having regard to the factors set out in the section. With regard to maintenance post-divorce, in the absence of an order made in terms of a written agreement between the parties, the court may having regard to those factors, make an order which it deems just in respect of the payment of maintenance by one party to the other for any period until the death or the remarriage of the party in whose favour is given, whichever occurs first. Hence, should the court decide to award maintenance to a spouse, the factors enumerated ultimately determine the amount of maintenance payable. It is trite law that each case must of course be considered on its own merits in the light of the facts and the circumstances peculiar to it and with regard to those factors set out in section 7(2).

[60] The inquiry embodied in this section 7(2) has as its purpose the determination of a just award. It requires a court to ruminate a multiplicity of listed factors embodied in section 7(2) in the determination of firstly, whether maintenance is to be paid at all and, if so, the amount to be paid and the period for which the maintenance is to be paid. They are not listed in any particular order of importance or relevance. One is required to go further than just financial needs and obligations, existing means and earning capacities. [14] The parties' future earning capacities, their ages, an order in terms of the Divorce Act for the transfer of

assets from one party to the other all relate to the criteria of need for support and ability to pay. It is patent that this section confers on the court a wide discretion which is absolute and the court may have regard to any other factor that in the opinion of the court should be taken into account. It is putative that this discretion must be exercised

judicially according to established rules of law and practice.

[61] Prior to the Divorce Act 70 of 1979, much emphasis was placed on conduct when divorce was based on matrimonial fault and parties were penalised in terms of maintenance. It must be stressed that since divorce is no longer fault orientated, post-divorce maintenance can no longer be considered as a form of penalty for misconduct as it sometimes was in the past. The criteria of 'conduct' clearly introduces a moral judgment. In the determination of maintenance, such conduct is not irrelevant. However, this court is not there to assess the moral blame worthiness of the parties but to identify the actual conduct which caused the breakdown of the marriage.[15] After that, considerations of justice must prevail in the determination of maintenance.

[62] The comments by author, RH Hahlo in *The South African law of Husband and Wife*, Fifth Edition on page 373 on the issue of misconduct are indeed noteworthy:

All this has changed. There are no longer 'innocent' or 'guilty' spouses in the old sense. 'Substantial misconduct' on the part of one or the other spouse is only one of the factors which the court may take into consideration. And while it is presumably still the law that the courts may not make a forfeiture order unless one of the spouses applies for it, it is within the discretion of the court whether to make an order or to withhold it. It may make it in favour of the plaintiff or the defendant – there is nothing to preclude it from making an order in favour of the spouse who formerly would have been considered the guilty one.

[63] The award of maintenance post-divorce is based on a balancing of need and the ability to pay. Section 7 of the Divorce Act can and should be used by the court to ensure fairness between the parties. While none of the factors claim dominance, need and the ability to pay are generally the predominant considerations. It becomes apparent that the ability to earn an income and support oneself and the potential to earn an income does not disentitle the court from ordering rehabilitative maintenance.[16] This is clearly evinced from the factors enumerated in section 7(2) and the wide discretion which is conferred on the trial court.

[64] It is well established that the plaintiff's claim for maintenance is dependant inter alia upon the marital standard of the living of the parties, the plaintiff's actual and reasonable requirements and the capacity

of the defendant to meet such requirements. With regard to the standard of living of the parties prior to divorce, it is generally

recognised that neither party is entitled to maintain the same standard of living as during the marriage and therefore cannot be

expected to enjoy after the divorce the same standard of living that he or she had as a married person.[17] They are expected to abate their requirements accordingly. The needs of both parties must be balanced and the available income distributed fairly and equitably.

[65] The clean break principle after divorce has found resonance with our courts for many years. The aim of this principle is to ensure that the parties become financially independent of each other as soon as possible after divorce. This principle however has to be applied with due consideration of the particular circumstances of each case and if such circumstances permit. [18]

ANALYSIS

OF LAW AND THE FACTS

[66] On a conspectus of the evidence, this was clearly an acrimonious marriage. The plaintiff and the defendant, notwithstanding the allegations of infidelity levelled against each other before and during the trial, were both in agreement that their marriage was beyond salvation. That the marriage was emotionally, psychologically and financially abusive to both parties is patent. Whether in equal measure or not cannot be determined with any certainty. It is patent that the marriage relationship between the parties clearly deteriorated over time to such an extent that on the 16 October 2016, the plaintiff left the matrimonial home and launched the present proceedings.

