IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 010556/2022

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 2024.10.01

SIGNATURE:

In the matter between: -

K[...] P[...] S[...] Plaintiff

VS

M[...] D[...] S[...] Defendant

JUDGMENT

MABUSE J

[1] This matter came before me as a divorce action. By way of the pretrial minutes signed by the parties' legal representatives on 4 May 2023, the parties herein had agreed on the following issues which were not in dispute:

(i) the jurisdiction of this Court.

(ii) that they were married to each other by a civil marriage and that the said marriage still subsists.

(iii) that the parties' marriage relationship has irretrievably broken down. The court may add that such marriage cannot be retrieved.

(iv) that there are three minor children born of the said marriage.

(v) that the residence of the minor children must be awarded in accordance with the recommendations of the Family Advocate.

[2] By agreement between the parties, this Court was only required to decide the following issues:

[2.1] forfeiture of the benefits arising from the marriage in community of property.

[2.2] it will be noted that while, in his plea, the Defendant prays for a division the joint estate, in her particulars of claim (poc) and testimony the Plaintiff seeks an order of forfeiture of the benefits arising from marriage in community of property against the Defendant

[2.3] the amount that the defendant must pay towards the maintenance of the three minor children.

THE PARTIES

[3] The parties are as follows:

[3.1] the Plaintiff in this matter, K[...] P[...] S[...](Ms S[...]), is an adult female who resides at 6[...] I[...] Avenue, Mountain View, Pretoria, Gauteng Province. The Plaintiff has, since 2007, been employed at the Road Accident Fund as a Bill Reviewer.

[3.2] the Defendant, M[...] D[...] S[...] (Mr. S[...]), is an adult unemployed male who also resides at 6[...] I[...] Avenue, Mountain View, Pretoria, Gauteng Province.

For purposes of convenience, the Plaintiff and the Defendant will be jointly referred to as “the parties”.

[4] THE BACKGROUND

[4.1] The parties were married to each other in community of property on 13 August 2009. The said marriage still subsists. It is this marriage that the parties have agreed to terminate.

[4.2] three minor children have been born of the said marriage:

[4.2.1] M[...] K[...], a boy, born on 6 November 2008.

[4.2.2] K[...] L[...], a boy, born on 23 May 2011; and

[4.2.3] R[...] L[...] A[...], a girl, born on 30 January 2014.

[4.3] all these three children stay with the parties and attend different schools around the area where they stay. The parties seek an order of the primary residence of the minor children to be made based on the recommendations of the Family Advocate.

[5] The Plaintiff claims against the Defendant forfeiture of the benefits arising from marriage in community of property on the basis that, among others, the Defendant has committed adultery. The fact that the Defendant committed is the straw that broke the camel’s back. According to the testimony of the Plaintiff, constitutes the fundamental reason why she has sued the Defendant for divorce. The Defendant has admitted that he committed adultery.

[6] According to the Plaintiff, the marriage relationship between the parties broke down because of the infidelity of the Defendant. The Defendant had an extra-marital affair or affairs from which two minor children, T[...] and T[...], were born. These two children stay in Mpumalanga with their parents. Their relationship went awry after she learnt about these two children.

[7] Various intervention methods were employed, all aimed at saving the parties’ marriage relationship, but all in vain. For these reasons, and various other

reasons, she has alleged in the particulars of claim, the Plaintiff desires divorce. Those other reasons are as follows:

[7.1] the parties have not shared a bedroom for almost two years.

[7.2] the parties are no longer able to communicate with each other in a meaningful way.

[7.3] they no longer share a common interest and have been leading separate lives for almost a year.

[7.4] they argue constantly and there is no meaningful communication between them.

[8] Over and above, there is undisputed evidence by the Plaintiff that the Defendant:

[8.1] does not pay school fees and any fees for the minor children, despite any agreement between the parties. The Defendant admits that he does not pay anything towards the children's' school fees. He testified that he was responsible for the payment of the children's' school fees from their tender age until recently when his funds dried up. He was aware, at the time he testified, that children's school fees were outstanding. His defence is that he has no money to pay school fees. According to the Plaintiff, the Defendant runs another business. He runs a business of selling petrol. He operates like a tank station from home. Photographs of such petrol contained in 20-liter containers were placed before the Court. The Defendant denies that he operates a tank station. He told the Court that what was contained in those 20-liter containers was oil. He admitted that he did not tell his attorneys that he did sell petrol.

