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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

COURT A QUO CASE NO.: 22341/19

APPEAL CASE NO.: A288/2023

(1) REPORTABLE: YES/NO

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

(3) REVISED: YES

DATE: 27/3/2025

SIGNATURE

In the matter between:-

M[...] J[...] L[...]

Plaintiff

v

L[...] O[...] L[...] (BORN: M[...])

Defendant

Heard on: 25-26 November 2024 and 11 March 2025

Delivered: 27 March 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 27 March 2025.

Summary:

In action proceedings the defendant sought a partial forfeiture order against the plaintiff, namely in respect of the immovable property and her pension benefits.

1. It was confirmed that partial rescission of divorce orders is permissible where the divorce decree is severable from proprietary or other relief sought, *D v D* (GJ) A3079/IS (12 February 2016)
2. The reasoning is that it is in the interest of justice to craft an order that permits the previously divorced status of the parties to continue, while affording a party to prosecute the other aspects of the claim.
3. A court may order forfeiture if it is satisfied that a party, will in relation to the other be unduly benefited (*Wijker v Wijker*) 3 SA720A
4. A forfeiture claim should be determined in the divorce proceedings at the time the decree of divorce is granted. In this case the forfeiture issue was ventilated in the divorce proceedings that resumed after the court hearing the rescission application ordered that the defendant file her plea and counterclaim.

ORDER

It is ordered: -

1. The counterclaim is upheld;
2. The plaintiff forfeits the benefits of the marriage in community of property in respect of:
 - 2.1 the immovable property situated at No. 6[...], B[...] Gardens, S [...] Drive, Polokwane, Limpopo Province; and
 - 2.2 the defendant's pension interest in the Government Employees Pension Fund.
3. The plaintiff is ordered to pay the costs of these proceedings.

JUDGMENT

KOOVERJIE J

- [1] In these action proceedings, the defendant, Mrs L[...], seeks a partial forfeiture order against the plaintiff, Mr L[...], in respect of her immovable property and her pension interests in the Government Employees Pension Fund.
- [2] On 26 August 2000, the parties were married to each other, at Polokwane, in community of property. On the 26 August 2019, the court granted a divorce order together with the division of the joint estate.

ISSUE FOR DETERMINATION

- [3] The main issue for determination is whether Mrs L[...] is entitled to a forfeiture order pertaining to her property and her pension interest. Mr L[...], the plaintiff, opposes the forfeiture relief.
- [4] A claim for forfeiture of benefits is governed by Section 9 of the Divorce Act, No. 70 of 1979 (Divorce Act), which provides for the forfeiture of patrimonial benefits of the marriage. A patrimonial benefit is a benefit that accrues to a party's interest in the assets of the estate of the marriage by virtue of the marriage.

THE PLEADINGS

- [5] Prior to this matter being matter being heard, the parties had instituted other proceedings in court. It thus necessary to understand the context in which I heard the matter.
- [6] Mr L[...] instituted divorce proceedings, which were not defended by Mrs L[...]. The orders granted were a divorce decree and a division of the joint estate.
- [7] In order to claim 50% of Mrs L[...]’s pension benefits, Mr L[...] applied for the variation of the court order to include details of the respondent’s pension fund and give effect to S7(7) and S78 of the Divorce Act.
- [8] This is when Mrs L[...] realized that the divorce together with the division of the joint estate orders entitled Mr L[...] to not only his share in the immovable property but in her pension interests as well.
- [9] She then sought legal assistance and was advised to file a rescission application. The court hearing the rescission application granted Mrs L[...] leave to file a plea and counterclaim in the divorce proceedings. A partial rescission was granted, since the divorce order was not rescinded. Only the order prayer 2 “division of

the joint estate” was rescinded. At the time Mr L[...] neither pursued the variation application nor did he oppose the rescission application.

[10] In her rescission application, Mrs L[...] explained that when the divorce order was granted, she did not appreciate the consequences of the order. She did not appoint a legal representative at the time. It was her understanding that each party would maintain their assets which they had in their possession at the time. In her case, it was the immovable property located at 6[...] B[...] Gardens, S[...] Street, Bendor, Polokwane and her full pension interest.

[11] The value of her assets at the date of the divorce regarding the immovable property was R570,000.00, and her pension interest in the Government Employees Pension Fund was estimated to be R2,279,144.00.

POINT IN LIMINE

[12] The court mero motu raised a point namely whether a claim for forfeiture of the benefits of the marriage in community of property in terms of S9(1) of the Divorce Act may be made on their facts.