[67] It becomes apparent that the bulk of the incidents that both parties have latched onto in furtherance of their claims occurred during the course of the marriage, subsequent to the plaintiff's vacation of the matrimonial home and are relevant to the extent that they reveal that there was indeed a communication breakdown in the marriage. I align myself with the argument of Advocate Van Aswegen that it is arguable as to whether substantial misconduct after an irretrievable breakdown had taken place could be taken into consideration in adjudicating forfeiture of benefits. Notwithstanding, I am in agreement that guilt per se is no longer an overriding or decisive factor when a prayer for forfeiture is considered.

[68] Finances was indeed a recurring issue and a source of contention in the marriage. It was the evidence of the plaintiff that the marriage was placed under considerable stress at the end of each month and at the end of each financial year. It is also undisputed that the defendant was the breadwinner of the family and for the most part, the sole breadwinner of the marriage and was liable for all expenses. The defendant was gainfully employed and a member of a pension fund. As regards the matrimonial home, all payments were either deducted from the defendant's salary or paid by the defendant himself or by the plaintiff on behalf of the defendant from the defendant's salary. The defendant for his part admitted that he controlled the purse strings and disbursed amounts that he deemed necessary. The plaintiff was clearly at the will of the defendant financially for the greater part of the marriage. The defendant buttressed this arrangement citing the plaintiff's delinquency in the payment of their utility bills, her wasteful expenditure on unnecessary items, her

inability to account for the manner in which their money was utilised, her penchant for obtaining medication on medical aid and never using it, her wilful and continued neglect to secure a prescription from the doctor ensuring her medication fell under chronic under the medical aid and the failure of the printing business and the accompanying loss incurred to the amount of R185 000.

[69] The evidence establishes that the plaintiff worked for approximately 12 years of the 24 years that the parties were married. According to the plaintiff, she contributed financially to the matrimonial home during this period. She utilised her monthly income on the acquisition of household necessities and payment of the utility bills, thus improving the parties common home saving the defendant expenses which the defendant would have otherwise have had to incur. The plaintiff admitted that she ran a printing business bought for her at the instance of the defendant which was subsequently closed. It is not disputed that the defendant shouldered the loss of R185 000 incurred by the business nor was evidence led establishing the reason for the loss. The plaintiff sought to ascribe such loss to the personnel who were stealing money from the business as well and in consequence of her remaining at home to attend to the defendant in his recovery after undergoing heart surgery. The defendant merely ascribed the loss to the plaintiff's management of the business.

[70] Subsequent to the business closing down, plaintiff remained at home and created a home environment for the defendant where the defendant could enjoy all the creature comforts and which enabled the defendant to commit and apply his energy and time to his work. The plaintiff during this period at home took care of the household duties without the assistance of a domestic worker and garden services which only came in once or twice a week. The plaintiff attended to members of the community belonging to the church in which defendant was a priest, accompanied the defendant to social functions and attended to his administrative duties in the church, indirectly assisting the defendant. The plaintiff further assisted with the breeding of the birds which by all accounts was a joint hobby. She made her own clothes which was a cheaper option than buying clothes and she nursed the defendant during his ill health.

[70] Notwithstanding the plaintiff being unemployed, the evidence establishes that the plaintiff in contributing to running the

household did not contribute to a lesser degree in the accrual of the defendant's estate. It becomes patent that the during the subsistence of the marriage between the parties, that the plaintiff contributed both directly at certain periods and indirectly by saving the defendant money or expenses which the defendant would have otherwise have had to incur and thereby contributed to the growth and or increase of the defendant's estate. During this period the value of the defendant's estate indeed escalated. The plaintiff's estate however consists of nil. The defendant eventually found himself constrained to concede that the plaintiff did have a right to share in the accrual, albeit a smaller percentage as opposed to what was claimed.

