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

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no. **4410/2016**

In the matter between:

L M Plaintiff

and

F M Defendant

CORAM: **I VAN RHYN AJ**

HEARD ON: **14, 15 AUGUST 2018 AND**
16 AND 17 OCTOBER 2018

JUDGMENT BY: **I VAN RHYN AJ**

DELIVERED: **8 NOVEMBER 2018**

INTRODUCTION:

[1] The issues for determination in this divorce action are whether the Defendant should forfeit the marital benefits in terms of the provisions of Section 9(1) of the Divorce Act 70 of 1979 ("Divorce Act") read with the provisions of Section 9 of the Matrimonial Property Act ("MPA") 88 of 1954 and the issue of costs.

[2] The divorce action was instituted by the Plaintiff, Mrs L M against the Defendant, whom she married out of community of property subject to the accrual system on 28 March 1987. The two children born from the marriage relationship have both attained majority although their son, F is a full-time student and is therefore not yet self- supporting.

[3] The grounds relied upon by the Plaintiff for the forfeiture claim are succinctly that the, the Defendant became an alcoholic, he failed to support his family financially, he fraudulently caused a bond to be registered over the Plaintiff's immovable property which necessitated the sale of the property in order to repay some of the debts incurred by the Defendant.

[4] Mr Badenhorst on behalf of the Defendant argued that a party who sought a forfeiture order had first to establish what the nature and extent of the benefit was. He argued that Plaintiff failed to prove the extent of the benefit the Defendant stands to forfeit, as a result the Plaintiff's claim for forfeiture of all the benefits from the accrual stands to be dismissed.

[5] Section 9(1) of the Divorce Act provides as follows:

"*When a Decree of Divorce is granted on the grounds of 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 break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefitted.*"

[6] In interpreting Section 9 of the Divorce Act, Van Coller AJA stated as follows in **Wijker v Wijker**[1]:

"*It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefitted. 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.*"

[7] Once it is held that the Defendant will indeed be benefitted, the Court may proceed to determine whether such benefit will be undue. Mr Groenewald, on behalf of the Plaintiff argued that where a claim for forfeiture of benefits of

1 1993 (4) SA 720 at 727 E - F

the marriage in community of property is formulated, the full particulars upon which such a claim is based, including the nature and extent of "*benefits*", must be pleaded and proved. However where the parties are married out of community of property subject to the accrual system, the grounds upon which such a forfeiture order are sought must be pleaded, but the "*benefit*" does not need to be quantified.

[8] Section 3(1) of the MPA reads as follows:

"***3. Accrual System***

(1) 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."

<u>THE MARRIAGE AND BREAKDOWN THEREOF:</u>

[9] The parties met while still at school and continued their relationship throughout university until their marriage on 28 March 1987. Prior to their marriage they concluded an antenuptial contract incorporating a scheme of separate property, brought about by the exclusion of community of property and exclusion of community of profit and loss subject to the accrual system.

[10] The net value at the commencement of the accrual for Plaintiff amounted to R56 500.00 and consisted of a motor vehicle, immovable property, furniture and a piano worth R10 000.00. The commencement value of the Defendant's estate was R1 000.00. A marriage settlement in the form of a donation by the Defendant (*donatio propter nuptius*) to the Plaintiff included all gifts received at the wedding, furniture and household appliances to the value of R10 000.00 and an Old Mutual policy to be taken out by the Defendant to the value of R20 000.00.

[11] The Plaintiff obtained a position as a teacher at President Brand School in Bloemfontein and was so employed until the end of 2013 when the parties relocated to Mossel Bay. She, as a qualified school teacher, initially earned more than the Defendant who was employed as a salesman at Russels in Bloemfontein. Defendant, even though he throughout his testimony appeared to be uncertain and vague about the specific time periods, testified that he, within the first three years of their marriage earned more than the Plaintiff. Subsequent to resigning his employment at Russels, the Defendant joined his father-in-law's business and while so employed he started a part-time business installing and cleaning carpets.

