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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 10/13906

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

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SIGNATURE

In the matter between:

[V....., J..... J.....]
Plaintiff

And

[V....., M..... J..... E.....] Defendant

J U D G M E N T

MAKUME, J:

[1] The parties in this divorce action were married to each other on the 11th June 1994 out of community of property with the inclusion of the accrual system.

[2] There are two children born out of that marriage namely:

2.1 H.... M..... V..... born on the 14th March 1995 (also known as Sean).

2.2 D..... V..... born on the 16th July 2005 (“D....”).

[3] The eldest child S..... is now a major. Both children presently live with the plaintiff. A draft order has been submitted by the parties in respect of and pertaining to the minor child been D..... In terms of that draft order the following has been resolved and agreed upon and will be made an order of court simultaneously with the judgment in the main action. The order reads as follows:

3.1 Both parties shall have joint parental rights and responsibilities pertaining to D..... V..... as contemplated in terms of section 18(3) of the Children’s Act.

3.2 Primary residence of D..... V..... shall rest with the plaintiff subject to the defendant’s rights or reasonable contact which shall include the following:

3.2.1 The right to have the minor child with her on alternative weekends, alternative short school holidays and half of long school holidays.

3.2.2 Reasonable telephonic contact.

3.2.3 The rights to have the minor child on her birthday.

3.3 The defendant may approach the court for a variation of the above order at any given time.

[4] It is common cause that the parties' marriage has broken down irretrievably. The plaintiff in his particulars of claim as well as the defendant in her counterclaim both asked for a decree of divorce. The plaintiff has asked for an order that the right of the defendant to share in the accrual of the plaintiff's estate be forfeited whilst the defendant requires that an order be made entitling her to share in the accrual of the plaintiff's estate in accordance with Chapter 1 of Act 88 of 1984.

[5] Furthermore the defendant claims maintenance for herself in the amount of R11 500,00 per month as well as that the plaintiff keep her on a medical aid by paying premiums for same.

[6] The plaintiff testified that when she met the defendant back in Volksrust the defendant was a student nurse at a hospital in Paardekraal. After their

marriage it became difficult for her to commute daily to the college which was 60 km away. She then stopped her nursing career.

[7] Shortly after their marriage the couple moved to Krugersdorp then to Ellisras at which place the defendant worked between 09h30 to 13h30. She worked for the same company where the plaintiff worked. She left because she had to undergo a back operation.

[8] In the year 2004 the contract on which the plaintiff had been employed at Ellisras came to an end and they relocated back to Krugersdorp. When they were back at Krugersdorp the defendant told him that she wishes that they should go back to Volksrust as nobody in Krugersdorp wants to be her friend.

IN ISSUE

[9] It is evident from the pleadings and the evidence led in the matter that this Court is required to adjudicate on two issues namely:

9.1 Plaintiff's claim for forfeiture of benefits arising from the accrual system.

9.2 The defendant's claim for spousal maintenance including a claim to be retained on plaintiff's medical aid.

FACTUAL BACKGROUND ISSUES

[10] It is necessary to set out a brief narrative of certain facts and circumstances giving rise to the litigation which bear on the questions to be decided in this matter as they emerge from the pleadings and evidence.

[11] The plaintiff is a qualified Control and Instrumentation Engineer. He has worked in this capacity for various companies and received training in Germany. He is presently in the employment of DRA Mineral Projects (Pty) Ltd in Sunninghill, Johannesburg.

[12] The defendant holds no qualification and is presently unemployed and has for a large part of her marriage been a housewife. She suffers from a multitude of health problems ranging from depression to osteo-arthritis in her cartilage for which she has received medical treatment.

[13] During or about 2008 the defendant started a relationship with a Ms Retha van Aswegen ("*Retha*") which relationship the plaintiff says is intimate in that the defendant and the said Retha are in a lesbian relationship. The defendant denies this vehemently and says that Retha is just a friend to whom she relies for comfort during her bad times with the plaintiff. The plaintiff

maintains and testified that Retha is the cause of all the problems that have led to their divorce.