[8.2] the Defendant does not pay any municipal accounts as agreed by the parties. Consequently, the parties owe the municipality a massive amount. As at the date the Plaintiff testified in this matter, the parties owed Tshwane Metropolitan Municipality a sum of R94,000.00.

This amount will be paid by the Plaintiff alone. Sometimes she pays whatever can afford. At times she does not even have money to pay. According to her testimony, the Defendant does not pay for anything in the house.

[8.3] the Plaintiff alone pays the instalments in respect of the bond. The parties' house has a mortgage bond. In terms of the mortgage bond, the parties are obliged to make monthly payments of the bond. These monthly payments are made by the Plaintiff only. When the Plaintiff tries to talk to the Defendant about the house, particularly the mortgage bond, the Defendant's response is that he has no money.

[8.4] as it is, the Defendant does not contribute anything towards the acquisition of the joint estate.

[8.5] according to the Plaintiff, the Defendant runs from the parties' home, an aluminium products manufacturing business. She finds it opaque that despite that business, the Defendant is unable to contribute meaningfully in the house, in other words, is unable to pay for anything in the house. The Defendant cannot even pay for the electricity that he uses at the house to run his business. It is the Plaintiff who pays for the electricity. This she does by part-payment or her credit card or by making payment arrangements with the Municipality. The Defendant has admitted that he runs an aluminium manufacturing business at home.

[9] This Court concludes that even if he is not employed, the Defendant can generate income from the two businesses he conducts. He can devise means to make money. In the circumstances, he should be able to support his family with the money he generates. If he complains that he does not make any money in his two businesses, my view is that he must put more effort in his businesses well- knowing that he is obliged to support his family.

[10] The Plaintiff informed the Court that she does not know what the Defendant did with the amount that he was paid by the Government Employee Pension Fund (GEPF) when he was discharged. An amount of R171,621.88 was deposited into the Defendant's First National Bank account**.** The Plaintiff has testified that the Defendant has not shared the said money with her, nor has he even accounted to her about the said amount. Looking around the house, she could not point out to what the Defendant might have done with that amount. The Defendant did not use the money to benefit the family.

[11] The Defendant told the Court that with the money he was paid by GEPF, he renovated the kitchen, bought groceries, and paid the children's school fees. This evidence is disputed by the Plaintiff who testified that the kitchen is still incompletely renovated. From the reports she has received from the schools, the children's school fees are still outstanding. The Defendant has not furnished any proof form the schools that he has paid any school fees. Regarding grocery, it is to be expected that the Plaintiff will not be able to produce any receipts. The Defendant used to operate two bank accounts, one at Capitec in his names and the other at Nedbank under their company's name, M[...] C[...] a[...] P[...] (Pty) Ltd. The Capitec account number was 1[...] while the Nedbank Account was 1[...] 3[...]. Copies of the Capitec bank statements that were placed before court were from 26 September 2022 to 24 December 2022 and from 1 April 2023 t0 30 May 2023. During those periods, a total sum of R56937.37 was deposited into his Capitec account. This, in my view, establishes the Defendant's ability to generate income. The amount of R56937.37 consists of various amounts that were over the relevant period, deposited by various people into his bank account.

[12] The parties own several motor vehicles which are all paid up. Some of these motor vehicles could be sold and the proceeds thereof used to pay the outstanding debts.

[13] In her testimony, the Plaintiff told the court, *inter alia*, that the Defendant does not help at home, and furthermore that he is uncooperative. She told the Court that she wanted an order in terms of which the Defendant forfeits the benefits arising from marriage in community of property. She benefited nothing from the Defendant's pension benefits. She also benefited nothing from the proceeds of their Shoshanguve house which they sold, and the Defendant retained all the proceeds.