[71] I find myself aligned with the thinking of my learned brother, Lekale J, who wisely captured the essence of marriage as follows:

Marriage as a social institution, is not a business enterprise and parties thereto do not generally regard each other with calculated prudence as shrewd business individuals would each other when engaged in business transactions. They do not keep precise records of the favours they extend to each other, nor do they, as a matter of course and practice, reduce their daily undertakings to each other to writing. They are guided, in their dealings with each other, by trust and unquestioning acceptance that they would be together as husband and wife until death do them part. They generally remain gullible towards each other until their love for each other loses its flame and only then do they start to gaze around and tread with care and suspicion as against each other.[19]

[72] The evidence further reveals that both parties made sacrifices, concessions and contributions consistent with the institution and sanctity of marriage. It is patent that both parties made concerted efforts during the marriage and it is disingenuous of either party to raise their discontent at this stage. Their actions, correctly contextualised were consistent with institution of marriage, taking care of and being responsible for each other and extending such care beyond their immediate family. I remain unpersuaded that the plaintiff habitually burdened the accrued estate or did not contribute towards the accrual of the defendant's estate. Even the various attempts at reconciliation and the plaintiff's exhibitions of jealousy must be correctly contextualised and may well be ascribed to the fact that the parties had not reached a stage where they had accepted that their marriage had ended.

[73] Notwithstanding the defendant's attempt to convince the court that the plaintiff had breached her moral obligation to him, abandoned the marriage and vacated the matrimonial home and that she was presently residing with and being maintained by Mr D., there exists no tangible evidence before this court to sustain such allegations. The only evidence before court is that the defendant was informed that the plaintiff left with a white haired gentleman on the day she vacated the matrimonial home; that the plaintiff refused to disclose her residential address and Mr D. paid the deposit for the guesthouse where the plaintiff resided after she left the matrimonial home. To the contrary, the evidence of the defendant's witnesses buttresses the version of the plaintiff to the extent that Mr D. never stayed at the guesthouse during the period the plaintiff resided there and he returned to his partner every night up until their relationship ended in December 2017. I remain unpersuaded that the defendant has shown that the plaintiff on a balance of probabilities caused the breakdown of the marriage nor am I convinced on the evidence before me that the plaintiff alone is responsible for the breakdown of the marriage. It becomes manifest that the marriage progressively worsened and both parties, whether by omission or commission were responsible for its disintegration.

[74] Having said that, this court is content to grant a decree of divorce on the ground of the irretrievable breakdown of the marriage having satisfied itself that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is

no reasonable prospect of the restoration of a normal relationship between them. In the peculiar circumstances of this divorce action, I have come to the conclusion that if an order for forfeiture is made, the plaintiff, will in relation to the defendant be unduly prejudiced and thus matrimonially disadvantaged. It is my considered view that the defendant has not adduced sufficient evidence and made out a case to justify his prayer that the plaintiff should forfeit in whole or partially the patrimonial benefits of the marriage. I would therefore exercise my discretion to withhold making such an order having due regard and accorded sufficient weight to the duration of the marriage of approximately 24 years, the circumstances which gave rise to the breakdown thereof, the absence of any substantial misconduct on the part of either of the parties, the contributions both directly and indirectly made by the plaintiff and the fact that the plaintiff does not have a home, she does not earn an income presently nor does she possess a pension for her old age. Accordingly, half of the accrued estate inclusive of half of the defendant's pension interest is assigned to the plaintiff in satisfaction of her accrual claim in respect of the accrued estate and the pension interest of the defendant.

[75] While the defendant was indeed forthcoming with regard to his means and eventually conceded that the plaintiff was entitled to some share in the accrual, albeit half of what the plaintiff actually claimed, he was however resolute in his stance that she should be entitled to rehabilitative maintenance only. From the evidence, it is patent that the defendant has a stable and regular income. Notwithstanding his impending retirement in approximately two years, he will receive a monthly pension albeit a lesser amount as compared to the income he yields presently. He owns property and has two cars, he has a pension interest,

policies and annuities and there is no evidence that he lacks any financial resources to fund his lifestyle. It also manifest

that the plaintiff has no income and is financially dependent on what she receives in terms of the Rule 43 order. She presently has no means to maintain herself and cannot survive without the assistance of the defendant. This must of course be tempered by the potential of the plaintiff to earn an income and maintain herself.

[76] Sufficient evidence was placed at the disposal of the court regarding the factors embodied in section 7(2). The plaintiff is a long-standing wife who clearly assisted her husband in building up materially his separate estate and thus entitled to some form of maintenance. She remained at home for approximately half of her married life at home, managing the home and helping with church administration and building his position in the church. It is noteworthy that the plaintiff was content to rely on her advanced age and medical history as a reason to disqualify her from securing employment. It is also correct that this court must not be too quick to proclaim the need of the plaintiff to be financially independent of the defendant with due regard to her medical history. However, this was indeed the opportune time to present such medical evidence. There exists no convincing medical evidence before this court that effectively precludes the plaintiff from seeking, obtaining and maintaining employment. Furthermore, there was no tangible evidence of any attempts, concerted or

otherwise of the plaintiff attempting to secure employment with remuneration.

