

and

P[...], J[...] D[...] (Born N[...])

Respondent

JUDGMENT

SEGAL AJ:

- [1] There are two applications before court which require determination. The one application is brought by the wife, Mrs P in which she is the Applicant and Mr P is the Respondent. In the other application Mr P is the Applicant and Mrs P is the Respondent. To avoid confusion and for the sake of convenience I refer to the parties as Mr P and Mrs P.
- [2] Mr P and Mrs P were married in community of property on 30 November 1991. They had been separated for approximately 14 years when Mrs P obtained an order for *inter alia*, a decree of divorce and an order that 50% of Mr P's pension and provident interest be paid to her.
- [3] It was subsequently established that Mr P had no knowledge of the fact that the action had been instituted and that the return of service from the Sheriff reflecting service on Mr P had been fabricated.
- [4] Mr P then approached the court to rescind the divorce order. He ultimately obtained an order rescinding only paragraphs 3 and 4 of

the divorce order dated 10 September 2021, namely the provision that 50% of Mr P's pension fund interest held at Alexander Forbes be paid to Mrs P and the order for rehabilitative maintenance to be paid to Mrs P. Accordingly, the parties remain divorced and the rescission did not affect the order granting the decree of divorce.

[5] Subsequently Mrs P sought details from Mr P in respect of the said pension fund and Mr P refused to provide any such information or documentation. The parties refer interchangeably to the pension fund / pension interest and provident fund. There is no clarity from Mr P regarding whether the fund is a pension fund or a provident fund or an investment fund.

[6] Mr P filed a Plea to the Plaintiff's claim as well as an amended Plea in which he baldly denied that he was still a member of the Alexander Forbes pension fund.

[7] It was unclear to Mrs P when Mr P had indeed ceased being a member of the pension fund, whether this had occurred before or after the grant of the decree of divorce and accordingly Mrs P's attorneys dispatched a Notice in terms of Rule 35(3) on 12 January 2023, seeking documentation in relation to the pension fund.

[8] Mr P replied in March 2023 essentially confirming; (a) that he no longer belonged to a "provident fund" and that he was not in

possession of nor could he provide to Mrs P a statement reflecting the value of his provident fund as at the date of the grant of the decree of divorce; (b) that he did not have a statement reflecting the value of his “pension interest” on date of withdrawal; (c) that he did not have a statement reflecting the value of his “provident fund” as at date of withdrawal if it was withdrawn; and (d) that he did not have proof of investments made by him with the monies withdrawn from the “pension interests” and provident fund if withdrawn.

[9] A trial date was allocated. In consequence of Mrs P having essentially been stonewalled by Mr P, it became necessary for the trial to be postponed as Mr P adopted the attitude that Mrs P had the duty to begin and bore the onus of proving the existence of the pension fund but, simultaneously refused to provide any of the information or documentation sought by her in relation to this matter which fell squarely within his knowledge.

[10] After the trial was postponed and on 1 August 2024, Mrs P caused a Request for Further Particulars for Trial to be served on Mr P’s attorneys and in that Request for Further Particulars the following questions were addressed in relation to paragraph 2.3 of the Defendant’s amended Plea namely:-

10.1 when did the Defendant (Mr P) withdraw his pension from Alexander Forbes and to which entity was it moved?

10.2 what was the value of Mr P's pension benefit alternatively of the pension preservation fund further alternatively investment at the entity to which his pension was moved on the 10th of September 2021?

[11] When Mr P failed to reply to the Request for Further Particulars, Mrs P brought the application to compel him to do so, on 11 October 2024, in terms of Rule 21(4), seeking an order that; (a) Mr P be ordered to furnish the Further Particulars as requested by her on 1 August 2024 within 10 days; and (b) should he fail to comply with the order that she may on the same papers duly supplemented, set the matter down for the dismissal of Mr P's case and counterclaim in the main action.

