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

**CASE NO: 14166/2019**

**DELETE WHICHEVER IS NOT APPLICABLE**
**(1) REPORTABLE: NO.**
**(2) OF INTEREST TO OTHER JUDGES: NO.**
**(3) REVISED. YES**
**DATE 22 July 2024**
**SIGNATURE**

In the matter between:

**N[...] O[...] T[...]** Plaintiff
**ID NO. (7[...])**

and

**N[...] S[...] C[...] (BORN K[...])** Defendant
**ID NO. (8[...])**

**JUDGMENT**

**WANLESS J**

**Introduction**

[1] In this divorce action the Plaintiff is T[...] O[...] N[...], adult

male *("the Plaintiff")* and the Defendant is S[...] C[...] N[...], adult female *("the Defendant").* The parties were married to one another on the 17th of April 2015, at Katlehong, in community of property and are still so married.

[2] This trial commenced on Monday 24 April 2023 having been set down for hearing for two to three days. The number of days allocated to this matter was grossly underestimated. On Wednesday the 26th of April 2023 the matter became part-heard and was postponed *sine die.* At that stage the Plaintiff had not completed his evidence-in-chief. It is true that some court time was lost on Tuesday the 25th of April 2024 due to the sitting of a ceremonial court. However, time was made up by this Court sitting earlier on Wednesday the 26th of April 2024.

[3] The matter was then set down, before this Court, for a further period of five court dates (during the December 2023 recess) from Wednesday the 6th of December 2023 until Tuesday the 12th of December 2023. The Plaintiff finally closed his case at 12h00 on Friday the 8th of December 2023 without calling any other witnesses. In the premises, it took approximately five and a half court days to complete the evidence of a single witness (the Plaintiff). In contrast thereto the Defendant's evidence was completed in approximately a day and a half (from 12h00 on Friday the 8th of December 2023 to Monday the 11th of December 2023) when the Defendant closed her case. As was the case for the Plaintiff the Defendant elected not to call any other witnesses. The final day of the trial (Tuesday the 12th of December 2023) was devoted to argument. In the premises, it took a total of eight court days to complete a trial which involved the evidence of only two (2) witnesses. The relevance of the aforegoing will become more apparent at a later stage in this judgment.

[4] It was always the intention of this Court to deliver a written

judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be "converted", or more correctly "transformed", into a written judgement and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an *ex tempore* basis.

**The issues and common cause facts**

[5] The pleadings in this matter consist of the Plaintiff's Particulars of Claim *("the POC")*; the Defendant's Plea to the POC *("the Defendant's Plea")*; the Defendant's Counterclaim; the Plaintiff's Plea to the Defendant's Counterclaim *("the Plaintiff's Plea")* and the Plaintiff's Replication to the Plea *("the Replication")*. In terms of those pleadings the issues were defined as follows:

> 5.1 whether the Defendant should be ordered, in terms of subsection 9(1) of the Divorce Act 70 of 1979 *("the Act")* to forfeit certain patrimonial benefits of the marriage in community of property, in favour of the Plaintiff, either wholly or in part;
>
> 5.2 maintenance for the two (2) minor children born of the marriage, namely E[...] B[...] N[...], born on 14 June 2016 and O[...] E[...] N[...], born on 22 November 2017;
>
> 5.3 the primary residence of and contact to the aforesaid

minor children;

5.4 whether there should be a division of the joint estate with the Defendant receiving a half share of the Plaintiff's pension interest in the Chemical Industries National Provident Fund in terms of subsection 7(7)(a) of the Act;

5.5 whether the Plaintiff should pay maintenance to the Defendant; and

5.6 the issue of costs.

[6] The POC included a specific prayer that the Defendant should forfeit her rights to claim half of the furniture in the former matrimonial home. However, at the conclusion of the trial, this Court was advised that the Plaintiff no longer sought such an order.

[7] This Court was not asked to decide the issues of maintenance for the minor children; their primary residence or rights of contact with them. On the first day of the trial this Court made an order in terms of subrule 33(4) in terms of which the issue of whether maintenance was payable by the Plaintiff to the Defendant was separated and postponed *sine die*. In the premises, the sole issue to be determined by this Court is that of *"forfeiture".*

[8] In that regard, the Plaintiff sought a specific order that the Defendant forfeit the following patrimonial benefits of the marriage, namely:

8.1 her half-share in the Plaintiff's pension interest in the Chemical Industries National Provident Fund;

8.2 15 T[...] Road; 1[...] S[...] R[...] C[...], D[...] 0[...],

Gauteng *("the D[...] property")*;

8.3 Number 3[...] S[...] Road, 4[...] E[...] P[...]; KwaZulu – Natal *("the E[...] P[...] property")*;

8.4 2[...] G[...], G[...], Durban, KwaZulu – Natal *("the G[...] property")*;

8.5 57 T[...] C[...], H[...], W[...], Mpumalanga *("the W[...] property")*; and

8.6 an Audi A4, 2019 model with registration H[...] *("the motor vehicle")*.

[9] The facts which are either common cause or cannot be seriously disputed by either of the parties are:

9.1 the marriage between the parties has broken down irretrievably; and

9.2 the lobola negotiations and process as set out in the POC.

**The law**

[10] Subsection 9(1) of the Act reads as follows:

*"When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the Court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the Court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the*

*part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefitted".*

[11] Both parties relied upon the principles as enunciated in the matter of *Wijker v Wijker*[1] where the erstwhile Appellate Division *("the AD")* held, *inter alia*, the following:

"*It is obvious from the wording of this section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be purely a factual issue. Once that has been established the trial 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 benefitted if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial Court after having considered the facts falling within the compass of the three factors mentioned in the section."*[2]

[12] The AD also held: [3]

*"To determine whether a party would be unduly benefitted, a trial Court would certainly not be exercising a discretion in the narrower sense. Here too no choice between permissible alternatives is involved. In considering the appeal this Court is therefore not limited by the principles set out in Ex parte Neethling (supra) and it may differ from the Court a quo on the merits. It is only after the Court has concluded that a party would be unduly benefitted that it is empowered to order a forfeiture of benefits, and in making*

[1] *1993 (4) South Africa 720 (AD)*
[2] *At 727E-F*
[3] *At 727J-728B*

> *this decision it exercises a discretion in the narrower sense. It is difficult to visualise circumstances where a Court would then decide not to grant a forfeiture order."*

[13] It is not a prerequisite for making a forfeiture order that all three factors, as set out in subsection 9(1) of the Act, be present.[4] This was (correctly) conceded on behalf of the Defendant.

