

SOUTH AFRICA / JUDGMENT

VT v NK (21530/2016) [2024] ZAWCHC 185 (28 May 2024)

[2024] ZAWCHC 185**COURT**

Western Cape High Court, Cape Town

BEFORE

N Bawa

CASE / FILE NUMBER

21530/2016

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Policy**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION, CAPE TOWN)****Before: Acting****Justice N Bawa****Date of hearing:**

18 March 2024

Judgment

delivered electronically: 28 May 2024

Case

No: 21530/2016

In the matter between:

V[....]

A[....]

T[....]

Plaintiff

and

N[....]

S[....]

K[...]

Respondent

JUDGMENT

BAWA AJ:

A.

Introduction

[1] This is an acrimonious divorce action. Plaintiff instituted divorce proceedings in November 2016 seeking a decree of divorce and extensive ancillary proprietary relief.

[2] The action was opposed. It was initially set down for trial on 15 March 2021. The Defendant denied both the existence of a valid marriage and subsequently also the paternity of the aforesaid minor child, YH, (“the minor child”). A paternity test confirmed that the Defendant was indeed the father of the minor child.

[3] The issue of the existence of the marriage was resolved in *Tshongweni v Kwankwa* (21530/2016)

[2021] ZAWCHC 126 (9 July 2021) (“the first judgment”). The Court held that a valid customary marriage was concluded between the Plaintiff and the Defendant in July 2012 and that a marriage in community of

property still subsists. Leave to appeal was refused. Leave sought from both the Supreme Court of Appeal and Constitutional Court was similarly unsuccessful.

[4] The parties filed a statement of agreed facts, wherein, inter alia, the following was agreed:

4.1. The parties were married during July 2012 in Mnqaba Village, Eastern Cape – in terms of customary law, such marriage still subsists.

4.2. There is one minor child born, age 16.

4.3. The Defendant is currently liable to pay maintenance of R8 000 granted pursuant to an order in the Rule 43 pendente lite. The parties’ marriage has broken down irretrievably and there is no prospect of reconciliation as they have been separated for over 9 years. An order of divorce may be granted by agreement.

4.4. The main issue of dispute is the division of the joint estate in accordance with the marital regime and maintenance.

4.4.1. The Defendant seeks forfeiture and denies he is liable for any maintenance.

4.4.2. The Defendant bears the burden to begin herein.

[5] The dispute was identified in the statement of agreed facts as follows:

“The Plaintiff proffered that on pleadings there are no triable issues and the only order that may be granted by the Court is division of joint estate.

The Defendant persists with court hearing the matter that the Plaintiff forfeits the marital benefits arising out of the marriage.”

[6] The Defendant appeared to accept that he had the burden to begin on what appears to be all the aforestated issues. It is so that the onus is on the party seeking forfeiture to demonstrate that in the event an order of forfeiture is not granted, the party against whom the order is sought will, in relation to the other, be unduly benefited. Based on the relief sought, both parties sought forfeiture to some degree. It is trite that the person who claims must prove.[1]

[7] This matter has a protracted and somewhat bitter history, and it serves the interest of both parties and the affected minor child that it be finally resolved. In my view there was sufficient evidence obtained during the hearing to determine all the unresolved disputed. Both the Plaintiff and the Defendant gave oral evidence.

[8] The issues arising for decision are:

8.1. The decree of divorce;

8.2. Parental plan;

8.3. Spousal maintenance;

8.4. Child maintenance;

8.5. Forfeiture in favour of the Defendant against Plaintiff in relation to the Defendant’s pension;

8.6. Forfeiture in favour of the Plaintiff against Defendant in relation to the property she currently resides in, Erf 3[...], Mandalay (the Montclair property”); and

8.7. Costs.

[9] For the sake of completeness, I record that in relation to moveable property and motor vehicles the parties agreed that each retained what is in their respective possession as his or her sole and exclusive property. The evidence was that the Plaintiff no longer had her BMW320d but is currently paying a monthly instalment in the amount of R6 710 on a new vehicle, together with other expenses attendant thereto like insurance and a car tracker. Counsel for the Defendant, Adv Busakwe, submitted from the bar that the Defendant has sold his vehicles. In light of the parties’ agreement in relation to motor vehicles, the allegation that the Defendant claims to no longer have a motor vehicle, and yet appears to continue to pay for a car tracker, need not concern this Court any further.

