IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: **7612/2019**

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED:

DATE: 05 SEPTEMBER 2025

SIGNATURE

In the matter between:

S[...] B[...] K[...]	Plaintiff
and	
P[...] T[...] K[...]	Defendant

This judgment is prepared and authored by the Judge whose name is reflected as such 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 handing down is deemed to be 5 September 2025.

JUDGMENT

RETIEF J

INTRODUCTION

[1] This is a divorce action in which the plaintiff, who is married to the defendant in community of property, seeks *inter alia*, partial forfeiture in terms of section 9(1) of the Divorce Act [Divorce Act] [forfeiture relief]. The remaining issues pertain to the maintenance and contact rights in respect of the minor child settled. The defendant seeks the division of the joint estate and denies that the plaintiff is entitled to her forfeiture relief.

[2] The defendant, in his counterclaim, seeks an equal division of the joint estate with the appointment of a receiver for assistance.

[3] The common cause facts on the pleadings are that the plaintiff and defendant were married to each other on the 26 March 1995, but that from September 2017 they separated. The divorce proceedings were instituted by the plaintiff in January 2019. Four (4) children were born of the marriage, namely K[...] K[...], R[...] K[...], A[...] K[...] and O[...] K[...]. O[...] K[...] [the minor] is the only siblings who has not attained majority by the time the trial commenced.

[4] The triable issues are to be determined by the pleadings. What follows is an illustration of how both the parties and their respective legal teams failed to appreciate the issues, as raised on the pleadings. In consequence an unnecessary lengthy trial followed.

[5] To illustrate the point the Court now considers the trial bundles, the relevant pre-trial minutes and the pleadings themselves before considering the evidence.

TRIAL BUNDLES

[6] The plaintiff prepared the trial bundles as directed by the pre-trial minute held in March 2025. Three bundles were prepared. The first bundle, bundle 1, contained the pleadings and pre-trial minutes. Bundle 2 and 3 contained clearly marked and paginated documentary evidence prepared by the plaintiff in support of her forfeiture relief. The status of the documents in these bundles was not in dispute. The defendant was required and, was provided an opportunity to supplement the bundles but, did not. His Counsel made no objection to the content of the bundles handed up and confirmed that the defendant would not be supplementing the same. In other words, the trial was to commence solely on the documentary evidence provided by the plaintiff and on the state of the pleadings as contained in bundle 1.

[7] The pleadings in trial bundle 1 contained the plaintiff's amended particulars of claim dated June 2024, the defendants plea and counterclaim dated 21 September 2022 and the plaintiff's amended plea to the defendant's counter-claim. Trial bundle 1 did not contain the plaintiff's unamended particulars of claim and nor did a copy thereof appear under the pleading section on Caselines. The defendant nor his legal team referred the trial Court to the unamended particulars of claim. This is an important consideration as the defendant failed to give any context to his plea in relation to the amended particulars of claim.

[8] Furthermore, the relevance thereof lies in the procedural fact that the defendant failed to file an amended plea to the plaintiff's amended particulars of claim. Such procedural failure appeared to be endorsed by the defendant's Counsel' who failed to raise an objection to the amended particulars and the placement thereof in trial bundle 1. His Counsel furthermore failed to deal paragraph 2.3.1 in the March 2025 pre-trial minutes. In paragraph 2.3.1, the defendant recorded that the plaintiff' could not rely on her amended particulars of claim of June 2024. The defendant's Counsel was recorded as being present at the pre-trial yet, the statement at paragraph 2.3.1 remained hollow and without any context. Furthermore, at no point during the hearing, nor in written closing argument did the defendant's Counsel raise any objection to the use of the amended particulars of claim. Conversely, the defendant's Counsel relied on the

allegations in the plaintiff's amended particulars of claim in his written closing argument.

[9] The parties were ready to proceed on the first day of trial and the state of the pleadings, at that time as contained in trial bundle 1, remained undisturbed.

