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**OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

AMMENDED JUDGEMENT

Case NO: 10481/2018

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

In the matter between:

P[...] **N[...]**

PLAINTIFF

and

D[...] **N[...]**

DEFENDANT

Coram: Kholong, AJ

Date of hearing: 14 May 2025

Date of Judgement: 6 August 2025

JUDGEMENT

KHOLONG AJ

Introduction

1. In this action, the plaintiff seeks a decree of divorce and an order dividing the proceeds of the joint estate equitably on the strength of a marriage entered into by plaintiff and defendant on 10 January 2003. Plaintiff prays that she is entitled to the relief she seeks in the particulars of claim on account of irretrievable breakdown of marriage. Defendant who in his plea does not contest that the marriage has broken down irretrievably, counterclaimed and sought forfeiture of benefits wholly or in part against plaintiff in his favor on account of alleged substantial misconduct by Plaintiff during the marriage.

2. The Plaintiff is Mrs. P[...] N[...] (born R[...]) (herein-after "plaintiff"), an adult female resident of Cape Town who until institution of these proceedings had been staying with defendant as his wife, having been married in community of property.

3. The defendant, Dr. D[...] N[...] (herein-after "defendant") is an adult male medical practitioner who resides in Cape Town and is a husband of the plaintiff.

Background

4. Plaintiff and defendant were married in community of property on 10 January 2003. The Plaintiff and defendant have one minor son who currently resides with defendant. Whilst in the pleadings plaintiff sought custody and maintenance in respect of the minor child who at that point lived with her, given changed living arrangements, in respect of the minor child who had moved to stay with his father, this prayer was not pursued by the plaintiff during these proceedings. Plaintiff claims that the marriage relationship between herself and defendant has irretrievably broken down. The reason being that the parties frequently quarrel and argue. They no longer share common interests and are no longer compatible with each other. Plaintiff claimed that defendant is emotionally abusive and that it is in their interest that they seek a decree of divorce.

5. Plaintiff pleaded that she no longer wished to remain married to defendant as she had suffered emotional and psychological turmoil and has no desire for reconciliation. Defendant both in the pleadings and in evidence accepted that the marriage has irretrievably broken down.

6. The central issue which remained for this Court to determine therefore is whether the Plaintiff should forfeit all or part of the patrimonial benefits of the marriage in terms of Section 9(1) of the Divorce Act¹.

The Counter-claim

7. In his counter-claim defendant pleaded that the marriage relationship irretrievably broke down because of compulsive gambling addiction by plaintiff. That when plaintiff was provided with support to deal with this gambling addiction amongst others, she becomes aggressive and verbally abusive. That this gambling addiction caused severe strain.

8. In respect of arrangements for the child, the defendant sought this Court to order that both parties shall be the minor child's co-guardians with both having full parental rights and responsibilities. That the care and primary residence of the minor child be awarded to defendant subject to reasonable contact. Defendant tendered to retain the minor child on his medical aid and sought both parties to be equally liable and responsible for school fees and related costs.

9. Defendant seeks Plaintiff to forfeit her patrimonial benefits of the marriage in favor of the defendant either wholly or in part as Plaintiff is said to have a gambling addiction which has contributed to the irretrievable breakdown of the marriage and caused losses to the estate. That this addiction systematically, particularly between 2013 and 2018 diminished the joint estate rather than contributed to its growth. Defendant pleaded that Plaintiff's gambling addiction constitutes substantial misconduct as contemplated in Section 9(1) of the Divorce Act².

¹ Act 70 of 1979.

² Act 70 of 1979.

10. In her plea to defendant's claim in reconvention plaintiff denies gambling addiction and denies that there is any basis upon which she should forfeit any patrimonial benefits of the marriage which may be due to her. That there hasn't been any misconduct let alone substantial misconduct to justify forfeiture.

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Plaintiff's evidence

11. Plaintiff led her evidence of how the parties at various stages of the marriage conducted their financial affairs and contributed to the marriage. She testified about how the parties, from the beginning contributed towards the acquisition and maintenance of the various assets of their joint estate. Although in the particulars of claim plaintiff pleaded irretrievable breakdown of marriage and sought that the primary residence of the minor child to be with her and maintenance. This plea in respect of the minor child was not pursued in evidence and plaintiff appeared resigned during examination in chief and cross examination to the primary residence of the minor child being with defendant. She also did not pursue life-long maintenance with respect to herself.