[14] The defendant's relationship with Retha is so peculiar that the defendant went to the extent of tattooing Retha's name on her neck despite the plaintiff's protest and disapproval thereof. Initially to hide that she had the name Retha tattooed she had it done in Chinese sign language.

[15] As if that was not sufficient three months after she had the neck tattoo the defendant had another tattoo done under her eyes. It was a Star tattoo. The tattoos were done by one Chris Koch whose role in this divorce action would be dealt with later.

[16] The defendant and Retha commenced their relationship in the year 2008. They studied nursing together. Retha is now a qualified nurse and is in full-time employment at Bell Hospital in Krugersdorp. The plaintiff complained about the defendant spending more time with Retha which started off with one night or weekends away at Retha's place and later the defendant would spend a whole week staying with Retha and when the plaintiff questioned this defendant would tell him that they went out on ladies night. On a certain day a doctor asked the plaintiff if the defendant was lesbian whereupon he said he does not know.

[17] One weekend the plaintiff took the defendant and their two children to a weekend camping. The defendant insisted on bringing Retha along against

plaintiff's wishes and whilst there the defendant and Retha slept in one room on the same bed whilst the plaintiff slept with the two boys. At one stage whilst there plaintiff found defendant and Retha kissing each other. This must have surely convinced him that the defendant was in an intimate lesbian relationship with Retha.

[18] When the plaintiff objected to the plaintiff spending more time with Retha than with her family this led to fights between them. The defendant would arrive home back from visiting Retha at 03h00 and when asked to explain defendant told plaintiff not to treat her like a child.

[19] The plaintiff testified that the defendant was wasteful with money to the extent that she overspent the credit limit on their joint credit card and as a result the plaintiff dispossessed her of the use of the credit card. The defendant spent time at the local casino gambling, she used a lot of money on cosmetics and other medicines to keep herself slim and thin. She also did three boob operations.

[20] After the birth of their second child the defendant insisted on doing a tummy tuck operation as well as liposuction for which the plaintiff paid.

[21] In her testimony the defendant told the court about her sexual life with the plaintiff which she says was forced on her by the plaintiff. This included oral and anal sex for which the defendant told court she agreed to because then the plaintiff would give her extra money for the special treat. The plaintiff

vehemently denied this except that he admitted having had oral sex only on two occasion during 2006/2007 with the defendant and says it was with the defendant's consent.

[22] The defendant continued to testify that the plaintiff on several occasions insisted on having anal sex with her which caused her to bleed and cry. She says that this conduct annihilated and embarrassed her. She only did it for the sake of money. She says that on numerous occasions the plaintiff raped her.

[23] The plaintiff conceded under cross-examination that he is fond of oral sex and confirmed that whenever the defendant offered him that he used to give her R500,00 as he knew that defendant loved gambling it was her extramural activity. He testified further that although the parties argued a lot there was seldom any violence involved save on one occasion when the defendant was drunk and they slapped each other whereupon the defendant fell off from a chair.

[24] It was put to the plaintiff that the defendant is not in a position to take up employment because of her epilepsy. The plaintiff disputed this and said that the defendant takes medication and that her epilepsy is under control, that there are a number of people with that condition who are in employment. The plaintiff testified that the defendant is lazy and does not want to work. She always wakes up late as a result the child Dean was always late for school.

[25] The plaintiff set out his financial position and told the court that he inherited R330 000 from his late father's estate which money he used to pay off the bond on the house as well as the bakkie that the defendant was using. He also paid other debts. After he had paid off the bakkie the defendant sold it and purchased a 2.7 double cam Toyota Hilux bakkie.

[26] The plaintiff produced his payslip for the month of December 2013 which indicated his net salary for that month as R70 373,85. His monthly expenses as set out on page 173 of Bundle 5 for the period November to December 2013 shows that he spent R61 617,16 per month and is left with an amount of ± R15 000 per month surplus. He has built a cottage for his eldest son this cost him about R150 000. He did this because his eldest son wants his own time and he is growing to become independent.