[13] This point was raised in light of the recent **Phokobye** matter¹, where the full court expressed that forfeiture relief must be sought at the time the decree of divorce is granted.

[14] The full court expressed at para 13 “It is trite that at the date of the divorce, a marriage in community of property is visited with an order for division of the joint estate under an order for forfeiture of benefits is granted in terms of S9(1) of the Divorce Act. This means that apart from certain exceptions, all assets of the parties at date of their marriage and acquired thereafter falls within the joint

¹ Mothibedi Alfred Phokobye v Felicia Mosima Adelaide Nkhumishe 2024 Full Bench decision of Gauteng High Court, 29 August 2024, case no.:A151/2023

estate by virtue of S7(7)(a) of the Divorce Act, this includes the spouse pension interest”.

- [15] It was argued by counsel for Mrs L[...], that the facts are distinguishable in this matter. In Phokobye, the applicant instituted a variation application so that he could benefit from the respondent’s pension interest. The respondent in her answering papers, sought an order that the applicant forfeits the benefits of the joint estate. Accordingly, the court a quo considered the matter and granted the forfeiture order in the respondent’s favour.
- [16] On appeal, the Appeal Court found that, in the circumstances, it was irregular for the court a quo to have considered the forfeiture issue in the variation application. It expressed that the forfeiture relief must be sought at the time the decree of divorce is granted.
- [17] I find that the facts of this matter are distinguishable. Firstly, there is a court order which directs Mrs L[...] to file her plea and counterclaim in the divorce action proceedings. Secondly Mrs L[...] did not attempt to make her case out in the variation application. She was advised to file a rescission application to annul the divorce orders granted.
- [18] The court hearing the rescission application, granted a partial rescission by only rescinding the “division of the joint estate” order. The decree of divorce was not rescinded. The matter then resumed in the proceedings instituted in the divorce action on the forfeiture issued. Evidence was then led by both parties on the forfeiture aspect.

[19] The granting of partial rescission of the divorce orders are permissible. In the Togo matter² the court was seized with a rescission of a divorce order and where the spousal maintenance was the disputed issue.

[20] Togo followed the approach in M v M³, where the divorce status of the parties was not rescinded. The court only rescinded the proprietary aspect. The court accepted that the parties wish to remain divorced. The court also appreciated that their party was entitled to have her dispute resolved. It echoed the sentiments that judgment depriving her rightly or wrongly of her rights should not have been taken in her absence.

[21] The Appeal Court in D v D ⁴ was in agreement that partial rescission of the proprietary aspects of the divorce judgment was permissible. The court supported the view that it would serve the interest of justice to craft an order that permits in effect the previously divorced status of the parties to continue, while affording a party to prosecute the other aspects of the claim⁵. Consequently, the court's order in the rescission application is permissible.

On the facts of the matter before me, the relief sought for the forfeiture of benefits are not in conflict with the legal proposition set out in Phokobye. The issue was ventilated under the divorce. In the premises, the matter is properly before me to adjudicate the matter.

THE FORFEITURE CLAIM

[22] In her counterclaim Mrs L[...] pleaded that the cause for the breakdown of the marriage was due to the following factors:

² Mathepe Mildred Togo & Paladi Piet Molabe and Eskom Provident Fund (29059/2014 [2016] ZAGPP16C 666 (26 July 2016)

³ M v M (2007[2011] ZAGPPHC/155(27 May 2011

⁴ D v D (A3079 [2016] ZAGPJHC31(12 February 2016

⁵ Supra at paragraph 3 of D v D

- 22.1 Mr L[...] was involved in extramarital affairs;
- 22.2 Mrs L[...] was humiliated by Mr L[...] during their marriage;
- 22.3 he abused Mrs L[...] in all possible ways;
- 22.4 he failed to contribute towards their joint estate;
- 22.5 the parties separated in 2014 and had not since lived together as husband and wife.

[23] In justifying her claim for partial forfeiture of the benefits of the marriage in community of property, Mrs L[...] pleaded that the forfeiture is premised not only on factors that led to the breakdown of the marriage but on substantial misconduct due to Mr L[...]’s extra-marital relationships as well as the manner in which he made one sided decisions regarding his finances and assets. In particular, the joint estate did not benefit from his pension fund.

[24] Section 9(1) provides 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 were 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.

The entitlement to a half share in the pension interest of the other spouse is governed by Sections 7(7) and 7(8) of the Divorce Act. It provides:

7(a) In the determination of patrimonial benefits to which the parties to any divorce action may be entitled;

a pension interest of a party shall, subject to the paragraphs (b) and (c) be deemed to be part of his assets.”