THE PLEADINGS

[10] On the pleadings, the plaintiff's basis for the forfeiture relief was clear, and yet, as mentioned, remained unanswered by the defendant. The consequence, thereof is that such failure to plead to material facts results in the admission of such facts. On the pleadings this translated into the defendant admitting his conduct giving rise to the basis the plaintiff relies on in support of her forfeiture relief and an admission that, if the forfeiture relief was not awarded, he would unduly benefit therefrom. This would then be the end of the plaintiffs case if the Court was to find that the admitted conduct constituted substantial misconduct which, together with the remaining material factors warranted the relief.

[11] In amplification, admission of material facts are not in in issue between the parties. The result evident, disputes narrowed and trial duration curtailed. An obvious result clearly missed by both parties and which, was not appreciated in written closing argument either when the Court requested each party to address duration. A factor for consideration when dealing with costs.

[12] Notwithstanding, moving to the state of the pleadings during the trial, the plaintiff initially waived her right to claim 50% of the remaining joint estate after the forfeiture claim had been applied. However, during the trial she sought to amend such waiver by moving for an amendment. She sought to the deletion of paragraphs 13 and 14 of her amended particulars of claim. The defendant did not object to the sought amendment. The Court ruled that paragraphs 13 and 14 were so deleted.

[13] The plaintiff having pleaded to the defendant's counterclaim denied that the defendant was entitled to 50% of the joint estate.

THE PLAINTIFF'S ONUS

[14] The plaintiff in paragraph 6 of her particulars of claim, sets out the reason for the irretrievable breakdown of the marriage, in paragraph 11 she sets out the basis for her seeking the forfeiture claim and, in paragraph 12, she clearly sets out what patrimonial benefits she seeks the defendant to forfeit as a result of the basis laid in paragraph 11.

[15] In paragraph 6 the plaintiff makes the following material allegations:

15.1. The parties have not resided together as husband and wife since the 11 September 2017, the defendant moving out of the matrimonial home living a separate life from the plaintiff and the children and never communicating the details of his life;

15.2. The defendant has psychologically, verbally, emotionally and financially been abusive towards the plaintiff since 2010;

15.3. The defendant subjected O[...] K[...] [the minor] to a paternity test on or about the 7 August 2018 without the knowledge and consent of the plaintiff;

15.4. The defendant failed to contribute towards the maintenance and improvements of the matrimonial home, repayments of the mortgage bond, rates and taxes;

15.5. The defendant failed to make meaningful contributions towards the upbringing of the children and little contributions towards the benefit of the joint estate.

[16] The defendant referring to a paragraph 6 in his amended plea admits the content. No other context to such admission was given to the trial Court nor argued before it. The defendant further at paragraph 11 of his amended plea admits that the marriage relationship between the parties has irretrievably broken down and that no prospect of restoration is possible. Other than that, the defendant failed to deny the allegation that he failed to contribute towards the maintenance and improvements of the matrimonial home, repayments of the mortgage bond, rates and taxes. He too failed to deny that he meaningfully contributed towards the upbringing of the children and he did not deny that he made little contribution towards the benefit of the joint estate.

[17] Notwithstanding the admissions on the pleadings, the plaintiff's testimony in this regard was supported by documentary proof in which she demonstrated her contributions towards the upbringing of the children, the joint estate and the matrimonial home. This evidence not disturb by the defendant's testimony.

[18] The material allegations in paragraph 6 were then repeated by the plaintiff in paragraph 11 of her amended particulars of claim. She added the following material allegations, which too, were supported by evidence:

18.1. The defendant had persistently refused to contribute towards vocational training of R[...] K[...] while studying at Varsity College, ETA College and Squadra Corse [Exhibit S, H, I, J, K, L, M, R, V];

18.2. The defendant failed to pay his personal and business income tax to the detriment of the joint estate [Exhibit 'Y'];

18.3. The defendant, upon being retrenched in or about 2001, utilised his pension benefits exclusively for his personal use and not for the benefit to the joint estate [Exhibit "21"];

18.4. The defendant has concealed financial assets and interest held in B[...] Commonwealth (Pty) Ltd, B[...] Creations (Pty) Ltd and B[...] HR

Consulting Close Corporations, thereby unlawfully diminishing the patrimony of the joint estate [Exhibit 5,7,8,9,12] and

18.5. The defendant failed to make full and frank disclosure of the aforesaid business and financial interests as well as the proceeds thereof during the rule 36 discovery process and interlocutory proceedings further evidenced his intent to unlawfully enrich himself at the expense of the joint estate.