[27] The value of plaintiff's policies and investments amount to ± R4,7 million as set out in the documents. The plaintiff testified that the defendant did not contribute anything towards the building up of his assets and therefore she should not benefit from any accrual. The defendant argues that it is the plaintiff who told her not to work and to look after the children and the household and therefore her contribution to the built up of the plaintiff's estate is that she remained home growing up the children and looking after the house.

[28] Under cross-examination the plaintiff said that when he realised that the only nursing training facility was far from the defendant to continue training

as a nurse he told her to stop as at that time his employers was looking after them adequately. He did not see any necessity for the defendant to work. At times the defendant did help in their office at his place of employment in Volksrust.

[29] When he left employment at Volksrust he transferred his accumulated pension benefits to a new fund known as Coronation. He went for training in Germany as well as in Sweden. The defendant did come with her and they also visited France.

[30] When he came back from overseas he worked at various power stations namely Arnot in Middelburg and Kusile as well as Matimba Power Station. At that time the defendant remained in Krugersdorp where he had purchased a home. He used to come home once a month. It was during that time when he was working at Thathuka Power Station in Standerton when her youngest son D..... was born in the year 2005.

[31] It was put to him that the defendant had to stay home to look after the children hence she did not work. The plaintiff replied that if the defendant had taken up employment he would then have had to make arrangements that the children go to an aftercare.

[32] He gave the defendant a debit card to use to make household purchases and deposited therein on a monthly basis an amount of ± R8 000.

He and the defendant made bulk purchases at Makro for which he paid out of his cheque account.

[33] He also paid for water and lights. He conceded that he was very strict with water usage as there were water restrictions applied in Volksrust but not in Krugersdorp.

[34] The plaintiff further conceded that the defendant does have a back problem and a slip disc and has constant pain. However, he maintains that the defendant is under medication. He denied that the defendant cannot sit or stand for a long time because of her back problem.

[35] The court observed the defendant as she sat in court during the first two days when the plaintiff testified and when it was her turn to testify she did so standing the whole day and did not take a seat. In further cross-examination about the health problem of the defendant the plaintiff denied that the defendant was not in good health. He says she is on medication which is helping her to cope.

[36] His evidence is that his marriage relationship started deteriorating in July 2007 when Retha van Aswegen came into the life of the defendant. He says he did not consider a divorce at that time because he had a family to look after and keep together.

[37] He conceded that he could have told one Christina Botha who is a friend of the defendant after she was discharged from the hospital that he wants to get rid of the defendant.

[38] When they were at the camp Retha and the defendant shared a bed. They seldom sat together with the rest of the family for meals. Retha and the defendant were always together. It was put to him that Retha was assisting the defendant because the defendant was not well. The plaintiff disputed this.

[39] He repeated under cross-examination that Retha and the defendant had their so-called Girls weekend out every month and during one weekend they spent the whole weekend gambling at the casino.

[40] He testified about an incident when the defendant told him that their eldest son Sean was being aggressive to her. The plaintiff reprimanded S.... telling him that he will stay with the defendant for the rest of his life and if S..... does not want to tow the line then he must leave the house.

[41] He testified further that the defendant knew about his policies because whenever his financial advisor was there they would all sit together and listen when he explained his portfolio. The defendant once said to him it is boring stuff.

[42] It was put to him that the defendant would testify that plaintiff used to force her at least three to four times per month to have anal sex with her. This

the plaintiff vehemently denied as being lies. He admitted that it only happened twice on the bed. He denied that as a result of that she was injured and had to walk to hospital to receive treatment. The plaintiff questioned why if that happened did she not report this to Retha who is her best friend and works at the hospital.

[43] The plaintiff conceded that he watches pornography on TV but never in the presence of the children. The defendant did a breast operation to make her breast bigger because he told her friend that she likes it that way and not because of him.

[44] It was put to the plaintiff that because of all her frustration caused by the plaintiff's unusual sex demands that the defendant started using alcohol. The plaintiff denied this and said the defendant had long started drinking and that she does finish a bottle of Whisky per day.