[12] Defendant left his employment with his father–in-law after approximately two years and continued full-time with the carpet business called "Matkor". Initially his brother joined him but within six to eight months, according to the Defendant while Plaintiff estimates a period of between four to five years,

their ways parted and Defendant continued on his own under the name "M[…]" until the beginning of 2013.

[13] Two or three years after their marriage the parties purchased a property from Plaintiff's father situated in Langenhoven Park, Bloemfontein. The property was registered in Plaintiff's name and subject to a mortgage bond. Defendant attended to paying the bond registered over the property. In 1993 the initial property in Langenhoven Park was sold and a house situated in E Crescent, Pellissier, Bloemfontein ("*E Crescent property*") was purchased and again registered in Plaintiff's name.

[14] A bond was registered over the E Crescent property and the Defendant paid the monthly instalments. By agreement between the parties the Respondent was also responsible for instalments on the parties' respective vehicles, insurance premiums as well as other household expenses relating to rates and taxes as well as groceries. The Plaintiff was responsible for the children's school fees, all extramural activities such as dancing classes of their daughter, extra math classes, sport clothes and outdoor activities. She was a member of GEMS Medical Scheme and had the members of her family included as beneficiaries. Each party's contributions were guided by their respective income.

[15] According to both parties they were happily married and enjoyed a reasonable standard of living. During 2004 a second bond was registered over the E Crescent property to purchase a property at the Van der Kloof

Dam (*"Van der Kloof property*") in the Northern Cape. The purchase price of the Van der Kloof property amounted to R150 000.00. This property was also registered in Plaintiff's name and Defendant continued to pay the increased bond repayments on the E Crescent property. Defendant purchased a boat and the family enjoyed numerous happy days with friends at the Van der Kloof property.

[16] During 2005 the Defendant's mother suffered from serious health problems. Plaintiff testified that her mother-in-law had a drinking problem and while their mother was in hospital, the Defendant's two brothers reprimanded him about his alcohol abuse. Defendant denied that he was reprimanded by his brothers and was corroborated to a certain extent by his brother, even though his brother indicated that he does not have any recollection that a discussion regarding the Defendant's drinking habits occurred at that stage. The Plaintiff explained that the Defendant used to be conscious of his fitness and even participated in the Argus Cycle Tour. He was a dedicated father and a good husband. However since 2005 his drinking habits changed from being a normal social drinker to abusing alcohol.

[17] Over a period of several years his normal social drinking eventually developed into a habit that caused him to withdraw himself socially, show a lack of interest in his family and neglected his previous fitness regime. He complained of being tired or unwell when he returned from work and would immediately retreat to the parties' bedroom without spending any time with the family. On numerous occasions he appeared intoxicated, empty liquor

bottles were found and during 2011 to 2013 he was involved in three different motor vehicle accidents, palpably while under the influence of alcohol. Plaintiff pleaded with the Defendant to stop drinking on numerous occasions and threatened to leave him, but often resorted to protecting her husband by allowing him to retreat to their bedroom where he would fall asleep. On several occasions he promised to refrain from using alcohol but his excessive and inappropriate consumption of alcohol continued.

[18] Defendant, even though he admitted to lying about his drinking habits to the Plaintiff, conceded that he drank secretively and switched to consuming Vodka as he believed that the Plaintiff would not detect the smell of alcohol that easily. He furthermore testified that he, for a long period has not consumed any alcohol but then admitted to having a few beers only two weeks prior to his testimony in Court. The Defendant denies that he suffers from alcohol dependency.

[19] When alcohol is consumed it alters the levels of certain chemicals in the brain including dopamine. These chemicals controls a person’s impulsivity and frequent drinking copious amounts of alcohol alters this chemical production. Dopamine, when released, causes pleasurable feelings like happiness and joy. If a person then tries to stop drinking alcohol, the brain is deprived of the alcohol’s effect which results in unpleasant symptoms. Defendant testified that due to his financial problems he resorted to using alcohol to stabilize his depressed mood and emotions. It made him feel better and relieved the feeling of being in a “deep black hole”.