[14] Also, in *Wijker* the AD held that: [5]

> *"The fact that substantial misconduct has been included as a third factor does not in my opinion exclude a consideration of misconduct as a circumstance which gave rise to the breakdown of the marriage. Substantial misconduct may include conduct which has nothing to do with the breakdown of a marriage and may for that and other reasons have been included as a separate factor."*

[15] Only the factors set out subsection 9(1) of the Act may be taken into account by a Court deciding the issue of forfeiture.[6]

[16] In the matter of *Z v Z*,[7] it was held:

> *"It is clear from the wording of the subsection that to qualify for forfeiture, based on misconduct, such conduct must be "substantial". I understand this to mean that, it must not only be a misconduct which does not accord with the marriage relationship, but also that the misconduct must be serious. Undue benefit in my view, is also a relative term. Benefitting from one spouse's sweat, in my view, would not*

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*[4] Binder v Binder 1993 (2) SA 123 (WLD) at 127C-D; Wijker at 728 - 729; KRN v JMN (A161/2023) [2023] ZAGPPHC1955 (27 November 2023) at paragraph [11]*
*[5] 1993 (4) SA 720 (AD) at page 730, para A - B*
*[6] Botha v Botha 2006 (4) SA 144 (SCA)*
*[7] Z v Z (43745/13) [2015] ZAGPPHC 940 (18 September 2015)*

> *necessarily amount to undue benefits. To come to the conclusion of undue benefit, one would be guided by a number of factors for example, refusal to work when it is possible to do so, squandering of money and other assets of one's estate and other factors of the handling of the estate which is prejudicial to the other spouse."*[8]

[17] Also, in the matter of *Phenya v Phenya*,[9] it was accepted that the failure to contribute to the joint estate when a party was in a position to do so, qualified as substantial misconduct.

**The Pleadings**

[18] In light of, *inter alia*, the amount of evidence (both *viva voce* and documentary) placed before this Court (dealt with at a later stage in this judgment) it is imperative to first examine the pleadings in this matter insofar as they set out the various grounds relied upon by the parties pertaining to forfeiture.

[19] The POC (which, despite having been drafted by an attorney of this court, read like a *"storybook"* and bear little or no resemblance to POC, having no regard to the rules of pleading) contain the following averments (set out below *verbatim*), namely:

> 19.1 "The Plaintiff, being aware of the fact that the defendant was unemployed, ensured that she was taken care of financially even at this early stage";
>
> 19.2 "Further to this, the Plaintiff added that he had been and would likely remain the primary and sole breadwinner in their relationship. Both parties had expressed a desire to

[8] *At paragraph [7].*
[9] *Phenya v Phenya [2020] JOL 48889(GJ). See also Mashila v Mashila (022/2022) [2023] ZASCA75 (unreported).*

have children. The Plaintiff would have to take *(care)* of the education, social, extra-curricular and other needs of the family. Obligations such as medical aid, housing, travel, fuel, food, clothing and entertainment would all be borne by the Plaintiff, and these would become burdensome if not unbearable. Given the high number of divorces primarily due to financial reasons, the Plaintiff pleaded with the Defendant to request her family to reduce the amount of lobola as he did not want to place financial strain on their union or commence the marriage in debt.";

19.3 "The financial needs of the Defendant continued to be taken care by the Plaintiff as they had been during the duration and subsistence of their relationship.";

19.4 "As was now customary, the Plaintiff attended to pay for *(the)* majority of the expenses occasioned by the wedding.";

19.5 "The Defendant has abused the Plaintiff verbally and emotionally throughout the duration of the marriage.";

19.6 "The Defendant has consistently and unreasonably denied the Plaintiff conjugal rights.";

19.7 "The Defendant failed to remain faithful to the Plaintiff and engaged in an adulterous extramarital affair during the subsistence of the marriage.";

19.8 "The Plaintiff became aware of the true intention for which the Defendant agreed to married (sic) him: that the Defendant sought to and did in fact obtain financial and material benefit from the Plaintiff, that in financing the lifestyle, debts and other obligations and desires of the

Defendant, the Plaintiff became indebted, and his financial position deteriorated drastically to the detriment of the Plaintiff.".

19.9 "Having expended himself financially and unable to keep up with the financially burdensome and unreasonable lifestyle of the Defendant, the Plaintiff was now in dire financial straits. The Plaintiff's credit cards were spent to their limits, the plaintiff had sold an immovable property intended as an investment for his future and that of his family to finance the costs of wedding and matrimonial process, the Plaintiff's credit rating and score was now adversely affected and financial institutions now considered the plaintiff a risk and unworthy of being advanced monies. The Plaintiff, and consequently the joint estate, remained severely over-indebted with a substantially negative credit rating. Notwithstanding the aforegoing, the Defendant has made no attempt at reducing this debt, instead the Defendant seeks to further and unduly gain financially from the assets of the Plaintiff. Awakening to this eventuality, the Defendant made plans to exit the marriage, which plans have now reached fruition, as the Plaintiff was now unable to continue to provide for her financial needs.";

19.10 "The true reason for the Defendant agreeing to marry the Plaintiff was rendered further obsolete because the plaintiff had now become severely over-indebted.";

19.11 "The plaintiff *(Defendant)* has, from inception of the marriage been emotionally abusive towards the Plaintiff, which led to the irretrievable breakdown of the marriage.";

19.12 "By the Defendant's own admission, she informed the Plaintiff that she never loved him from the inception of the

marriage. She further stated that she was coerced into the marriage by her family with Plaintiff. The Defendant's family put pressure on her and at the time the Defendant was encountering financial difficulties and she ultimately agreed to get into a marriage to rescue the defendant from both her financial woes and to alleviate the Defendant's family off (sic) the defendant as a financial burden.";