B. Pleadings before Court

- [10] Included in the pleadings bundle before Court stamped 8 March 2024, is an amended Particulars of Claim dated 25 May 2022 and an amended Plea dated 8 November 2023. In the court file is a Notice of Amendment dated 15 March 2024 in which the Plaintiff seeks 50% of the Defendant's pension interest in the pension fund administered by Alexander Forbes. Despite the notice, this amendment was not effected to her Particulars of Claim, but for reasons set out below I need deal no further with it.
- [11] At the tail end of his argument, Plaintiff's counsel, Mr Dzakwa, without foreshadowing it anywhere else, raised opposition to the forfeiture sought by the Defendant. The objection was that whilst the Defendant had filed a Notice of Intention to amend his plea seeking forfeiture of patrimonial benefits under section 9 of the Divorce Act 70 of 1979 ("the Divorce Act"), not all the amendments contained in the Notice of Amendment were made to his Plea and as such not pleaded, though the prayer for forfeiture was included in the amended Plea.[2]
- [12] In essence, what transpired is that whilst the Defendant filed a Notice to amend his plea dated 6 November 2023, the amendments to paragraph 6 and 10 of the Plea were never effected. Only the amendment to paragraph 11 as foreshadowed in the Notice was made. This related, inter alia, to the Defendant's date of separation in relation to which oral evidence was led. Further it contained reasons on which the Defendant sought forfeiture of the benefits in his favour in relation to his pension and leave gratuity and referred to the short duration of the marriage; the Plaintiff's lack of financial contribution to the joint estate; the circumstances of the breakdown of the marriage; that the Plaintiff resides at Montclair property solely funded by the Defendant and that the Plaintiff has no moral entitlement thereto.
- [13] I requested that both counsel submit a written note dealing with the implications hereof. This was to afford the Defendant's counsel an opportunity to deal with this belated submission. Despite raising this, the Plaintiff's counsel in his written submissions simply set out the trite law of amendments submitting that the Court should exercise a discretion and decide whether to "allow or reject the defective (does not follow notice of amendment) amended plea.". This submission takes the matter no further as it does not address the point raised in oral argument i.e. that forfeiture was not pleaded in the main in the Plea albeit that it is sought in the relief sought (purportedly limited to the forfeiture of his pension), and as such the Defendant is not entitled to seek forfeiture in relation to the pension and properties in the joint estate, as no grounds were pleaded.
- [14] In the note filed by the Defendant's counsel, Ms Busakwe, she too does not deal pertinently with the issue raised, instead agreeing with Mr Dzakwa's note. However, she draws the Court's attention to the following paragraph:

"It is so, however, that a court must always be cautious about deciding probabilities in the face of conflicts of fact in affidavits."

Affidavits are settled by legal advisors with varying degrees of experience, skill and diligence, and a litigant should not pay the price for an advisors shortcomings.”[3]

[15] The note further refers to the law on resolving disputes of facts in civil matters which is also not relevant to the question on hand. Apparent from this note is a submission that the amendment was not made to the Defendant’s plea because of an “omission caused by its (sic) legal advisors”

[16] Despite this being raised and despite such amendments being permissible up to any point before judgment, the Defendant’s legal representatives still failed to make the amendment. This could readily have been done overnight. It remains inexplicable that no attempt was made to file such amended Plea.

[17] However, given the Defendant’s oral evidence in relation to the grounds on which he sought forfeiture and giving evidence on why he opposed the forfeiture sought by the Plaintiff, as set out below I have decided that it would be just and equitable to decide the matter on the basis of the pleadings as contained in the pleadings bundle before the Court.

C. The Divorce decree

[18] In the statement of agreed facts and confirmed in the oral evidence of the parties, the Plaintiff and Defendant are agreed that the marriage has irretrievably broken down and that there is no reasonable prospect of reconciliation. They have already lived separately for at least nine years. There is no impediment to the granting of a decree of divorce.

D. The Parental plan

[19] The minor child resides with the Plaintiff. It emerged from the evidence of the Plaintiff that the relationship between the minor child and the Defendant had broken down primarily due to the Defendant having disputed his paternity. Despite having done so, and having been proven wrong, it was not the Defendant’s position that he did not want to have a parental relationship with the minor child or that the Plaintiff was hindering his parental access.

[20] No evidence was led before me in relation to the parental plan and what precisely was implementable and no effort had been made to update the draft attached to the Plaintiff’s particulars of claim. I was informed that given the Defendant’s work schedule, the draft parental plan attached to the particulars of claim had not been agreed to as he could not comply. Moreover, that it did not provide for the minor child to overnight with the Defendant. At the time it was prepared the minor child was nine years old. She is now approximately 17 years old and likely able to decide whether she would wish to spend time with the Defendant and/or to overnight with him. I directed that counsel assist their respective clients in revising the parental plan. I was emailed a copy of an unsigned parental plan and informed by the Plaintiff’s counsel that it had been agreed to. Subsequently, a signed parental plan was provided. As the signed parental plan did not have the stamp of the Office of the Family Advocate affixed thereto, I caused the signed parental plan to be provided to the Office of the Family Advocate. A stamped copy was returned by the Office of

the Family Advocate, indicating that there were no concerns in respect thereof. A copy of the signed parental plan was put in the court file, together with the correspondence from the Office of the Family Advocate. The Court is so satisfied that the parental plan serves the best interests of the minor child and should be implemented.