[20] During 2007 the Defendant started experiencing severe financial difficulties. Prior to 2007 he at times battled to keep up with his financial commitments due to cash flow shortages but even though he sometimes fell behind on bond payments or other accounts, he succeeded in maintaining his financial obligations to a certain extent. He however refrained from informing the Plaintiff of his financial difficulties. According to the Plaintiff's explanation the stress and financial difficulties suffered by the Defendant was due to his practice of using a client's deposit for payment of another client's order. Defendant admitted to this practice.

[21] In 2009 and due to the fact that the immovable property was registered on the Plaintiff's name, she submitted to debt review proceedings because of Defendant's failure to fulfil his financial obligations regarding the bond payments as well as monthly instalments on their two motor vehicles. Plaintiff contributed R3 000.00 per month and Defendant the same amount per month in the hope of retaining the family home and other assets.

[22] Plaintiff had at times, when the Defendant was not financially able to meet all his commitments, made payments to ensure that the insurance premiums on the movable and immovable property were covered, paid the salary of the domestic worker as well as salaries of the Defendant's employees. She also, on numerous occasions, fulfilled the Defendant's obligations towards purchasing groceries and saw to the payment of other household expenses. Defendant would then repay the Plaintiff as soon as he was financially able

to do so but more often than not it occurred that she received no repayment. Plaintiff's parents, on several occasions, provided financial assistance. Defendant also borrowed an amount of R40 000.00 from the Plaintiff's brother. According to the Plaintiff the Defendant only repaid an amount of R20 000.00 to her brother. Defendant admitted to borrowing the said amount from Plaintiff's brother but explained that he installed carpets to the value of R20 000.00 for Plaintiff's brother and repaid the balance of R20 000.00.

[23] Regarding the amount of R20 000.00 that Defendant borrowed from his father-in-law during 2012, he testified that due to the installation of a Trellidor, two devil's fork gates and other improvements at his father-in-law's property in Mossel Bay, he was exempted from repaying the loan to his father-in-law. Plaintiff testified that Defendant indicated that he would repay her father with the proceeds of the sale of a boat he owned, but she later discovered that he had sold the boat but failed to repay her father.

[24] The parties' daughter studied to be a dietician at the University of the Free State. The course over four years amounted to approximately R50 000.00 per year and was paid in full by the Plaintiff. She opened a savings account for each child and made monthly deposits into these accounts over many years, not only to pay for the children's education but also made available an amount of R50 000.00 towards their daughter's wedding in 2016. She paid for and provided both children with motor vehicles. She is currently paying all expenses relating to their son's studies at the University of the Free State. He is studying to become a physiotherapist. He is currently residing with her

in a rented townhouse and receives maintenance in the amount of R1 500.00 from the Defendant in terms of an order of this Court made in terms of the provisions of Rule 43.

[25] Defendant testified that he was under the impression that their children's tertiary studies were financed by his parents-in-law. According to the Defendant his parents-in-law, on numerous occasions when the children were still at school, indicated that they would finance their grandchildren's studies at university. He therefore never enquired whether this was indeed the position when his daughter started with her studies several years ago and accepted that it would be the same for his son, who is presently a second year student. Defendant's evidence in this regard seems improbable and implausible. It is furthermore in contradiction with the version contained in his plea that his son is not in need of maintenance due to proceeds derived from a study policy which covers his maintenance as well as all expenses at university.

[26] Due to his escalating financial difficulties and the mounting pressure by suppliers for payment of their accounts, Defendant resorted to borrowing an amount of R200 000.00 from a friend, Mr Delport. In a written loan agreement concluded between the Defendant and Mr Delport's business, Venerdi Eighteen CC, Defendant fraudulently indicated to the moneylender that the Plaintiff, being the owner of the property situated at Van der Kloof Dam, agreed to a bond being registered over the said property as security for the loan.