19.13 The Plaintiff has for the duration of the marriage committed himself wholeheartedly to the Defendant. To this end, the plaintiff was the sole provider for the needs and wants of the Defendant as well as within the matrimonial home.";

19.14 "Throughout the duration of the marriage between the Parties, the Defendant did not make contributions to the household expenses and/or necessities. The Defendant did not contribute financially to the household expenses as she refused to seek employment or start a business. The Plaintiff attempted to assist her in both endeavours often times buying data for the Defendant to apply for jobs and even going to the extent of hiring a business consultant to ensure that the defendant had the necessary support to commence her business. The defendant however maintained a lackadaisical towards the business venture and made no meaningful contribution in respect of same. Furthermore, the defendant failed to contribute to the upkeep of the household and nurturing of the children.";

19.15 "Prior to the commencement of divorce proceedings, the Defendant continued to threaten the Plaintiff that she would divorce him and leave him impoverished as the law was on her side when it came to divorce proceedings because they were married in community of property.";

19.16 “The marriage between the Parties lasted for a short period being approximately 3 years and 10 months.”;

19.17 “The Defendant furthermore engaged in substantial misconduct in (sic) she failed to remain committed to the Plaintiff and engaged in an adulterous extramarital affair during the subsistence of the marriage to the Plaintiff.”;

19.18 “Accordingly, the Defendant’s actions, properly construed, are such that fall within the ambit of substantial misconduct by reason that she entered into the marriage for financial benefit which benefit shall accrue to her if an order for forfeiture is not granted and by virtue of the persisting financial and emotional abuse the Plaintiff suffers at the hands of the Defendant.”;

19.19 “The collective actions of the defendant are in every sense of the word repugnant to what the institution of marriage stands for and undoubtedly constitute substantial misconduct, as per section 9 of the Divorce Act. Therefore, the Plaintiff avers that, taking into considerations (sic) the durations (sic) of marriage between the parties that the forfeiture of patrimonial benefits should accordingly be granted.”.

[20] The Defendant, in the Defendant’s Plea, stated:

20.1 “The Defendant avers that the Plaintiff is the one who was emotionally and physically abusive towards the Defendant.”;

20.2 “The Defendant further avers that the Plaintiff’s physical abuse caused the Defendant to move out of the

common property in December 2018.";

20.3 "The Defendant further avers that while she was pregnant with their first child, she had a sickly pregnancy hence she could not go back to work.";

20.4 "The Defendant avers that both parties agreed that the Defendant would stay home and take care of the minor children in that the parties could not afford the services of a helper.".

[21] In the Defendant's Counterclaim the Defendant avers:

21.1 "The Plaintiff gives the Defendant a monthly allowance of R2 000.00 from the year 2015 to date for the Defendant's personal use.";

21.2 "The Defendant submits that she received the aforesaid sum of money for her personal care and use in that she was not employed but taking care and raising the parties' two minor children at home.";

21.3 "The Defendant and the Plaintiff jointly agreed that the Defendant should not return to work but stay home to raise and take care of the minor children and to date the Defendant is still unemployed but looking for employment.";

21.4 "The defendant left the matrimonial home on the 24 (sic) December 2018 due to the verbal, emotional and physical abuse of the plaintiff.".

[22] Taking the aforegoing into account, it is then possible to properly evaluate the evidence placed before this Court by the parties.

**The evidence**

[23] Before dealing with the evidence of the respective parties, it is important for this Court to make the following observation. Whilst both parties, unsurprisingly, proffered different reasons for the breakdown of the marriage relationship when they gave their *viva voce* evidence during the trial, it was in fact common cause that the said relationship was a disaster from the very beginning thereof. In this regard, both the Plaintiff and the Defendant testified (for different reasons) that problems arose from the very first night that they were married to one another. Arising therefrom, it is indeed remarkable, not only that the marriage lasted for as long as it did, but produced two children therefrom.

[24] From the aforegoing, it immediately becomes apparent that the reasons for the breakdown of the marriage and the reliance by the Plaintiff upon any substantial misconduct on behalf of the Defendant, must play a less significant roll when determining whether or not this Court should order a forfeiture. This is simply because, on the evidence placed before this Court, the parties should clearly never have become married to one another. Moreover, whilst the tragic consequences of these parties realising, at the very outset, that the marriage was a *"mistake"*, there is nothing improbable therein. The Plaintiff and the Defendant are certainly not the first (or last) couple to come to the realisation that, upon becoming married to one another, they are simply incompatible. It is against this background that this Court will evaluate the evidence of the parties insofar as it is applicable to the issue of forfeiture.

**The evidence of the Plaintiff**

[25] At the outset, it must be noted that the Plaintiff was not a

good witness. This is true in respect of both his evidence-in-chief as well as when he was cross-examined. He failed (despite being asked by his Counsel; this Court and the Defendant's Counsel) to answer questions put to him directly. Instead, he continually embarked on lengthy and irrelevant narratives. Not only did this result in adding considerable time to Court proceedings[10] but it naturally cast great doubt on the Plaintiff's credibility. In this regard and since the Plaintiff had elected to testify in English (rather than in his home language) without the aid of an interpreter, this Court enquired as to whether an interpreter should be provided in order to assist him when giving his testimony and to avoid this Court drawing any adverse inference against him. The aforegoing was rejected by both the Plaintiff and the Plaintiff's legal representatives.

[26] When considering the Plaintiff's testimony before this Court, in broad terms, it was clearly apparent that the Plaintiff felt aggrieved by the Defendant's decision to ultimately vacate the matrimonial home with the children during December 2018 and not to return thereto. This was the thread that ran through the Plaintiff's lengthy (and confusing) evidence, more specifically that he had provided financially for the Defendant, both before and during the marriage relationship, only to be rejected by the Defendant. Ultimately, it is difficult for this Court to reject the submissions made by the Defendant's Counsel, in the Defendant's Heads of Argument, that *"It is clear that the plaintiff's evidence was riddled with long elaborate and irrelevant facts, some of which bothered (bordered) on insults, evasion and dishonesty"*.