E. Spousal maintenance

- [21] Under the Rule 43 order, which I was informed from the Bar, was obtained in 2017 (per order of Saldanha J) the Defendant was ordered to pay an amount of R8 000 per month for child and spousal maintenance. Payments hereof were not always made timeously and in 2019 the Plaintiff obtained a writ pursuant to which the Defendant paid outstanding spousal and child maintenance in the amount of R193 000. There was no evidence before the Court that the R8 000 had not been paid for 2020 – 2023. The evidence was that it had not been paid for one month thereof but that no payment had been made in 2024 (the last payment having been made in December 2023).
- [22] The application of section 7(2) of the Divorce Act requires a balanced assessment of maintenance needs and ability to pay. The starting point is the existing and prospective means of the Plaintiff and her earning capacity, because, if she has the ability to support herself, she is not entitled to maintenance from the Defendant.[4]
- [23] The Defendant's evidence was that he was not in a position to pay R8 000 a month and that he had five other children that he also maintained, including paying for their tertiary education. He testified that he paid R4 000 in relation to each of the other children. This was not placed disputed by the Plaintiff. Mr Dzakwa, acting on behalf of the Plaintiff, challenged the Defendant's version in general terms based on the contents of his affidavit deposed to in 2017 in the Rule 43 proceedings. This affidavit was not provided, nor were specific allegations made with reference to any particular paragraphs therein. Instead, he sought to challenge the Defendant's version by pointing to an absence of a Rule 43(6) application, alleging that the Defendant had not sought to amend the order made in the Rule 43 proceedings. The inference sought to be drawn appeared to be that had he not been in a position to pay he would have sought to amend the order. The Defendant's evidence was that he had several times instructed his legal representatives to do so. This was not taken any further.
- [24] Given the evidence put before the Court of the Defendant's current financial commitments and debts, as well as the Plaintiff's current income, there appears to be no basis on which the Defendant should continue to pay spousal support. This is not a case where the Plaintiff is indigent and unable to support herself, and the Defendant holds all the purse strings.
- [25] Moreover, on the Plaintiff's own evidence, save for the payment of her petrol, it was not the case that the Defendant has assumed the role of supporting the Plaintiff during the short period when they lived together as husband and wife. The Plaintiff at all material times remained employed. I was not told what the Plaintiff had been earning in 2017, when the Court ordered spousal maintenance or on which basis it had been granted. However, the

evidence placed before this Court is that the Plaintiff currently earns a gross salary of R37 707.85 (net R33 782.61). Given the evidence presented to the Court, including the parties' existing and prospective means and their financial needs and obligations and respective

earning capacities, coupled with the duration of which they actually resided together in a joint household being far less than their years of separation, I find no justification for granting an order now that the Defendant is to pay spousal maintenance to the Plaintiff until her death or until she remarries.

[26] In *EH v SH* 2012

(4) SA164 (SCA) at para [13], the court held that:

'the person claiming maintenance must establish a need to be supported. If no such need is established, it would not be "just" as required by this section for a maintenance order to be issued'.

[27] The Plaintiff has failed to establish such need and the relief for spousal support as sought in prayer (d) of the Plaintiff's particulars of claim is refused.

F. Child maintenance

[28] The Defendant also has five other children – four of whom are older than the Plaintiff's minor child, and one younger. The Defendant's evidence was that three of these other children are pursuing tertiary education. One remains at High School and that he pays for their education. No evidence was led in relation to the remaining child's education.

[29] As far as child support is concerned, it was not the Defendant's evidence that he did not have maintenance obligations to the minor child but that he was unable to continuing paying R8 000 (being the amount currently being paid in relation to both child and spousal maintenance) to the Plaintiff. Though this amount had not increased since 2017, the Defendant sought to have the amount reduced. He attributed the fact that he was in arrears to his juggling among various debt obligations, testifying that he was simply unable to pay the Plaintiff an amount of R8 000.

[30] The Defendant earns a net of R58 970. He testified that he was paying R4 000 in relation to the maintenance of each of his other children, including their school fees and tertiary education. In relation to the payment of child maintenance the Plaintiff, who it appeared through some agreement between the respective counsel, testified after the Defendant, did not put any evidence before the Court that refuted the Defendant's evidence to his current financial situation, nor his evidence as to what he paid in relation to the maintenance, high school and tertiary education of his other children. The Defendant's evidence was that he would pay the same in relation to the Plaintiff's minor child, though in 2024 he had paid nothing, leaving the Plaintiff to bear sole responsibility for the minor child's needs.