[25] This court has a discretion when granting a divorce on the grounds of irretrievable breakdown of the marriage or civil union in order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other. The court may only order forfeiture if it is satisfied that one party will, in relation to the other, be unduly benefitted. The court has a wide discretion and it may order forfeiture in respect of a whole or part of the benefits.⁶ The court needs to ask itself whether one party will be unduly benefitted if an order of forfeiture has not been made⁷.

ANALYSIS

[26] In my deliberation I had considered the evidence of both parties.

MRS L[...]'S TESTIMONY

[27] Mrs L[...] is currently 58 years old and still in the employment of the South African National Defence Force in the position as Private Corporal. She testified as follows:

27.1 she had a daughter, L[...], prior to meeting Mr L[...]. L[...] was born in 1986. She met Mr L[...] in 1991 and thereafter they married in 2000;

27.2 she commenced work with the South African National Defence Force in 1997 and was supporting Mr L[...] at the time;

⁶ Engelbrecht v Engelbrecht 1989 (1) SA 597 C

⁷ Wjker v Wjker 1993 (4) SA 720 A

- 27.3 Mr L[...] only commenced his employment as a teacher in 1999. At the time she was in Potchefstroom;
- 27.4 she relocated to Polokwane in 2001 with her daughter, L[...], where she resided with Mr L[...]’s family in his parental home;
- 27.5 since she was the only one employed at the time, she was responsible for all the household expenses, which included that of her mother-in-law, as well as the extended family that resided on the property;
- 27.6 Mrs L[...] explained that at this time Mr L[...] did not financially support her or L[...]. She was reliant solely on her income;
- 27.7 in 2005, Mr L[...] returned to Polokwane but stayed in another town, Lebowakgomo. She then moved in with Mr L[...] at Lebowakgomo and stayed there until 2014;
- 27.8 Unbeknown to Mrs L[...], Mr L[...] had an extramarital affair from which a daughter was born in 2002 from this relationship. She was only made aware of this fact in 2010 when he brought the child to his parental home. At the time the child was already 8 years old.
- 27.9 after he made this disclosure, Mr L[...] openly communicated with his mistress, and he would visit her often in Pretoria;
- 27.10 Mrs L[...] explained she was hurt and felt betrayed by Mr L[...]. She was expected to merely accept Mr L[...]’s life with another family;
- 27.11 the parties eventually separated in 2014. She explained that prior thereto, she continued to live in Lebowakgomo without Mr L[...]. She eventually left Lebowakgomo and went to live with her daughter on the stand.

27.12 during their marriage, Mr L[...] purchased various motor vehicles. In 2004 he purchased a Ford Courier Bakkie without her consent. In 2009 he purchased a Ford Focus once again without discussing it with her. He only requested her to accompany him to the dealership to sign the necessary documents to acquire the motor vehicle. In 2011 he purchased a Corsa from a colleague for R30,000.00. She had to pay the purchase price. She used her bonus and savings for the purchase. The Corsa was however registered in his name. In 2013 he purchased a Polo Vivo once again without discussing it with her;

27.13 She always desired a family home. This was the reason for the purchase of the stand. She suggested to Mr L[...] that they build their own house on the stand. Mr L[...]’s response was merely since he has his parental home, he was not interested in the stand. It was on this basis that she approached her daughter, L[...], to purchase the stand;

27.14 thereafter Mrs L[...] purchased the property situated in B[...] Gardens on 30 March 2014 for R495,000.00. The property was bonded in favour of Nedbank. Mrs L[...] explained that she had discussions with Mr L[...] again. He, however, made it clear that he would not be liable for any payments in respect of the property. Mrs L[...] nevertheless purchased the property, honoured the bond payments and effected the necessary renovations on the property. She testified that Mr L[...] failed to make any contributions to the property. He also never visited her at this home;

27.15 Mr L[...] had a good relationship with their daughter, L[...]. He supported her emotionally and academically in her school studies. She claimed that he failed to maintain her financially. Mrs L[...] had always given him cash to give to their daughter;

27.16 since L[...] did well in her studies, she only required financial support during her first year of university. After her second year she qualified for a full bursary which covered all her university expenses;

27.17 L[...] was given an allowance of R500.00 per month in this time;

27.18 under cross-examination Mrs L[...] explained that although she was in an unhappy marriage and the parties had separated, she did not proceed with the divorce action as her religious beliefs did not permit her to do so. Hence when Mr L[...] instituted the divorce proceedings, she did not oppose same;

27.19 she also explained that they were very happy during the initial years of their marriage. It was on this basis that she agreed that L[...] adopt his surname. Their relationship took a toll once he became involved in the extramarital relationship;

27.20 in respect of the alleged life policy that Mr L[...] took out in her name, she testified that her understanding was that it was a funeral policy which he had purchased in her name.