[27] In what can only be presumed to be a valiant attempt by the Plaintiff's legal representatives to consolidate the Plaintiff's evidence into something slightly more comprehensible, the

[10] *Paragraph [3] ibid*

Plaintiff had compiled no less than five lever arch files containing an array of evidence. Of this the Plaintiff elected to place before this Court approximately 77 exhibits (from a total of approximately 81 exhibits). Each exhibit varied in length and the number of pages. Regrettably, this election only resulted in burdening the record unnecessarily. In addition thereto, no schedules in support of the *viva voce* evidence given by the Plaintiff (with the exception of a schedule included in the Plaintiff's Heads of Argument setting out the benefit to the Defendant in respect of the immovable properties and the motor vehicle[11] should forfeiture not be granted) were provided, by either party, to this Court. Moreover, no suitable admissions were sought or made by either of the parties which would have had the positive result of not only reducing the *viva voce* evidence placed before this Court but also eliminating the need for documentary evidence considerably.

[28] When dealing with the Plaintiff's evidence, this Court is in agreement with the submission made by the Defendant's Counsel during the course of argument, that *"It is not necessary to undertake a blow-by-blow account of and the (sic) plaintiff's evidence save to deal with issues pertinent for this trial."*. Indeed, having regard to, *inter alia*, the amount and nature of the evidence placed before this Court, together with the lack of admissions made, makes a detailed analysis of the evidence not only impossible but, in this particular case, would serve little or no purpose. At the end of the day, such an approach would only result in burdening this judgment unnecessarily. The only alternative is to attempt to break down the Plaintiff's evidence into "categories" having regard to, *inter alia*, the Plaintiff's verbose pleadings, coupled with the less than satisfactory presentation of his evidence.

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[11] *Paragraph [8] ibid*

**The Plaintiff's reliance on the fact that the Defendant only entered into the marriage relationship for financial gain**

[29] This was averred in the POC. In this regard the Plaintiff relied on the grounds that the Defendant only agreed to marry him in that she sought to obtain financial and material benefits. Further and in this regard the Plaintiff averred that the Defendant married him to finance her lifestyle, debts and other obligations. Arising therefrom, the Defendant averred that his financial position had been drastically affected to his detriment. In addition thereto, he averred that the Defendant had informed him that she had never loved him and that she had been coerced into the marriage by her family.

[30] None of the evidence placed before this Court at trial supports such a scenario. The Defendant's financial status prior to the marriage (which the plaintiff alleged he later discovered was poor) was never proven as such. The Defendant's denial thereof was never proven, on a balance of probabilities, to be false. What *was* true (as was readily conceded by the Defendant when she testified before this Court) was that the Plaintiff spent a substantial amount of money on the Defendant from the time when the parties met (during or about 2013) until they were married (during 2017). Not only did the Plaintiff shower the Defendant with expensive gifts but he would pay amounts of money directly into the Defendant's bank account. All of this was common cause. It was further common cause that the Plaintiff was never coerced, in any manner whatsoever, to provide the Defendant therewith. In the premises, his decisions to do so (presumably to influence the defendant to marry him) were completely voluntary.

[31] As to the allegation by the Plaintiff that the Defendant informed him that she had never loved him and had been coerced by her family into marrying him the Plaintiff relied on the following

evidence. In the first instance, the Plaintiff relied on a “diary” entry made by the Defendant as evidence that the Defendant never loved him. The interpretation which the Plaintiff wishes this Court to apply to the aforegoing is rejected by this Court. Same is rejected on the basis that, *inter alia*, the aforesaid entry merely supports the common cause facts in relation to *(as observed by this Court earlier in this judgment)* the serious difficulties experienced by the parties from the very beginning of the marriage relationship. In addition thereto, it was common cause that the parties were, at the time, attending counselling sessions (at the instigation of the Defendant). Arising therefrom, it is not improbable that (as testified to by the Defendant) the entry made by the Defendant should be viewed by this Court in the manner as explained by the Defendant and not that as relied upon by the Plaintiff.

[32] Secondly, the Plaintiff relied upon the manner in which the lobola negotiations were carried out to support his averments that, *inter alia*, the Defendant only married him for financial reasons. He also complained (rather bitterly) that he had paid a substantial amount towards the costs of the wedding. Once again, for the reasons set out earlier in this judgment, this evidence takes the Plaintiff’s case in respect of forfeiture, no further. Whilst the lobola negotiations are admitted by the Defendant on the pleadings (factually), there was no evidence placed before this Court to support the Plaintiff’s averments. Not only were the disputes of fact raised by the Defendant more probable, but it is, once again, imperative to note that the payment of the amount of lobola by the Plaintiff and contributions to the wedding ceremony, were agreed to by the Plaintiff. As to those probabilities, it is more probable that the Defendant had little or nothing to do with the lobola negotiations (these being carried out between the families in accordance with custom). In addition, there was no evidence to support the fact that the Defendant herself insisted on

the Plaintiff paying large amounts towards the wedding.

[33] Finally, no evidence was placed before this Court to prove, on a balance of probabilities, that the aforesaid payments made by the Plaintiff had a significant and detrimental affect on his financial status. Of course, there is also the question as to whether these *"grounds"* and the evidence in support thereof, are even relevant to the real issue in this matter, being that of a forfeiture of benefits arising *from (and not before)* a marriage. The amount of time (and money) spent by the Plaintiff in leading this evidence, supports the submissions made by Defendant's Counsel that the Plaintiff *"....was a witness with an exaggerated good view of himself. He always primarily testified about money as a priority more than placing efforts to working on his marriage that has now subsequently failed."*.

**The Plaintiff's reliance on the averments that he was the sole provider during the subsistence of the marriage and that the Defendant made no financial contribution to the joint estate**

[34] It is trite that the actions of a party to deliberately fail to contribute towards the costs of the joint estate may, depending on the facts of a particular case, constitute substantial misconduct for the purposes of a forfeiture.[12] Further, it is fairly trite that a contribution to a joint estate is not necessarily in monetary terms but also in respect of services rendered, which result in that estate saving costs.[13] Of course, the classic example is where the parties agree that, even where one spouse is capable of working and earning an income, that spouse will remain unemployed to take care of the household, including minor children born of the marriage, thereby saving the estate various expenses.