[12] Mr P objected to providing these further particulars and on 6 November 2024, he (as Applicant) launched an application in which he claimed:-

12.1 that Mrs P's application to compel him to reply to her Request for Further Particulars for Trial be stayed;

12.2 an order that a separation of issues be granted as envisaged by Rule 33(4) of the Uniform Rules of Court "in that the forfeiture is to be determined separately"; and

12.3 that Mrs P make payment of the costs of suit if defended.

[13] Mr P does not specify precisely what issues are to be separated (as a claimant for a separation is obliged to do) and does not indicate what precise issues will be heard at the separated trial and what precise issues will be heard at the trial that follows. His Notice of Motion is woefully inadequate.

[14] It seems to me that the only live issues that the trial court needs to determine are:-

14.1 Mrs P's claim that Mr P make payment to her of 50% of the value of his pension / provident fund / investment fund as at date of divorce and Mr P's claim that Mrs P forfeit the benefits of that pension fund, contending, that she would be unduly benefitted if he made payment to her of his 50% share in the pension / provident / RA / investment fund as at date of divorce; and

14.2 The second issue in dispute between the parties is Mrs P's claim for rehabilitative maintenance from Mr P by way of payment of Mrs P's medical aid premiums for 24 months following on the grant of the divorce.

[15] During argument it appeared to me that Mr P was of the view that if he is successful in his application for a separation of issues, he would

not be obliged to respond to Mrs P's Request for Further Particulars, this on the basis that "*the issue of forfeiture should be dealt with first*".

[16] I asked the parties to file supplementary Heads of Argument in relation to *inter alia*, whether a court other than the court granting the decree of divorce would be permitted to determine the question of a forfeiture of benefits, having regard to the provisions of Section 9 of the Divorce Act.

[17] It seemed to me to be an important issue to clarify in light of the fact that it was common cause that the decree of divorce which had been granted had not been rescinded. Counsel for both parties prepared supplementary Heads of Argument which were of great assistance to the court and for which the court thanks them.

[18] Ordinarily only the court granting the decree of divorce can grant a forfeiture order. As confirmed in the matter of Mothibedi Alfred Phokobye v Felicia Mosima Adelaide Nkumishe.¹

[19] Section 9 of the Divorce Act provides "*When a decree of divorce is granted on the ground of irretrievable breakdown of a marriage, the court may make an order that the patrimonial benefits of the marriage were forfeited by one party in favour of the other, either wholly or in*

¹ (2024) Full Bench Decision of Gauteng High Court, 29 August 2024 – Case Number A151/2023

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 benefitted.”

[20] There are however exceptions to this Rule.

[21] In the matter of MJL v LOL ² the court considered the question of whether, in the face of a partial rescission of a divorce order it was permissible to determine proprietary relief and whether the grant of a decree of divorce was severable from such proprietary relief.

[22] The court confirmed that it is in the interest of justice to permit the previously divorced status of the parties continue while affording a party the opportunity to prosecute other proprietary aspects of the claim at a later date.

[23] In its judgment in the matter of MJL v LOL, the court referred with approval to the matter of Mathepe Mildred Tojo and Paladi Piet Molabe and Eskom Provident Fund ³ as also to the matter of M v M ⁴ and to the matter of D v D ⁵, in which matters the courts had

² (22341/19; A288/2023) [2025] ZAGPPHC 331 (27 March 2025)

³ ZAGPP 16 C 666 (26 July 2006)

⁴ (2007) [2011] ZAGPPHC / 155 (27 May 2011)

⁵ A3079 [2016] ZAGPJHC 31 (12 February 2016)

respectively *inter alia*, confirmed that (a) a partial rescission of a divorce order was permissible; (b) it would serve the interests of justice to craft an order that permits in effect the previously divorced status of the parties to continue while affording a party to prosecute the other aspects of the claim; (c) in such instances it is permissible for a court to determine a dispute in relation to the question of a forfeiture of benefits after the decree of divorce had been granted.

SHOULD MRS P'S APPLICATION TO COMPEL MR P TO REPLY TO HER REQUEST FOR FURTHER PARTICULARS FOR TRIAL BE STAYED?