[14] It is of paramount importance to point out that the fact that the Defendant does not contribute financially in the family does not constitute a ground upon which the Plaintiff seeks a divorce. This is nevertheless a factor that this Court should consider when it deals with the substantial misconduct on the party of the spouse.

[15] In his heads of argument, Mr Marweshe, counsel for the Defendant, argued that the Plaintiff's evidence fell short in various ways, was inconsistent, contradictory, and did not support her claim for forfeiture. I disagree with him. On the contrary, the evidence of the Plaintiff was clear, unblemished, and consistent. The Plaintiff did not contradict herself. She answered all the questions put to her during cross-examination satisfactorily. The Court cannot make any adverse remark about her evidence.

[16] Before 14 May 2024, s 9(1) of the Divorce Act 70 of 1979 ("the DA"), which deal with forfeiture of the benefits arising from marriage in community of property, provided as follows:

> *"9(1) 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."

This section was amended, with effect from 14 May 2024, by section 5 of Act 1 of 2024 by the inclusion of *"including a Muslim Marriage"*. Therefore, section 9(1) as it was unamended before 14 May 2024, is applicable to this matter.

[17] Quite clearly, the purpose of the provisions of the said section are to ensure that a party to a marriage does not benefit from a marriage that he or she has destroyed or has actively broken down. See in this regard ***Murison v Murison 1930 AD 157,*** where the court had the following to say:

""Where a marriage is dissolved on the ground of adultery committed by one of the spouses, such spouse forfeits any benefits derived from the marriage, and the Court has no discretion to withhold an order for forfeiture of benefits if such an order be claimed by the injured spouse".

The guilty spouse will forfeit a benefit if, in relation to the injured spouse, he or she will unduly benefit if an order of forfeiture is not granted against him or her. In **Swil v Swil 1978 (1) SA 790 (W) at p. 792H-793A,** the court had the following to say:

"As Van Den Heever J.A. in Allen v Allen 1951 (3) 320 AD, pointed out, an order of forfeiture is an independent remedy which has acquired the characteristics of equitable relief. Its object and effect is to prevent the spouse responsible for the breakup of the marriage from benefiting financially therefrom."

[18] Section 9(1) of the DA mentions three factors that must be considered by the Court when it deals with an application for forfeiture of the benefits. Those factors are:

[18.1] the duration of the marriage.
[18.2] the reason for the breakdown of the marriage; and
[18.3] any substantial misconduct on the part of either spouse.

[19] In terms of common law, a party who seeks an order of forfeiture of the benefits must allege and prove any of the jurisdictional grounds. Once such a party has proved a jurisdictional ground, the Court has no space within which to refuse the order of forfeiture. It has no discretion but to grant the order of forfeiture.

[20] A party that claims forfeiture need not prove all the three factors. It is enough if he or she proves any one of the three factors. See in this regard ***Klerck v Klerck 1991 (1) SA 265 (W) at 266 A-B***.

[21] The fundamental change in the common law, as set out above, was however introduced by the DA. While the duty still lies on the party who claims forfeiture to allege, as the Plaintiff in this matter has done so in paragraph 6.1.3 and prayer 2 of her particulars of claim, such a party must still prove a jurisdictional ground.

The decision whether to grant the forfeiture order, unlike under common law, now rests on the discretion of the Court.

[21.1] **the duration of the marriage**:

According to the marriage certificate, the parties were married on 13 August 2009. A copy of the combined summons commencing or instituted the divorce action was issued on 30 August 2022. This means that as at 13 August 2022

the marriage had endured for 13 years. During that period of 13 years, the parties have managed:

[21.1.1] to have three children.

[21.1.2] to purchase property, movable and immovable.

This is a factor that the court must consider. The Plaintiff is 44 years of age, while the Defendant is 42. It is highly unlikely that with three children she can remarry, while the Defendant has a chance of remarrying because of his age. From the evidence on record, the Plaintiff does not need any financial assistance from the Defendant. She can survive without the Defendant.