[19] The defendant failed to specifically deal with and plead to these further allegations to sustain the grounds for forfeiture [[sub-paragraphs 11.3 -11.12 of paragraph 11]. Therefore such are admitted. The plaintiff notwithstanding, provided testimony pertaining thereto and documentary evidence.

[20] The defendant in his plea, notwithstanding the admissions, pleaded to a sub-paragraph 11.1 and 11.2. of as follows:

"***AD PARAGRAPHS 11, 11.1 TO 11.2 THEREOF***

22.1 The defendant again denies that the plaintiff is entitled to claim for partial forfeiture in the plaintiff's favour and puts the plaintiff to the proof thereof.

22.2 The defendant pleads that the joint estate should be equally divided between the parties as set out in the defendant's counterclaim."

[21] The weight of the bare denial of paragraph 11.1 and 11.2 must be considered against his admissions and against the defendant's failure to plead to paragraph 12 of the plaintiff's amended particulars of claim.

[22] In paragraph 12, he failed to deny that he would not unduly benefit if the forfeiture relief not be granted in respect of:

22.1. The remainder of the proceeds from the sale of the matrimonial home in the amount of approximately R1,4 million held in trust by Snyman De Jager Attorneys;

22.2. The plaintiff's Haval motor vehicle with registration number L[...];

22.3. The plaintiff's interest in Satrix shares held with Standard Bank Limited [Exhibit "G"];

22.4. The plaintiff's shares in Woolworths held with Standard Bank Limited;

22.5. The plaintiff's interest in Old Mutual Max Investment Retirement Annuity with code 1[...] [Exhibit "E"];

22.6. The plaintiff's interest in Momentum Retirement Annuity with code P[...] [Exhibit "F"];

22.7. The plaintiff's interest in Sanlam's Umbrella Provident Fund with number 7[...] [Exhibit "D"];

22.8. The household furniture in the plaintiff's present possession;

22.9. Each party to pay the debts incurred in their own names.

[23] Notwithstanding the admissions, the plaintiff testified for two days taking the trial Court through all the documentary evidence to establish the nature and the extent of the benefit.[1] The necessity thereof, on the pleadings, unclear.

[24] Notwithstanding, she testified in support of paragraph 12 of her pleadings that the defendant would stand to unduly benefit in the amount of R 2 079 697.96 should the forfeiture relief not be granted.

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1 ***Engelbrecht v Engelbrecht*** 189 (1) SA 597 (C).

[25] It is common cause that the defendant is a businessman with interests in B[...] HR Consulting CC, B[...] Creations (Pty) Ltd, B[...] Wealth (Pty) Ltd and P[...] Investment Holdings (Pty) Ltd. According to the testimony of the plaintiff, the defendant repeatedly represented that these businesses were not generating an income and thereby justifying his lack of financial contribution to the household, the joint estate and the meaningful maintenance of the children. The defendant in pursuit of the narrative in 2024 launched a rule 43 application in which he sought, *inter alia*, interim maintenance for the two minor children, A[...] and O[...] K[...]. He wished the plaintiff to pay their school fees in the amount of R12 100.00 per month and he sought a contribution towards his legal costs in the amount of R50 000.00. Under oath, the defendant stated that he was self-employed and that he did not have a stable monthly salary due to change in his income. This he maintained under oath whilst, at trial the reverse was demonstrated. According to financial statements obtained by the plaintiff, his salary and directors drawings in respect of B[...] HR Consulting CC and B[...] Creations (Pty) Ltd did not accord with what he stated and the amounts were significantly higher than he had stated under oath in his rule 43 application.

