



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

Case No: 067730/24

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 13 August 2025

SIGNATURE

In the matter between:

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

Plaintiff

and

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

Defendant

NEUKIRCHER J:

1] On 19 June 2024 the plaintiff issued out summons for divorce and ancillary relief in this division. The action is opposed by the defendant who subsequently filed a plea and a claim in reconvention (the counterclaim). The plaintiff then filed a plea

to the counterclaim and the matter was, after completion of the requirements for the conduct of trials provided for in the Uniform Rules, set down for hearing on 11 August 2025.

2] It is common cause that the only aspect that this court must decide is whether or not a partial forfeiture of benefits should be awarded against the plaintiff. It is common cause between the parties that should the defendant fail to prove forfeiture the following order should result:

- a) a decree of divorce;
- b) division of the joint estate;
- c) such order in respect of costs as this court deems appropriate in the exercise of its discretion.

Common cause facts

3] The parties were married to each other on 29 December 2004 in community of property. There are two children born of their marriage:

- a) KP was born on 30 August 2005 and is 20 years old. He is still financially dependent on his parents and is busy with his tertiary education. He lives with the plaintiff;
- b) SP was born on 31 July 2007 and turned 18 years old shortly before the commencement of the trial – he is thus now a major. He is still at school and is therefore still financially dependent on his parents. He lives with the defendant.

4] The parties' marriage has irretrievably broken down and the plaintiff vacated the common home during August 2023. Since that time, the parties have not lived together as husband and wife. At the time the counterclaim was filed, they had been separated for a year. Thus, in terms of the provisions of s4(2)(a)¹ of the Divorce Act

¹ "(2) Subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence

70 of 1979 (the Divorce Act), it is deemed that the marriage has irretrievably broken down.

The claim for forfeiture

5] The defendant's counterclaim sets out her claim for partial forfeiture as follows:

“5.1 The Plaintiff had his pension fund interest paid out to him during 2023 and which payment the Plaintiff used for his sole advantage and to the exclusion of the Defendant;

5.2 The Defendant pleads that she would be unduly impoverished and the Plaintiff unduly enriched if the Honourable Court does not order that the Plaintiff forfeits the right to share in the pension fund interest of the Defendant in terms of section 9 (1) of the Divorce Act, 70 of 1979.”

6] The plea to these allegations raise a denial that the defendant is legally entitled to such an order and sets out the allegations in respect of the manner that the pension monies were expended by the plaintiff. They don't add much to the pleadings and it is not necessary to deal with his defence in much detail in light of what occurred during trial.

7] On the first day of trial, Mr van Wyk² argued that the defendant has failed to properly plead her claim for forfeiture and has failed to plead anything with regard to the undue benefit that the plaintiff would receive were such an order to be refused. He argued that, having regard to the trite and established authorities of *Wijker v Wijker*³ (Wijker), *Engelbrecht v Engelbrecht*⁴ (Engelbrecht) as well as the recent decision in *ZPG v ZBB*⁵ (ZPG) it must be both alleged and proved that the party against whom forfeiture is sought will be benefitted if an order for forfeiture is not granted. Once that leg of the enquiry has been established, the next enquiry is

(a) that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;...”

² For plaintiff

³ 1993 (4) SA 720 (A)

⁴ 1989(1) SA 597 (C)

⁵ (34253/10) [2024] ZAGPJHC 4 (10 January 2024)

whether the benefit will be an undue one having regard to the provisions of s9(1) of the Divorce Act.

8] But it is not as simple as the above picture paints:

[16]. In *Engelbrecht* (supra) the Full Court emphasised that a party who seeks a forfeiture order must first establish what the nature and extent of the benefit was. Unless that is proved 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 three factors which may be brought into consideration in deciding on the inequity thereof.”⁶

9] Mr van Wyk submitted that, as the defendant has simply failed to plead these crucial elements of her claim she does not even get out of the starting block.