[21.1.3] It is not clear though how the duration of the marriage influences the decision whether to grant forfeiture of the benefits. Mr Mashaba referred the court, in his heads of argument to the judgment of **Singh v Singh 1983 (1) SA 797 (C).** In this judgment the parties had been married for 22 years. During the last two years of their marriage, the husband who was the plaintiff in the matter, alleged that the wife who was the defendant. had stayed away from the common home overnight on 73 occasions; had been intimate with other men and had committed adultery with one of them. The husband alleged further that the wife had neglected her marital duties. According to the wife, who denied these allegations, she had left the common home due to the plaintiff's ill-treatment of her and she had committed adultery only later. Nevertheless, on the evidence, the court found her misconduct to be 'substantial' and that such conduct outweighed the fact that the marriage had lasted for 20 years. Consequently, the court granted the husband a forfeiture.

[21.2] The lessons that one can learn from the Singh judgment are firstly, that adultery although a common ground in divorce proceedings,

is still regard as an essential requirement for the termination of the marriage. Secondly, it is easy to grant forfeiture when the parties were married to each other for long time.

[21.3] In **Soupionas v Soupionas 1983 (3) SA 757 (T),** a matter in which the spouses had each asked for a forfeiture against each other, in a marriage which had lived together for a period of 9 years before their marriage, the Court refused to order a forfeiture. The Judge had the following to say:

"if people, after finding solace and satisfaction in each other's physical company for a period of years, decide to marry, the legal consequences of marriage must be an important motivating factor for that contract of marriage and, consequently, all the material consequences of that marriage must have been thoroughly contemplated between the parties and it would be sound public what is it doing policy to enforce such contractual views of the parties against each other."

[21.4] **any substantial misconduct on the part of either of the parties**:

To succeed with a claim for forfeiture of the benefits against the other, a party who claims that relief must prove that the other party is guilty of substantial misconduct. Substantial misconduct includes marital fault. e.g. adultery, imprisonment, and malicious desertion. It also includes assault. *In this case*, the Plaintiff has proved that the Defendant has committed adultery, and that the Defendant has admitted it. In defence, the Defendant testified that on 26 November 2011, the Plaintiff told her that he was unable to satisfy her sexually. He was shattered. During her cross examination, the Plaintiff was never confronted with this version of the Defendant. Furthermore, it is not the Defendant's case that the Plaintiff condoned her infidelity and forgave him.

But it must be recalled that **in Swart v Swart 1980 (4) SA 364 (O)** it was held that adultery and desertion might in certain instances merely be symptoms and not causes of a breakdown and that conduct that cannot be considered very blameworthy, such as refusal to engage in conversation, might be a factor leading to the marriage breakdown. Still on this question of adultery, in **Kritzinger v Kritzinger 1989 (1) SA 67 (A)** it was held that even if the appellant's adultery was the immediate cause of the marriage coming to an end, the respondent was by no means free from blame. Human experience suggests that where there is a break down in a marriage, the conduct of both parties has contributed to it.

According to ***JW v SW 2011 (1) SA 545 GNP*** *it was that* the mere existence of a substantial misconduct is, on its own, insufficient to justify an order of forfeiture. But in this case, it does because the Plaintiff testified that it was primarily, because of such infidelity, that she sued the Defendant for divorce. By his conduct the Defendant ruined the parties' marriage. Unlike in Kritzinger above, there is no evidence by the Defendant that the Plaintiff was guilty of any misconduct. The only attempt by the Defendant to attribute his conduct of infidelity was when she mentioned how she ended up committing adultery. I have dealt with this aspect somewhere above.

[22] Apart from this adulterous relationship, there are several other ways, as argued by Mr Mashaba in his heads of argument, which demonstrate quite convincingly that the Defendant contributed substantially to the destruction of the parties' marriage relationship. For instance:

[22.1] the Plaintiff testified that the Defendant used to work for the Department of Home Affairs on a permanent basis. He was however dismissed after he was found guilty of:

(a) for committing an act of gross negligence in that on or about 20 November 2012 and at or near Marabastad Refugee Reception Centre, he irregularly extended and printed an asylum-seeker permit (section 22) of one, Ms Selma Ummay, a Bangledashee National, whilst her refugee status rejection was confirmed by Standing Committee of Refugee Affairs on 16 May 2012, and updated in the system on 17 May 2012; and

(b) for committing an act of gross negligence in that on or about 20 November 2012 and at or near Marabastad, Refugee Centre, he irregularly extended and printed an asylum-seeker permit (section 22) of Ms Selma Ummay without proof of payment for overstaying in the country.

