IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 282/2021
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

P[…] M[…] M[…]	Plaintiff
And	
T[…] N[…] M[…]	1st Defendant
N[…] L[…] M[…]	2nd Defendant
DEPARTMENT OF HOME AFFAIRS	3rd Defendant
SALA PENSION FUND	4th Defendant

CORAM: LOUBSER, J

HEARD ON: 30, 31 MAY and 2nd JUNE 2023

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 22 JUNE 2023. The date and time for hand-down is deemed to be 22 JUNE 2023 at 15:00

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[1] This is a divorce action where the plaintiff, mrs. P. M. M[…], claims a decree of divorce and division of the joint estate, including the pension funds held with the 4th defendant, from her husband, the 1st defendant. The 2nd defendant is the purported new wife of the 1st defendant. Whereas the matter initially seemed to be quite straight-forward, it soon appeared to be more complicated when the 1st defendant filed a counterclaim to the plaintiff's summons, claiming an order for forfeiture of patrimonial benefits against the plaintiff. During the course of the trial, four witnesses testified under oath, including the plaintiff and the 1st defendant.

[2] Before the commencement of the trial proceedings, the parties reached agreement to the following effect:

2.1. That the customary marriage between the 1st defendant and the plaintiff is a valid customary marriage in terms of the Recognition of Customary Marriages Act.

2.2. That the said marriage still subsists.

2.3. That the subsequent civil marriage between the 1st and 2nd defendant in March 2020 is null and void.

2.4. That the only issue remaining for adjudication by the court would be the question of the division of the joint estate.

2.5. That the only issue would then be the question of forfeiture of matrimonial benefits.

[3] The evidence before the court provides a reflection of the hardships many black families had to endure during the 1980's and the 1990's. These hardships existed in poor socio-economic circumstances, unemployment and little opportunities, that caused many fathers and husbands to work on the mines far away from home, or as migrant workers in other areas of employment. Sadly, this was also the fate of the M[…] family. The 1st defendant had to leave the plaintiff and their three daughters at his parental home in Sterkspruit while he went to work on the mines at Orkney. In 1995 he left the mines to return to Sterkspruit. Around 1998 the plaintiff made her way to Bloemfontein to find employment, leaving the children and the 1st defendant behind in Sterkspruit with her mother-in-law. Not long thereafter the 1st defendant also moved to Bloemfontein, where he eventually found employment. The marriage relationship was not destined to survive such adverse circumstances, and for the next 22 years the plaintiff and the 1st defendant lived in Bloemfontein, but not under the same roof. They lived completely separated. As the children grew up, they one by one also came to Bloemfontein, where they lived with their farther.

[4] Since the 1st defendant carried the onus to prove that a forfeiture order should be made, he was the first witness to testify. He testified that he and the plaintiff became husband and wife in a traditional marriage ceremony in 1980. When he came back from the mines in 1995, he bought a vehicle to transport people. The plaintiff was unemployed. When he came home some day in 1998, he found that the plaintiff had left. He did not know where she had gone. She had left the children behind with his mother. They were at school. The next year he moved to Bloemfontein, where he found employment with the municipality as a driver. He did not know the plaintiff's whereabouts, she did not tell him. Later on, the children came to live with him, and he became responsible for their schooling and their upbringing. The plaintiff never came to visit the children at his place, he testified. The children are now adults. According to him, he saw the plaintiff again for the first time here in court after all the years. He went on retirement at the municipality in 2021.

[5] In cross-examination the 1st defendant testified that his assets consist of his home. He obtained his pension money in 2021. The plaintiff never contributed to the

upbringing of the children, he testified. He denied that the plaintiff helped him to find employment in Bloemfontein, or that she had visited the children from time to time.

[6] The plaintiff testified that she never deserted the 1st defendant and the children. She came to Bloemfontein to find employment because the 1st defendant failed to provide adequately for her and the children. In Bloemfontein she found employment as a domestic worker with a mr. S[…], who is a CEO at the "Glaspaleis", meaning the municipality. She has her own quarters on the premises of mr. S[…], where she lives. She denied that she had ever deserted the children. She had contributed funds and clothes for the children and for the 1st defendant's mother through the years. She earns R3 500.00 per month. Through the assistance of mr. S[…], she obtained employment for the 1st defendant at the municipal library as a driver. He was later transferred to the fire department. A number of years ago the 1st defendant acquired a house in a place called Mafura outside Bloemfontein. She used to see him there when she went there to visit the children on a regular basis. She regard this house as her home, she testified. Since 2018 there was no longer any relationship between her and the 1st defendant, and he got married again in 2020. When she visited the children at Mafura, she always took groceries for the children. She even contributed to the building of the house in Mafura by cooking food for the builders and providing them with water. She did not contribute to the 1st defendant's pension fund.

[7] The next witness was the first daughter of the plaintiff and the 1st defendant, B[…] Mb[…]. She is now 41 years old and married. She denied that the plaintiff had disappeared from their lives in 1998. While working in Bloemfontein, the plaintiff often come to visit her and her younger sisters. After the year 2000, when the witness moved to Bloemfontein to live with the 1st defendant in Mafura, the plaintiff came to see her on a regular basis, and provided her with clothes and money to take to school. In giving testimony, she was adamant that her mother, the plaintiff, was always present in the lives of her children, and that she had never abandoned them.