[27] It is common cause that Defendant forged Plaintiff's signature on the power of attorney to register the covering bond over Plaintiff's aforesaid property. Defendant utilized the proceeds of the loan to settle accounts of suppliers, to update payments on the bond of the E Crescent property and instalments on the parties' motor vehicles.

[28] Early in 2013 the Defendant suffered a complete emotional breakdown due to stress and was convinced by the Plaintiff to undergo medical treatment at Bloemcare Hospital. After two weeks the Defendant was released from hospital on his own accord and testified that he received treatment for depression while hospitalized. He received a prescription for antidepressants but due to the sickening feeling it caused he soon stopped using the medication. Plaintiff testified that the Defendant continued to use alcohol with the prescribed antidepressants even though he was advised by the physician not to do so since it may be detrimental to his health.

[29] During June 2013 Defendant could not ward off further demands for repayment of the loan by Mr Delport and resorted to requesting his brother's financial assistance. On realizing what Defendant did, and understanding the possible consequences of Defendant's actions by fraudulently having a bond registered over the Plaintiff's property his brother, Mr D M advised the Defendant to discuss the problem with the Plaintiff without further delay. Mr D M was called as a witness by the Defendant and confirmed that he immediately realized the severity of the problem and that he advised the

parties to sell the property at Van der Kloof Dam in order to cancel the bond and to repay the loan to Venerdi Eighteen CC.

[30] Mr D M further proposed that the Plaintiff also sell the family home situated at E Crescent, and relocate to Mosselbay, where he offered a position as a manager of one of his businesses to the Defendant to financially assist him. At the time and due to the Defendant's remark that he will most probably be incarcerated for fraud, Plaintiff without any other available options agreed to the proposals.

[31] The Defendant testified that, although Plaintiff was initially disappointed, she agreed to the sale of the properties and was enthusiastic and excited to resign her position at the school and relocate to Mossel Bay. His testimony in this regard is unconvincing. Plaintiff testified that their son was in the middle of his Grade 10 year at school in Bloemfontein, she had to resign her position as a teacher after a period of almost thirty years and without being able to secure employment in Mossel Bay she, as a last resort in an effort to save her marriage and assist her husband, agreed to the proposal of her brother-in-law.

[32] The property at the Van der Kloof Dam was sold for an amount of R200 000.00 and the proceeds were paid over to settle the Defendant's debt to Mr Delport. The E Crescent property was sold for an amount of R1 244 000.00. An amount of R996 718.99 was paid to Absa Bank for cancellation of the bond and an amount of R105 000.00 was paid to the

estate agent. Plaintiff made an amount of R87 397.14 available for paying debts incurred by the Defendant and she received an amount of R54 883.87 from the sale of the E Crescent property. On 7 August 2013 a further amount of R35 000.00 were transferred from Plaintiff's Capitec Bank account to the Defendant's account to settle further accounts. An amount of R15 000.00 were used to pay for the relocation costs to Mossel Bay. Apart from an amount of approximately R5 700.00 which Plaintiff utilised when the parties moved to Mosselbay to pay for household expenditures, she did not receive any financial benefit from either the sale of the E Crescent property or the Van der Kloof property. The Defendant and their son moved to Mosselbay during the middle of 2013 while Plaintiff remained in Bloemfontein until the end of the school year when she too relocated to Mosselbay.

[33] During January 2014 the Plaintiff was fortunate to obtain a position at a school in Mossel Bay and continued with her profession as a teacher. The Defendant started off with a monthly income of approximately R25 000.00 in the employment of his brother. The Defendant however soon relocated the business of manufacturing devil's fork fences to another property and even though he started the business with equipment and machinery provided free of charge by his brother and without any debt, he continued with the business for approximately a year before closing it down. Plaintiff testified that her brother-in-law remarked that the Defendant failed to fulfil his obligations at the business and sometimes did not show up for work. The Defendant hinted that his brother accused him of spending too much time at

his son's rugby games, but denied that he left his brothers employment due to disgruntlement about his performance at the business. According to the Defendant the process of manufacturing galvanized devil's fork fences were time-consuming and became non-profitable.