[22.2] As a result of his dismissal, the Defendant was paid the sum of R171,621.88 of his pension fund. This amount was deposited into his First National Bank account. This information is clearly reflected in a letter dated 4 February on page 35 of Annexure 'B'.

Immovable property in Soshanguve

[23] The parties had an immovable property in Soshanguve which they were renting out. The Defendant sold the said property for R130,000.00 without informing her. As if that was not enough, the Defendant went further to spend the said amount for his own personal use and not for the benefit of the common estate.

Businesses

[24] The parties established a business enterprise by the name of "M[...] C[...] a[...] P[...] (Pty) Ltd", which specialized in creating aluminium window frames and the like. Page 2 of Annexure 'B' clearly illustrates the certificate issued by the

Company Intellectual Property Commission. Page 3 of Annexure 'B' illustrates that the Defendant applied for tax clearance with the South African Revenue Services on 16 November 2015. Pages 8 to 15 of Annexure 'B' clearly indicate photos of aluminium products which were made by the Defendant at the parties' house.

[25] The Defendant has bought his mother a motor vehicle, a Mitsubishi. He bought this motor vehicle and unbeknown to the Plaintiff had it registered in his mother's names. The Plaintiff saw the motor vehicle's documents in their kitchen. She asked the Defendant if he had bought his mother the motor vehicle and the Defendant answered that he did. She asked him why he had registered the motor vehicle in his mother's names, but the respondent did not respond. Two offshoots come out of the fact that the Defendant bought a motor vehicle for her mother. Firstly, it shows that the Plaintiff does as he pleases in the family. He does things behind his wife back. He cares less for the family. While the Plaintiff tries her best to pay the house debts, he chose to buy her mother a motor vehicle. Secondly, buying his mother a motor vehicle is evident enough that he has money and, even when he is unemployed, he can generate income.

[26] The Plaintiff further alleged that the Defendant was illegally selling petrol in the house. She even took photos of containers with petrol inside to prove her allegations. She submitted Annexures 'E1-4' depicting containers of petrol.

[27] The Plaintiff has, in my view, successfully established two jurisdictional factors upon which this Court may grant her application for forfeiture of the benefits arising from marriage in community of property against the Defendant. But there is a catch here. The idea of marriage in community of property, this is the law in our country, is to create community of property and profit and loss between the two parties who conclude such marriage. Grotius would say that a community of property creates "*communio bonorum, gemeenskap van*

goedere". This community is created by the marriage and comes to being as soon as the parties' marriage is solemnized:

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

See the South African Law of Husband and Wife by HR Halo Fifth Edition, pages 157 to 158. See also ***Thom v Worthmann N.O. and Another 1962 (4) SA 83 M at page 88*** where the court stated, per Henochsberg J, as follows:

"When two parties are married in community of property, the marriage creates a universal partnership between the husband and wife, under the sole administration of the husband (may I pause here to remark that the law that the estate falls under the sole administration of the husband is no longer part of our law in this country since section 14 of the Matrimonial Property Act Nr. 88 of 1994 was enacted) in all property, movable and immovable, belonging to either of them before marriage until the date of their dissolution."

[28] According to this principle, ownership of an undivided one-half share of the assets that the Plaintiff acquired before her marriage to the Defendant vested in the Defendant at marriage and *vice versa*. That portion of the joint estate became hers by virtue of marriage in community of property, irrespective of whether she contributed financially towards the acquisition of the assets and equally, that portion of the joint estate became his by virtue of marriage in community of property, irrespective of whether he contributed financially towards the acquisition of the assets. In ***De Wet N.O. v Jurgens 1970 (3) SA 38 at page 46*** Rabie AJA had the following to say:

"By 'n huwelik in gemeenskap van goed is die man en vrou gesamentlik eienaars van die gemeenskaplike goed (the spouses own the assets of the joint estate in equal undivided shares)."