10] As a result, and in answer, Mr Kriel⁷ moved an amendment. The amendment was not opposed and was granted. Paragraph 7 of the counterclaim thus now states the following:

“7.

7.1

7.1.1 On 24 May 2023, the Plaintiff obtained a pay out of his pension fund interest at Alexander Forbes pension fund in an amount of R1,223,582.91 in terms of annexure “A” of the Plaintiff’s reply to the Defendant’s Rule 35(3) notice⁸.

7.1.2 On 26 May 2023, the Plaintiff transferred an amount of R800.000.00 to his Standard Bank Money Market Account with account number 1[...].

⁶ ZPG v ZBB supra

⁷ For defendant

⁸ Why the source of the information has been pleaded is puzzling as this constitutes evidence and is not relevant to the consideration of whether forfeiture should be granted

7.1.3 In paragraph 2 of the Plaintiff's reply to the Defendant's Rule 35(3) notice⁹ the plaintiff alleges that R880,000.00 was utilized for the purposes of home improvements.

7.1.4 The Defendant pleads that the amounts alleged were not used for home improvements but for the sole benefit of the Plaintiff, and to the exclusion of the Defendant and/or the joint estate.

7.2 The Defendant pleads that she would be unduly enriched if the High Court does not order that the Plaintiff forfeits the right to share in the pension fund interest of the Defendant to the limit of an amount of R440,000.00 in terms of section 9 (1) of the Divorce Act, 70 of 1979."

11] I will deal with the adequacy of the amended pleading in due course. It became relevant as, at the closure of the defendant's case, the plaintiff sought absolution from the instance.

12] It was common cause that the only issue being that of forfeiture, the defendant bore not just the *onus* in respect of this claim, but also had the duty to begin.

The defendant's evidence

13] I do not intend to deal with the defendant's evidence in minute detail. I also wish to state from the outset, that I am of the view that given the argument, findings of credibility at this stage are unnecessary. The issue turns on the pleadings, the common cause facts, the admissions elicited during cross-examination and, ultimately, the evidence regarding the alleged undue benefit that was placed before court.

14] It was very clear during the course of her evidence that despite the fact that the parties have been separated for two years, the defendant is still deeply affected by her perception of what transpired during the marriage and the reasons that led to

⁹ Ibid

its breakdown. Whether her version is entirely correct is, in my view, unnecessary to decide at this stage.

15] What is factually correct is that the defendant fell pregnant with the parties' first child shortly after their marriage. He was born 8 months later and their second child just shy of two years after that. She was working at the time, as was the plaintiff. At present she is a compliance officer at First National Bank and she earns a net salary of approximately R61 000 per month and receives a performance bonus in August of a year. Although the performance bonus is not guaranteed and the amount fluctuates, she admitted that her bonuses in 2023 and 2024 were an amount of approximately R300 000 each year.

16] The evidence of the defendant in chief was that, given the financial threats made by the plaintiff that he would withdraw financial support for her and the children and given that he had already on several occasions caused their electricity to be cut for days at a time, she decided to start contributing to a retirement fund and savings for the children "a few years ago." Her evidence was that she also did this as the plaintiff would travel for work and leave the common home for at least two weeks at a time and then return, only to disappear for four to six months at a time and she and the children would be left without any means to contact him.

17] Her evidence (in chief) was further that she opened three Satrix accounts: one for her and one for each of the two children. The children's accounts were to make provision for their future education as the parties' only substantial asset was their home. The value of the Satrix funds at trial was approximately R93 000 each.

18] Other than a vague reference to a retirement fund and the specific reference to the Satrix accounts, no documentary evidence was produced to substantiate these allegations. More especially, and since it is partial forfeiture of the benefit related to her pension interest that is sought, it was incumbent upon her to *inter alia* prove where the pension interest was held and the value of that interest.

19] During defendant's cross-examination, the following information was elicited: the defendant contributes an amount of approximately R26 000 per month to a

pension fund and R11 000 per month to a Discovery policy. The combined value of these is R6,7 million.

