

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

**CASE NO: 2023/126365**

|     |                                    |
|-----|------------------------------------|
| (1) | REPORTABLE: NO                     |
| (2) | OF INTEREST TO OTHER<br>JUDGES: NO |
| (3) | REVISED: NO                        |

DATE: 27 March 2025

SIGNATURE: \_\_\_\_\_

In the matter between:

**M[...] B[...] M[...]**

Plaintiff

And

**M[...] G[...]**

Defendant

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**Summary:** Application for divorce. Parties married according to customary law in terms of the Recognition of Customary Marriages Act 120 of 1998 (RCMA). Marriage is not registered with the Department of Home Affairs (DHA) and is now irretrievable broken down and there are no prospects to reconcile. Section 8(1) of RCMA empowers Court to dissolve the marriage, thus, section 7(3) requires the Court to apply the provisions of section 9 of the Matrimonial Property Act 88 of 1984 and section 9(1) of the Divorce Act 70 of 1979 in regulating the proprietary consequences of the customary marriage.

Difficulty raised herein in drawing lessons from a different setting of law in addressing the proprietary consequences that arose from another distinct system. Notwithstanding the difficulty, the Court considered the blend of these systems in granting the appropriate remedy in the dispute. The parties submitted a settlement agreement which is tagged as “Original” that is made an order of this Court. The contentious issue was the division of pension interests wherein the Plaintiff rejected it as it would unduly benefit the Defendant. The Court considered the nature of the marriage in community of property within the framework of the RCMA and the fact that the Plaintiff is a member of the Momentum Corporate Funds At Work Umbrella Provident Fund (Provident Fund). This Court put emphasis on the overall purpose of the RCMA with supplementation of the jurisprudence in giving context to the relief sought. It then ordered the division of the pension interest and for the Defendant to receive 50% of the share as regulated by the nature of their marriage in community of property.

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## **ORDER**

- (i) The application for the dissolution of marriage between the parties is granted.
- (ii) The Deed of Settlement attached as “ORIGINAL” is made an order of Court.
- (iii) The Defendant is to receive 50% of the Plaintiff’s total pension interests in the Momentum Corporate Funds At Work Umbrella Provident Fund (Provident Fund), calculated at the date of the decree of divorce as defined in section 7 subsections 7 and 8 of the Divorce Act 70 of 1979.
- (iv) The Provident Fund is, effectively from the date of this order, required to endorse its records and pay the Defendant the calculated amount as per the order in (iii) above.
- (v) The parties are ordered to pay their own costs relating to this application and the costs of one Counsel where so employed on Scale B in terms of Rule 67 of the Uniform Rules of the Court.

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## **JUDGMENT**

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## NTLAMA-MAKHANYA AJ

### *Introduction*

#### *Background*

[1] This matter involves an application for a divorce wherein the parties were married in terms of customary law as envisaged in the Recognition of Customary Marriages Act of 120 of 1998 (RCMA). The marriage was celebrated on 17 June 2017. Thus, the marriage has since irretrievably broken down and both parties sought an order for divorce. The parties appeared before me and were legally represented. I reserved the orders for the sought prayers. I am presenting the reasons for the reservation of such orders.

[2] In this matter, the issues were settled between the parties and prayed for this Court to confirm and make such settlements an order of this Court. The parties sought an order for confirmation that:

[2.1] the bonds of marriage subsisting between the Plaintiff and the Defendant be and hereby dissolved.

[2.2] the Deed of Settlement attached hereto marked "**ORIGINAL**" be made an order of Court.

[3] However, the contentious issue of the forfeiture of the pension payout interests remained contested and was left for argument. After hearing the argument, the judgment was reserved by this Court.

[4] For argument, Counsel for the Plaintiff invited Ms M[...] (Plaintiff) to testify and give a background on the status of the marriage. The summary of her evidence is as follows. As noted above, the parties were married according to customary law and two

children were born out of the marriage. Ms M[...], as led by her Counsel, traced the existence of the marriage on 17 June 2017 and indicated that it was not registered with the Department of Home Affairs (DHA). The marriage has since irretrievably broken down and is in a state of disintegration to an extent of the non-existence of any possibility that the parties may reconcile. The Plaintiff mentioned that during the subsistence of the marriage, they acquired both movable and immovable properties. The said properties included a house; three (3) motor-vehicles (cars): Mercedes Benz; Corsa and a VW Polo. The two (2) motor-vehicles: Mercedes Benz and Corsa, have been sold by the Defendant and she is now left with the VW Polo. She once lost employment and regained it in June 2021 at SOS Protection. The Defendant also moved out of the marital home on 29 December 2020.