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[12] *Z v Z (supra) at paragraph [7]*
[13] *Molapo v Molapo (4411/10) [2013] ZAFSHC 29 (14 March 2013).*

[35] There was, once again, a factual dispute pertaining to whether the parties had entered into an agreement whereby the Defendant, despite being a qualified Homeopath and capable of earning an income, would stay at home to take care of the household and the two minor children. The Plaintiff, during the trial, testified that, *inter alia*, he paid to the Defendant a monthly amount of R2 000.00 to enable her to employ an assistant to assist in the running of the household and care of the minor children. He further gave evidence that he attempted to assist the Defendant in starting a business, even hiring a business consultant to provide assistance therewith.

[36] It is imperative, when deciding where the probabilities lie in relation to the reasons as to why the Defendant was not gainfully employed (on a permanent basis) to, once again, examine the Plaintiff's pleadings. In this regard, it is apparent that (apart from several other consistencies within the POC and between the Plaintiff's evidence when compared to the POC) that there is a glaring contradiction between certain averments as set out in paragraph 4 and subparagraph 8.7 of the POC. Before dealing therewith, it is also important to note that the Defendant failed to take exception to the POC and/or request Further Particulars from the Plaintiff in terms of Rule 21 in order for the Defendant to properly plead to the POC.

[37] As set out in paragraph 4 of the POC (divided up into no less than eight (8) separate subparagraphs, not numbered) the Plaintiff avers, *inter alia*,[14] that he was aware that the Defendant was unemployed prior to the marriage and accepted that he had been and would likely remain the *primary* and *sole* breadwinner in the marriage relationship. He further avers that he would have to take care of the education, social, extra-curricular and other needs of

[14] *Subparagraphs 19.1 and 19.2 ibid*

the family (including children). Importantly, once again in terms of his own POC the Plaintiff averred that *"Obligations such as medical aid, housing, travel, fuel, food, clothing and entertainment would ALL* be *borne by the plaintiff*...". These excerpts of the POC can only be construed as an agreement between the parties (whether express or tacit) that the Defendant would not be employed during the marriage relationship but would render services to the joint estate.

[38] In complete contrast to the aforegoing the Plaintiff then avers, in subparagraph 8.7 of the POC, that, *inter alia*, the Defendant did not make contributions to the household expenses and/or necessities and that the Defendant did not contribute financially to the household expenses as she refused to seek employment or start a business. In addition, the Plaintiff pleads, in the same subparagraph of the POC that *"....the defendant failed to contribute to the upkeep of the household and nurturing of the children."*

[39] This stark distinction between the aforegoing averments in the POC must cast great doubt about the Plaintiff's *bona fides* in attempting to rely on this ground in support of a forfeiture. At no stage did the Plaintiff attempt to explain this material contradiction in the POC. Furthermore, no application was made to amend the POC to resolve same. Moreover, the reliance by the Plaintiff on the fact that the Defendant failed to make a contribution towards the joint estate is not supported by the evidence placed before this Court during the trial or by the probabilities.

[40] As set out above the Plaintiff testified that he paid an amount of R2 000.00 per month to the Defendant to employ a domestic assistant. It is common cause between the parties that the Plaintiff paid this amount, on a monthly basis, to the defendant.

Furthermore, it appears to be common cause that not only did the Defendant elect not to employ any domestic help but also, when this election was made the Plaintiff was, at all material times, aware of that decision. This gives rise to two (2) important inferences which this Court is entitled to draw from that evidence. The first is that the Defendant did not employ any assistance to run the household so, it can be inferred and is more probable, that the Defendant ran the household single-handedly and took care of the minor children. It may also be inferred that the Defendant declined these services with the consent of the Plaintiff in that he continued to make these monthly payments. At this stage, it is also important to note that the Plaintiff did not provide this Court with any evidence that the household was not kept to his satisfaction or that the minor children were not properly cared for.

[41] The aforegoing also gives credence to the evidence of the Defendant that, *inter alia*, not only did she render those services but she also utilised the monthly payments towards the expenses incurred by the household (including, as set out in the Defendant's Counterclaim, her personal expenses). Indeed, it was clear from certain bank statements tendered in evidence that the Defendant did attract certain expenditure in that regard. This, in turn and also having regard to the documentation tendered into evidence, supports, on a balance of probabilities, a scenario that the Defendant was employed, on certain occasions, as a part-time locum in the Homeopathic profession.

[42] It was not disputed by the Defendant that the Plaintiff made certain payments on her behalf and to her personally, in respect of a possible business venture. It was however the Defendant's testimony that she did not have sufficient faith in that business venture. Also, her ability to make such a venture a success was hampered by her illness during pregnancy and her desire to

nurture their children. This Court finds that the aforegoing was either common cause or that the Plaintiff has failed to place before this Court any evidence which would lead this Court to make a finding that the Plaintiff has discharged the onus incumbent upon him in respect thereof. In addition thereto the fact that, once again, the Plaintiff made these payments voluntarily, must result in this Court finding that, *inter alia*, the probabilities favour the Defendant's version.

[43] From the aforegoing, it is clear that the Defendant did contribute to the joint estate, both financially (to a lesser extent than the contributions by the Plaintiff) and the rendering of services. The fact that this contribution was (financially) far less than that of the Plaintiff and/or cannot be valued strictly in monetary terms, does *not* have a bearing on the issue of forfeiture.

**The Plaintiff's reliance on emotional, verbal and physical abuse by the Defendant as a reason for the breakdown of the marriage relationship**

[44] Whilst the Plaintiff relied, in the POC, on the fact that the Defendant had abused him both emotionally and verbally during the course of the marriage relationship the POC were devoid of any allegations pertaining to physical abuse. Despite the aforegoing the Plaintiff led evidence (without objection thereto on behalf of the Defendant) that the parties had an argument at Germiston Lake. Thereafter, having returned home, the Plaintiff alleged that the Defendant had "twisted" his arm. He attended a Netcare Emergency Department on the 24th of October 2015. From the medical report entered into evidence, it would appear that the extent of the "injury" sustained by the Plaintiff was a bruised left hand/forearm. He was bandaged and given medication.