- [31] As the Plaintiff and the minor child resides at the Montclair property to which I revert below, and which forms part of the joint estate, no accommodation costs have been incurred to accommodate the minor child. Were this property to be sold or forfeited for the Defendant, it would not only leave the minor child, and also the Plaintiff without a home, but it would then also impact on the amount of child maintenance to be paid, given that the Defendant would need to contribute to the minor child's reasonable accommodation costs. His evidence when asked by the Court, was that the other children resided with him.
- [32] In light of the evidence, it appeared that the Defendant would not likely be able to do so, given his inability to pay the R8 000 maintenance that had been ordered.
- [33] I raised with the Defendant's legal team the issue of increased maintenance were accommodation costs to be incurred in respect of the minor child. This resulted in a tender from the Bar made on behalf of the Defendant by his counsel, Ms Busakwe, that were the Court to order forfeiture, the Plaintiff and minor child, could continue to reside at the property, until the latter reached the age of majority, or became self-supporting. I revert to the issue of the division of the joint estate and the forfeiture sought below. Suffice it to say that in considering the amount of maintenance that the Defendant is to pay, I have taken into account that no accommodation cost would have to be incurred on behalf of the minor child were she to reside at the Montclair property.
- [34] The Plaintiff gave evidence in relation to the minor child's expenses, including what I regard to be a dubious expense of R2 000 for pocket money for a 16-year old, especially given that a further R250 is allocated for outings. In addition, thereto the minor child is attributed a budget of R1 000 a month for clothing. The aforesaid amounts do not appear to have been deposited into the minor child's bank account on a monthly basis. When pressed to elaborate on what precisely the R2 000 pocket money was being used for, the Plaintiff claimed not to really know, beyond emergencies to which one reference to a school outing was made. Whilst providing emergency funds to children is not unusual, the paucity of evidence before this Court in relation to what such is spent on, and the Plaintiff's inability to explain this, lends itself to the

conclusion

that this expense is not credible at all. Further, as the minor child is in matric there is scant likelihood of further school uniforms being required. I regard the minor's expenses as detailed by the Plaintiff, in light of the explanations that were provided, as to how these were calculated to be inflated. The Plaintiff seeks an order that the Defendant pay an amount of R8 000 for child support in prayer (c)(i) of her particulars of claim. Taking into account all the evidence, I am ordering that amount of R4 000 be paid by the Defendant to the Plaintiff for child maintenance. This amount is to increase on an annual basis by inflation until the minor child is a major, or if she is a major and a full-time student, until such time as she is no longer a full-time student. The Defendant remains obliged to pay to the Plaintiff the outstanding arrear maintenance to the date of this order and should enter into an arrangement with the Plaintiff to ensure that this debt is

paid.

[35] As to the claims in prayers (c)(ii) and (iii) of the Plaintiff's particulars of claim, no relevant evidence was led as to actual expenses. The minor child is retained on the Plaintiff's medical aid. The Plaintiff pays R2 332 (and gets a tax credit of R728). This amounts to approximately R1 600. I have taken this into consideration in determining the amount that the Defendant is to contribute to the minor's maintenance. To the extent necessary, and with reference to what is sought in prayers (c)(ii) and (iii) from the Defendant, in addition to the R4 000, the Defendant shall pay half of any medical expenses not covered by the medical aid as specified and half of any additional educational expenses.

G. Forfeiture of patrimonial benefits

[36] It is common cause that the parties are married in community of property and that such marriage still subsists albeit that they have separated over 9 years ago. As indicated below the exact amount of years are in dispute.

[37] Turning to what is in contention:

37.1. Being the division of the two properties Erf 3[...] in Montclair where the Plaintiff and the minor child reside and Erf 2[...], Sandown, where the Defendant resides. The Plaintiff seeks an order that she been entitled to keep the Montclair property as her sole and exclusive property. In other words, she seeks an order of forfeiture of the Defendant's rights in the property and that the Defendant keeps the Sandown property together with the bond liability.

37.2. The Defendant's past and present pension. Though the Defendant seeks forfeiture this is sought solely in relation to his pension and leave gratuity, given the duration of the marriage and give that the Plaintiff had not contributed to the increase in the value of the joint estate, even though she had been gainfully employed. Whilst no mention is made of forfeiture in relation to the properties on the Defendant's pleadings or in his heads of argument, in his oral evidence the Defendant sought to retain both properties, but this was not pleaded. The Defendant's Plea in the further and alternative relief to his claim for forfeiture of his pension sought division of the joint estate at the date of separation (which he pegged as at December 2012) and not the date of divorce. As such it would exclude the Sandown property. Alternatively, that the estates be divided equally with reference to both assets and liabilities, and in doing so the bond liability of the Sandown property would then be included in the liabilities and division of the estate as would any other liabilities the Defendant had incurred subsequent to the parties' separation.

[38] I will consider the issue of forfeiture with reference to the pleadings and evidence before the Court. Both parties seek forfeiture of the other's benefits to some extent.

[39] Section 9(1) of the Divorce Act empowers that the Court that grants a divorce order on the grounds of irretrievable breakdown of the marriage may make an order that the

patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, taking into account

the following factors:

- (1) the duration of the marriage;
- (2) circumstances which led to the breakdown of the marriage; and
- (3) any substantial misconduct on the part of either spouse.