[5] She also highlighted that they tried to reconcile which was initiated by the Defendant through mediation by family involvement and such an attempt was in vain. She further stated that she was unemployed at the time of separation and only got re-employed in June 2021. Following the enquiry from this Court she indicated that she is currently a member of the Momentum Corporate under Funds At Work Umbrella Provident Fund. She also indicated that the Defendant never contributed to the said Fund and there is a standing Protection Order against him dated 02 February 2022 granted by the Magistrate in the District of Ekurhuleni. She is also not claiming any share from the Defendant and on the other hand, the division of the pension interests will be of prejudice to her and unduly benefit the Defendant.

[5] On the other hand, the Defendant, in his quest for the sharing of the pension benefits stated that he paid the bond when the Plaintiff was unemployed. He only stopped contributing to the marital home when the house was rented out by the Plaintiff and the tenants started paying rent. He, therefore, by virtue of the status of their marriage in community of property entitled to the share of the divided pension interests. He prayed for this Court to consider the division of the interests as he will be prejudiced by the non-division.

[6] This background is of importance in that it forms the basis upon which the Plaintiff applies for the forfeiture of pension payout interests against the Defendant. I will then incorporate the legal principles in the analysis of this matter because the parties have settled and only argued for the forfeiture of patrimonial benefits relating to the payment of pension interests to the Defendant. Thus, I am also not going to deal with the settled issues of the application wherein the parties merely seek an order for confirmation by this Court. It then begs a question on the extent to which customary law practices fall within the broader framework in the regulation of the proprietary consequences of a customary marriage.

### ***Analysis***

[7] The subject of contention in this matter is the forfeiture of the pension payout interests to the Defendant. The Plaintiff is strongly opposed to the sharing of pension interests with the Defendant. Of interest in this matter is that the parties are married according to customary law. The status of the marriage is automatically in community of property and there is no prior exclusion in terms of an antenuptial contract. Let me reiterate, it then raises the question about the fitting of customary law in the entire scheme of regulating the proprietary consequences of the marital benefits on dissolution of a customary marriage. Simply put, how does customary law, as an independent constitutionalised legal system, regulates the proprietary consequences of marriage on divorce?

[8] It is common cause between parties that they are married according to customary law which is defined in section 1 of the RCMA as the 'customs and usages traditionally observed amongst Indigenous people of South Africa which forms the culture of those people'. Customary marriage falls within this definition as it relates to the conclusion of marriage in terms of the customary law practices.

[9] It is also worth mentioning that the marriage was not registered with the Department of Home Affairs (DHA). However, I will not comment on non-registration

because section 4(9) of the RCMA does not render the marriage invalid because of its non-registration. Further, its existence and validity were not challenged as the parties have settled in terms of the settlement agreement tagged “Original” which is to be made an order of this Court. Of further importance is that the Constitutional Court in *Mayelane v Ngwenyama* 2013 (8) BCLR 918 (CC) at para 32 held:

“Importantly, however, the Recognition Act does not purport to be – and should not be seen as – directly dealing with all necessary aspects of customary marriage. The Recognition Act expressly left certain rules and requirements to be determined by customary law, such as the validity requirements referred to in section 3(1)(b). This ensures that customary law will be able to retain its living nature and that communities will be able to develop their rules and norms in the light of changing circumstances and the overarching values of the Constitution.”

Hence, recently, Ntlama-Makhanya AJ in *T.S.N. v J.K.M* (2023/120095) [2025] ZAGPJHC at para 15 put an emphasis and held that the marriage is not rendered invalid due to non-registration as envisaged in section 4(9) of the RCMA. Such contention is borne by the constitutional space which customary law has since attained in the new dispensation.

[10] This matter is one that subjects the constitutional status of customary law and its practices to unnecessary criticisms. The RCMA, as envisaged in section 7(2) regulates the proprietary consequences of customary marriage that is in community of property which is also of profit and loss between the spouses unless such is specifically excluded by the antenuptial contract. The latter provision is specific and is not on a ‘goose-chase’ exercise about the status of the marriage and its intended benefits. This then raises an issue regarding the interdependence of the relationship that exists between the living and official customary law and the Constitution. The RCMA was designed to deal specifically with customary law. Particularly in the division of assets, which in this instance, the pension payout interests. At face value, it appears easy, but a deeper

reflection evidences the complexities relating to the effect of customary law in regulating its own proprietary marital consequences as they emanate from its own context.