[76] That the plaintiff is not without skills is patent. In addition to being proficient with the computer and being in possession of strong administrative skills, the evidence clearly evinces that the plaintiff possesses numerous skills and talents. She operated a printing business, albeit its unsuccessful conclusion, she held permanent employment at a mine and an electric company for numerous years doing administrative work and bookkeeping, she has the ability to fashion and sew garments, she has intimate knowledge and experience in breeding

birds, she showcased dogs and did volunteer work as a caregiver to cancer patients, all of which serve to buttress the attitude of this court that the plaintiff has the potential to be gainfully employed.

[77] Absent any substantial misconduct on the part of the plaintiff, justice requires that it should be the defendant who receives a salary and in two years a pensionable income who must pay an amount of maintenance and medical aid, albeit of a rehabilitative nature rather than to allow the plaintiff to suffer the hardship of an inadequate income if in fact she does not find employment immediately. Having said that, I remain unpersuaded that the plaintiff is unable to secure employment and find myself reluctant to make an order for the payment of permanent maintenance inclusive of medical aid.

[78] I am inclined to disagree that the defendant's entire case for resisting a claim for permanent maintenance inclusive of medical aid was premised only on the fact that the plaintiff was living with and being maintained by Mr D.. It is indeed one of the grounds on which he counterclaims for forfeiture and resists the claim for maintenance. It is putative that the mere fact that a wife is co-habiting with another man is not a bar to a claim for maintenance. [20] However, this court finds it unnecessary to canvass or delve further with this aspect in the absence of any convincing evidence tendered before this court that the plaintiff in fact cohabited with or was being maintained by Mr D..

[79] There is indeed no evidence, tangible or otherwise before this court to show that Mr D. provided in the plaintiff's needs, put a roof over her head and in all factual respects treated her as his life partner. Notwithstanding the evidence surrounding the monthly pension of Mr D. or that Ms V. was supporting him financially towards the end of their relationship, this argument is neither here nor there as there is no evidence regarding his finances. It is also noteworthy that the version of the defendant vacillates from the allegation that the plaintiff is presently residing with and being maintained by Mr D. to ascribing the non- payment of guesthouse account as evidence that Mr D. is not in position to pay for the plaintiff and wants the defendant to look after them.

[80] It is further noteworthy that both parties are clearly not averse to moving forward with their lives and engaging in meaningful

relationships. The age of the parties and their medical dispositions indeed present no bar as is borne out by their individual testimonies and that of their witnesses. To that extent, the evidence of the nature of the relationships with the witnesses are relevant. It however has no bearing on what occurred during the subsistence of the marriage. It is also noteworthy that both parties vacillated in terms of their initial prayers and made concessions during the course of the trial. This was clearly done in the attempt to cut all ties and put an end to the marriage. In these circumstances, achieving a clean break finds resonance with this court.

- [81] At the commencement of the trial Advocate Van Aswegen that this court does not have the power to determine the accrual. That is indeed correct as regards the issue of quantum. This court is not empowered to adjudicate in the calculation of the accrual in the estate of the parties. This court is however empowered to adjudicated on and decide on the plaintiff's interest in the accrued estate in terms of the pleadings as at date of divorce and especially in light of the forfeiture counterclaim. It is putative that in the deciding on the counterclaim for forfeiture the court will invariably determine the division of the accrued estate.
- [82] I do not consider it necessary to entertain the arguments advanced by Advocate Van Aswegen that the pleadings fell short of a proper case for forfeiture in that there was no single allegation that there is a benefit and that the benefit is undue. Nor do I consider it to prudent to canvass the argument that the counterclaim for forfeiture should fail because the defendant ultimately conceded that the plaintiff should partially forfeit her right to share in the accrual. It bears mentioning that the plaintiff also vacillated in her prayers to the extent that she was content to abandon her claim for permanent maintenance in lieu of a lump sum settlement. What is clearly dispositive of the matter before me is that both parties have made concessions and deviated from their prayers with the intention of achieving a clean break.
- [83] Consistent with principle of a clean break that resonates through our judgments, it is incumbent upon this court to equip the plaintiff to live independently of the defendant and to focus on developing and empowering herself to secure and sustain her future. In the circumstances, I am of the view that the required result which is the ultimate self-sufficiency of the plaintiff will be achieved by rehabilitative maintenance. I am further of the view that a proper analysis of the rationale behind the awarding of rehabilitative maintenance will conclude that an arbitrary period of the payment of rehabilitative maintenance will not address the ultimate achievement of self-sufficiency. A two year period of rehabilitative maintenance is justified in the circumstances.
- [84] This approach is further buttressed by the fact that there are indeed assets of sufficient worth in the accrued estate to enable both parties to be self-sufficient in the event of division of those assets. Furthermore, the plaintiff has at her disposal numerous administrative skills and talents which will enable her to secure future employment. There is also a conspicuous absence of medical evidence that effectively precludes the plaintiff from securing and maintaining such employment. It is also evident from the expenditure of the defendant that he will be in a financial position to pay the plaintiff rehabilitative