[26] At the time that the defendant launched the rule 43 application, his financial statements demonstrated a monthly income in the form of director's fees and benefits which far outweighed that of the plaintiff. Over and above his misrepresented earnings, the defendant admitted that he failed to pay the agreed cash contribution of maintenance for his minor children as far back as 2022. This he did, whilst concealing his earnings and perpetuating the narrative . In this way he rather elected to allow the plaintiff to single handedly pay for all the household expenses whilst most of their children still resided with her, he allowed her to single handedly take care of the children and he allowed her to single handedly carry her own financial responsibilities. The defendant was not only content to misrepresent his earnings and earning capacity to his family but he was willing to do the same under oath before a Court of law. This constitutes substantial misconduct.

[27] The defendant's misconduct spilled over into his unwillingness to provide the documentary evidence sought by the plaintiff in preparation for the trial. The plaintiff had to obtain Court orders in an effort to shift the unwillingness barometer. Notwithstanding Court orders, the defendant still withheld annual financial statements for the year ending February 2023 for B[...] HR Consulting CC and B[...] Creations (Pty) Ltd. He too failed to provide all the source documents that were used by his accountant for B[...] Commonwealth Financial Statements. Such failure to fully comply with 2 (two) Court orders was not only clear from the documents in the trial bundle 2 and 3 but, was readily conceded by the defendant under cross examination. The defendant has furthermore failed to disclose values of his shares in P[...], failed to disclose his role in Let's Build it Together Foundation and failed to provide the current value of his shares in B[...], Commonwealth. This constitutes substantial misconduct.

[28] The defendant's narrative of his inability to earn sufficient income was again exposed as a falsehood by Exhibit "Y," a personal tax assessment by SARS for the year ending 2023 in which SARS sought the payment of the sum of R1 096 145.58 from the defendant as his tax liability for income earned by him personally during that financial year. The defendant was unable to provide proof of how he utilised that income earned during that financial year. No evidence was tendered that he used it for the benefit of the joint estate.

[29] The plaintiff's counsel argues that the defendant's conduct is analogous to the facts of M.P.M v G.P.M[2] where the Court held that pocketing funds for personal use while the other spouse carries the financial burden amounts to substantial misconduct. He further argued in support of Z v Z[3] where the Court stated that a lack of meaningful contribution to the joint estate was found to be substantial misconduct justifying forfeiture.

[30] It is furthermore an undisputed fact that the defendant used the proceeds of his pension fund for his sole benefit after he was retrenched in 2001 without

2 (26016/2017) [2022] ZAGPPHC 439 (15 November 2022) at par 36.

3 (34253/2010) [2024] ZAGPJHC 4 (10 January 2024) at paras 7, 9 and 10.

contributing towards the estate. In this regard, the plaintiff's counsel referred the Court to Tsebe v Tsebe[4] in which the Court found that Mr Tsebe committed substantial misconduct as envisaged in terms of section 9(1) of the Divorce Act, in that he used the pension solely for himself to the exclusion of the joint estate and his wife. Furthermore, in this case, it is common cause that the defendant ceased contributing towards his retirement annuity in 2020 thereby diminishing the joint estate.

[31] On the pleadings, and considering the evidence the plaintiff has discharged her onus in respect of undue benefit and substantial misconduct.

[32] As far as the duration of the marriage is concerned this Court accepts that 29 years is a marriage of long duration albeit, that the parties separated from each other already in 2017. Notwithstanding, this factor must be seen in context. What transpired during that duration is relevant. Twenty nine years of having to be the major bread winner, the constant mother, the carer and the responsible partner in every aspect of the family's life is a factor. The duration of the marriage has been considered as a factor and does not tip the scales having regard to all the evidence over the period.

[33] Having regard to all the factors, the plaintiff's forfeiture relief succeeds.