[45] The defendant went for a job interview at a massage parlour and before she went there the plaintiff says she told him that type of work is likely to involve sexual activities. It was put to the plaintiff that he told the defendant to accept the job. The plaintiff denied this.

[46] On the 23rd December 2009 the plaintiff gave the defendant an amount of R1 000 to buy herself something to please herself. The defendant instead went to the tattoo shop of Chris Koch where she had a tattoo done on her

neck. This the defendant did despite objection from the plaintiff who told her he does not like tattoos.

[47] It was on this day the 23rd December 2009 that according to the defendant the plan to kill the plaintiff was hatched. According to the defendant's testimony a certain Sarah who is Chris Koch's wife planted the seed in her to fix up a "*troublesome*" husband. She says she initially did not like the idea but succumbed later because of pressure and threats from Chris Koch.

THE EVENTS OF THE 14TH FEBRUARY 2010

[48] The parties were not living a happy marriage. This is common cause however it is clear that they were just tolerating each other. The plaintiff was suspicious of the defendant's infidelity because of her relationship with Retha. On the other hand the defendant depicted a picture of an unhappy wife deprived of all the love and yet subjected to humiliation and unnatural sexual acts.

[49] It is common cause that what happened on the 14th February 2010 was the final straw that broke the camel's neck. The plaintiff says that it is what happened on that day that convinced him that his marriage had broken down. The 14th February each year is internationally celebrated as a day when people who are in love with each other exchange gifts and cards with

messages in which they express love to each other. However with the plaintiff it was not to be that type of day.

[50] It is not in dispute that in the morning of the 14th of February 2010 which fell on a Sunday the defendant left home to visit Retha. It so happens that this day also marks the birthday of Retha.

[51] The defendant spent the whole day at Retha's place from 09h00 to about 17h00. She returned home according to the plaintiff she did not look happy and started shouting about dirty dishes. The plaintiff had spent the whole day at his home with the couple's two minor children.

[52] At about 20h00 the defendant left the house again saying that she was driving to a nearby Shell garage to buy cigarettes. She was driving her bakkie. According to the plaintiff said Shell garage is about 15 minutes walk to and from their home. At about 20h45 the defendant had not returned and when he phoned her to find out where she was the defendant told her that she could not find the cigarette that she wants at that Shell garage and had thus proceeded to another garage further on. The plaintiff told her that he does not believe her and said he thinks she is with Retha again.

[53] The plaintiff phoned again some thirty minutes later to find out where she was whereupon the defendant did not answer her phone. The plaintiff decided to go and lie on his bed and watch television. Shortly thereafter he

heard the dog barking. He was watching television in the main bedroom with Sean whilst Dean son was playing TV games in the lounge.

[54] The defendant entered the main bedroom followed by two unknown men one of whom had his hand on the shoulder of the defendant. At first the plaintiff thought this must be a hijack or a home robbery when the defendant said in Afrikaans "*Ek is jammer, ek is jammer*".

[55] The two men were Chris Koch and Heinrich Kraft. One of the men said "*Vandag gaan jy sterf en vrek jou donder*". The plaintiff raised his hands in a form of surrender and pleaded with the two men not to hurt his family and to take whatever they wanted in the house. He was hit with a fist and sprayed with water on his face.

[56] The one man later to be known as Heinrich Kraft stabbed him with a knife on his body. He sustained about 13 stab wounds on his neck and his body. All this happened in the presence of the defendant and the minor child Sean. He was bleeding from the face. Chris Koch said to the eldest son "*Jou pappie is besig om dood te bloei*". Sean fought with Chris Koch whilst the plaintiff grabbed Heinrich Kraft, kicked him and strangled him. The two assailants managed to get out of the house and fled the scene. The plaintiff took out his firearm and shot outside from the window of the house. This drew the attention of their neighbours.

[57] An ambulance was summoned and the police also called. Chris Koch and Heinrich Kraft were arrested about 30 minutes later not far from the house of the plaintiff. The plaintiff was taken to hospital. The defendant did not accompany him to hospital neither did she visit him. She decided to go and spend the balance of the night with Retha and later booked herself in at hospital for depression.