In keeping with the judgment of **Pillay and Krishna and Another 1946 AD 946,** the Plaintiff must allege and prove the grounds on which she relies, if she wants forfeiture. In this case, the court stated that:

"*It consequently becomes necessary at the outset to deal with the basic rules which govern the incidence of the burden of proof- the onus probandi-for upon them the decision of this case must ultimately rest. And should be noted immediately that this is a matter of substantive law and not a question of evidence; Tregea and Another (1939 AD 16, at page 32). The first principle in regard to burden of proof is thus stated in the Corpus Iuris; "semper necessitas probandi incumbit illi qui agit" [D. 22.3. 21.). If one person claims something from another in a Court of Law, then he has to satisfy the Court that is entitled it."*

[29] In order to succeed with her claim for forfeiture of the patrimonial benefits against the Defendant, the Defendant need only proof one of the three factors mentioned in the section. It was never the intention of the legislature that those three factors should be proved cumulatively. But the Plaintiff must first prove **the "benefit".**

[30] What the concept of a "*benefit*" is, is best illustrated or captured by Schreiner J in ***Smith v Smith 1937 SA (WLD) 126 at pages 127 to 128*** where the Court stated that:

"What a defendant forfeit is not his share of the common property but only the pecuniary benefits that he would otherwise have derived from the marriage. It is not uncommon to refer to division and forfeiture as alternative remedies

upon the plaintiff. On this view forfeiture means that each party keeps what he or she brought into the marriage. An alternative division of an order of forfeiture is that it is really an order for division of estate plus an order that the defendant is not to share in any excess that the plaintiff may have contributed over the contributions of the defendant."

[31] The history of the principle enunciated in ***Smith v Smith*** supra can be traced back to ***Celliers v Celliers 1904 (WLD) 926 at 928*** where the court stated that:

"There can be no question that the usual order which is made in these cases that the guilty party shall forfeit all the benefits which may have accrued to him or her by virtue of community of property, whether those benefits have accrued by virtue of marriage in community of property or anti-nuptial contract or by virtue of gift which may have been made by one party to another."

[32] In the same authority, Curlewis J stated as follows at page 936:
"I therefore come to the conclusion that the abundance of authority is that, whatever may have been Roman Law on the subject, and however far that law may have been adopted in earlier times, it has certainly fallen into disuse; and if we consider the practice in South Africa, it is very clear that except for this decision in the case of Mulder v Mulder, decided by the majority of the late High Court, the practice in South Africa has not been to declare forfeiture of a share of the community but only to declare forfeiture of any benefits which the guilty spouse may have derived from the marriage."

[33] Finally, Mason, J himself stated the following on this point of forfeiture:
"It appears to me it is not only South African law, but it appears also to have been the practice of the Dutch Courts, but the only forfeiture which should be decreased is that of the benefits and not a forfeiture by the guilty spouse of the

whole of her property so that she should be sent forth into the world as the beggar." See page 935.

[34] In his book, A Practical Guide To Patrimonial Litigation in Divorce Actions, PA Van Niekerk at page 3-4, observed that:

"a *misconception exists that an order for forfeiture where parties are married in community of property means that the party against whom such an order is made forfeits the right to share in the division of joint estate. This is obviously incorrect and the proper position that such a party forfeits the right to share in any "benefits" of the marriage in community of property.*

After referring to a paragraph in **Smith v Smith 1937 WLD 126, 127-128**, he went about to explain what a "benefit" constitutes as follows:

"*This means that 'benefits" constitutes the access of the one party's contribution to the joint estate over and above the other party's contribution. For example, if the Mr Citizen possesses an estimate of R 1,000,000 and marries Miss Money- grabber, who possesses an estimate of R100000 on date of marriage, it would constitute a joint estate of R1100000. The undivided half share of Miss Moneygrabber would therefore constitute an amount of R 550,000, which means that, the benefit which she realized from the marriage in community of property constitutes an amount of R 450000 being that portion that she would receive on division of the joint estate if a forfeiture order were not made, exceeding Miss Moneygrabber's contribution towards the joint estate.*

What constitutes a "contribution" towards the joint state is a question of fact and in Gates v Gates 1940 NPD 361, it was held that the services of the wife in managing the joint estate and caring for the children should be taken into account."