[45] The oral and documentary evidence provided by the Plaintiff (and the Defendant) in respect of this incident supports, at best for the Plaintiff, an unfortunate scuffle between the parties. It does *not* support an assault by the Defendant upon the Plaintiff of any significance, if at all. Even if it did, the Plaintiff only placed evidence before this Court in respect of a single incident. This can never qualify as a ground of substantial misconduct giving rise to a forfeiture on the part of the Defendant.

[46] With regard to the allegations of emotional and verbal abuse (which were pleaded by the Plaintiff) it appears to this Court that same are based primarily, if not solely, upon the common cause facts in this matter that, from the very first night of the marriage relationship, marital difficulties were experienced between the parties. In addition thereto, the Plaintiff gave extensive evidence that the Defendant's family also treated him with disdain.

[47] Apart from the fact that the Defendant also relies on these grounds as a reason for the breakdown of the marriage relationship the real difficulty is that the Plaintiff is a single witness who failed to lead any other evidence in support of the aforegoing. In the premises, this evidence must be treated with caution. Added thereto, is the fact that, once again, it is common cause that difficulties arose between the parties from the very beginning of the marriage relationship. Arising therefrom, this Court cannot find that any emotional or verbal abuse by the Defendant is present which would support substantial misconduct on the Defendant's behalf, sufficient for this Court to grant a forfeiture.

**The Plaintiff's reliance on the denial of conjugal rights by the Defendant and the Defendant having an extramarital relationship, as reasons for the breakdown of the marriage relationship**

[48] The very fact that two (2) minor children were born of the marriage, would, *prima facia*, contradict this allegation made by the Plaintiff. In addition thereto, is the striking failure to lead any corroborating evidence in respect thereof.

[49] Further, if this Court understood the Plaintiff's evidence correctly (this evidence being difficult to understand, as dealt with earlier in this judgment) the Plaintiff elected to build an additional room (or rooms) at the matrimonial home where he took up residence. Any alleged extramarital affair by the Defendant took place after he did so. In the premises, on the evidence before this Court, it is not possible to find, on a balance of probabilities, that the Defendant either denied the Plaintiff his conjugal rights *or* entered into an extramarital relationship. If she did enter into such a relationship and/or denied the Plaintiff his conjugal rights, it would appear that any love or affection between the parties had already ended.

[50] Even if this Court has misconstrued the said evidence, it must not, once again, be forgotten that it is common cause between the parties that serious problems existed between them from the very beginning of their marriage. In the premises, little reliance (if any) can be placed on the aforegoing factors as reasons for the breakdown of the marriage relationship. Lastly, adultery alone, even if proven, is not necessarily a valid reason for forfeiture. Each case must be decided on the relevant facts pertaining thereto. This is, once again, trite law. Finally, it must be noted that the Plaintiff's Counsel did not rely on this factor during the course of argument.

**Other factors relied upon by the Plaintiff in support of his claim for forfeiture**

[51] The Plaintiff also gave extensive evidence in respect of payments made by him in relation to the Defendant's motor vehicle (largely resulting from services carried out in respect thereof). As submitted on behalf of the Defendant it was clear from the evidence that within a period of three years the plaintiff spent no more than R10 000.00 on the Defendant's motor vehicle. It was also further correctly submitted that the Plaintiff was also responsible for any damage, together with wear and tear, in relation to the Defendant's motor vehicle since, *inter alia*, he was using that motor vehicle to travel to Secunda on a daily basis. This evidence was not seriously disputed by the Plaintiff.

[52] In respect of the issue of the Defendant's debt, it was also submitted, on behalf of the Defendant, that the only evidence provided by the Plaintiff in respect thereof was a payment of approximately R6 000.00 by the Plaintiff on behalf of the Defendant to African Bank. Further, the Defendant's credit record shows that the Defendant did not have any major debts as the Plaintiff sought to suggest.

[53] With regard to the Plaintiff's own indebtedness allegedly incurred the Plaintiff gave testimony before this Court that when the Defendant vacated the former matrimonial home in December 2018 the joint estate was indebted to an amount of approximately R500 000.00. However, as correctly pointed out by Defendant's Counsel, no proof of such quantification was placed before this Court. It is important to note that the Plaintiff failed to place any real evidence before this Court as to what transpired to the sum of R1.2 million received by the Plaintiff in respect of his pension benefit (accruing to him once he left his previous employment). In this regard, the Plaintiff merely stated that he had spent a considerable amount on the children and the payment of debts. In relation thereto, it is also important to take cognisance of the fact that it transpired that the Plaintiff had given approximately

R700 000.00 to his friend (Sizwe Mghobozi). Apart from the fact that this would appear, *prima facie*, to be to the prejudice of both the joint estate and the Defendant, it makes little or no sense to do so if the matrimonial estate had genuinely incurred an indebtedness of approximately R500 000.00. The Plaintiff also made the broad averment (unsupported by any documentary evidence) that he had utilised monies from his pension towards payment of his attorneys arising from the litigation between the parties. Even if true, this is clearly a dilution of the joint estate to the prejudice of the Defendant. Finally, it is also important to note (as pointed out on behalf of the Defendant) that in 2022 the Plaintiff generated a total income in excess of R2.4 million. The aforegoing clearly supports the Defendant's evidence that she was *"kept in the dark"* as to the true financial status of the joint estate. Added to the aforegoing is the common cause fact that (extracted from the Plaintiff under cross-examination) the Plaintiff, on numerous occasions, drew large sums of cash (via an ATM). On the Plaintiff's evidence, he did so to *"pray over"* that money. This explanation as to the indebtedness of the joint estate is, in the opinion of this Court, less than satisfactory.