[40] In *Wijker v Wijker* 1993 (4) SA 720 (A) the then Appellate Division held that the abovementioned factors need not all be present and need not be viewed cumulatively. They do not all need to be alleged. Further, although misconduct is no longer a requirement for obtaining a divorce order the introduction of no-fault divorce did not do away with fault as a factor in respect of forfeiture orders. This is because section 9(1) of the Divorce Act lists substantial misconduct as a separate factor.

[41] Subsequently the decision has been confirmed in the SCA as it remarked that the-catch-all phrase, permitting the court, in addition to the factors listed, to have regard to 'any other factor' was conspicuously absent from section 9 of the Divorce Act. Further that section 9(1) of the Divorce Act should be construed within the context of the evidence tendered by the parties in court.[5]

[42] The test remains, however that as stated by the Court in *Engelbrecht*[6] that:

"the court has the discretion when granting a divorce on the grounds of irretrievably breakdown of the marriage or civil union to order that the patrimonial benefits of the marriage or civil union be forfeited by one party in favour of the other. The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefitted. The court has a wide discretion, and it may order forfeiture in respect of the whole or part only of the benefits".

[43] This discretion must be judicially exercised. The first enquiry is a factual one. The Court must determine whether or not the party against whom the order is sought will in fact be benefitted if the order is not made. Once it has been established that the party will indeed benefit, the Court must determine whether the benefit is undue. Although this involves a value judgement, the value judgment is made after the Court has considered the three factors listed in section 9(1).

[44] I now turn to the three factors to be so considered.

Duration of marriage

[45] The Defendant submitted that the duration of the marriage with the Plaintiff does not warrant the normal consequence of a dissolution of marriage in community of property in equal shared, submitting that the marriage endured for only five months before they separated.

[46] But this date is in dispute.

[47] The first judgment at para [18] stated that the Plaintiff and Defendant lived together from 2010 at the Montclair property,

owned by the Defendant. The marriage occurred in July 2012. The parties lived together until the Defendant moved. In the first judgment it is also indicated that the Defendant had stated under oath in his affidavit in the Rule 43 proceedings as follows:

“7. In January 2015 when it became clear that the differences we experienced in our relationship would not be reconcilable I moved out of my house, which until then, I shared with the applicant and my daughter ...”

[48] Bozalek J in his judgment further held in relation hereto:

“[104] This version is wholly at odds with the defendant’s viva voce evidence that the parties were only together till the end of 2012. Confronted with this contradictory material during his evidence the defendant’s answer was that he had moved out of the house at the end of 2012 but had only formally (whatever that means) moved out in 2015.”

[49] According to the Plaintiff’s oral evidence this move occurred in 2015. Before this Court the Defendant again stated that he had been separated from the Plaintiff in 2012. However, from the Bar, counsel acting for the Defendant indicated that the Defendant had given instructions that he had sought to occupy a residence made available for members of Parliament in late 2014 when he left the Plaintiff. Counsel for the Defendant later sought to retract this statement – clearly when it was apparent that it was at odds with the version that the Defendant had moved out already in 2012.

[50] From the statement of agreed facts which is dated October 2023, it was “over 9 years”. On the common cause version, the Plaintiff and the Defendant have not lived together from at least 2014. At best they had been together for approximately four

years – if counting the period prior to the marriage and approximately two years from the date of marriage.

[51] In *Matyila v Matyila*[7] the court held that the meaning of the words 'duration of marriage' as appearing in section 9(1) means no more nor less than the period during which the marriage has, from the legal point of view, subsisted, namely from the date of marriage to the date of divorce or, at the very least, to the date of institution of divorce proceedings. [8]

[52] On that approach the parties were married in July 2012 and divorce proceedings were instituted on 2 November 2016, being the date that the necessary allegations in support of a forfeiture order should be made. This constitutes a period of 4 years and 4 months.

[53] The period they have not been living together as husband and wife exceed the period they lived together as husband and wife, the later, in my view being of a short duration. It is also in that period after they had parted that the movements in relation to the Defendant’s pension and acquisition of the Sandown property occurred.