20] No documentary evidence of any of the above was put before court. Certainly, the fact that the Discovery policy and the defendant's pension interest are a "combined" value of R6,7 million is relevant to the issue and, once again, no documentation was presented or evidence led vis-à-vis the value of each.

21] Also during cross-examination, the following admissions were elicited from defendant:

- a) that during the marriage, the plaintiff would pay the bond and the household "bills" and she would pay all other expenses;
- b) that the plaintiff did contribute towards renovations of the parties' home;
- c) that he paid for the eldest child's university fees;
- d) that he pays the medical aid fund in respect of their youngest child;
- e) that the parties fought with each other and that they both swore at each other;
- f) that she called the plaintiff a homosexual and accused him of not knowing how to satisfy her;
- g) that they both "said terrible things to each other";
- h) that he cooked for the family, packed the defendant a lunch box for work, packed the children's lunch boxes, took the children to school.

22] On the issue of whether the plaintiff used the money paid out to him for his sole benefit (as was pleaded), the following evidence emerged in cross-examination from the documents put before court and the evidence elicited from the defendant:

- a) the gross amount payable was R1 223 582,91;
- b) the amount of income tax deducted was R412 310,85 which left a net amount payable of R811 272,06. This amount was paid to the plaintiff's Standard Bank Money Market Call account on 26 May 2023;

- c) an amount of R122 000 was paid to “school fees” on 13 June 2023. Although the defendant sought to deny this, the highwater mark of her denial was that this could have been a payment to her to settle a loan she took out for the payment of the children’s school fees;
- d) an amount of R100 000¹⁰ was paid for “rent” on 26 July 2023 for a fully furnished house for the plaintiff and KP – the amount is for rent for one year. The defendant could not deny this;
- e) entries on the plaintiff’s bank statements and a University of Pretoria Student Account statement reflect payments made by the plaintiff in respect of KP’s university fees from 10 July 2023 until 30 June 2025 – the defendant admitted she had not paid towards these;
- f) a statement from C[...] I[...] L[...] High School dated 21 May 2024 and in the amount of R59 990, reflects payments made by the plaintiff between 18 July 2023 and 21 May 2024 with an outstanding balance of R1 293-00. Defendant admitted she did not make any of these payments;
- g) the balance of the Standard Bank Money Market account as at 28 July 2024 was R333 578-53;
- h) it was put to defendant that the plaintiff’s pension is now valued at R900 000 and her response was that she “had no idea’.

23] Thus, a calculation of monies expended by the plaintiff show that the plaintiff utilized R477 753,53 of the amount received as pension. If the pension is now worth R900 000, it means that its value has grown by R566 421,47.

24] Given the defendant’s concessions vis-à-vis monies expended, it would also appear that these were not done for the plaintiff’s sole benefit, but rather utilised to repay the defendant the money she had loaned for the children’s school fees, for housing and accommodation of himself and KP after they vacated the common home and for both children’s schooling and education.

The legal position

¹⁰ Over a period of a year this equates to approximately R8 300 per month

25] Section 9(1) of the Divorce Act provides for forfeiture. It states:

“Forfeiture of patrimonial benefits of marriage

(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage, including a Muslim marriage, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

(2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.”

26] The problem *in casu* is that the defendant’s pleadings appear to conflate the requirements of s9(1) of the Divorce Act with s15(9) of the Matrimonial Property Act 88 of 1984. Section 15(9) of the Matrimonial Property Act provides:

“(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16(2), and—

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case

may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.”

27] As is stated in paragraph 10 *supra*, the defendant has pleaded *inter alia* that the plaintiff has used his pension fund for his sole benefit and to the exclusion of the defendant and the joint estate. A reading of the amended pleading thus appears to conflate the requirements of s9 of the Divorce Act with s15(9) of the Matrimonial Property Act.