[34] Plaintiff indicated that Defendant even after obtaining employment with his brother in Mosselbay, failed to make regular payments on the insurance premiums of their motor vehicles and often borrowed money from her to pay his employees' salaries. He also regularly failed to pay the rent to her parents who provided housing, initially in a town house and later in a residential property. She realized that the Defendant's drinking habits continued to cause strain and unhappiness and contributed to the final breakdown of the marriage. During 2015 Plaintiff decided to end the marriage and to move back to Bloemfontein. She was re-employed at President Brand School in Bloemfontein and continued her profession as a teacher. Defendant fell back on his carpet cleaning business and expanded the business to include the general cleaning of premises in the Mossel Bay area. He earns approximately R6 000.00 to R9 000.00 per month.

ASSETS OF THE PARTIES:

[35] Plaintiff's and Defendant's net values of their respective estates at the date of the marriage on 28 March 1987 were R56 500.00 and R1 000.00 respectively. There is no indication that there are any disputes concerning the commencement value or the current value of the assets nor the debts of

either parties. To counteract the effect of inflation and the concomitant depreciation in the value of money, the MPA provides that, when calculating the accruals, the commencement value of a spouse's estate must be adjusted in accordance with any change in the value of money from the commencement of the marriage to the dissolution thereof.[2] For this purpose the weighted consumer price index as published from time to time in the *Gazette* serves as *prima facie* proof of any fluctuation in the value of the money.

[36] The Plaintiff testified as to the updated values of assets and liabilities in her estate during the course of her evidence. The Plaintiff's net value assets at the time of the trial as on 14 August 2018 were a pension interest in the amount of approximately R1 600 000.00 held in a Classic Preservation Pension Plan, pension from the last four years in an amount of approximately R96 000.00, her furniture valued at R30 000.00, R1 000.00 in a Capitec Savings account and the Aveo motor vehicle valued at more or less R55 000.00 with an amount of approximately R35 000.00 still owing on the motor vehicle. She also holds a Liberty Life Retirement Annuity in the amount of R200 000.00.

[37] Plaintiff indicated that many of their furniture were sold when they moved to Mossel Bay. During that time she discovered that Defendant sold her piano for an amount of R5 000.00 without her consent. She did not receive the proceeds of the sale. Due to its high fuel consumption the Tucson motor

[2] Act 88 of 1984,s 4(1)(b), read with s 21(2)(d)

vehicle was sold during 2016 and Plaintiff is currently borrowing a vehicle from her son-in-law. The Cherry motor vehicle was also sold for an amount of R20 000.00 to pay her son's studies which have been settled in full for the 2017 and 2018 academic years.

[38] During cross-examination Plaintiff was confronted with the fact that she was able to save due to the financial input made by the Defendant. She admitted that she throughout the marriage continued to open savings accounts for both children and also saved an amount of more than R10 000.00 in a Nedbank savings account which she eventually used to purchase a lounge suite for the communal home. The saldo of her Absa Bank account amounted to approximately R5 000.00. In her Capitec Bank account she saved an amount of approximately R70 000.00 which has now been utilized for legal costs.

[39] During cross examination Plaintiff was confronted with the fact that she travelled overseas during 2014, which according to the Defendant happened to be within his darkest financial period which lasted from 2008 to 2016. Plaintiff explained that she joined other mothers who raised money by selling "hot dogs" at sport gatherings. The profit was deposited into a savings account and the total savings were utilized by the group of mothers to enjoy a holiday overseas. There is no indication of the cost associated with the overseas holiday, but strangely Defendant obviously blamed the Plaintiff for spending money on herself in this way. Defendant obviously ignores his own behaviour by selling his boat, valued at R45 000.00 and Plaintiff's piano, a

gift from her father and failed to properly account for his spending of the money. He merely testified that he settled debts. He furthermore caused the family to lose their holiday home at Van Der Kloof Dam. They similarly lost the security of owning immovable property after retirement. The proceeds were consumed by the Defendant's inability to handle the family's finances and fulfil his duty to sufficiently support his family albeit that the Plaintiff had a similar duty which duty she duly fulfilled.