[24] Mr P contends that Mrs P's application to compel Further Particulars for Trial should be stayed, because "*it is neither necessary nor required to discover the documents from his pension fund and/or pension interest as he is claiming a forfeiture of benefits, and should the forfeiture be granted, Mrs P will not be entitled to such information, should the forfeiture not be granted the division of the estate will be ordered by the court as it deems fit*".

[25] I cannot agree with this argument which is not only devoid of merit but also untenable. When I enquired of counsel for Mr P during the argument how a court determining the issue of the forfeiture could make such a determination in the absence of knowledge of the value of:-

25.1 the pension interest;

25.2 the remainder of the joint estate; and

25.3 the value of the assets and liabilities that each party had agreed to retain.

Counsel indicated to me that the court hearing the forfeiture case could order that a percentage of the pension fund be forfeited. These submissions too are untenable for it would not be possible for a court determining the question of forfeiture to be placed in a position to make a decision in relation to forfeiture and determine the question of undue benefit without the financial position of each party being disclosed to the court and to the other party. Part of the court's consideration would be the identification and quantification of the assets to be forfeited.

[26] Mr P's efforts to delay the provision of this information are transparent. There is no justification in fact or in law for Mr P not to provide all relevant information and documentation pertaining to his financial position more especially the details concerning his pension interest and what has become of it to Mrs P. This duty is manifest. He cannot obscure Mrs P's or the court's visibility into all of his financial affairs as they were on the date of the grant of the decree of divorce.

[27] Whilst the court accepts that Mr P is entitled to prosecute his

forfeiture claim, given that he was not afforded the opportunity to do so when the decree of divorce was granted, it does not follow that in circumstances where a forfeiture claim is to be prosecuted, neither party is obliged to provide the court with details of the joint estate as it existed as at the date of the grant of the decree of divorce including its assets and liabilities, and their income and expenses.

[28] The court determining the forfeiture claim cannot sensibly, fairly or in the interests of justice execute its duty to determine whether or not there should be a forfeiture and if so, what precisely should be forfeited, without being in possession of the financial information of both parties. Accordingly, there is no merit in Mr P's contention that he should not be compelled to reply to Mrs P's Request for Further Particulars for Trial immediately and that it should wait until after the question of forfeiture has been determined.

[29] Indeed, a court would be hard-pressed to make such a finding blindly and in the absence of all the necessary information.

[30] As such, irrespective of whether Mr P succeeds in his claim in terms of Rule 33(4) for a separation, (which I deal with below) there is no basis on which Mrs P should not be successful in securing an order to compel Mr P to reply to her Request for Further Particulars for Trial. I would venture to say that this information is within the peculiar knowledge of Mr P and there is no way for Mrs P to secure such

information, nor should she be obliged to do so other than from Mr P.

[31] The duty to discover in divorce actions and for litigants to be transparent and act in good faith cannot be sufficiently emphasised.

[32] The dicta of Gorven AJJA (as he was then) in the matter of DEB v MGB⁶ insofar as it pertains to Mr P's obtuse attitude towards disclosure of the information and documentation in respect of his pension interest bears repetition.

[33] “[38] *Before arriving at the order to be made it is appropriate to comment on the manner in which the Defendant approached the litigation on the accrual claim...*”

[34] “[39] *The attitude of many divorce parties, particularly in relation to money claims where they control the money can be characterised as “catch me if you can”. These parties set themselves up as immovable objects in the hopes that they will wear down the other party. They use every means to do so. They fail to discover properly, fail to provide any particulars of assets within their peculiar knowledge and generally delay and obfuscate in the hope that they will not be “caught” and have to disgorge what is in law due to the other party.*”

[35] In the circumstances, I am persuaded by Mrs P that an order should be granted compelling Mr P to provide her with a response to her

⁶ (700/2013) [2014] ZASCA 137 (25 September 2014)

Request for Further Particulars for Trial.

- [36] It goes without saying that the relevant documentation in relation to the pension interest ought to be discovered by Mr P as he is obliged to discover all relevant documents in relation to his financial circumstances and the issues of forfeiture and rehabilitative maintenance. If he is indeed not in possession of the relevant documentation as he contends in his reply to Mrs P's Notice in terms of Rule 35(3), there is no-one better placed than he to procure such evidence, to contact the relevant pension / provident funds and obtain the relevant information and documentation and then discover it.