[11] This case is also evidence of the imposition of the different settings of law in addressing matters that emanate from a distinct legal system. I must express that the imposition is the creation of the RCMA itself in that section 7(3) imports the principles of section 9 of the Matrimonial Property Act 88 of 1984 wherein the 'right to share in the accrual or estate of a spouse may on divorce be declared forfeited, either wholly or in part.' The imposition of such principles is not in accord with the constitutionalised status of customary law endorsed by Langa DCJ in *Bhe v Khayelitsha Magistrate* 2005 (1) BCLR 1 (CC) at para 41 who stated:

“Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.”

Langa DCJ extended the affirmation of the status of customary law to the obligatory role of the courts as he held:

“... customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.”

[12] I am not going to recycle the produced jurisprudence about the status of customary law but in the context of this case, the parties have settled all other issues relating to the dissolution of their marriage. The only contentious issue was Plaintiff's opposition to sharing the patrimonial benefits relating to the payment of pension interests to the Defendant. During the subsistence of the marriage as adduced in evidence, both parties were members of the pension fund schemes or provident funds

until their retrenchment wherein they spent their respective payouts apart. The Plaintiff was re-employed in June 2021 and began to contribute to the provident or pension fund and the Defendant never contributed towards it or the household. The Plaintiff argued that the Defendant would unduly benefit from the sharing of the payout interests.

[13] Counsel for the Plaintiff heavily relied on section 9(1) of the Divorce Act 9 of 1970 relating to the forfeiture of patrimonial benefits of marriage. The latter section provides:

"When a decree of divorce is granted on the grounds of irretrievable break down of a marriage, the Court can make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either in wholly or in part, if the court having regard to the duration of the marriage, the circumstances giving 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 the other be unduly benefited."

However, section 8(1) of the RCMA states:

"a customary marriage may only be dissolved by a court by a decree of divorce on the grounds of the irretrievable breakdown of the marriage."

In this case, the court is empowered to dissolve a customary marriage in terms of the RCMA whilst on the other hand, it must draw from the provision of the Divorce Act to order the forfeiture of benefits on divorce. There is a misnomer in the regulation of the proprietary consequences of the customary marriage system. It is striking that the same Court is authorised to import principles from a different setting of law to address the proprietary consequences that emanate from another area of the legal system. This is an indirect infusion of the common law principles in the regulation of the marital regime of customary law rendering it a 'poor cousin' of the amalgam of South Africa's legal system.

[14] The importation of common law principles in the regulation of the proprietary consequences of a customary marriage is a cause for great discomfort for this Court. This Court is empowered by section 8(1) of the RCMA to dissolve the marriage. It is also on the other hand obligatory to import the provisions of the Divorce Act and the Matrimonial Property Act to address the consequences of the dissolved marriage. It is my considered view that the obligation to dissolve a customary marriage whilst on the other hand there is direct authority to resolve the matter through the lens of another system is a condemnation of the framework of the RCMA. The condemnation 'waters down' the contextualised purpose of the RCMA as endorsed by Moseneke DCJ in *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC) at para 24 who gave effect to the purpose and constitutionalised context of the statute (RCMA) as he held:

"Without a doubt, the chief purpose of the legislation is to reform customary law in several important ways. The facial extent of the reform is apparent from the extended title of the Recognition Act. The legislation makes provision for recognition of customary marriages. Most importantly, it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses. It specifies the essential requirements for a valid customary marriage and regulates the registration of marriages. In this way, it introduces certainty and uniformity to the legal validity of customary marriages throughout the country. The Recognition Act regulates proprietary consequences and the capacity of spouses and governs the dissolution of marriages, which now must occur under judicial supervision. An additional and significant benefit of this legislative reform is that it seeks to salvage the indigenous law of marriage from the stagnation of official codes and the inscrutable jurisprudence of colonial 'native' divorce and appeal courts."

Majiedt JA in *Cool Ideas 1186 CC v Hubbard* 2014 (8) BCLR 869 (CC) at para 28 narrowed the focus and contextualised the very purpose of the statute as is the case with the RCMA as he held it is imperative to put emphasis on the:

- (i) purposive interpretation of a statute;
- (ii) proper construction of the context; and
- (iii) construction to be consistent with the Constitution ... to preserve the constitutional validity of a statute.”