Irretrievable breakdown of the marriage/ substantial misconduct on the part of either spouse

- [54] These two issues appear to be linked. The Defendant testified that he left the marital home because the Plaintiff was not accepting of his other children.
- [55] The Plaintiff testified to misconduct on the part of the Defendant. The Plaintiff gave evidence of the Defendant being unfaithful, disrespecting her, failing to disclose precisely how many children he had prior to their union and being unsupportive during a miscarriage she had in 2015.
- [56] All the evidence relating to the alleged misconduct of the Defendant were vague and not foreshadowed in the particulars of claim. The Plaintiff provided no corroborating evidence but of more concern is that the allegations put before the Court were not put to the Defendant during cross-examination. As already indicated, the parties had agreed that the Defendant would testify first, because of a burden of proof arising from the forfeiture he sought.
- [57] As such the Defendant was afforded no opportunity to deal with these allegations which was hence never tested and can therefore, not be accepted in evidence, as this would be prejudicial to the Defendant who was not made aware of the allegations in time to plead thereto or give oral evidence.
- [58] Yet, counsel for the Defendant did not object to this evidence. With due regard to the totality of admissible evidence, the misconduct was not substantial to warrant an order of forfeiture against him.
- [59] Further, although the irretrievable breakdown of the marriage is common cause, given the paucity of evidence, the Court could not
- be expected to make a finding as to who the guilty party was that caused the irretrievable breakdown of the marriage.
- [60] I remain mindful that the extraordinary remedy of forfeiture is precisely in order to do justice between the parties.

H. Forfeiture of properties

- [61] The Montclair property was acquired by the Defendant prior to his marriage to the Plaintiff. It was not disputed that the Defendant was solely responsible for making the bond payments, even during the time they resided together, or even thereafter when the Plaintiff resided there alone. The Defendant settled the outstanding bond entirely without any contribution from the Plaintiff and did so from pension funds that he withdrew in 2019. It was only after he vacated the property that the Plaintiff paid the rates and utilities and attended to maintenance of the property, which based on the evidence appear to be limited to having painted the Montclair property once.

- [62] Given the short duration of the marriage and with the circumstances of the divorce, it does not support a forfeiture claim of the Plaintiff in relation to the Montclair property. The Plaintiff would unduly benefit were the Montclair property be forfeited to her.
- [63] It also begs the question as to whether the Defendant will unduly benefit if forfeiture of the Montclair property to the Plaintiff does not occur. The Plaintiff's own evidence was that her contribution with reference to the Montclair property was limited to repairs and maintenance after they parted and she remained in occupation. I am inclined to conclude that were the relief sought in prayer (e)(i) be granted that the Plaintiff will be unduly benefit and if it were not granted the Defendant will not be unduly benefitted.
- [64] I am mindful, however, that the Plaintiff and minor child resides at the Montclair property and that the Defendant is unable financially to contribute to the minor child's accommodation needs. In the circumstances, the just and equitable order to be made, given as indicated above, that a lower amount in child maintenance is to be paid by the Defendant, that any sale of the Montclair property is to be delayed until the minor child reaches the age of majority, or is no longer a full-time student, whichever occurs last, if it is so that she continues to reside at the Montclair property. Should she move out, prior thereto, then the Montclair property can be sold and the Plaintiff and Defendant share equally in the proceeds. Whilst the Plaintiff continues to reside in the Montclair property she remains responsible for all expenses arising in relation to the property, including the rates and all utilities. The Plaintiff and Defendant may also seek to reach an agreement that the property be sold prior thereto or
- should it become necessary at the appropriate time approach this Court for a variation of this order.
- [65] The Defendant did not seek on his pleadings relief for the forfeiture of the Montclair property and as such it remains in the joint estate. The Plaintiff's relief seeking to retain the Montclair property as her sole property is declined.
- [66] As for the Sandown property the evidence was that the Defendant acquired it in 2019 after divorce proceedings had already commenced. He paid the costs and deposit from his 2019 pension. Whilst it is valued at about R2.6 million, the Defendant's evidence was that there is a bond over this property in the amount of R2.1 million. Currently, the Defendant makes a bond payment in the amount of R15 000. I am inclined to grant the relief sought in prayer (e) (ii) of the Plaintiff's amended particulars of claim granting the Defendant sole rights to the Sandown property – and to avoid any misunderstanding it is to be excluded from the joint estate and the Plaintiff would have no obligations in relation to this property and any bond registered over such property or any other liabilities arising in relation thereto.

I Forfeiture of pension

- [67] The entitlement to 50% of a spouse's pension benefit is governed by section 7(7) of the Divorce Act. It does not need to be pleaded. Section 7(7) provides:

“7(a) In the determination of the patrimonial benefits to which parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.”