THE DEFENDANT'S ONUS

[34] From the defendant's testimony it is clear that in the beginning of their marriage he assisted the plaintiff to realise her occupational potential and gave of his time and support to the children and the joint estate. In other words when he needed the plaintiff's earning potential he supported her. However, as soon as he did not, the plaintiff was left in the dark as to his earnings and earning potential and he persisted with the narrative that he was unable to contribute. In this way the plaintiff continued to make her financial contribution to the household, the children's maintenance and their interests, the medical aid for the benefit of the

4 [2016] ZAGPPHC 573 (24 June 2016) at par 15.

family and to plan a nest egg for retirement. The defendant conceded under cross examination that the plaintiff paid the mortgage bond and the school fees for the first three children whilst he contributed by taking them to school.

[35] To be frank, the defendant and his legal team where unprepared on the pleadings, failed to provide documentary evidence which clearly demonstrated his contribution to the minor children, the household and the joint estate over the period of the marriage and his testimony was riddled with inconsistencies and half-baked truths considering the documentary evidence placed before Court. The defendant's evidence was unreliable. His Counsel's written argument did not refer the Court to corroborated evidence in support of his client's allegations of support during 2001 to 2017 nor, for that matter 2017 to date. The only reliance was the defendant' say-which could not be relied on.

[36] The inevitable is that the defendant and his legal team did not appreciate his onus *vis a vis* the counter application nor *dire* consequence of his pleadings. They appeared rather, to be fixated on a misrepresented narrative, a rule 43 and an application in terms of section 20 of the Matrimonial Properties Act 88 of 1984 which he brought in 2024. In this way they failed to concern themselves with the task at hand. The defendant has failed to discharge his onus that 50% of the entire joint estate should accrue to him.

[37] Having said that, what his narrative and actions have illustrated is that, in so far as the residue of the joint estate is to be divided his call for a receiver may assist with discerning the true value and the whereabouts of the assets which make up the joint estate.

COSTS

[38] There is no reason why costs should not follow the result. However, considering the state of pleadings it is clear that the duration of the trial could and should have been curtailed for that reason. The court will allow for a day and a half in respect of recoverable day fees and costs in respect of the plaintiff's claim. As

far as the defendant's counter claim is concerned having regard to all the facts, each party to pay their own costs.

[39] The following order:

1. A decree of divorce;

2. The parental rights and responsibilities in respect of O[...] K[...] [the minor child] shall vest both in the Plaintiff and Defendant as envisaged in terms of section 18 of the Children's Act, 38 of 2005;

3. Primary residency shall vest with the Plaintiff;

4. The Defendant shall exercise the following contact rights in respect of the minor child:

   4.1 the minor child will spend every alternate weekend with the Defendant starting from 18h00 on a Friday until 18h00 on the Sunday alternatively, should the weekend be a long weekend, from 18h00 of the last school day before the long weekend until 18h00 on the last day of the long weekend;

   4.2 the minor child shall be entitled to have reasonable telephonic contact with the Defendant when with the Plaintiff and will be entitled to have reasonable telephonic contact with the Plaintiff when with the Defendant;

   4.3 the short and long school holidays will be equally shared between the parties;

   4.4 Christmas, new year, Easter holidays will alternate between the parties;

4.5 both parties will have access to the minor child on her birthday. In the event that the birthday falls on a weekday, the Defendant will have the minor child after school until 18h00 and will retain the minor child in the evening. In the event that the birthday is on a weekend, the parties will arrange with each other to have access to the minor child;

4.6 both parties will have access to the minor child on the birthdays, and the minor child will spend Father’s Day with the Defendant and Mother’s Day with the Plaintiff.

5. In the event that either party wishes to travel overseas with the minor child, written consent of the other party shall be required, which written consent will not unreasonably be withheld and/or delayed;

6. The parties shall further have the right to see the minor child at any reasonable time by prior agreement with each other and with the minor child;

7. In the event that the parties are unable for whatever reason to have the minor child with them during any time period allocated to them, in terms of this order, they will timeously advise the other party accordingly to enable arrangements to be made if at all possible;

8. The parties will notify each other of any changes in their address or cell phone numbers;

9. Access to the minor child shall be exercised in the best interests of the minor child which should create a minimum degree of disturbance to the minor child’s routine, educational and necessary extramural activities;

