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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 044505/2024

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

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

(3) REVISED.

SIGNATURE:

DATE: 20 AUGUST 2025

In the matter between:

P[...] **R[...]** **V[...]**

(IDENTITY NUMBER: 8[...])

Plaintiff

and

S[...] **N[...]**

(IDENTITY NUMBER: 8[...])

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 AUGUST 2025

JUDGMENT

MODISA AJ:

[1] This is an opposed divorce action wherein the Defendant seeks an order for the forfeiture of matrimonial benefits against the Plaintiff.

[2] On the other hand, the Plaintiff seeks an order to the effect that a degree of divorce be issued, division of the joint estate, an award of 50% of the Defendant's pension fund interest which is held at Woolworths Group Retirement Fund/ Alexandra Forbes under the Defendant's identity number 8[...] as well as an order of costs.

[3] The parties were married in terms of customary law on 25 November 2023 and the marriage still subsists. It is trite law that such marriage will therefore be a marriage in community of property.

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

[5] On 30 March 2024 the Defendant opened a protection order in terms of the domestic violence legal prescripts against the Plaintiff.

[6] The Plaintiff is the first witness who testified in these divorce proceedings. According to her evidence, a customary marriage was entered into and a lobola document filed of record was prepared by both families. They resided at Mamelodi West as tenants having rented a room during March 2019.

[7] The Defendant is employed at Woolworths and is a member of the pension fund.

[8] Subsequent to the protection order which I referred to hereinabove, according to the Plaintiff's version, she attempted to commit suicide and she was hospitalised for a period of three (3) days.

[9] Upon her discharge, she was told by the Defendant to leave the rented room and never to return. In her evidence in chief, she testified about an incident where she was contacted by the caretaker where they had rented a room with her spouse. She was informed by the caretaker that someone was present with her husband at the room.

[10] She could not proceed to go to Mamelodi on that particular day but at some point when she went to Mamelodi to fetch her clothing she found some condoms in the room and she then also testified that according to her, her husband had an affair with his colleague who was also employed at Woolworths.

[11] They had an argument and the Defendant called his older brother. According to her evidence, she further testified that the Defendant called his girlfriend whilst he locked her outside and she became angry to such an extent that she broke the windows of the property which they have rented and she therefore left.

[12] The Plaintiff, apparently, is a person who is involved in a business of lending people money in order to generate interest.

[13] She was assisted by a certain Mr Mbuso Mahlangu ("Mbuso") in her business transactions whose primary purpose was to accompany her where she had to collect monies from the people who borrowed money from her.

[14] She has been involved in this business activities since 2021 and the Defendant joined her in 2022. She testified that she did not have any intimate relationship with the said Mbuso and that Mbuso is staying at Nkosini, Mpumalanga.

[15] The evidence which is disputed is that the Plaintiff opened a protection order against Mbuso after having been sent by her husband. It is also disputed that she contributed to the joint estate.

[16] Under cross-examination, Ms V[...], the Plaintiff, confirmed that lobola was paid and an amount of R 24 000.00 (Twenty-Four Thousand Rand) was paid and R 4 000.00 (Four Thousand Rand) is still outstanding after the parties or both families having agreed on an amount of R 28 000.00 (Twenty –Eight Thousand Rand).

[17] It is common cause that the Defendant bought the rings which were blessed by a pastor.

[18] Some level of criticism must be levelled against the Defendant's evidence.

[19] Firstly, I see no reason as to why would the Plaintiff implicate herself in the contents of the protection order which she opened against Mbuso and state that Mbuso is her boyfriend and send the same protection order to her husband being the Defendant.

[20] Secondly, the Defendant in his evidence in chief testified about an incident where the Plaintiff left Mamelodi from the rented room and departed for Mpumalanga to visit Mbuso. That particular incident involved Ms V[...]’s mother in law who according to the Defendant went together with him in search of the Plaintiff.