maintenance. The plaintiff's alleged inability to properly manage her finances or Mr D's ability to influence her expenditure does not negate the plaintiff's right to her share of the accrual as per the marital regime nor can it influence the court in its determination for an award of maintenance.

[85] As regards the issue of costs, while the plaintiff has successfully staved of the claim for forfeiture and has proved successful in her claim for maintenance, albeit rehabilitative maintenance, it is not axiomatic that a court is bound to make an order for costs in favour of the successful party[21]. The breakdown of the marital relationship was never an issue. Having due regard to the individual means of the parties and their conduct in so far as it may be relevant to make such order, there exists no reason why both parties should not be responsible for their individual costs. This court thus considers it just that the costs of the proceedings be apportioned between the parties in equal measure with due regard to their individual future means and the reasons that led to the breakdown of the marriage[22].

[86] ORDER

In the result, the following is ordered:

9. That the plaintiff's claims insofar as they do not accord with what is contained in this order is dismissed.
10. That the defendant's counter claim insofar as it does not accord with what is contained in this order is dismissed.

Q, NULLIAH, AJ

On behalf of the Plaintiff: Adv. Van Aswegen

Instructed by: McIntyre and Van Der Post

BLOEMFONTEIN

On behalf of the defendant: Adv. P. Heymans

Instructed by:

EG Cooper Majiedt Inc. Attorneys

[1] Section 3 and 4 of the Matrimonial Property Act 88 of 1984.

[2] Section 4 of the Divorce Act 70 of 1979: Irretrievable breakdown of the marriage.

[3] Section 9 of the Divorce Act 70 of 1979.

[4] See *State v Guess* 1976 (4) SA 715 (A) and *Stellenbosch Farmer's Winery Group Ltd and Another v Martell and Cie SA and Others* 2003(1) SA 11 (SCA at para [5]).

- [5] The provisions of section 7(2) and (4) of the Divorce Act 70 of 1979, as amended by section 36 of the Matrimonial Property Act 88 of 1984 which deals with the division of assets and maintenance of the parties as well section 9 which deals with forfeiture of benefits has application.
- [6] Section 9 of the Divorce Act 70 of 1979: When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other , wither wholly or in part , if the court having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties , is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other will unduly be benefitted.
- [6] Section 9 of the Divorce Act 70 of 1979:
- When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other , wither wholly or in part , if the court having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties , is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other will unduly be benefitted.
- [7] Beaumont v Beaumont 1987 (1) SA 967 (A) at 987. See also Archer v Archer 1989 (2) SA 885 (E) at 895.
- [8] Section 3(1) and 4(1)(a) of the Matrimonial Property Act 88 of 1984. Section 3: Accrual system (1) At the dissolution of a marriage subject to the accrual system, by divorce or by death of one of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the estate of the other spouse or his estate for the amount equal to half of the difference between the accrual of the respective estates of the spouses. Section 4: Accrual of Estate (1)
- (a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of the marriage.
- [8] Section 3(1) and 4(1)(a) of the Matrimonial Property Act 88 of 1984.

Section 3: Accrual system

- (1) At the dissolution of a marriage subject to the accrual system, by divorce or by death of one of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the estate of the other spouse or his estate for the amount equal to half of the difference between the accrual of the respective estates of the spouses.