L[...]’S TESTIMONY

[28] L[...], the daughter, testified that:

28.1 she is currently 38 years old and married. She is almost qualified as a chartered accountant. She has one exam left in order to qualify;

28.2 she confirmed that from her second year she was fortunate to receive bursaries in order to finish her studies;

- 28.3 she also confirmed that Mrs L[...] would give her money and support her. On occasions when Mr L[...] would hand money to her, she knew that the cash came from Mrs L[...]. L[...] was required on each occasion to confirm with her mother that she received the cash from her father;
- 28.4 L[...] was aware that the parents did not have a good relationship. She recalled an incident where she witnessed her father abusing her mother. He physically dragged her from the car. Mrs L[...] was upset that he was leaving their home to visit his mistress in Pretoria;
- 28.5 she explained that she learnt that her father was involved with someone else when she saw his car parked outside a hotel. At that time he presented a different alibi for not being at home;
- 28.6 she however explained that in her younger years, she had a great relationship with her father. He supported her emotionally and in her school studies. He specifically taught her mathematics which resulted in her doing well in this subject;
- 28.7 L[...] also confirmed that when they would go on trips together as a family, Mrs L[...] was requested to pay for the petrol.

MR L[...]’S TESTIMONY

[29] Mr L[...] testified that:

- 29.1 he is currently 57 years old. He is employed as the Head of Department at the Department of Education, Gauteng Province;
- 29.2 the parties have not lived together as husband and wife since 2014;

- 29.3 he had always financially contributed towards the home. Prior to their breakup when the parties lived in Lebowakgomo, he was responsible for the rental payments;
- 29.4 he had a good relationship with L[...] and he had provided her with whatever she required during her growing-up years. He claimed to have given her R1000.00 on a regular basis;
- 29.5 when he had bought the vehicle, specifically the Ford Courier in 2004, as well as the Ford Focus, Mrs L[...] agreed to these purchases;
- 29.6 he was forced to buy another vehicle in 2013 as the Ford Courier was not in a good condition. It was then that they bought the Polo Vivo. He testified that Mrs L[...] agreed to the purchase of the vehicle as well;
- 29.7 when Mrs L[...] was interested in buying the property at B[...] Gardens, he had complied with her request and participated in ensuring that the bond application was processed and approved on both parties' earnings. It was agreed between them that they would use her bank account for the debit orders. Moreover, since she had a house allowance in terms of her employment benefits, it was agreed that she would pay for the home;
- 29.8 he testified that he took out a life insurance policy, in the name of Mrs L[...] (as bondholder). It was a requirement for the bond application;
- 29.9 Mrs L[...] agreed that he could use his pension payout to make improvements at his parental home;
- 29.10 he denied that he had extramarital affairs. He explained that he had a one-night fling which resulted in the child being born, and him having to maintain the child.

[30] Under cross-examination Mr L[...] was taken through the bank statements where he was directed to various entries which reflected that:

30.1 he made payments to his mistress with whom he had the child;

30.2 it was also pointed out to him that entries did not reflect that he made any contributions to L[...]. He confirmed that the monies paid to his mistress was in order to maintain his child;

30.3 it was also put to him that Mrs L[...] was not aware of these expenses, particularly the payment of maintenance in respect of the child at the time;

30.4 he could further not deny that the pension fund was not used for the benefit of the joint estate. He simply explained that he used it in order to improve his parental home;

30.5 he also did not deny that he abandoned Mrs L[...] in 2014 when he left their home in Lebowakgomo;

30.6 he was unable to proffer a probable explanation when it was put to him that Mrs L[...] was unaware that he had received his pension funds upon his resignation;

30.7 with regard to the use of the motor vehicles he also did not deny that she was not allowed to use the motor vehicles.

[31] Further under cross-examination it was put to him that there was substantial misconduct on his part in that:

31.1 he abandoned Mrs L[...] in 2014;

31.2 he commenced a relationship with another woman shortly after his marriage and had a child with her;

31.3 he abused Mrs L[...] financially and emotionally; and

31.4 Mrs L[...] was humiliated by him, particularly by having to remain in his parental home and support his entire family whilst he selfishly went on with his life and started another family in Gauteng.

31.5 he handled his finances recklessly. He had taken out a loan with Capitec Bank in an amount of R148 000, without Mrs L[...]’s knowledge. He also went under debt review in 2016, again without Mrs L[...]’s knowledge and consent.