[58] It appeared that during the gruesome attack on the plaintiff the defendant stood by and did not trigger the panic button nor did she try and get help from the neighbours or even phone the police.

[59] It is common knowledge that the defendant stood trial as the third accused with Chris Koch and Heinrich Kraft and all three were convicted of attempted murder in the Krugersdorp Regional Court during 2012. At the time of the hearing of this matter sentence had not as yet been passed on all three.

[60] The learned magistrate in his judgment found as follows at page 435:

“It is quite clear that there was an agreement or arrangement or a conversation that took place prior to the date of the assault on Mr Vermaak initiated by accused 3 with regard to the killing of her husband. It is quite clear that this witness after having conversation in this regard proceeded to assist Ms Vermaak in the furtherance of the offence on the day concerned.”

[61] This clearly was a contract murder initiated by the defendant to kill the plaintiff because of what she says was the abuse on her by the plaintiff.

EVENTS POST THE 14TH FEBRUARY 2010

[62] The events following upon the savage attack on the plaintiff are worth mentioning for they have a bearing on this judgment.

[63] Shortly after the attack and whilst the plaintiff was in hospital the defendant made a sworn statement to the police at 23h00 on that day in which she told the police that she was hijacked by two white male persons who drove with her to her house where they proceeded to assault and attack the plaintiff as already explained. Two days later on the 16th February 2010 she made a second statement which was completely different from her first statement.

[64] In her second statement she no longer said anything about the hijack but that in fact Chris Koch whom she had come to know in December 2009 called her to fetch him and later forced her to take him and Heinrich to the common home where they proceeded to attack the plaintiff in the manner already explained above.

[65] Whilst the plaintiff was still being treated in hospital the defendant who never even on a single day paid plaintiff a visit telephoned him to tell him that

she had sourced the services of a good lawyer who needs to be paid R10 000 to help the plaintiff about the firing of the shots. The plaintiff told her that he does not need or require the services of a lawyer.

EVALUATION OF EVIDENCE

[66] It is clear that the plaintiff and the defendant had a strange sexual life. I say this because the plaintiff admits to watching pornography and also admitted that once or twice he and the defendant engaged in anal sex. He says it was by consent. The defendant says she was compelled to do it for the sake of money and when she could no longer carry on with this she decided to get rid of the plaintiff. Their private bedroom life and happenings will forever remain known only by the two of them.

[67] The plaintiff as compared to the defendant was open and honest with their sexual life. On the other hand the defendant exaggerated what used to happen to her and yet she took no steps to get help. It is strange that she did not deem it necessary to confide in her closest friend Retha about what she described as anal rape on her by the plaintiff.

[68] The defendant would like this Court to believe that she decided to have her husband killed because of the bedroom abuse when she could have simply laid criminal charges against him or at worst simply walk out of their marriage and divorce the plaintiff.

[69] The defendant lied to the police about the happenings of the 14th February 2010 unbeknown to her her co-accused had decided to tell the truth namely that they were hired assassins. When she left the home at 20h00 she said to the plaintiff that she was going to buy cigarettes when she knew very well that she was going to fetch Chris and Heinrich to do her dirty work.

[70] She did not care if her children were around or not all she wanted to see is the plaintiff dying. There is evidence that her eldest son does not want to see or speak to her. He is growing up as an angry young man due to what he experienced. I have no doubt that even the youngest son is traumatised.

[71] I have no hesitation in finding that the reasons behind the decision to kill the plaintiff were not the alleged sexual abuse and harassment it was all about money. She knew that she stands to benefit close to R4 million had the plaintiff died subject of course to her not being implicated in the killing. She had promised Chris and Heinrich money from the proceeds of the life insurance policies of the plaintiff and his other investments. Where else would she have got the money to pay the killers because she was unemployed. It could only have been from the plaintiff's estate.