28] But even were this not to be so, it appears that the defendant has based her forfeiture claim on a principle of fairness and equity, rather than placing it squarely within the four corners of s9 of the Divorce Act. There is no reference at all to any of the factors a court must consider when deciding whether to grant forfeiture. Instead, the defendant pleads that the plaintiff would be “unduly enriched” and she “unduly impoverished” were her claim to be unsuccessful¹¹.

29] But undue enrichment and undue impoverishment are not factors a court takes into account. Instead, as has been stated *supra* the court must have regard firstly to whether the plaintiff will be benefitted were he to share in the defendant’s pension interest and, if so, whether that benefit would be undue having regard to (i) the duration of the parties’ marriage, (ii) the reasons for the breakdown thereof, and (iii) any substantial misconduct on the part of the plaintiff¹². None of this was pleaded.

30] It is trite law that the object of pleadings is to define the issues¹³. In *Imprefed (Pty)Ltd v National Transport Commission*¹⁴ the court stated:

¹¹ RM v MM 2023 JDR 0740 (ECMA) par 4

¹² *Wijker v Wijker* 1993 (4) SA 720 (A) at 727: “It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefitted. That will be purely a factual issue. Once that has been established the trial Court must determine, having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefitted if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial Court after having considered the facts falling within the compass of the three factors mentioned in the section.”

¹³ *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173

¹⁴ 1993 (3) SA 94 (A) at 107

“At the outset it need hardly be stressed that: ‘The whole purpose of pleading is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed’ (*Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082) This fundamental principle is similarly stressed in *Odgers’ Principles of Pleading and Practice in Civil Actions* in the High Court of Justice 22nd ed at 113: ‘The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.’”

31] Rule 18 provides:

“(9) A party claiming division, transfer or forfeiture of assets in divorce proceedings in respect of a marriage out of community of property, shall give details of the grounds on which he or she claims that he or she is entitled to such division, transfer or forfeiture.”

32] Given all of the above, in my view, the elements contained in s9(1) of the Divorce Act are crucial to the proper pleading of a claim for forfeiture. Absent them, the claim is excipiable on the basis that no proper cause of action has been pleaded.

33] But even were one to accept that the counterclaim vaguely makes out a claim for forfeiture, the defendant’s *onus* does not stop there. In order to demonstrate that the plaintiff will be benefitted, she must set out the particularity of that benefit and, moreover, the evidence must support it. In this case, and in her evidence in chief, the high water mark of her evidence is that she, at some stage, began to contribute to a retirement fund, but she provided no evidence to support this allegation.

34] In *Koza v Koza*¹⁵ the Full Bench of this Division stated:

“The attitude adopted on behalf of the appellant, both in the court *a quo* and on appeal, was that it is competent for a court to order forfeiture of the patrimonial benefits of the marriage out of community of property without

¹⁵ 1982 (3) SA 462 (T) at 465

specifying the nature or extent of such benefits. That it was indeed competent, and in fact obligatory should the innocent spouse so claim, for a court in granting a decree of divorce to make a general order of this nature, is apparent from the case of Murison v Murison 1930 AD 157. That, however, was the position prior to the enactment of the Divorce Act 70 of 1979. Section 9 (1) of that Act 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 be forfeited by one party in favour of the other, either wholly or in part, if the Court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.'

A discretion is clearly conferred upon the Court in terms of s 9 (1) whether or not to order forfeiture of the patrimonial benefits of the marriage. That discretion may be exercised in favour of either of the spouses, and may relate to the whole or only a portion of the patrimonial benefits. Moreover, the Court is enjoined to have regard to various factors, specified in the said section, in the exercise of that discretion, in order to determine whether one party will in relation to the other be unduly benefited if the order for forfeiture is not made. (See Hahlo and Sinclair *The Reform of the South African Law of Divorce* at 51 - 53.)

In my view it is therefore necessary that there be placed before the court evidence in respect of the factors mentioned in s 9 (1) and also, in order to establish properly whether there is undue benefit warranting the making of an order, evidence of the nature and value of the benefits in respect whereof a forfeiture is sought. It follows that a party making a claim of this nature should plead the necessary facts to support that claim and formulate a proper prayer in the pleadings to define the nature of the relief sought.