[54] The Plaintiff spent a considerable amount of time before this Court giving testimony in respect of the alleged actions of the Defendant in denying him contact to the minor children. This was disputed by the Defendant. Further, this Court is under the impression that any disputes between the parties in respect of the Plaintiff's rights of contact with the minor children presently form part of separate legal proceedings, either already commenced or pending. This is clear from the fact that this Court was not requested to deal with this issue during the trial.[15]

[55] Once again, the Plaintiff purports to rely on an *"issue"* which

[15] *Paragraph [7] ibid*

was never pleaded. Despite making other amendments to the POC the Plaintiff never made any application during the course of the trial to include same. In addition, this Court repeatedly asked the Plaintiff's Counsel to explain on what basis a pending dispute such as that relating to contact with the minor children could be relied upon in a divorce action dealing solely with forfeiture. No satisfactory explanation was provided to this Court during the trial. Likewise, no satisfactory explanation has been provided at the conclusion thereof.

[56] In this regard, this Court understood the Plaintiff to rely on, *inter alia*, the matters of *Wijker* and *Z v Z*, read with the provisions of subsection 9(1) of the Act. It is trite that, in respect of substantial misconduct, subsection 9(1) provides for *"any"* substantial misconduct on the part of either of the parties. In *Wijker,* it is clear that a Court, when dealing with whether a party would be unduly benefitted in relation to the other if a forfeiture order is not made, the trial court must make a value judgment after having considered the facts falling within the compass of the three factors mentioned in the section. Further, in *Wijker,* it was held that *"Substantial misconduct may include conduct which has nothing to do with the breakdown of a marriage and may for that and other reasons have been included as a separate factor."* In addition to the aforegoing, Plaintiff's Counsel relied on the matter of *Z v Z* to support the wording of the subsection (dealt with above) and submitted that this would include the Defendant denying the Plaintiff contact with the minor children.

[57] This Court is of the opinion that the alleged failure of the Defendant to allow the Plaintiff contact with the minor children, is not, in this particular matter, a factor which can *(or should)*, be taken in to account when deciding the issue of forfeiture. This is based on, *inter alia*, the following, namely:

57.1 the issue as encapsulated above was never pleaded by the Plaintiff;

57.2 this aside the Court was never requested to make a decision in respect thereof;

57.3 the issue is to be decided upon by another court (if not settled between the parties);

57.4 even if proven that the Defendant has denied the Plaintiff contact with the minor children, this could only have occurred *after* the Defendant vacated the matrimonial home with the minor children;

57.5 in the premises, such conduct (if proven) was not a factor which gave rise to the breakdown of the marriage relationship;

57.6 whilst it may be argued that the aforesaid conduct may be considered on the basis that it should be included as a *"separate factor"* the wording of the subsection, upon a proper interpretation thereof, should not be construed too widely. This is particularly so in the present matter where the issue was not properly before this Court *and* appears to be *sub judicae*.

[58] Even if this Court is incorrect in respect of the aforegoing the Plaintiff has failed to prove, on a balance of probabilities, that the Defendant has indeed denied the Plaintiff contact to the minor children and/or the denial thereof has not been in the best interests of the minor children. Apart from the fact that this issue warrants a separate trial the Plaintiff has, once again, failed to lead any material and corroborating evidence to support his averments in respect thereof. Correspondence alone, placed

before this Court as a number of exhibits, is insufficient, on the facts of this particular matter, to support the Plaintiff's *viva voce* evidence.

**The duration of the marriage**

[59] Both parties made various submissions pertaining to how this Court should determine the duration of the marriage between the parties. Various authorities were cited in respect thereof. This judgment will not be burdened further with a detailed analysis of earlier decisions dealing therewith. This is unnecessary having regard to the fact that whichever method is used does not result in a large discrepancy.

[60] It is common cause that the parties were married to one another on 17 April 2015 and separated during December 2018. On this calculation the marriage lasted three years and eight months. The Combined Summons was issued on the 17 August 2019 and served upon the Defendant the very same day. On this second method of calculation the marriage lasted exactly four years. For the purposes of this judgment, it will be accepted that the duration of the marriage relationship was four years.

[61] The parties also provided this Court with some authorities that dealt with forfeiture orders made by our courts in relation to the duration of the marriage relationship. Whilst these authorities are useful, this Court is of the opinion that, once again, this matter should be decided on the facts thereof and the discretion vested in this Court when deciding forfeiture should not be restricted by any previous decisions in relation to the duration of the marriage.

**The evidence of the Defendant**

[62] This evidence has, to a large extent, been dealt with by this Court when, *inter alia*, considering the evidence of the Plaintiff. For that reason and, in light of the fact that the Defendant's evidence consisted of rebuttals to that given by the Plaintiff, this Court shall not deal therewith in great detail.

[63] At the beginning of her evidence *(also given without the aid of an interpreter despite English not being her first language)* the Defendant appeared to be a good witness, providing concise and clear testimony before this Court. There were no material contradictions in her evidence and she appeared to be honest in all material respects. Whilst she did become somewhat argumentative when cross-examined the Defendant, overall, made a good impression upon this Court.

[64] During the course of the aforesaid testimony provided by the Defendant, she made an important concession. This was that she accepted she should not benefit from the Edgecombe Park property; the Glenwood property and the Witbank property. This concession was made voluntarily by the Defendant whilst she was testifying and no attempt was made, by her Counsel, to *"resurrect"* the Defendant's defence to a forfeiture order in relation to the aforesaid properties.

**Discussion and conclusions**

[65] In light of the aforegoing concessions made by the Defendant, it is only necessary for this Court to decide whether the Defendant should forfeit the following benefits of the marriage, namely:

> 65.1 her half-share in the Plaintiff's pension interest in the Chemical Industries National Provident Fund;

65.2 the Dalpark property; and

65.3 the motor vehicle.

[66] It was submitted, on behalf of the Plaintiff, that this Court should make an order that the Defendant wholly forfeit the benefits of the marriage, as set out above. On behalf of the Defendant, it was submitted that no such order should be made, *alternatively*, at worst for the Defendant, she be asked to forfeit only ten percent thereof.

**Is there a benefit?**

[67] It is trite that before a Court can order a forfeiture of benefits, it must be proven that there is indeed a benefit to be forfeited. In this regard the Plaintiff has shown that if there was to be a division of the joint estate the Defendant would benefit as follows:

67.1 by R25 000.00 in respect of the Plaintiff's pension interest;

67.2 by R296 050.00 in respect of the Dalpark property; and

67.3 by R85 000.00 in respect of the motor vehicle.