THE FACTS APPLIED TO THE LAW

Forfeiture of the benefits

[72] It is trite law that in answering the issues in this matter this Court is guided by the provisions of the Matrimonial Property Act No 88 of 1984 as well as the Divorce Act.

[73] Section 3 of the Matrimonial Property Act reads as follows:

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

[74] The plaintiff has been employed since the date of marriage and his estate has increased considerably from the amount of R73 000 when the antenuptial contract was signed. It is now estimated at well over R7 million. The defendant has not been employed and during the few occasions that she was there is no evidence of her building up on her assets which stood at R37 000 when they married.

[75] It is the accrual portion of the plaintiff's estate to which the defendant pleads that she is entitled to fifty percent thereof as at date of divorce. She bases her claim on the fact that she has been a good wife all along despite what happened on the 14th February 2010. She also says that she looked after the children and raised them whilst the plaintiff was working and building up his estate.

[76] The plaintiff relies on section 9(1) of the Divorce Act which reads as follows:

“When a decree of divorce is granted on the grounds of the irretrievable breakdown of the marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of 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 benefited.”

[77] The plaintiff pleads that the breakdown of the marriage was substantially as a result of the criminal deeds of the defendant who hired people to kill him and for that the plaintiff prays that the defendant will be unduly benefited if it be ordered that she acquires a share in the accrual of the estate.

[78] The factors which the courts have in the past taken into account when deciding whether or not a forfeiture order should be made under section 9(1) are the duration of the marriage, the circumstances which gave rise to the breakdown, and any substantial misconduct on the part of either of the spouses.

[79] In the matter of *Singh v Singh* 1983 (1) SA (CPD) 781 the court decided that the wife's misconduct with another man amounted to substantial misconduct and outweighed the fact that the marriage had lasted 20 years. In the present matter the defendant's intimate relationship with Retha does not

seem to be substantial misconduct on its own for despite knowing of it the plaintiff continued with the marriage since 2008. He says he just decided to ignore the existence of the relationship.

[80] However it is this strange relationship that led to the events of the 14th February 2010. The defendant came to know Chris Koch through her association with Retha. She went to Chris to tattoo Retha's name on her neck. The learned writer Hahlo and Sinclair in the book "*The Reform of the South African Law of Divorce*" published in 1980 writes as follows:

"The Divorce Act revolutionizes the South African law of divorce by replacing fault with failure, matrimonial offence with marriage breakdown as the main ground of divorce."

[81] The parties in this matter have been married for 16 years when the plaintiff decided to sue for a divorce. In his particulars of claim he cites the final cause of the breakdown as the brutal attack on him on the 14th February 2010 by two men who had been hired by the defendant. I regard this cause of the breakdown as substantial which justifies a forfeiture order.

[82] Section 9(1) is couched in terms such as that not only does it give the trial court a discretion whether or not to order forfeiture it also says that forfeiture may be either wholly or in part and largely there must be proof that the guilty party will be unduly benefited if forfeiture of the benefits is not ordered.

[83] The marriage of the parties was to a certain extent happy until about 2007/2008 when the defendant commenced the relationship with Retha. This relationship has all the elements of infidelity. Retha sat in court throughout the hearing and was never called as a witness to corroborate the defendant's denial of their relationship being an innocent one based on support for each other.

[84] It is common knowledge that the plaintiff has done well for himself since the marriage. On the other hand the defendant has done little to establish her contribution save to say that she looked after the children and kept the home.

[85] At page 791C-F in the matter of *Singh v Singh supra* Baker J in dealing with the adultery aspect committed by the defendant which was the cause of the breakdown of the marriage said the following:

"I intend to order forfeiture because the defendant's misconduct with Bennet was 'substantial' in my opinion and outweighs the fact that the duration of the marriage was 20 years. The third consideration enjoined upon the court, namely the circumstances which gave rise to the breakdown involves fault and responsibility. It overlaps the misconduct factor insofar as the adultery and desertion are concerned and is neutral insofar as the quarrelling, arguing and recrimination are concerned, for I consider the blame for this should be apportioned 50/50. I consider that division would unduly benefit defendant and she is not in my opinion entitled to it. I do however consider that she is entitled to salvage something from the wreck of her marriage, even though she is largely responsible for it."