SHOULD THE ISSUE OF MR P'S CLAIM THAT MRS P FORFEIT THE BENEFITS OF MR P'S PENSION FUND BE SEPARATED FROM THE REMAINING ISSUES IN DISPUTE?

- [37] The manner in which Mr P has framed his relief in his Notice of Motion is not only vague but unhelpful. This is so because he does not set out what the remaining issues for determination will be in the event that he is successful in securing an order in terms of Rule 33(4).
- [38] From what I can gather, the only issues in dispute are:-

38.1 the question of whether Mrs P should forfeit the benefits of Mr P's pension fund;

38.2 the question of whether Mr P should make payment of Mrs P's medical aid premium for a period of two years after the grant of the decree of divorce; and

38.3 the question of the costs of suit.

[39] I cannot see that there are any remaining issues in dispute and to the extent that I am incorrect, Mr P was dutybound to set out in detail precisely what those remaining issues are.

[40] To the extent that the three issues identified by me above are the only issues in dispute, there is no basis upon which an order for a separation could be justified. Such an order:-

40.1 will not materially shorten the proceedings;

40.2 will require similar evidence to the evidence that would be led in relation to interim maintenance resulting in a duplication of evidence;

40.3 would not be convenient to the court or the parties;

40.4 would not be expedient;

40.5 would result in unnecessary delay and wasted costs;

40.6 would not substantially curtail the proceedings and would in

fact increase the costs of the litigation resulting in the parties having to duplicate evidence in different proceedings.

[41] I cannot fathom the basis upon which Mr P would contend that two separate trials should be run. One relating to whether or not Mrs P should forfeit the benefits of his pension fund and two, whether or not interim maintenance should be paid. These two issues should most certainly be determined in one single hearing for the convenience of the court and the parties. To permit two separate trials to run would be ludicrous.

[42] Mr P's separation application is entirely ill-conceived and has served only to delay the finalisation of the divorce proceedings further. There have already been extensive delays in finalising this divorce including; (a) the parties separation for 14 years before action was instituted; (b) Mrs P having used the services of a person who obtained a fraudulent return of service when in truth the Summons and Particulars of Claim had not been served on Mr P; (c) the proceedings to partially rescind the proprietary portion of the divorce order; (d) the subsequent trial being postponed; and (e) Mr P's refusal to reply to Mrs P's Request for Further Particulars for Trial and his response thereto namely the application for a stay of Mrs P's application to be compel and his application for a separation of issues.

[43] Enough time has been wasted in this matter, and the matter should be brought to finality as soon as practicably possible.

[44] In the circumstances, I grant the following order:-

In Mrs P's application

44.1 Condonation is granted for the late filing of Mrs P's Rule 21(4) application.

44.2 Mr P is ordered to furnish the further particulars as required by the Plaintiff's Request for Further Particulars for Trial dated 1 August 2024 within 10 days of the date of the grant of this order.

44.3 Should Mr P fail to comply with this order, Mrs P may, on the same papers duly supplemented set the matter down for the dismissal of Mr P's Plea and Counterclaim in the main action.

44.4 The costs of Mrs P's application are to be paid by Mr P, such costs to include the costs of counsel on Scale B.

In Mr P's application

44.5 Mr P's application to stay Mrs P's application to compel is dismissed.

44.6 Mr P's application for a separation of issues in terms of Rule 33(4) of the Uniform Rules of Court and for the issue of the forfeiture of benefits to be determined separately is dismissed.

44.7 Mr P is ordered to make payment of Mrs P's costs of the application to stay and the application in terms of Rule 33(4), such costs to include the costs of counsel on Scale B.

SEGAL AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: 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 on 3 October 2025.

Heard on: 31 July 2025

Delivered on: 3 October 2025

Appearances:

Adv AM Raymond:

Denton Incorporated Attorneys:

for the Applicant

Adv X van Niekerk:

Schoeman Incorporated Attorneys

for the Respondent