The above factors are of direct relevance in the context of the RCMA regarding the dispute of pension interests in this matter. They resonate with the discomfort expressed herein of RCMA empowering the courts to dissolve customary marriages but the final determinant for the remedies to be imposed are to be imported from a different setting of law. If the RCMA is designed to regulate its own proprietary consequences but effective remedies are to be drawn from principles of another legal system constitutes an uncertainty on the evolution of customary law practices. This Court is put in an ‘awkward’ position by the very same statute it is meant to interpret and apply in giving meaning to its overall purpose. I am of the view that this is the continued manifestation of the past that is couched under the constitutionalised space and misses the constitutional construction for the determination of the context where the dispute emanates from, which is customary law.

[15] I now turn to the crux of the dispute regarding the non-sharing of the pension interests. The Plaintiff contended that the Defendant did not contribute to the upkeep of the family household and therefore was not entitled to the share of pension interests. She also does not claim any benefit that may arise from the nature of marriage from the Defendant. There is also a standing Protection Order issued against the Defendant in terms of section 6 of the Domestic Violence Act 116 of 1998 which was also issued by the Magistrate in the District of Ekurhuleni dated 02 February 2022. On the other hand, the Defendant argued that he contributed to the household whilst the Plaintiff was unemployed. It was only in 2023 when the house was rented out by the Plaintiff and the tenants started paying rent when he also stopped contributing to the family upkeep. He therefore states that he will be prejudiced as he is also entitled to the interests because of the nature of their marriage and prays for the Court to divide them.

[16] The question that emanates from the parties' contentions is for this Court to balance what is prescribed by RCMA relating to the nature of the marriage and its intended benefits *vis-à-vis* the remedies to be drawn from the provisions of the Divorce Act and the Matrimonial Property Act on dissolution of their marriage?

[17] I have already made the reservation that this Court has in this balancing act as I am now placed in a position to follow Langa DCJ in *Bhe* who drew lessons from the Intestate Succession Act 81 of 1987 to fill the *void* in a matter involving the centrality of the principle of male primogeniture in customary law of succession. Although this matter involved the administration of the deceased estate through the lens of non-discrimination against women and children in the context of customary law, it is of significance and finds relevance in the sharing of the pension interests in this matter. The importance is borne by the nature of marriage in community of property within the broader framework envisaged in the RCMA.

[18] The Plaintiff's reliance on section 9(1) of the Divorce Act relating to the forfeiture of benefits which should be considered in the context of the ill-behaviour of the Defendant is without merit. The latter section places emphasis first, on the duration of marriage; secondly, the circumstances that gave rise to the breakdown and thirdly, any substantial misconduct on either of the parties. I must express that there is no further or alternative relief to be considered by this Court except the three factors in determining the forfeiture of the patrimonial benefits. It is common cause that the parties were married according to customary law for a period of less than five years (2017-2020) as the Defendant moved out of the marital home and two children were born in the relationship.

[19] In this case, I am persuaded by Chesiwe J in *P[...]/[...]/[...]* v *P[...]* *E[...]* *L[...]* Case number: 5345/2017, Free State, at para 34 who held '... the fact that the parties are married in community of property cannot be ignored, and has to be taken into consideration'. This is the point of departure as a firm basis for the consideration of

the eligibility of the Defendant to the pension interests. At the risk of repetition, marriage between the parties is in community of property. The status of this marriage should therefore not be overshadowed by what I would refer to as the 'guilty party' on divorce. This means that this Court is required to uphold the law as it applies to the dispute and not be motivated by the other party's misconduct. It is not for this Court to make a moral judgment except for the foundational principles of the law. It is alleged on papers and during oral argument that the Defendant has since moved out of the marital home on 29 December 2020 and is involved in a relationship with another woman. There is also an existing Protection Order against the Defendant that is indicative of the toxic relationship between the parties. However, there is also no evidence placed before this Court that the Defendant broke the terms of the Order that would warrant this Court to consider as a bar to the non-sharing of the pension interests. It is my view that the settlement agreement on all other issues relating to this application is indicative of what I may consider as the Defendant's 'remorse' and does not show any 'punitive' tendencies he may have or labouring against the Plaintiff. This Court acknowledges without digressing to the substance of this judgment, about the levels of gender-based violence against women and children which remain of great concern. This Court is vehemently opposed to any form of aggressive behaviour against women. Vast literature and jurisprudence is in the public domain and I need not further elaborate on it.