[8] The last witness was P[…] M[…], the next daughter of the plaintiff and the 1st defendant. She is now 36 years old. She testified that after her mother had left Sterkspruit to work in Bloemfontein, she came to visit her children every holiday. She

then bought them school uniforms, clothes and food. When she later lived with the 1st defendant in Mafura, the plaintiff visited her children there on a regular basis and continued to support them, she testified.

[9] I now turn to the legal principles applicable to the forfeiture of patrimonial benefits when a decree of divorce is granted. In this respect section 9(1) of the Divorce Act[1] provides as follows: " When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

[10] Through the years, our courts have pronounced itself in clear terms how the provisions of section 9(1) should be approached and applied. As early as 1989 the Cape High Court pointed out in **Engelbrecht v Engelbrecht**[2] that joint ownership of another party's property is a right which each of the spouses acquires on concluding a marriage in community of property. Unless the parties make precisely equal contributions, the one that contributed less shall on dissolution of the marriage be benefited above the other if forfeiture is not ordered. The court went on to state that section 9 does not give the greater contributor the opportunity to complain about this. He can only complain if the benefit was undue. At 601H of the judgement the court stated that, unless it is proved what the nature and extent of the benefit was, the court cannot decide if the benefit was undue or not. Only if the nature and ambit of the benefit is proved, is it necessary to look to the factors which may be brought into consideration in deciding on the inequity thereof. Here the court obviously referred to the three factors mentioned in section 9 that the court has to consider.

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[1] Act 70 of 1979
[2] 1989(1) SA 597 (CPD)

[11] This approach has been endorsed by the Supreme Court of Appeal[3] and followed by courts of this division[4] on a number of occasions. In the Wijker-case it was stated[5] that the first step is to determine whether or not the party against whom the order is sought, will in fact be benefited. Once that has been established the court must determine, having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefited if a forfeiture order is not made. In the NWP-matter, the court of appeal stated the following:[6] "The court *a quo*, having regard to the approach set out in the Wijker-matter, found that the appellant's counterclaim and evidence failed to establish the specific benefits of the marriage in community of property and that it was therefore not necessary to proceed to the second step of determining whether or not the respondent would be unduly benefited. As a result, the court *a quo* did not consider the evidence of the alleged misconduct of the respondent. In my view the court *a quo* cannot be faulted in this regard."

[12] In the present matter, the question is then whether the 1st defendant has managed to establish the specific benefits of the marriage in community of property, in order to enable the court to decide whether the plaintiff will be unduly benefited if a forfeiture order is not made, having regard to the three factors mentioned in section 9.

[13] Unfortunately the 1st defendant failed to establish the specific benefits. All that he could say, was that his home represented an asset in the marriage in community of property, but he did not give any evidence as to the value of that home. He also did not provide any information regarding the value of his pension fund, the amount that was paid out to him from that fund in 2021, if any, and the amount of the funds that are still available in the pension fund. The court is therefore completely in the dark as far as the specifics of the benefits in the marriage in community of property is concerned. It follows that the court is not in a position to establish whether the

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[3] Wijker v Wijker 1993 (4) SA 720 (AD)
[4] See for instance NWP v MHP case no. A201/2013 (unreported) and Lesia v Lesia case no. 450/2013 (unreported)
[5] At 727 E of the judgement
[6] At par 17 of the judgement

plaintiff will be unduly benefited if an order of forfeiture is not granted against her. The counterclaim for forfeiture therefore cannot succeed.

[14] On the other hand, there can be no doubt that a decree of divorce should be granted, as prayed for by the plaintiff. The 1st defendant does not take issue with this aspect of the plaintiff's claim. I can also find no reason why the remaining prayers contained in the summons should not be granted.

[15] In the premises, the following orders are made:

1. The plaintiff's customary marriage to the 1st defendant on or about 6 December 1980, is declared a valid marriage in terms of the Recognition of Customary Marriages Act 120 of 1998.

2. The 3rd defendant is ordered to register the marriage between the plaintiff and the 1st defendant as such.

3. The marriage entered into between the 1st and 2nd defendants on 12 March 2020 is declared null and void *ab initio*, and the 3rd defendant is ordered to remove the registration of such marriage from its records.

4. A decree of divorce in the marriage between the plaintiff and the 1st defendant is hereby granted.

5. A division of the joint estate of the plaintiff and the 1st defendant is hereby ordered, which joint estate includes the 1st defendant's pension funds held with the 4th defendant.

6. The 1st defendant is ordered to pay the plaintiff's costs in the main action.

7. The 1st defendant's counterclaim is dismissed with costs.

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P. J. LOUBSER, J

For the Plaintiffs:	Mr. A. C. Mlozana
Instructed by:	Mlozana Attorneys, Inc. Bloemfontein
For the Defendant:	Mr. N. W. Phalatsi
Instructed by:	N. W. Phalatsi and Partners Bloemfontein

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