In the present case, no doubt because of the approach that a general order for forfeiture was claimable, the pleadings were not formulated along the lines indicated above. That defect might have been cured had the issues been canvassed fully at the trial. However, although there is some evidence to

indicate that the appellant worked during the subsistence of the marriage and gave her salary to the respondent, and that she borrowed money from her brother to assist in the building of the matrimonial home of the parties, the evidence (assuming that it is relevant in the determination of the 'patrimonial benefits' of the marriage) is in my view quite insufficient to enable the court to exercise its discretion in accordance with the principles stated in s 9(1) of Act 70 of 1979, or to make an order specifying the nature and extent of the patrimonial benefits, if any, which are to be forfeited by the respondent in favour of the appellant.” (my emphasis)

35] This line of reasoning was subsequently followed in *Engelbrecht* where the court stated:

“Tensy dit bewys word – en dit is myns insiens duidelik dat die bewyslas rus op die gade wat die verbeurdverklaringsbevel aanvra – wat die aard en omvang van die bevoordeling was, kan ‘n Hof nie beslis of die bevoordeling onbehoorlik was of nie. Eers as die aard en omvang van die bevoordeling bewys is, word dit nodig om kyk na die faktore wat by die beoordeling van die onbehoorlikheid daarvan in aanmerking geneem word.”

36] In accordance with the principles laid down above, it is thus necessary for the defendant to plead and prove the nature and value of the benefit sought to be forfeited in her favour so that the court can decide whether or not the plaintiff would be benefitted – she failed to do so. And given this failure, this court cannot move to the second leg of the evaluation ie whether or not any benefit would be undue.

Absolution from the instance

37] The defendant is the plaintiff in reconvention and as such, as has been stated *supra*, bears the onus in respect of her claim. The plaintiff argues that the defendant has failed to acquit her *onus* and therefore absolution from the instance should be granted in respect of her counterclaim.

38] The test for determining whether absolution from the instance should be granted at the close of the plaintiff's case was set out by the Supreme Court of Appeal in *Claude Neon Lights (SA) Ltd v Daniel*¹⁶ as follows:

“[W]hen absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.”

39] In my view, and given all stated above, the defendant has not made out a case for forfeiture. Accordingly, absolution from the instance must be granted.

Costs

40] The plaintiff argues that the deficiencies in the defendant's case and the “frivolous and reckless” manner in which it has been pursued should attract a punitive costs order as there is no reason that the plaintiff should be out of pocket.

41] But in my view, the plaintiff could have excepted to the counterclaim when it was filed in 2024. He did not do so. This would have placed the argument as regards the deficiency of the pleading before the court a year ago. Whilst it is so that the plaintiff is entitled to leave the defendant to her own devices and then point out the deficiencies of her case at trial, that tactic may well leave the plaintiff without his costs from the date that the exception should have been filed.

42] What saves the plaintiff from that order in this matter is that the defendant moved an amendment at commencement of trial.

43] Although her pleadings, and her evidence are deficient, I am not of the view that this should attract a punitive costs order. But I am of the view that costs should follow the result. As the matter was not a run-of the-mill matter and involved

¹⁶ 1976 (4) SA 403 (A) at 409 G-H

somewhat complex issues of law, I am of the view that costs should be awarded on Scale B.

ORDER

Thus, it is ordered that:

1. A decree of divorce is granted.
2. Absolution from the instance is granted in respect of the defendant's claim for forfeiture.
3. The joint estate shall be divided.
4. The defendant is ordered to pay the plaintiff's costs of suit.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 13 August 2025.

For the plaintiff : Adv van Wyk
Instructed by : Burnett Attorneys

For the defendant : Adv Kriel
Instructed by : Du Toit's Attorneys

Matter heard on : 11 August 2025
Judgment date : 13 August 2025