[40] Plaintiff furthermore occupied the position of secretary of the South Free State Tennis Association and received an income in that capacity. She received a separate income from sewing and provided extra classes to students which rendered an income of approximately between R5 000.00 and R6 000.00 per month. She was confronted with the fact that the Defendant suffered extreme financial difficulties because he owed an amount of approximately R170 000.00 to suppliers of carpets. Strangely enough the Defendant never explained why he submitted orders to the value of the said amount without explaining what happened to the stock. If the contracts fell through the stock would still be available for re-sale, but no explanation other than his vague indication that his business was not BEE compliant resulting in him not being granted new contracts were proffered.

[41] Plaintiff's total debts at the time of the trial was less than stated in the Request for Further Particulars for trial because the 2017 and 2018 tuition fees for their son were already settled. Even though the precise amount is not known it should be approximately R61 000.00.

[42] Defendant's assets and the net value thereof at the time of the trial are his camping equipment valued at R5 000.00, a carpet washer valued at R3 000.00, other equipment valued at R2 000.00 and clothes valued at R10 000.00 with a total value of R20 000.00. His retirement annuity fund from Sanlam is valued at approximately R51 000.00. Defendant's Volkswagen Amarok motor vehicle was repossessed during 2016. He is currently renting a fully furnished flat and a vehicle. During June 2018 he was indebted to Vodacom in the amount of R12 570.38.

[43] On 27 July 2016 the Old Mutual Flexi pension Retirement Annuity policy (with date of commencement 1 September 1987) donated to the Plaintiff by the Defendant in the antenuptial contract, amounted to R134 663.00. However during October 2017 this policy as well as a retirement annuity with the Liberty Group Limited were paid up and Defendant received an amount of R110 354.93 which he utilized to fund the divorce proceedings. Counsel on behalf of the Plaintiff argued that the Old Mutual policy belonged to the Plaintiff and the Defendant's blatant disregard of the provisions of the antenuptial contract also amounted to substantial misconduct. During cross examination the Defendant conceded that he lost everything. He, *inter alia* blamed the financial collapse during 2008, the fact that his business was not BEE compliant and that he made several wrong decisions for his financial demise.

[44] From the particulars in the pleadings, documents in the Court bundle and evidence adduced during the trial it is possible to calculate the accrual. It is apparent that the Plaintiff's estate showed a larger accrual than that of the Defendant. Furthermore it was argued by counsel on behalf of the Defendant that it was common cause that Plaintiff's estate showed a larger accrual and in consequence the Defendant acquired a claim against the Plaintiff for an amount equal to half of the difference between the accrual of the respective estates.

[45] During her evidence, and obviously without the prior knowledge of her legal team, Plaintiff indicated that even though she sought an order that the Defendant forfeits the patrimonial benefits in totality, she is willing to abandon the forfeiture claim as pleaded in the particulars of claim and is merely requesting an order whereby Defendant forfeits the right to share in the benefits of her pension interest which amounts to approximately R1.7 million. Counsel on behalf of the Defendant argued that with this concession the Plaintiff failed to make out a case as pleaded in the particulars of claim. Plaintiff had, so the argument goes, the opportunity to apply for an amendment of her claim in between the time she gave evidence until the trial resumed, approximately 2 months later but failed to do so.