12. Her evidence was that when the parties married they both brought assets into the marriage. She testified that defendant brought an immovable property known as SS C[...] T[...] and a Toyota conquest. That she had bought an immovable property known as SS T[...] G[...] and a BMW vehicle. That her property, which she had bought, was used as the couples' marital home at the beginning of the marriage for approximately three years until it was sold on 18 January 2006. That towards latter part of the marriage, one of their property investments, C[...] T[...] after much trading in investment properties was sold eventually in 2024 after delays, according to her, caused by defendant.

13. Her evidence is that for the first few years of the marriage, starting with her employment at the SABC, she used her money to help pay bond instalments; rates and taxes for property like T[...] G[...] and for various other household expenses to the benefit of the joint estate. That when they moved to Cape Town the proceeds of her property went into paying household expenses for the estate. Her evidence is

that she paid monthly rentals and deposit for their rental accommodation at Century City until they bought the D[...] road property.

14. Her evidence is further that for a number of years after their marriage she took over the administration of the immovable properties in the joint estate. That she would for example receive rental income from SS C[...] T[...] and she would in turn pay levies and rates thereon. That this approach, which included her paying for shortfalls in some instances was broadly used until about October 2017. This evidence is by and large not contradicted by defendant save the complaint that her gambling addiction especially post 2012 and more so post 2018 contributed to the neglect of this responsibility and spending in furtherance of this gambling addiction to the detriment of the joint estate.

15. Plaintiff testified that during 2004 they bought a Witkoppen property which they sold at a profit in 2012. She had signed the debit order for the bond on this property. That the proceeds of the sale of this property went to the purchase around 2013 of another property, Melkbosch Strand, Erf 3 [...], which is the property defendant has been occupying since March 2019, and according to plaintiff's Counsel the biggest remaining asset in the estate. Plaintiff's evidence is that there were two sectional title properties bought and sold during 2004 which defendant secured the purchase of using blank cheques issued by her. That in 2005 the parties bought various properties in Johannesburg pointedly Crestview 9, 12 and 16.

16. The evidence is that Crestview 12 was sold in 2015 at a profit. The plaintiff's evidence is that the proceeds went to her and she used that money to pay for C[...] T[...] and the atlantic beach bond. That crestview 16 was sold in 2016 for about R750 000 and the proceeds went to defendant. That Crestview 9 was sold with minimal proceeds because of various debts that had accrued on it. She testified that they acquired and sold SS Lamone during their marriage with defendant receiving the proceeds.

17. The evidence is further that in 2007 they bought Erf 1[...] in Milnerton together with others. Plaintiff paid the bond and rates and collected rental. The property was sold in 2020 for R1 140 000. It appears at this point there was conflict between the

parties about how to share the proceeds, a matter apparently resolved by a rule 43 order allowing both parties to share equally.

18. It is Plaintiff's evidence that when she worked at various institutions, she contributed meaningfully to the joint estate. She testified that when she worked and resigned from Faber Coach Works she was granted R1.2 Million of which R250 000 of was paid over to defendant, the balance being used for joint household expenses. It was her evidence that whilst later employed at Foschini Group around 2008 she bought a golf vehicle for defendant to use to travel to and from work at his Vredenburg medical practice. That she paid for the golf until it was replaced by another vehicle, a Toyota. That this Toyota was paid for by the restaurant she operated, the I[...] C[...], which at that point ran as a successful business until the business was liquidated and Toyota vehicle consequently repossessed.

19. Plaintiff conceded that she started gambling socially around 2012 when her son turned 3 and was at school. That at that point she had won about R4000 from the R500 her mother had given her. That gambling became an enjoyable habit for her to have fun. Plaintiff could not give a definitive figure of the amounts gambled over time in total. She admitted taking money from the business she ran, the I[...] C[...], to fund her gambling habits. She claimed that from her winnings she would not deposit it back into the business but took it home and dispensed it towards household expenses. That she contributed to paying for some parts of the roof at the Atlantic Beach house where defendant currently resides.

20. Plaintiff testified that the environment in the marriage was positive as long as she was bringing in money. The environment changed when her revenue generating abilities diminished. She states that when money dried out the environment changed and defendant became abusive. She pointed out that when she was out of a job around 2012 defendant on occasion would suggest that she go to Johannesburg with the minor child to look for a job. That she, at the beginning, took sole responsibility for the physical care of the minor child as an infant, something defendant didn't have interest in.

21. In cross examination she testified that there are occasions defendant punched her and periodically emotionally abused her. She testified those experiences left her afraid of defendant as husband. That defendant during the marriage has bought various vehicles some of which she doesn't know where they may have ended up or how proceeds thereof may have been used if ever they were sold. She further had no idea what happened to some assets in the estate including shares they held in the joint estate.