[86] In his affidavit in support of his counter-application in the Rule 43(6) application dated the 19th November 2013 the plaintiff at paragraphs 18 and 20 thereof says the following:

- “18. We are married out of community of property with the accrual system and if the applicant had decided that she was not happy in our marriage she could simply have approached her attorney or another attorney to institute a divorce action. In that instance she would have received approximately at that stage R1,5 million being her share of the accrual in my estate.
20. Simply put for divorce purposes I was worth R1,5 million but if I was dead I would have been worth R7 million.”

[87] Having considered all the relevant factors required to be applied in accordance with section 9(1) of the Divorce Act I have come to the conclusion that the defendant should be entitled to a portion of the R1,5 million that represented accrual to the estate of the plaintiff prior to the events of the 14th February 2010.

[88] I accordingly order that the defendant receive a cash amount of R750 000 from the plaintiff as well as to keep the Double Cam Toyota Hilux bakkie which is hers.

MAINTENANCE AND MEDICAL AID

[89] Section 7(2) of the Divorce Act provides that in the absence of a consent paper in respect of maintenance of the spouses by the other the court

may having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct insofar as it may be relevant to the breakdown of the marriage and any other factor which in the opinion of the court should be taken into account make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until death or re-marriage of the party in whose favour the order is given whichever event may first occur.

[90] In terms of section 9(1) of the Divorce Act the misconduct relevant to the breakdown of the marriage must be “*substantial misconduct*” but under section 7(2) that misconduct can be any conduct which has caused or contributed to the breakdown of the marriage.

[91] The writers Hahlo and Sinclair (*supra*) cited the English decision of *Wachtel v Wachtel* (1973) 1 All ER 829 at 836 per Lord Denning wherein he says the following:

“There will no doubt be a residue of cases where the conduct of one of the parties is in the Judge’s words ‘both obvious and gross’ so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone’s sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered.”

[92] In the present matter the parties' standard of living was not lavish. On the other hand there is evidence that the defendant is hooked on gambling at casinos using the same money given to her by the plaintiff. She planned the killing of her husband over a long period. She knew that after the death of her husband she stood to benefit financially. The killing was not aimed at getting rid of an abuser as she wanted this Court to believe it was for monetary benefit.

[93] The defendant has also over-exaggerated her health condition. I do not believe that she is unemployable. She is still young at the age of 43 she can still find suitable employment and fend for herself. In any case she has been living with her present lover Retha who is in full-time employment. She has in a manner "*remarried*". I do not consider that defendant ought to receive maintenance from the plaintiff nor is she entitled to benefit from the medical aid fund of the plaintiff.

[94] Similarly I do not agree that the defendant is entitled to any medical aid benefits funded by the plaintiff not under the present circumstances. She can with the R750 000 that she will receive purchase for herself an affordable hospital or medical plan.

[95] The order that I make is as follows:

1. A decree of divorce is granted.

2. The plaintiff and defendant shall have joint parental rights and responsibilities to the minor child Dean Vermaak as contemplated in section 18(3) of the Children's Act.
3. Primary residence of Dean Vermaak shall rest with the plaintiff subject to the defendant's rights of reasonable contact with the minor child:
 - 3.1 The right to have the minor child with her on alternative weekends, alternative short school holidays and half of long school holidays;
 - 3.2 Reasonable telephonic contact;
 - 3.3 The right to have the minor child on her birthday.
4. The defendant may approach the court for a variation of the above order at any given time.
5. The defendant will forfeit the benefits accruing from the marriage. Plaintiff will pay to the defendant an amount of R750 000 (Seven Hundred and Fifty Thousand Rand) being half of what had accrued to the estate prior to the 14th February 2010.
6. The defendant's claims in reconvention are dismissed.

7. Each party will pay own costs.

M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING:

14TH to 19TH FEBRUARY 2014

JUDGMENT HANDED DOWN:

2nd APRIL 2014