The scenario set out by Mr. Van Niekerk supra applies where the Court grants a general order of forfeiture only.

The learned author, H R Hahlo sets out the "benefit" as follows in his book, **The South African Law of Husband and Wife, 4th Edition. Page 435:**

"*Whereas an order of division (or no specific order) means equal division, irrespective of the amounts contributed to the joint estate by the by husband and wife, and order for forfeiture of benefits may mean equal or unequal division, depending on whether the defendant or the plaintiff has contributed more to the going fund, for an order of forfeiture, even if this is not expressly stated, amounts to an order for division of the joint estate, coupled with an order for forfeiture of the benefits which the guilty spouse has derived from the marriage. Since the order does not affect benefits which the innocent spouse has derived from the marriage, the estate will be divided in equal shares if the guilty spouse has contributed more to the joint estate than innocent spouse, there being nothing on which the order for forfeiture could operate, but if the contributions of the innocent spouse exceeded those of the guilty one, the guilty spouse will be deprived of the benefits which he has derived from the marriage."*

[35] It is quite clear from the aforegoing judgments that s 9 (1) of the DA does not vest any powers in the Courts to award the one-half share of the joint estate that belongs to the guilty party to the party that claims forfeiture. See in this regard see **Rousalis v Rousalis 1980 (3) SA 446 (C).** As stated above, by forfeiture, is meant the benefits of the marriage and not the guilty party's share of the community. It is the extent to which the guilty party is enriched that is 'the benefit' that he or she may be forfeited.

[36] Somewhere above, I stated that unlike it was the position during the days of common law, as demonstrated in the Murison case supra, s 9 of the DA gives

the Court a discretion. Accordingly, the Court may, in its discretion, declare a particular asset in the community estate, forfeited or the court may declare that one-half of the patrimonial benefits derived from the community estate by the guilty party forfeited in favour of the innocent party.

[34] It is appropriate, in my view, to make an order of forfeiture as the Plaintiff has prayed for it, in other words nothing more and nothing less.

[35] **Accordingly, the following order is made:**

(1) The bond of matrimony existing between the Plaintiff and the Defendant is hereby severed.

(2) In accordance with the Family Advocate's Report Attached hereto and marked "XYZ",

(2.1) both parties shall retain their parental rights and responsibilities regarding their care and maintenance of the minor children.

(2.2) The primary care of the minor children is hereby awarded to the Plaintiff.

(2.3) The Defendant shall have contact with the minor children in the following manner:

(2.3.1) contact on alternate weekends from Friday 17h00 to Sunday 17h00, alternate short school holidays and equally share one-half of the long school holidays.

(2.3.2) The children spend a day with the father on Father's Day and on the father's birthday with the mother on Mother's Day and the birthday of the mother.

(2.3.3) the birthday of the children to be shared between the parties.

(3) The Defendant shall forfeit, in favour of the Plaintiff, the entire benefits arising from marriage in community of property in respect of:

(3.1) the immovable property of the joint estate known as 6[...] I[...] Avenue, Mountainview, Pretoria, The Province of Gauteng, with the result that the said immovable property shall become the sole and exclusive property of the Plaintiff, who shall be alone responsible and liable to pay the outstanding amount owed to First National Bank in terms of the mortgage bond.

(3.2) his claim to 50% of the Plaintiff's pension interest held with or by the Road Accident Fund Pension Fund.

(3.3) Ford Escort 1.0 with registration NO. J[...] 2[...] N[...] G[...].

(4) The Defendant is hereby ordered to pay a sum of R3000.00 per month towards the maintenance of the parties' minor children.

(5) Each party shall pay its own costs of this action.

PM MABUSE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Plaintiff:	*Adv. MG Mashaba SC*
Instructed by:	*SJ Mashaba Attorneys*

On behalf of the Defendant:	*Mr. M Marweshe*
Instructed by:	*Marweshe Attorneys*
Date heard:	19 April *2024*
Date of Judgment:	1 October *2024*