[46] The argument that a party to litigation's case during the trial differs from the version stated in the pleadings, is often applicable during an appeal and the

principles applicable to such a situation have been restated several times. In Robinson v Randfontein Estates G.M. Co Ltd[3] Innes CJ held as follows;

"*The object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For the pleadings are made for the court, not the court for the pleadings"*

[47] The above principles were discussed and decided upon by the Appellate Division in the matter Marine & Trade Insurance Co Ltd v Van der Schyff[4]. It was found that where the court (in this case, a court of appeal) has all the material before it on which to form an opinion upon the real issues emerging during the course of the trial, it will be proper to treat the issues as amplified or enlarged where this can be done without prejudice to the party against whom the enlargement is to be used. Corbett, AJA (as he was then) explained and elaborated upon the principle as follows:

"Arguments halwe aanvaar ek ten gunste van die verweerder dat die eiser se saak so wesentlik afgewyk het van die tersaaklike bewerings in sy besonderhede van vordering dat die bogemelde regsbeginsel ter sprake kom. Ek is egter die mening toegedaan dat hierdie beginsel nie sonder voorbehoud op 'n saak soos die onderhawige toegepas kan word nie. Een van die vernaamste oorwegings wat aan hierdie beginsels ten grondslag lê is dié van die benadeling wat die een party mag ly as die ander toegelaat word om buite die bestek van sy pleitstukke te gaan. Sodanige oorweging is nie hier ter sprake nie, want 'n party wat ten volle besef dat sy teenparty se saak buite die bestek van die pleitstukke gaan en wat swyg en doelbewus nalaat om met die

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[3] 1925 AD 173 at 198.

[4] 1972 (1) SA 45 (AD) at 45 B-F.

veranderde geskille te handel – òf by wyse van kruisondervraging òf deur middel van die aanvoering van getuienis – kan daarna beswaarlik toegelaat word om te kla dat hy deur die teenparty se optrede in dié opsig benadeel word.

[48] At the close of Plaintiff's case the Defendant launched an application for absolution of the instance on the basis that not enough evidence was placed before Court to adjudicate whether a forfeiture order can be made. It was contended that the duration of the marriage, being thirty one years of which the last thirteen years, were problematic as well as the fact that no evidence was placed on record concerning the exact nature and extent of the accrual, the Court was not in a position to make a proper finding relating to forfeiture as requested. The Plaintiff's concession that the Defendant suffered from depression also fuelled the argument that the Defendant's conduct cannot be condoned, but that due to his state of mind his conduct does not constitute substantial misconduct.

[49] I agree with Mr Groenewald's argument that although the formulation of the claim for forfeiture and the grounds must be pleaded and proved, the "benefit" does not need to be quantified. It merely consists of the right to share in the accrual. As indicated, the Plaintiff testified as to the nature and extent of her assets and liabilities at the time of the trial. Her evidence was supported by documentation. On the other hand it appears as if the Defendant's assets amounted to R125 000.00 in 2014 but has since dwindled to an amount of R20 000 during 2016.

[50] I therefore find that at the time of the hearing during August 2018 and October 2018 it would have been possible to compile a list of assets belonging to each of the parties with their respective values as well as the liabilities to calculate the nett value of each estate. The commencement value of the respective estates is available and the accrual can therefore be determined.[5]

[51] However section 3(1) and 3(2) of the MPA determines that "…*at the dissolution of a marriage subject to the accrual system…the [beneficiary] spouse, acquires a claim against the other spouse of his estate …"* In Le Roux v Le Roux[6] Olivier J held that the implication of the provisions of Section 3 of the MPA was that a beneficiary spouse could not sue for an accrual computation until after a decree of divorce was ordered. Sutherland J in JA v DA[7] held that it is plain that there cannot be any basis to calculate the value of the estates at a moment earlier than the dissolution of the marriage.[8] Even though it is possible to calculate the extent of the accrual, there is no need for such a calculation to be done at this stage of the proceedings.