[21] The critical version of the Defendant regarding Mbuso was never put to the Plaintiff. There was no version put to the Plaintiff by the Defendant that:

- a. The Plaintiff left Mamelodi for a period of seven (7) days and went to stay at Mbuso's place in Nkosini, Kwa-Ndebele.
- b. The Defendant visited Mbuso's residence together with the Plaintiff's mother and the Plaintiff's cousin, Thato.
- c. Upon our arrival at Mbuso's house the Plaintiff's clothes were hanging on the washing line.
- d. They together with the mother in law of the Plaintiff, found a black Citron motor vehicle inside Mbuso's place of residence. This motor vehicle belonged to the Plaintiff.

e. They were accompanied by another person by the name of Popi to go to Mbuso's place.

f. They discussed the conduct of the Plaintiff with Mbuso's parents and Mbuso's parents confirmed that the Plaintiff was residing with Mbuso in the house.

[22] I am not going to dwell much into this lengthy version by the Defendant suffice to indicate that this version was never put to the Plaintiff under cross-examination hence I am of the view that it is unreliable and should be rejected as false.

[23] It is the basic principle of our law that a litigant must put and challenge a version presented by a witness in order for him or her to argue later that such version may be accepted or rejected by the Court.

[24] In relation to the failure by a litigant to put material aspects of his or her case, and testimony to the other parties witness under cross examination, the Constitutional Court in the **President of the Republic of South Africa and Others v South African Rugby Football Union and Others**¹ stated as follows:

“[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.”

¹ 2000 (1) SA 1 (CC)

[25] 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**² 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 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

² 2003 (1) SA 11 (SCA)

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.”

[26] I am of the view that the Defendant’s version is unreliable, improbable and not credible.

[27] The Defendant seeks an order of forfeiture of matrimonial benefits against the Plaintiff.

[28] Section 9 of the Divorce Act 70 of 1979 which is relevant for purposes of these proceedings provides as follows:

“9 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.”

[29] Having regards to the evidence in its totality, I am of the view that the Defendant is responsible for the irretrievable breakdown of the marriage between the parties by having an extra marital affair with his colleague. There is no reason for the Plaintiff to break the windows of their residential place without any issue which triggered her anger.

[30] I am not satisfied that an order for forfeiture should be granted or that the Plaintiff will unduly benefit from the joint estate.

[31] In **V v V (3389/2017) [2020] ZAGPPHC 154 (4 March 2020)** the Court stated the following:

“10. The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited. A party claiming forfeiture must ‘plead the necessary facts to support that claim and formulate a proper prayer in the pleadings to define the nature of the relief sought’.

11. Similarly, the allegation of undue benefit must be pleaded and proven...

16. ... The proof of substantial misconduct is not a sine qua non for the granting of a forfeiture order.”

[32] There is no evidence to suggest that the Plaintiff was responsible for the breakdown of the marital relationship of the parties.

[33] I find the evidence of the Plaintiff to be credible, reliable and probable

[34] In the circumstances, the order for the forfeiture for the matrimonial benefits as prayed for by the Defendant must fail.

[35] 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.”

[36] It is not necessary to mulct either of the parties with a costs order.

[37] In the premises, I make the following order:

1. The degree of divorce is granted.
2. The Defendant's counter claim is dismissed.
3. The Plaintiff is entitled to 50% of the Defendant's pension fund benefits held at Woolworths Group Retirement Fund / Alexander Forbes under the Defendant's identity number 8[...].
4. Each party to pay his or her own costs.

MODISA AJ
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING : 02 JUNE 2025, 03 JUNE 2025 AND
05 JUNE 2025
DATE OF JUDGMENT: 19 AUGUST 2025

APPEARANCES:

FOR THE PLAINTIFF: ADV M.V SEHUNANE
INSTRUCTED BY: SEHUNANE INC ATTORNEYS

FOR THE DEFENDANT: ADV T.I DIKGALE
INSTRUCTED BY: RK MADUNDA ATTORNEYS