- [68] The Defendant drew his pension of approximately R1.2 million at the end of the parliamentary term in 2019 and used the bulk thereof to settle the Montclair property bond, paying arrear maintenance to the Plaintiff, paying debts and paying the cost of a deposit on the Sandown property. The Defendant's current pension arises from his current parliamentary term (2019 – 2024) which commenced after his relationship with the Plaintiff had ended, they were separated and the summons for divorce had already been issued.
- [69] The Plaintiff claims division of the joint estate both in relation to past and present pensions by virtue of the fact that the marriage still subsists. Though the Plaintiff tenders that the Defendant would similarly be entitled to 50% of the Plaintiff's pension with Old Mutual, it transpires that the Plaintiff in fact drew her pension in the amount of R107 444 from the Pep Pension fund in 2016 when she left the employ of Pep, and in 2019 and 2022 respectively again drew the amounts of R72 024.20 and R71 670.50 from her pension fund and used it for her own personal gain. To make an order in relation the Defendant's pension that he had already drawn and spent and from which to an extent the Plaintiff had benefitted, serves no purpose. I am not able to make any finding that the Defendant would unduly have benefitted from the retention of his pension therefrom given the duration of the relationship and the evidence on how it was spent. I am also mindful that, though a lesser amount, the Plaintiff had also spent of her pension, as indicated above.
- [70] In light hereof I am granting the relief sought by the Defendant on his pleadings and motivated in oral evidence that the Plaintiff forfeits any share of the Defendant's pension fund and leave gratuity, if any. To do otherwise would result in an undue benefit in favour of the Plaintiff. In a similar vein, the Defendant would have no rights in relation to the Plaintiff's pension fund. It is ordered that the Defendant forfeits any share of the Plaintiff's pension fund, despite her tender. In other words, each party retains their respective pensions, in their own interest.

J. Costs

- [71] I now turn to deal with the issue of costs. Costs fall within the discretion of the Court. Whilst generally, costs follow the results i.e. they are awarded in favour of the successful litigant, section 10 of the Divorce Act provides that in a divorce action, a court is not bound to make an order for costs in favour of a successful party, but having regard to the means of the parties and their conduct in so far as it may be relevant make such order as it considers just, which may even be that costs be apportioned between the parties. In the instant case each party is to pay his/her own costs, save that the

wasted costs arising from the postponement lie with the Defendant.

H. The order

[72] The following order is made:

1. A decree of divorce dissolving the bonds of marriage between the Plaintiff and the Defendant is granted.
2. The Plaintiff and the Defendant are declared to be co-holders of full parental responsibilities and rights in respect of the minor child, YH , as provided for in ss 18(2) – (5) of the Children's Act 38 of 2005, subject to the provisions of the signed Parenting Plan provided to the Court and approved by the Office of the Family Advocate.
3. The Defendant is ordered to contribute towards the maintenance of the minor child by:
 - 3.1. Paying to the Plaintiff, free of deduction or set off, the sum of R4 000 (four thousand rand) per month following the grant of this order commencing from 1 June 2024, and thereafter on or before the 16th day of each and every succeeding month until the minor child attains the age of majority, or remains a full-time student, whichever occurs last;
 - 3.2. The amount to be paid in terms of para 3.1 above shall be deposited by the Defendant into the Plaintiff's nominated bank account and shall be increased annually on the anniversary date of the date of the grant of this order in line with the annual increase in the consumer price index (CPI) during the preceding year as published in the Government Gazette from time to time.
4. The Plaintiff shall retain the minor child, as a dependant on her current medical aid scheme, alternatively a medical aid with analogous benefits, until she attains the age of majority or ceases to be a full-time student, whichever occurs later, and shall be liable for payment of all monthly premiums as well as escalations from time to time.
5. Subject to para 4 above, and should the medical expenses incurred in respect of the minor child exceed the limits of the medical aid cover provided for her, the Plaintiff and the Defendant shall share equally in bearing the costs in respect thereof including but not limited to medical, dental, surgical, hospital, ophthalmic, orthodontic and other medical treatment reasonably required by the minor child, including but not limited to, sums payable to a physiotherapist, psychiatrist, physician, psychologist, as well as all prescribed pharmaceutical expenses, including chronic medication, incurred on prescription, and the reasonable costs of spectacles and/or contact lenses, provided that, save in the case of emergencies, the Plaintiff must first obtain the Defendant's prior approval therefor, which approval shall not be withheld.
6. In the event that the Plaintiff incurs any expenditure by paying for any medical expenses for the minor child upfront in the case of an emergency or when it cannot reasonably be expected of her first to obtain the Defendant's prior approval, and such expenses are not covered by the medical-aid cover provided, she shall forthwith provide a copy of the relevant invoice/s and proof of payment to the Defendant, who shall reimburse her within five calendar days of presentation of such invoice and proof of payment thereof, alternatively within a reasonable period as agreed between the Plaintiff and the Defendant.

