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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 110453/2023

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 20/08/2025

SIGNATURE:

In the matter between:

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

Plaintiff

and

R[...] **J[...]** **M[...]**

Defendant

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 20/08/2025.

JUDGMENT

MODISA AJ:

[1] This is an action for divorce proceedings wherein the Plaintiff seeks an order for the forfeiture of matrimonial benefits inclusive of a degree of divorce as well as an order for costs.

[2] The parties have entered into a customary marital relationship on 11 November 2013 and they are married for a period of 12 years.

[3] There are no minor children born out of the marriage between the parties.

[4] It is common cause that the parties did not stay together as husband and wife but they visited each other due to their employment commitment.,

[5] They acquired an immovable property together through a joint bond which property is situated at Orchards, Pretoria. According to the Plaintiff the Defendant left during 2019 and never came back and was no longer visiting him as she used to visit him according to their arrangements.

[6] There is a dispute about the party responsible for the breakdown of the marital relationship as well as misconduct. It is instructive that a Mr T[...] D[...] M[...] came to testify on behalf of the Defendant in order to dispute the fact that she became married to him whilst having an existing marital relationship with the Plaintiff.

[7] Mr D[...] testified that the photographs depicted on item 01-11 of Case Lines was his own lobola ceremony and they were taken on 08 April 2023. He admits that R[...] M[...] being the Defendant *in casu* is known to him and was present at his lobola ceremonial event on 08 April 2023.

[8] Nothing turns on his evidence during cross -examination.

[9] The Defendant also called Mr H[...] B[...] M[...] who is the brother to the Defendant.

[10] He testified that he resides at Mamelodi Mahube and that on 10 August 2019 which was a Saturday he was present when the Plaintiff assaulted the Defendant. Nothing turns on his cross-examination as to whether the door was closed or whether it was pushed during the altercation since it was common cause that the Plaintiff does not deny having being there on 10 August 2019.

[11] In instances where the Court is confronted with two mutually distractive versions, the principle enunciated in the matter of **Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others**¹ should be considered. The Court in Stellenbosch Winery held as follows:

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities

¹ 2003 (1) SA 11 (SCA)

he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[12] The evidence of Mr D[...] affects the credibility of the Plaintiff in so far as the allegation to the fact that the Plaintiff entered into a marital relationship whilst being married.

[13] The parties were married on 23 November 2013 and no children were born of the marriage between the parties. However, the Defendant already had a child born prior to marital relationship.

[14] After the conclusion of the marital relationship in terms of customary rites, the parties did not live together as husband and wife. The Plaintiff was residing at his parental home and sometimes at the residence of the Correctional Services Department commonly known as the Barracks. The Defendant stayed at her parental home. They visited each other during weekends, public holidays and when both of them are not working.

[15] I will not deal with the question as to whether a valid customary marriage came into being. I am satisfied that a valid customary marriage came into existence irrespective of the fact that same was not registered in terms of the Recognition of Customary Marriages Act 120 of 1998.

[16] I am not satisfied that there is sufficient evidence justifying an order of forfeiture of benefits or that the Defendant would unduly benefit from the marriage relationship.

[17] In the matter of **Wijker v Wijker**² the Court remarked as follows regarding the issue of forfeiture:

"...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 benefited. 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 benefited 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. When considering the approach that should be adopted on appeal in such a matter, the remarks made by E M Grosskopf JA in Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A) at 80C-G in dealing with the manner in which an appeal in an unfair labour practice dispute should be approached, are equally applicable. To determine whether a party would be unduly benefited a trial Court would certainly not be exercising a discretion in the narrower sense. Here too no choice between permissible alternatives would be involved. In considering the appeal the Appeal Court would therefore not be limited by the principles set out in Ex parte Neethling and Others 1951 (4) SA 331 (A) at 335D-E and it may differ from the Court a quo on the merits. It is only after the Court has concluded that a party would be unduly benefited that it is empowered to order a forfeiture of benefits, and in making this decision it exercises a discretion in the narrower sense. It is difficult to visualise circumstances where a Court would then decide not to grant a forfeiture order."

[18] I am of the view that the Plaintiff also failed to prove any substantial misconduct on the part of the Defendant. Instead, the evidence of Mr D[...] and Mr M[...] proves otherwise.

² 1993 (4) SA 720(A)

[19] It is clear from the evidence of Mr D[...] that the Defendant is not married to any other person during the subsistence of the customary marriage in issue. It is also clear from the evidence of Mr M[...] that the Plaintiff assaulted the Defendant.

[20] In the circumstances I am of the view that the Plaintiff is solely responsible for the irretrievable breakdown of the marriage between the parties. He assaulted her and made false accusations against her in that she was entered into another marital relationship during the subsistence of their marriage.

[21] The Plaintiff failed to call any witnesses to corroborate his version whilst the Defendant was able to call two witnesses to corroborate her version.

[22] The Defendant left the common home fearing for her life during 2019

[23] In so far as the issue of costs is concerned, I invoke the provisions of section 10 of the Divorce Act, which provides as follows:

"10 Costs

In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties."

[24] I see no reason as to why either of the parties should be mulcted with costs.

[25] In the premises I make the following order:

1. The decree of divorce is issued.
2. Division of the joint estate.
3. The Plaintiff's claim for forfeiture of matrimonial benefits is dismissed

4. The Defendant is entitled to 50% of the pension fund benefits of the Plaintiff.

5. Each party to pay his or her own costs

MODISA AJ
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING : 03 JUNE 2025 AND 06 JUNE 2025

DATE OF JUDGMENT: 19 AUGUST 2025

APPEARANCES

ON BEHALF OF THE PLAINTIFF: ADV M.M SONO

INSTRUCTED BY: DIKOLOBE ATTORNEYS INC

ON BEHALF OF THE DEFENDANT: ADV J BRENKMAN

INSTRUCTED BY: MACHOBANE KRIEL INC