Defendant's Evidence

22. The defendant in evidence confirmed the plea and admitted that the marriage relationship has irretrievably broken down. He confirmed his counterclaim claiming forfeiture by plaintiff of all or part of the patrimonial benefits of the marriage.

23. The defendant's evidence is that Plaintiff's conduct has resulted in significant financial losses to the joint estate. His testimony is that plaintiff withdrew and gambled substantial sums from the joint accounts and the business accounts of the I[...] C[...] without defendant's knowledge or consent. It was defendant's testimony that the gambling losses ran into the millions of rands. His testimony is that when they first discovered the gambling problem with plaintiff's brother, plaintiff admitted to them when questioned. At first stating that she gambled R3000; with further probing she admitted to gambling R5000. When his brother put a figure of R10 000 to her, it was defendant's testimony that she didn't respond and kept quiet.

24. It was defendant's evidence that plaintiff failed to apply herself fully given her experience and qualifications for the benefit of the joint estate. That whilst she studied various courses during the marriage, she did not bring these to bear for the benefit of the family. That she failed to contribute meaningfully to the maintenance of the joint estate, household expenses and the minor child's needs since the breakdown of the marriage. His testimony is that he has been the primary financial contributor to the estate throughout and has maintained the properties in addition to supporting the minor child since institution of divorce proceedings.

25. Defendant testified that plaintiff would be unduly benefited if she were to receive half of the joint estate given her conduct and limited contribution to its growth. His submission to this Court was that one cannot claim or get what they do not deserve or worked for. He states that his medical degree cannot be used unduly as a retirement package. Defendant's evidence was that he was the primary breadwinner throughout the marriage working as a medical practitioner at places like the Men's Clinic International; Transnet and the Vredenburg practice. That this hard work allowed the family to have a reasonably comfortable life.

26. He testified that he identified various investment opportunities especially as it relates to various property. That he secured funding for those opportunities and paid bonds. Defendant conceded that Plaintiff's role was managing the properties he, as defendant, would have sourced. That she would collect rent and pay necessary running costs for those properties. That the rest of the money was for Plaintiff to keep and use as she wished.

27. Defendant's evidence was that his work at Transnet added additional sources of revenue for the family that allowed them to have a good life. That he paid for renovations at the Atlantic Beach property thereby spending something in the region of R1.8 Million. That since 2018 he maintained the Atlantic Beach property and paid the bond on the D[...] Road property. That he has been responsible for the maintenance and education of their son.

28. It is Defendant's further evidence that he only discovered plaintiff's gambling addiction on or around 20 January 2018 when she failed to return home and it was discovered later that she had been gambling at Grand West Casino. That when confronted, plaintiff initially minimized her gambling problem, claiming she had spent small amounts of money. That upon this realization he took plaintiff to Grand West Casino to sign a self-exclusion.

29. It was Defendant's evidence that the I[...] C[...] Restaurant failed due to Plaintiff's mismanagement and squandering of funds with gambling and diversion of funds with her family connections. That plaintiff had been borrowing money from other people to cover her expenses to the detriment of the estate. Defendant testified

that the joint estate had debts on bonds in the region of R4.5 Million. In cross examination defendant put the outstanding bond on the Atlantic beach property at about R2.7 Million. That the bill to home owner association was about R100 000; municipal bills estimated at about R450 000.

30. In cross examination defendant conceded that he understood that the marriage was in community of property and that he opted not to settle an ant-nuptial contract. The defense led the evidence of Mr. Kamal Naicker and Mrs. Niranj Pather. These witnesses' evidence essentially related to debts incurred and donations made from the joint estate by the plaintiff and defendant respectively. Save to confirm debts incurred and donations made, not much could be made of this evidence, however, in determining the central question of forfeiture.

31. The Defense further led the evidence of the minor son of plaintiff and defendant. This witness's evidence was in summary that his relationship with his mother is strained and was happy staying with his father. That before 2018 he never heard his parents argue. This evidence confirms in this Court's view arrangements as to the care and contact of the minor child after divorce as submitted by the parties.

The Law

32. Section 9(1) of the Divorce Act states:

“when a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the Court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favor of the other, either wholly or in part, if the Court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited”.

33. In Wjker³, citing Hahlo in ***The South African Law of Husband and Wife***, 5th edition at 157, the Court noted that a marriage in community of property was described in the following terms:

“community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares”.