7. The Plaintiff shall be liable for the school fees for the minor for 2024, as well as the cost of her reasonable extramural activities and the equipment and attire required by her therefor, together with any further prescribed school uniforms, prescribed books and stationery, local tours, school excursions and local camps, which liability can be offset from the maintenance to be paid as per this order. Any arrear maintenance ordered under Rule 43 and which is still unpaid, remains due and payable by the Defendant to the Plaintiff.
8. The Plaintiff and Defendant shall be jointly and equally responsible for paying for the minor child's tertiary-education fees, if any, as well as board and lodging at such tertiary-education institution, if applicable, in the event that the minor child demonstrates the aptitude and desire to pursue any recognised tertiary education qualification, and for so long as the minor child while undergoing such tertiary education is promoted to the next academic year.
9. In relation to the immovable property described as Erf 3[...], Ikwezi Park, held under title deed T6[...], also known as 25 C[...] Road, Ikwezi Park, Montclair (referred to in the judgment as the Montclair property):
 - 9.1. The Montclair property remains part of the joint estate to be equally shared by the Plaintiff and the Defendant.
 - 9.2. The Plaintiff and minor child may continue to reside at the Montclair property, until the latter reached the age of majority, or until the end of her full-time studies, whichever is later.
 - 9.3. Any division of the joint estate insofar as it relates to the Montclair property is delayed until the minor child has reached the age of majority or has completed her full-time studies, if any, whichever is the later, on condition she continues to reside at the Montclair property.
 - 9.4. In the event the minor child vacates the Montclair property, division thereof to the Plaintiff and the Defendant in equal shares may occur.
 - 9.5. For the duration of the Plaintiff's aforestated occupation of the Montclair property, she remains responsible for all expenses arising including all municipal accounts (rates and utilities) and necessary and reasonable maintenance of the property.
 - 9.6. Provided that the minor child is suitably accommodated, prior to her reaching the age of majority or on completion of her full-time studies, the Plaintiff and the Defendant may agree to the sale of or an earlier division of their respective shares of Montclair property.
 - 9.7. Nothing aforestated precludes the sale of the Plaintiff or Defendant's share of the property, to the other, as long as the minor child is suitably accommodated.

10. In relation to the immovable property described as Erf 2[...], Sandown held under title T33]....], the Defendant is to retain it as his sole and exclusive property and shall bear sole and full responsibility in relation to such property, including and not limited to mortgage payments and municipal accounts and any other debts arising, with the Plaintiff having no responsibility in relation to any debts that have or may arise in relation to this property.
11. The Plaintiff's request for spousal maintenance is refused.
12. The Plaintiff and Defendant shall each retain their respective pensions and neither shall have a claim on the pension of the other.
13. It is recorded that in accordance with the agreement of the parties, each retains movable property in their respective possession, including motor vehicles, if any, and irrevocable waive and abandon all claims against each other in this regard.
14. The parties shall not be precluded from approaching the relevant Maintenance Court for a variation of the maintenance set out in this order by virtue of any subsequent change of circumstances after the making of this order.
15. Save that the Defendant is ordered to pay the wasted costs incurred by the Plaintiff arising out of the postponement sought for purposes of effecting an amendment to the Defendant's Plea, and any wasted costs arising from such amendment, each party shall pay their own costs.

N BAWA AJ

Acting Judge of the High Court

Cape Town

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to SAFLii. The date of the judgment is deemed to be 28 MAY 2024.

APPEARANCES:

Counsel for the applicant: Adv S Dzakwa

Counsel for the respondent: Adv A Busakwe

Date of argument: 18 March 2024

Date of Judgment electronically handed down: 28 May 2024

[1] ST v CT 2018 (5) SA 479 (SCA) at paras [39] – [40].

[2] In prayer (d) the Defendant sought an order that the Plaintiff forfeits her half share in the Defendant's pension fund and leave gratuity. In the alternative to prayer (d) the following relief was sought in prayer (e) "(i) The division of the joint estate be as at the date of separation, in that the plaintiff was a non-contributing party in the increase of the joint estate whilst being at all material times under gainful

employment; further alternative, that: (ii) The joint estate of the parties shall be divided equally, and that

the parties share in both their liabilities and assets."

[2] In prayer (d) the Defendant sought an order that the Plaintiff forfeits her half share in the Defendant's pension fund and leave gratuity.

In the alternative to prayer (d) the following relief was sought in prayer (e)

"(i) The division of the joint estate be as at the date of separation, in that the plaintiff was a non-contributing party in the increase of the joint estate whilst being at all material times under gainful

employment; further alternative, that:

(ii) The joint estate of the parties shall be divided equally, and that

the parties share in both their liabilities and assets."

[3] Johnstone v Shebab 2022 (1) SACR 250 (GJ) at para [28].

[4] Van Wyk v Van Wyk [2005] JOL17228 (SE).

[5] Botha v Botha 2006 (4) SA 144 (SCA); Mashola v Mashola (022/2022) [2023] ZASCA 75 at para 29.

[6] Engelbrecht v Engelbrecht 1989

(1) SA 597 (C) at para 44.

[7] 1987

(3) SA 230 (w) at 236-237.

[8] Matyila v Matyila 1987

(3) SA 230 (W) at 236D to G; PP v JP (A3007/20)

[2020] ZAGPJHC 281 (2 November 2020) at par 37 – 39 p 9; K.W.M v P.J.M (14861/2018)

[2023] ZAGPPHC 48 (31 January 2023); T.S v M.L.S (5483/2022)

[2024] ZAGPPHC 289 (19 March 2024).

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