[32] In considering whether Mrs L[...] can succeed in her forfeiture claim, the enquiry that must follow- is whether the party against whom forfeiture is sought, will, in relation to the other, be unduly benefitted if the order is not made. This is a 2-stage enquiry:

32.1 the first step is to determine whether or not the party against whom the order is sought will, in fact, be benefitted. This is a factual enquiry;

32.2 the second step is whether or not that party will in relation to the other be unduly benefitted if a forfeiture order is not made (this is a value judgment).⁸

[33] The factors which have to be considered are 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.

⁸ Wjker v Wjker 1993(3) SA 720A page 727

[34] On the factual enquiry, the undisputed facts portray:

34.1 the parties purchased the immovable property for an amount of R495,000.00, which has been bonded in favour of Nedbank. The market value of the property was R570,000.00 and the outstanding bond R321,771.00. The benefit thus being R248,229.00;

34.2 the property was purchased after the parties' separation in 2014;

34.3 Mrs L[...] was solely responsible for the bond and all related expenses in respect of the property;

34.4 Mr L[...] had not contributed towards the property. Even if one were to accept his version that he paid the life policy, it became evident that the monthly payments are minimal;

34.5 Mr L[...]’s pension was paid in July 2015. The benefit amounted to R432,000.00;

34.6 he dissipated his pension benefit without informing Mrs L[...] of the payout. His pension funds were most definitely not utilized towards the joint estate.

[35] In respect to the first stage of the enquiry it is evident that, Mr L[...] would unduly benefit from the marriage in an estimated amount of over R1.2 million.

THE DURATION OF THE MARRIAGE

[36] In considering the factors outlined in Section 9(1) of the Divorce Act, it is common cause that the marriage lasted 14 years. Most years were unhappy, and

the parties separated in 2014. For the first several years of their marriage they did not even live together as Mrs L[...] moved in with her in-laws.

- [37] The factors that gave rise to the breakdown of the marriage were also elaborated upon. Mrs L[...] testified that they had a blissful marriage for the first few years. The breakdown was caused mainly due to Mr L[...] becoming involved in the long extramarital relationship. In the time that he was forging a relationship with his mistress and starting another family, she was left to fend for herself and her daughter, and more so burdened to maintain his family members. Most of her earnings was utilized towards the household expenses. Mr L[...] was unable to show this court that he was supporting Mrs L[...] financially and emotionally during the duration of their marriage.
- [38] Mrs L[...] was given no respect in the marriage. He had the audacity to bring the child born out of wedlock to his parents' home. No consideration was given to Mrs L[...]’s feelings. She was expected to accept his relationship with his mistress and child. He did not care about her emotional wellbeing when he openly continued with his extra-marital relationship and disappeared on weekends to be with his other family.
- [39] He attempted to water down his wrongdoing by claiming that the relationship with the mistress was intended to be a nightstand. His version is highly improbable. Since evidence reflected that he paid regular maintenance for the child and visited them regularly.
- [40] Furthermore the manner in which he acquired the various motor vehicles and manipulated Mrs L[...] to sign for them when they are being purchased contributed towards the breakdown of the marriage. He accorded her no respect. She was not even allowed to use the motor vehicles. It also remains undisputed that she had to pay for the petrol when she was traveling with Mr L[...].

[41] Substantial misconduct includes conduct where a prolonged extra-marital affair in existence or even when a party irresponsibly diminishes the patrimony of the joint estate⁹. On the evidence before me Mr L[...] was not only involved in a prolonged extra-marital affair, but he disposed of his assets and spent his income without giving consideration to the interests of the joint estate and further did so without Mrs L[...]’s knowledge.

CONCLUSION

[42] Mrs L[...] satisfied the requirements of Section 9(1) of the Divorce Act. Mr L[...] would unduly benefit if the forfeiture order is not granted. In the premises, Mrs L[...] will be prejudiced if the forfeiture order is not granted. Mrs L[...] succeeds in her counterclaim. The partial forfeiture order is thus granted.

COSTS

[43] The issue of determining costs are in the discretion of the court. I find that the costs should follow the result as Mr L[...] is unsuccessful in the forfeiture dispute, he should bear the costs.

H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

⁹ Mashola v Mashola (022/2022)[2023] ZASCA TS (26 May 2023)
B.LST v MSM (33568/20) [2023] ZAPPHC1125 (14 September 2023)

Counsel for the first plaintiff: *Adv. Miller Moela*
Instructed by: *Jegeh Attorneys*

Counsel for the defendant: *Ms De Klerk*
Instructed by: *DDKK Attorneys Inc*

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Date of Judgment: *27 March 2025*