[68] In the premises, the total amount by which the Defendant would benefit is the sum of R406 050.00. Accordingly, it is accepted that there is a benefit for the Defendant to forfeit, which is the first step to enable this Court to order a forfeiture.

**The duration of the marriage**

[69] Whilst, at first glance, a period of four years may appear to

be a marriage of fairly short duration, it does not, in the opinion of this Court, disqualify the Defendant from benefitting from the assets as set out herein.

[70] This is because, *inter alia*, despite the fact that for the Plaintiff to succeed with his claim for forfeiture he need only rely on one of the factors as set out in subsection 9(1) of the Act, it is not proper (or even possible in this Court's opinion) to consider each of these factors solely in isolation. In the premises, having regard to all of the evidence in this matter the fact that the marriage was entered into with the best intentions of the parties; tragically was a disaster from the beginning and that both parties (on either version) contributed (in different means) to the maintenance of the joint estate, does not mean that the relatively short duration of the marriage should, viewed in isolation, result in the Defendant forfeiting the benefits thereof.

**The reasons for the breakdown of the marriage and any substantial misconduct on the part of either of the parties**

[71] As should be clear from that set out in this judgment it is not possible (and even necessary) for this Court to make a finding as to the reasons for the breakdown of the marriage relationship. This Is simply because that relationship was broken from the beginning. In addition thereto, no independent evidence was placed before this Court to corroborate the versions of the parties (despite the fact that before the trial both parties indicated they would be calling other witnesses). Hence, it was not possible to decide, on a balance of probabilities, what the real reasons for the breakdown of the marriage were.

[72] The same applies equally to the issue of any substantial misconduct. More particularly, as dealt with above, there is no evidence to hold that, once again on a balance of probabilities,

the Defendant is guilty of any substantial misconduct. Even accepting, for the purposes of argument, that the Defendant *is* guilty of misconduct, it can never be said that same is substantial for the purposes of ordering a forfeiture.

[73] Arising therefrom and having regard to all of the aforegoing, this Court finds that the Plaintiff has failed to discharge the onus of proof incumbent upon him to persuade this Court, in the exercise of its discretion, to grant the relief sought.

**Costs**

[74] The record will show that, on numerous occasions, this Court *(as it is entitled, even obliged, to do)* attempted to get the parties to reach a sensible solution to end this litigation having regard, *inter alia*, to the costs thereof and the relatively small amount involved in the actual benefit to the Defendant in respect of the joint estate. Not only are these amounts relatively small (as set out above) compared to the costs incurred by the parties in relation to the costs of this action but the order of this Court will not, *prima facie*, necessarily resolve all of the issues between the parties. In particular, since the Counterclaim of the Defendant contains only a prayer for the equal division of the joint estate *(a matter of law)* without the appointment of a liquidator to divide the estate the likelihood of future litigation between the parties in respect of the patrimonial aspects of the present litigation is immense. This must be as a result of, *inter alia*, the dissipation of the major asset of the joint estate by the Plaintiff, being the Plaintiff's pension interest. Regrettably, all attempts by this Court to not only convince the parties to bring an end to this litigation but also to limit the issues to be dealt with at trial, fell on deaf ears.

[75] Further and in this regard the following facts, insofar as they relate to a costs order, must be noted, namely:

75.1 the failure of the parties to make any real admissions in the two (2) pre-trial conferences held before the trial in this matter commenced which would have had the effect of properly defining the issues, thereby shortening the duration of the trial;

75.2 as a result of the aforegoing, this Court directed that the parties hold a further Rule 37 Conference on the first day of trial. Regrettably, the parties made no progress in respect thereof. All admissions sought by the respective parties were not made;

75.3 the state of both of the parties' pleadings; the failure of both parties to properly react thereto and the considerable time taken to complete the Plaintiff's evidence, have all been dealt with above;

75.4 the concession made by the Defendant in respect of the fact that she should forfeit three (3) of the immovable properties was only made by her at a late stage of her evidence;

[76] The division of the joint estate following a decree of divorce is a matter of law and will therefore not be included in the order of this Court.

[77] It is also imperative to note that at the pre-trial conferences held between the parties, it was agreed that each party would pay their own costs up to the commencement of the trial. Also, the tender made by the Plaintiff at a late stage during the trial, in an amount of R100 000.00, cannot assist the Plaintiff in having the Defendant attract an order for costs. Not only was this tender very late but it did not exceed the benefit to which the Defendant is

entitled, even on the Plaintiff's own case (and putting aside that the ultimate benefit may be greater).

[78] It is trite that an order for costs would normally follow the result of the litigation unless unusual circumstances exist. No such circumstances have been brought to the attention of this Court. However, it is also trite that a court has a general discretion (to be exercised judicially) when arriving at a suitable costs order. Having regard to the aforegoing, this Court, in the exercise of its discretion, holds that each party should pay their own costs. This order is also just and equitable in light of both parties being partially successful.

**Order**

[79] This Court makes the following order:

1. A decree of divorce.

2. The Defendant is to wholly forfeit the following benefits to the marriage in community of property between the parties, as more clearly described in the judgment of this Court, read with the pleadings exchanged between the parties, namely:

    1. the E[…] P[…] property;

    2. the G[…] property; and

    3. the W[…] property.

3. In terms of subsection 7(7)(a) of the Divorce Act 70 of 1979 the Defendant is entitled to receive one-half of the Plaintiff's pension interest in the Chemical Industries National Provident Fund.

4. Each party shall pay their own costs.

**B. C WANLESS**
**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION**
**JOHANNESBURG**

**APPEARANCES:**

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|---|---|
| For the Plaintiff: | Adv. L. Pretorius |
| Instructed by: | Geniv Wulz Attorneys Inc |
| | |
| For the Defendant: | Adv. M. Kgoongwe |
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| | |
| Heard on: | 24 April 2023 to 26 April 2023<br>6 December 2023 - 12 December 2023 |
| | |
| *Ex tempore* Judgment: | 12 June 2024 |
| | |
| Written Judgment : | 22 July 2024 |