34. The ratio arising from this judgement in Wjker is that in deciding whether to grant a relief of forfeiture, a Court has “to determine whether or not a party against whom the order is sought will in fact be benefitted”⁴. If so whether such benefit was undue. This inquiry is purely a factual inquiry. That in undertaking this inquiry, the Court has to consider a number of factors which factors need not be cumulative to find application. These are

- i) The duration of the marriage;
- ii) Circumstances which gave rise to the breakdown of the marriage;
- iii) Consider whether there has been substantial misconduct.

35. The Court held that it is only after the Court has concluded that a party would be unduly benefitted that it is empowered to order a forfeiture of benefits. That in making this decision it exercises its discretion in a narrower sense. The Court in this matter also held that in interpreting Section 9(1) it could never have been the intention of the legislature that the factors mentioned in the section should be considered cumulatively. The dictum arising from this judgement is that too much importance should not be attached to misconduct which is not of a serious nature. The misconduct should be so gross that it would offend the whole notion of justice to allow the guilty party to get away with the spoils of marriage.

³ Wjker v Wjker 1993 (4) SA 720 (A) at 33

⁴ Wjker v Wjker, op cit, at 19.

36. In *Engelbrecht v Engelbrecht*⁵ the Court found that it could never have been the intention of the legislature that a wife who had for 20 years assisted her husband studiously should because of adultery forfeit the benefits of marriage in community of property. In *Engelbrecht* the Court made it plain that joint ownership of another's property is a right which each of the spouses acquire on concluding a marriage in community of property. That unless the parties made precisely equal contributions the one that contributed less shall on dissolution of the marriage be benefitted above the other if forfeiture is not ordered. Further that this is the inevitable consequence of the parties' matrimonial property regime. Arising from this judgement it is plain that the legislature does not give the greater contributor the opportunity to complain about this. He can only complain about this if the benefit was undue. Unless it is thus proved what the nature and extent of the benefit was, the Court cannot decide if the benefit was undue or not. Only if the nature and ambit of the benefit is proved is it necessary to look to the factors which may be brought into consideration in deciding on the inequity thereof. It is also apparent from this authority that the legislature did not intend to elevate fault in the granting of the forfeiture order.

37. In argument, Counsel for defendant argued that using conservative estimates, using Plaintiff's own testimony, using 3 visits per week at an average of R5000 per visit for approximately 5 years, this equates to a minimum of R3.9 Million in gambling expenditure. He argues that this figure equates to substantial portion of the joint estate that was wasted by gambling. He argues that the Court must disregard the Plaintiff's testimony that her gambling habits had the defendant's tacit approval given her testimony that 'when there was money there was no abuse' by defendant as she saw it. That this assertion is contradicted by defendant's action of immediately taking plaintiff to grand west casino to sign a self-exclusion. That her gambling wasn't just recreational but had escalated to a point of causing business failure; accumulation of debts; and ultimately the breakdown of the marriage. He argues that her conduct as foreshadowed meets the threshold for "substantial misconduct" as contemplated in section 9(1) of the Divorce Act.

⁵ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (c)

38. Counsel for defendant further argues that the I[...] C[...] restaurant, which plaintiff managed, was a significant asset of the joint estate. That its failure therefore and subsequent liquidation represents a substantial financial loss for the joint estate. That the evidence establishes a direct link between the plaintiff's gambling and business failure. That she admitted to using business funds for gambling and failed to properly manage the finances, resulting in accumulated debts which included an overdraft of R400 000 at First Rand Bank.

39. Counsel argues that the contrast between the restaurant's success before the plaintiff's gambling escalated and after the marriage broke when her brother took over management strongly suggests that her mismanagement was the primary cause of its failure. That her attempts during her testimony to minimize her responsibility for the failure of the business by attributing that failure to competition from another restaurant is contradicted by her own admission that she took money from the business to fund gambling. That her concealment of her financial activities and lack of accountability constitute a breach of good faith obligation between spouses married in community of property further supporting the argument of substantial misconduct.

40. That the plaintiff would be unduly benefitted if forfeiture is not granted because defendant had been the primary financial contributor to the joint estate throughout the marriage, while plaintiff's gambling actively diminished the estate. That since 2018 defendant has solely maintained the properties and supported their son, with minimal contribution from plaintiff. That plaintiff's gambling losses have effectively already given her the benefit of millions of rand from the joint estate, which would not be accounted for in a simple 50/50 division. That plaintiff has secured ongoing financial benefit from the business relationships established during the marriage whilst claiming limited financial resources.