10. Any school which the minor child attends shall be informed that both the Plaintiff and the Defendant are co-holders of parental rights and responsibilities and jointly involved in all educational issues concerning the minor child;

11. In terms of section 10 of the Children's Act, 38 of 2005, when the minor child is of an age, maturity and stage of development to participate in an appropriate manner regarding decisions that affect her, her views expressed must be given due consideration under the circumstances;

12. The Defendant shall retain the minor child until they are self-sustaining as follows:

    12.1 payment of the school fees directly to the school or institution that the minor child is attending;

    12.2 payment of 50% of any tertiary fees, directly to the instituting where the child will be attending;

    12.3 payment of the sum of R3 000.00 per month to the Plaintiff towards the maintenance of the child, payable on or before the 1st day of each proceeding month, commencing from the date of his order;

    12.4 payment of the reasonable and agreed extramural activities, extra lessons and excursions that the minor child may require to attend from time to time, directly to the service provider;

    12.5 purchase the minor child's school uniforms, books and stationery;

12.6 purchase clothes and shoes for the minor child on a seasonal basis (twice a year in May and September);

12.7 pay 50% of the shortfall that is not covered by the Plaintiff's medical aid;

12.8 pay 50% of R[...] K[...]'s vocational training;

12.9 pay 50% of the same child's medical contributions.

13. The plaintiff shall maintain the minor children until they are self-sustaining as follows:

13.1 provide accommodation;

13.2 provide food, toiletries, lunch and grooming;

13.3 retain the minor child on a medical aid;

13.4 pay 50% of all the shortfalls that are not covered by the medical aid;

13.5 pay 50% of their tertiary fees directly to the institution where the child will be attending;

13.6 pay 50% of R[...] K[...]'s costs of vocational training;

13.7 pay 50% of R[...] K[...]'s medical contribution;

13.8 pay all the costs of cell phones, WiFi, DSTV and entertainment.

14. The Defendant is to forfeit his 50% share in the following patrimonial benefits:

14.1 the remainder of the proceeds from the sale of the matrimonial home in the amount of approximately R1,4 million held in trust by Snyman De Jager Attorneys;

14.2 the Plaintiff’s Haval motor vehicle with registration number L[...];

14.3 the Plaintiff’s interest in Satrix shares held with Standard Bank Limited;

14.4 the Plaintiff’s interest in Woolworths shares held with Standard Bank Limited;

14.5 the Plaintiff's interest in Old Max Retirement Annuity with code: 1[...];

14.6 the Plaintiff’s interest in Momentum Retirement Annuit with code: P[...];

14.7 the Plaintiff’s interest in Sanlam Umbrella Provident Fund with number 7[...];

14.8 the household furniture which is in the Plaintiff’s possession as at date of the order.

14.9 Each party is to pay their own debts incurred in their own names as at date of the divorce order.

15. A Receiver for the division of the remaining joint estate is to be appointed with the following functions and powers:

15.1 to assist both the Plaintiff and the Defendant in the division of the remaining residue of the joint estate or any part thereof which cannot conveniently be divided, by agreement between them and if necessary, to sell any residue or part thereof and to divide the proceeds equally between them;

15.2 to demand from both the Plaintiff and the Defendant a true and correct account of any portion of the assets which either the Plaintiff or the Defendant may have taken possession of or have an interest in and/or which can be dealt with;

15.3 to demand from the Plaintiff and Defendant the payment or delivery of such portion of the assets of the remaining joint estate which the Plaintiff or the Defendant may have dealt with which does not form the subject matter of this order;

15.4 both the Plaintiff and the Defendant are jointly liable for the costs of the Receiver;

15.5 the division of any net assets, shall be subject to the protection of the rights and claims of any secured or preferent creditors of the joint estate, if applicable.

16. The Defendant is to pay the Plaintiff's party and party costs, taxed on scale B associated with her claim and the recoverable trial day fee is the confined 1.5 court days.

17. Each party is to pay their own costs associated with the Defendant's counterclaim.

L.A. RETIEF

Judge of the High Court

Gauteng Division

Appearances:

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