[20] The Plaintiff brought to the attention of this Court the judgment in *Swart v Swart* 2011 (1) SA 545 (GNP) as the Judge held 'adultery and desertion in certain instances merely be the symptoms and not the cause of the marriage break down and that conduct cannot be considered blame worthy', (emphasis added and all footnotes omitted). As is the case in this matter, the Defendant's unwarranted conduct of moving out of the marital home should not be the basis for the determination of his potential not to receive the share of the pension interests. Simply put, section 8(1) of the RCMA is clear in that it is only the Courts that are empowered to dissolve the marriage and not the Defendant's mere desertion of the marital home that may have to be considered as the basis for non-eligibility for pension interests. This Court acknowledges that each case is judged according to its own merits and voluminous jurisprudence has since

been produced relating to the forfeiture of pension interests. Amongst, others, Chesiwe J in *P[...]* *I[...]* *L[...]* at para 34 citing with approval *Wijker v Wijker*, 1993 (4) SA 720 (A) at 727D – F which was also the source and point of legal argument for the Plaintiff, where the court held in respect of forfeiture:

“It is obvious from the wording of section 9(1) 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.”

[21] I am moving from a premise of the new democratic dispensation as it equates both men and women in marital relationships which is endorsed in the RCMA and various other adopted legislation. For example, even the Divorce Act is designed to be of equal application to both parties on divorce and not necessarily to favour one party over the other, (Chesiwe J in *P[...]* *I[...]* *L[...]* at para 35). I am influenced by the lessons drawn from Moseneke DCJ in *Gumede* where a husband's retention of exclusive ownership of the family property at the prejudice of the wife was declared invalid. That principle is of equal application herein in that the wife (Plaintiff) does not have the sole retention of the joint estate, particularly in the context of the community of property marriage and of profit and loss. I am not to argue for a discrimination principle as in *Gumede*, thus, of great concern in this Court is the nature and status of the marriage that is regulated by customary law which is automatically in community of property. The sharing of pension interests is a fundamental principle of law and not designed to be at the 'whim' of the unhappy person (Plaintiff) in the marriage to turn around and seek retention of the pension interests against what is prescribed by law. The Plaintiff, as of 05 March 2025, her anticipated benefit statement until the age of retirement at 65 years is situated at R133 743.41, having joined the Scheme on 01 July 2021. In this case, the

Plaintiff regresses to the 'fault' system and not open to the key content of the prescription of the laws that regulate their marital regime system.

[22] Having considered the above, I am not satisfied that there is sufficient evidence that would permit this Court declaring the forfeiture of the pension interests whether wholly or partially. The Defendant is eligible to have a divided share of the pension interests due to the nature of their marriage. The proprietary consequences of marriage are today, further influenced by the principles of the new dispensation, which are of fundamental importance in the context of customary law that is progressively, taking its rightful place in post-apartheid South Africa. I must revert and state that the crux of this matter involved a blend of different legal systems in the resolving of the pension interests payout. It limits the potential of customary law in addressing its own proprietary consequences that emanate from its own legal system. It conflates the customary law principles as independent and amalgam of South Africa's legal system.

## **COSTS**

[23] It is a standing principle of law that the costs should follow the results. In this case, due to the nature of the dispute the costs are to be indicated as reflected below.

## **ORDER**

[24] In the circumstances, the following order is made:

[24.1] The application for the dissolution of marriage between the parties is granted.

[24.2] The Deed of Settlement attached as "ORIGINAL" is made an order of Court.

[24.3] The Defendant is to receive 50% of the Plaintiff's total pension interests in the Provident Fund, calculated at the date of the decree of divorce as defined in section 7 subsection 7 and 8 of the Divorce Act.

[24.4] The Momentum Corporate Funds At Work Umbrella Provident Fund is, effectively from the date of this order, required to endorse its records and pay the Defendant the calculated amount as per the order in 24.3 above.

[24.5] The parties are ordered to pay their own costs relating to this application and costs on one Counsel where so employed on Scale B in terms of Rule 67 of the Uniform Rules of the Court.

**N NTLAMA-MAKHANYA**  
**ACTING JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

***Delivery:*** *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 27 March 2025.*

***Date of Hearing:*** 13 March 2025

***Date Delivered:*** 27 March 2025

***Appearances:***

***Plaintiff:*** Advocate CM Maswanganyi

Instructing Attorneys: Motjopi Attorneys, Notaries and Conveyancer INC

***Defendant:*** Thabiso Mashita

Instructing Attorneys:

Nhlapho Moloto and Associates Incorporateda