41. In conclusion Counsel for defendant argues that given the current estimated value of the joint estate of approximately R22 Million. A 50/50 division would award plaintiff approximately R11 Million despite her having already consumed millions through gambling and having contributed little in recent years.

42. He argues that plaintiff's testimony regarding the subsequent arrangement with her brother raises serious questions about whether assets were properly transferred out of the joint estate, whilst plaintiff claimed to earn only R20 000 per month as consultant. That she admitted that the business continued essentially under the same name and the same staff. That she never disclosed a record of her gambling wins and losses. That her vague testimony regarding the total amount gambled and her inability to account for winnings indicates a continued lack of financial transparency.

43. This court is not persuaded with this argument and finds no merit therein. This Court accepts plaintiff's evidence that for at least the first 4 years of the marriage she was a significant contributor to the joint estate. Defendant does not deny having stayed in a property at the beginning bought by plaintiff which they used as a marital home. Defendant in his evidence in chief and under cross examination conceded that he moved in with plaintiff into a property then owned by plaintiff. The further evidence not contradicted and which this Court accepts is that when they moved to Cape Town from Johannesburg plaintiff essentially laid the foundation of the couple's settlement in Cape town inter alia paying rental for the property, in century city, they moved into. This Court also accepts the evidence that plaintiff sold her property investment in Johannesburg and used the proceeds thereof to the benefit of the joint estate. This point was not meaningfully rebutted by defendant. The acquisition of the various investments, including property investments such as the atlantic beach property and the couples' main residence at which plaintiff currently resides cannot therefore reasonably be excluded from the foundations laid by plaintiff's contributions before and during the development of these assets.

44. In any event it falls upon the defendant to prove to this Court the inequitable contribution to establish benefit. On balance this Court finds that at the beginning of the marriage defendant has not proved that he brought more assets than plaintiff. On the contrary they moved into an asset of plaintiff which was more valuable. The liabilities at the beginning of this marriage have not been established satisfactorily. This Court can thus only infer that the plaintiff was in a better financial position than defendant at the beginning.

45. What remains is the contribution during the marriage. Evidently over time defendant through hard work and identification of investment opportunities accelerated his contribution to the joint estate to be more, especially when the plaintiff stopped working and had her business ventures failing. This Court however has difficulty on the evidence before it finding that to the extent that the plaintiff may have benefitted from this accelerated contribution of the husband after having a child and stopping to work to look after the child; look after the maintenance of the properties the couples invested in from the seed capital she contributed to from the beginning as well as the contribution to the estate before liquidation of the I[...] C[...] restaurant, that this benefit is undue. What remains is thus to examine gambling addiction as submitted by defendant and its impact.

46. The argument by defendant's Counsel about plaintiff's lack of transparency about transfer of assets and her financial dealings may have some merit to the extent that it supports plaintiff's own contention that an independent valuer be appointed by this Court to examine the assets and liabilities of the estate before ordering division in the event the parties do not agree on the question of asset distribution.

47. Counsel for defendant in argument concedes that defendant has been unable to properly maintain the D[...] road property, resulting in water supply and maintenance challenges. The Atlantic Beach property where Defendant resides has accumulated by defendant's own version levies debts of approximately R158 000 and municipal debt of approximately R216 000. C[...] T[...] attracted R89 000 of debt in unpaid levies. Evidently defendant's own actions or omissions have contributed in causing the estate loss of some value given that from 2019 the plaintiff had limited means to contribute thereto. This Court is not satisfied with evidence before it that plaintiff's failure to contribute to maintenance of the assets in the estate is due to her lack of trying. The Court accepts her testimony that after the failure of I[...] C [...], she tried various other ventures including assisting with a similar restaurant and shop which brought her R20 000 monthly consulting income. There would evidently be no reason to go around borrowing money to finance her living expenses or apply for a rule 43, which was granted, if she had means.

48. This Court accepts that the liquidation of the I[...] C[...] and repossession of the Toyota hilux caused the joint estate a loss. It accepts that these and the gambling habits of the plaintiff may have strained the relationship of the parties and contributed to the breakdown of the marriage and some loss to the estate. Fault is however not a ground upon which a Court may order forfeiture.

49. This Court is also not persuaded on the evidence that the failure of the I[...] C[...] restaurant is attributable solely due to gambling habits of the plaintiff. Nor that this gambling was hidden. The record shows that plaintiff used her bank cards at the casino and the casino cards which would be so loaded for gambling. This can hardly be said to be hidden activity. The only conclusion which this Court can draw therefore is that this habit as alleged by the plaintiff was not a problem as long as money kept coming into the estate. It only became a problem when money ran out as alleged by plaintiff.