Section 4: Accrual of Estate

(1)

- (a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of the marriage.

[9] See section 7(7) (a) of the Divorce Amendment Act of 1989. Section 7(7): in the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall be deemed to be part of his assets. In *Wiese v Government Employees Pension Fund and others* [2012] ZACC 5; 2012

- (6) BCLR 599 (CC) paras5-9, the Constitutional Court in dealing with the history and object of the amendment, analysed the legislative enactments that had preceded it and pointed out the following: During 1989, section 7(7)(a) was added by the Divorce Amendment Act to deal with certain problems. Under the Divorce Act, non- member spouses were, in certain circumstances, entitled to payment of part of the pension interest due, or assigned to, the member of the Government Pension Fund when any pension benefit accrued to that member. A pension interest which has not yet accrued was not considered an asset in the spouse's estate. To cure this defect, the amendment, provided that a pension interest is deemed to be an asset in the estate for the purpose of determining patrimonial benefits.

[9] See section 7(7) (a) of the Divorce Amendment Act of 1989. Section 7(7): in the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall be deemed to be part of his assets. In *Wiese v Government Employees Pension Fund and others* [2012] ZACC 5; 2012

- (6) BCLR 599 (CC) paras5-9, the Constitutional Court in dealing with the history and object of the amendment, analysed the legislative enactments that had preceded it and pointed out the following:

During 1989, section 7(7)(a) was added by the Divorce Amendment Act to deal with certain problems. Under the Divorce Act, non- member spouses were, in certain circumstances, entitled to payment of part of the pension interest due, or assigned to, the member of the Government Pension Fund when any pension benefit accrued to that member. A pension interest which has not yet accrued was not considered an asset in the spouse's estate. To cure this defect, the amendment, provided that a pension interest is deemed to be an asset in the estate for the purpose of determining patrimonial benefits.

[10] Section 7(8)(a)(i) of the Divorce Act 70 of 1979.

[11] Section 37D(4) of the Pensions Fund Act 24 of 1956.

[12] Section 9(1) of the Divorce Act deals with Forfeiture of Benefits: When a decree of divorce is granted on the ground of the irretrievable 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

another either wholly or in part, if the court, having regard to the duration of the marriage , the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will, in relation to the other be unduly benefitted.

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[13] Section 7(2) of the Divorce Act 70 of 1979: In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other , the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct insofar as it may be relevant to the breakdown of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until death or remarriage of the party in whose favour the order is given, which ever event may first occur.

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[14] B v B 2009(3) SA 89 (W). [15] Conduct as a factor in the award of maintenance was discussed in detail in Swart v Swart 1980 (4) SA 364 (O).

[14] B v B 2009(3) SA 89 (W).

[15] Conduct as a factor in the award of maintenance was discussed in detail in Swart v Swart 1980 (4) SA 364 (O).

- [16] In Joubert v Joubert [2004] 1 All 426 SA(C) a 46 year old women who had not worked for 17 years was awarded rehabilitative maintenance.. See also P v P 1990(1) SA 998 (E) where Mullins J stated that '[a] woman's ability to earn an income does not per se, in my view, disentitle the court from ordering her former husband to pay her maintenance (at 1003-G).
- [17] K v K 2006 (6) SA 127 (C). [18] AV v CV 2011 (6) SA 189(KZP). See also VW v VW (SE) (unreported case number 136/2005), 4-4-2006).
- [17] K v K 2006 (6) SA 127 (C).
- [18] AV v CV 2011 (6) SA 189(KZP). See also VW v VW (SE) (unreported case number 136/2005), 4-4-2006).
- [19] PGJ v AEJ delivered on 19 May 2016, Free State Division, Case number 4949/2013.
- [20] In the matter of EH v SH 2012 (4) SA 164 (SCA) the respondent had for almost 8 years prior to the divorce lived as another man's wife: a man who provided for her needs, put a roof over her head and in all factual respects treated her as his partner in life. The situation was regarded as permanent and they intended it to remain so. In that case the respondent was being fully maintained by her new partner in life and had no need for maintenance to be supplemented in any way.
- [21] Section 1 of the Divorce Act 70 of 1979.
- [22] Section 10 of Divorce Act 70 of 1979: In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct insofar as it may be relevant, make such order as it considers just and the court may order that the costs of the proceedings be apportioned between the parties.

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