[52] Counsel on behalf of the Defendant argued that for a period of two thirds of their marriage Defendant contributed to the growth of the Plaintiff's estate by settling the bond payments of the immovable property and providing for the

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5 DEB v MGB 2014 JDR 2016 SCA (Juta)

6 [2010] JOL 26003 (NCK) at paras 34 tot 35

7 2014 (6) SA 233 (GJ) at 239 [20]

8 Reader v Softline 2001 (2) SA 844 (W); A B v J B 2016 (5) SA 211 (SCA) at paras [16] and [19]

family's household expenses. This contention was duly admitted by the Plaintiff. However during 2015 she realized that her children's relationship with their father were under constant strain due to his alcohol abuse and she, after ten years of pleading with him to stop drinking, lost hope of any improvement and returned to her former teaching position in Bloemfontein. The parties' daughter severed all ties with the Defendant and denies him any contact with his grandchild, whom he has not yet met.

[53] According to the Defendant he, refrained from informing the Plaintiff of his financial difficulties until 2012, but his evidence in this regard contradicts the fact that Plaintiff was placed under debt review during 2009 due to his inability to finance the bond payments as well as the motor vehicle instalments. As is evident from the testimony of both the Plaintiff and the Defendant both immovable properties, registered in the name of the Plaintiff, were sold to settle debts incurred by the Defendant.

[54] With the enactment of the Divorce Act, the legislature decided to do away with fault as a ground for divorce. Fault still has a role to play in the divorce system due to the inclusion of the circumstances that gave rise to the breakdown of the marriage and substantial misconduct as factors to be considered when forfeiture of patrimonial benefits is considered. To qualify for forfeiture based on misconduct, such misconduct must be "*substantial*".[9]

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9 Beaumont v Beaumont 1987 (1) SA 967 (A) at 994 D - E

[55] The evidence unmistakably reveals that the Defendant’s irresponsible business dealings, illegal as well as fraudulent conduct caused both parties and their children irreparable financial losses, anxiety and concern regarding their future and well-being. Plaintiff gave a detailed, truthful and reliable account of their years spent as a family and her concerns about Defendant’s drinking habits. She refrained from making degrading remarks regarding the Defendant during her testimony. She clearly loved the Defendant and respected him, but due to his alcohol abuse and misconduct referred to above, has lost her respect for the Defendant. There is no possibility of a reconciliation.

[56] For most of the time the marriage was a happy one and even though the periods of dispute and unhappiness were less, which appears to be a factor militating against an order for forfeiture being granted, the Defendant’s misconduct is of a serious nature. The Plaintiff’s version as to the circumstances which gave rise to the breakdown of the marriage is plausible and consistent with the facts, concessions and admissions made by the Defendant. Presently at the age of 54 years, the Plaintiff has lost the security of owning immovable property and is currently borrowing a motor vehicle. I am satisfied that the Plaintiff has shown, in relation to her pension interest, that if a forfeiture order is not made the Defendant will receive a benefit.

[57] I do not agree with Mr Badenhorst’s argument that Plaintiff may not, while testifying request a lesser order than pleaded in the particulars of claim without amending her claim. Defendant was in no way prejudiced. He is to

the contrary benefitted by her virtuous gesture. I am furthermore, and after considering the factors referred to in section 9 of the MPA and as applied in the Wijker- matter, convinced that in relation to the Plaintiff the Defendant will be unduly benefitted if the order for forfeiture regarding her pension interest is not granted.

[58] Plaintiff has been substantially successful in her claims and should therefore be awarded with the costs of the action.

[59] **In the result the following orders are granted**:

1. A Decree of Divorce.

2. In terms of Section 9(1) of the Divorce Act 70 of 1970 read with Section 9 of the Matrimonial Property Act 88 of 1954 the Defendant forfeits his entitlement to share in the pension benefits of the Plaintiff held in the Classic Preservation Plan with Stanlib as well as her present pension benefits held with the Free State Department of Education (Member No. 990169680).

3. The Defendant is ordered to pay the cost of the action.

I VAN RHYN AJ

On behalf of the Plaintiff:	Adv. W J GROENEWALD
Instructed by:	MR W PRETORIUS of SYMINGTON DE KOK ING
On behalf of the Defendant:	Adv. D J BADENHORST
Instructed by:	MARIUS VAN ZYL ING