50. The explanation by the plaintiff as to the reason of the failure including increasing competition in the area the restaurant was located cannot be discounted without any corroborating evidence. By defendant's own admission plaintiff ran the business whilst he focused on the medical practice. He rarely went to the business nor took active interest as he by his own admission was not concerned in how his wife used her time and residue from rental collections once costs were paid until 2017 and 2018 when the gambling issue of grand west casino arose.

51. This Court finds that failure to maintain properties cannot be attributed solely to plaintiff. Whilst Counsel for defendant argues that properties under plaintiff's management such as crestview; C[...] T[...] and atlantic beach owed R158 000 levy arrears and municipal arrears; The D[...] road property owing R366 000 as evidence of this failure. This responsibility if regard is had to the rule 43 order was not the sole responsibility of plaintiff as the Court had recognized that the plaintiff at that point had limited resources and capacity. The evidence is that the property at which defendant currently stays is also as aforesaid in debt in respect of rates and levies to the detriment of the joint estate.

52. This Court is also mindful, as contended by plaintiff's Counsel, that there are various judgements and legal costs incurred by the joint estate but there is no satisfactory explanation by defendant as to how these were to be handled to the extent that they impact plaintiff and were caused by defendant in the event of forfeiture being granted. It would be a travesty for this Court to burden plaintiff with the liabilities arising from the marriage and exclude her from the benefits arising from the residue of marriage.

53. On the question of forfeiture because of gambling addiction as contended by defendant, this Court accepts that plaintiff by her own admission gambled. Evidently this gambling was probably more than social as plaintiff would have this Court believe as she concluded a self-exclusion from grand west casino with the prodding of her brother and defendant. There is however no record or evidence before this Court to enable this Court to prefer the evidence of the defendant above that of the plaintiff given the couple's social standing and lifestyle to conclude that this gambling fell within the realm of addiction. There are no gambling records brought into evidence before this court nor expert report to assist this Court in determining this question of addiction and its extend and impact on the estate.

54. The plaintiff's evidence is that she signed the self-exclusion to assure and appease defendant that she would not go to grand west casino again when she was engaged by defendant and her brother on this issue. This Court finds no reason to dismiss this explanation. This gambling on the evidence cannot be said to fall within the requirements of section 9(1) if this Court has regard to the facts of this case. Fault, and there is some attributable to plaintiff, is not a basis for a Court to order forfeiture. The evidence which this Court accepts is that both spouses to a greater and lesser extent gambled or alternatively tended to go to gambling areas. The evidence put before this Court, which defendant did not deny, is that from time to time defendant also went to the tout given the couple's social standing and lifestyle. The bank records evinces that defendant himself played the lottery. So if regard is had to the circumstances of this marriage the gambling habits of the plaintiff are not found by this Court, on the facts, to constitute substantial misconduct justifying forfeiture as contemplated in section 9(1) of the Divorce Act.

55. This marriage has in any event subsisted for at least 20 years and the plaintiff has on the evidence before this Court contributed reasonably to the joint estate. It is not the requirement of our law that for a spouse to benefit from the residue of a marriage concluded in community of property there ought to have been equal contribution to the joint estate. The law is that forfeiture can only be granted if the benefit is undue. The evidence is that the plaintiff throughout the marriage at least until institution of these proceedings looked after the couple's property portfolio and collected rental. She raised the couple's young child until he moved with his father. This Court cannot ignore this contribution. Neither can it rely on moving estimates submitted by the defense to determine the extent of the benefit. This Court thus finds the defendant's counterclaim on forfeiture meritless.

56. This Court further finds that given the testimony of the parties themselves and the testimony of their minor child, that current obtaining arrangements in respect of the child staying with the defendant, subject to reasonable contact by plaintiff, and with both parties being co-guardians with full parental rights and responsibilities must be left undisturbed in the child's best interest.

Conclusion

57. In the result, this Court finds that plaintiff has made out a case for the relief that she seeks. It is this Court's conclusion that the marriage has irretrievably broken down. This court further concludes that plaintiff has not unduly benefitted from the joint estate thereby allowing this Court to can order forfeiture of benefits in favor of defendant. This Court concludes that plaintiff is entitled to an order for division of the joint estate. The Court also concludes that a case having regard to parties' own submission in regard to the movement of assets has been made for an appointment of a receiver and liquidator.

Costs

58. Plaintiff and Defendant addressed this Court on costs. Costs follow the result.

59. This Court considers that in present circumstances, Defendant must pay costs including costs of the rule 43 order.

Order

60. Accordingly, I make the following order:

IT IS ORDERED THAT:

1. A decree of divorce is granted.
2. An order for an equal division of the parties' joint estate is made.
3. In the event that the parties fail to agree upon the mode and manner of the division of their estate within 30 days after the date of the decree of divorce or any further extended period as may be agreed to between the parties in writing, an order in the following terms is made:
 - 3.1. Mr. Lambertus von Wielligh Bester of Cape Trustees (Pty) Ltd, Seaside Village, Otto du Plessis Drive, Big Bay, Cape Town, an insolvency practitioner and member of SAPIRA is appointed as receiver and liquidator, or alternatively any other professional person agreed to between the parties in writing within thirty (30) days of this order, as a receiver and liquidator for the joint estate of the parties.
 - 3.2. Direct that the receiver and liquidator shall not be required to lodge security for his administration of the joint estate.
 - 3.3. Direct the plaintiff and defendant to each furnish the receiver and liquidator within fourteen (14) days of expiry of the period before he is appointed, as provided for above, with a complete inventory of all assets and a detailed list of liabilities of their joint estate as at the date of granting of the divorce.

3.4. Authorize the receiver and liquidator to take control over and or possession of all movable and immovable assets of the parties' joint estate, including any pension interests or pension benefits, shares or debts due to the joint estate and to divide the assets by mutual agreement, alternatively, failing such agreement, to realize such assets to the best advantage of the joint estate by way of public auction or private treaty and to divide the net proceeds between the parties in accordance with the provisions below.

3.5. Authorize the receiver and liquidator to sign all documents to effect transfer of any immovable property, movable property or shares on behalf of either of the parties in the event that they fail to sign such document after three (3) days of being requested by him to do so in writing.

3.6. Direct that, in addition to the aforesaid authorizations, the receiver and liquidator shall have the following powers:

3.6.1. to make all investigations which are necessary and obtain all necessary information from the parties themselves, bank managers and other financial institutions in relation to money in the joint estate which may have been invested in accounts under either of their control.

3.6.2. to obtain information from the auditors of any business of the parties and personal accounts of both parties and such other persons with the necessary knowledge in relation to their personal affairs.

3.6.3 to call and obtain balance sheets and other financial information of all companies and businesses in which the parties held or hold any interest.

- 3.6.4. to inspect books of accounts relating to any company or business in which the parties hold or held any financial interest.
- 3.6.5. to inspect personal bank statements, paid cheques, deposit books and personal statements relating to the affairs and liabilities of the parties complied for tax and other purposes.
- 3.6.6. to physically inspect the assets of the joint estate and to make the necessary inventories thereof.
- 3.6.7. to obtain appraisals or valuations of any assets of the joint estate in such manner as the receiver and liquidator regards suitable for the purposes of determining the value of the joint estate.
- 3.6.8. to deal with any pension interest accrued or deferred pension benefits which have accrued or been deferred by any party, and in particular to allocate a portion of one party's pension interest to the other party as envisaged by Section 7(7) and 7(8) of the Divorce Act of 1979, as amended, and to cause the appropriate endorsement to be made to the pension records of such party's pension fund.
- 3.6.9. to sell the assets, both movable and immovable, or any part thereof by either private agreement and or public auction as may seem to him the most beneficial to the joint estate, with leave to both parties in the event of a sale by public auction to bid for such assets, alternatively, to award any such assets to the parties by dissolution thereof, subject to such cash adjustments as the circumstances may deem necessary, provided that should the receiver and liquidator wish to sell any asset, he shall first offer for sale such asset in writing, to the parties for purchase which offer shall be open for five (5) days. In the event that either of the parties wishes to purchase such

asset, the necessary cash adjustment as the circumstances may deem necessary must be made. If a cash adjustment cannot be made in the circumstances where a party elected to purchase an asset, the purchase price must either be paid in cash or be secured by a final or unequivocal guarantee from a registered financial institution within fourteen (14) days as contemplated above, provided that the receiver or liquidator may at his sole discretion, extend the fourteen (14) days for up to a maximum of thirty (30) days. Should any of the time periods in this paragraph not be adhered to and or complied with, the option to purchase any such asset offered for purchase by the receiver or liquidator shall automatically lapse and shall not be capable of revival save by mutual written agreement between the parties.

3.6.10. to collect debts due to the estate.

3.6.11. to pay or allocate the liabilities of the joint estate, which shall include the parties' taxed or agreed legal costs, subject to any cost order which a court may have made against any party, such balance to be paid directly to the attorney of record of such party.

3.6.12. during the course of releasing the joint estate, to deal with the assets in his sole discretion, including the freezing of bank accounts wherever reasonably necessary.

3.6.13. to institute legal proceedings out of any court with the necessary jurisdiction against any person for the delivery to him of such documents as he deems necessary for the purpose of enabling him to discharge his duties.

3.6.14. to apply to court on due notice to both parties for any further directions as he shall or may consider necessary.

- 3.6.15 to deduct his professional fees from the amount available for distribution to the parties after the collection of all assets and the discharge or allocation of all liabilities of the joint estate.
- 3.6.16. to bring into calculation and or reckoning in his distribution the reasonable market value of any asset or the actual monetary value of money belonging to the joint estate, as at the date of divorce, that either party may have disposed of, determining whether such party received value or full value thereof.
- 3.6.17. should the receiver and liquidator not receive objections within seven (7) days period as provided for above, his account shall be deemed to have been confirmed by the parties and the receiver and liquidator shall be able to proceed to make a determination in accordance with the tenor thereof.
- 3.6.18. direct that, in the event that the receiver and liquidator receive written objections from either or both parties, after providing them with a reasonable opportunity of submitting representations to him, he shall determine the objections and amend his account in accordance with such determination/s to the parties marked as 'final amended account'.
- 3.6.19. direct that the receiver and liquidator shall within a reasonable period of time after having exercised his powers and authority as provided for in this order, furnish the parties with a provisional liquidation and distribution account, to which the parties will be entitled to raise objections within seven (7) days from date of receipt thereof.
- 3.6.20. direct that, in order to place him in a position to make such determination/s, the receiver and liquidator shall be entitled to

apply to court, on notice to parties, for such directions as he considers necessary.

3.6.21. direct that, in the event of either of the parties not being satisfied with such 'final amended account' of the receiver or liquidator, the party not so satisfied shall, within seven (7) days of the final amended account being provided to the parties, approach the high court with jurisdiction with such legal proceedings as he may deem fit, failing which the account shall become final and binding on the parties.

3.6.22. direct that after the account has become final and binding upon the parties as provided above, the receiver and liquidator shall make a distribution in accordance with the relevant account, whereafter he shall be released of his duties as receiver and liquidator. In the event of legal proceedings being instituted in terms of paragraphs 3.6.20 or 3.6.21 above, no distribution shall be made to any of the parties until such time as such legal proceedings are concluded.

3.6.23. direct that the receiver and liquidator shall be entitled to payment of his reasonable professional fees, which fees shall be apportioned equally between the parties and said fees shall be reflected in his account.

4. Both parties shall remain co-guardians of the minor child as provided for in Section 18(2)(c); 18 (4) and 18 (5) of the Children's Act 38 of 2005.

5. Both parties shall retain their full parental rights and responsibilities in terms of Section 18, 19 and 20 of the Children's Act 38 of 2005 in respect of the minor child.

6. The child's primary residence and care is awarded to defendant, subject to plaintiff's rights of reasonable contact, provided that her contact

with the child shall be exercised in accordance with the minor child's wishes and with due regard to his scholastic, social and extra-mural activities.

7. Defendant shall retain the minor child on his fully comprehensive medical aid scheme and shall be responsible for all medical premiums in respect thereof, provided that any reasonable medical expenses not covered by the medical aid fund shall be shared between the parties in equal shares.

8. The parties shall be equally liable and responsible for the following reasonable costs of the minor child:

- 8.1 School fees;
- 8.2 extra lessons;
- 8.3 school books, stationary and uniforms;
- 8.4 school tours within the Republic of South Africa;
- 8.5 school transport costs;
- 8.6 Extra-mural activities inclusive of outfitting and equipment,

Provided that plaintiff's half share of the aforementioned costs will only become due and payable on date of the final distribution of the parties' joint estate by the receiver and liquidator as provided for in paragraph 3 above.

9. Defendant is directed to pay the costs of the rule 43 application under case number 4584/22.

10. Defendant is directed to pay the costs of the divorce action.

S S T KHOLONG
ACTING JUDGE: WESTERN CAPE DIVISION

Appearances:

For the Plaintiff:	Adv. Thelma-Anne Pratt
Instructed by	Truter and Associates

For the Defendant:	Mr. T. Dunn
Instructed by	TJC Dunn Attorneys