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

CASE NO: 32283/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED.

DATE: **13 November 2025**

SIGNATURE: K. La M Manamela

In the matter between:

M[...] C[...] L[...] N[...]

Plaintiff

and

V[...] L[...] M[...]

Defendant

DATE OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge's secretary. The date of the judgment is deemed to be 13 November 2025.

JUDGMENT

Khashane Manamela, AJ

Introduction

[1] The plaintiff – of Pedi heritage - and the defendant – of Zulu heritage - were in a romantic or love relationship from around November 2011 or early 2012 onwards, which subsequently developed into a stable family relationship and cohabitation. Three children were born from their relationship between April 2017 and August 2020 ('the minor children'). Between those years, they decided to get married in terms of customary law.

[2] In September 2018, lobolo¹ negotiations took place and the defendant paid a significant portion thereof to the plaintiff's father or parents. The balance of the lobolo was paid on 7 November 2020 at a ceremony held at the homestead of the plaintiff's parents in Bela Bela, Limpopo. According to the plaintiff, it was on that day that she entered into a customary marriage in community of property with the defendant ('the marriage') in accordance with the Recognition of Customary Marriages Act 120 of 1998 ('the RCMA'). The defendant – whilst admitting his full payment of lobolo in respect of the plaintiff – disputes the marriage, primarily, on the ground that not all customs in terms of the Zulu culture or customary law were observed on that date or thereafter.

[3] The plaintiff claims that the marriage has irretrievably broken down and disintegrated with no reasonable prospect of restoration of a normal marriage relationship between the defendant and her. She cited many reasons to support her claim, including that during December 2020 the defendant married a third party in terms of custom without her

¹ Section 1 of the Recognition of Customary Marriages Act 120 of 1998 defines 'lobolo', among others, as 'the property in cash or in kind, whether known as *lobolo*, ... *magadi*...which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage'.

knowledge and/or consent. On 30 June 2021, the plaintiff caused summons to be issued, commencing these proceedings. She sought, among others: (a) decree of divorce; (b) award to her of the care and primary residence of the minor children, and (c) division of the joint estate.

[4] The defendant, advancing his defence that there is no valid customary marriage, defended the proceedings. In his plea, the defendant also raised the non-joinder of the third party he says he had married by custom on 12 June 2021. The defendant, further, counterclaimed that should this Court rule that he is indeed married to the plaintiff, the plaintiff ought to forfeit the benefits of marriage in community of property, including on the ground that the marriage was of a short duration.

[5] The matter came before me for trial on 14 April 2025, when Ms M Fabricius appeared for the plaintiff and Ms Z Qono appeared for the defendant. The trial continued on 15 and 16 April 2025. On the latter date, the part-heard matter was postponed for closing argument in written form. The written argument by the defendant counsel was filed – as agreed - on 01 July 2025, on which date this judgment is deemed to have been reserved. I am grateful to counsel for the detailed material filed in this regard.

Brief background

[6] A brief narration of the facts in the background to this matter is necessary. Although there are few areas of commonality, I will endeavour to constitute this from the common cause facts. Otherwise, I will indicate the area of or issue in dispute.

[7] The parties' love or romantic relationship, as already indicated, commenced towards the end of 2011 or in early 2012. The plaintiff said it was on 28 November 2011. The parties, then, worked for the same employer. Their relationship endured despite the plaintiff's relocation to Cape Town for work purposes from 2014 to 2016.

[8] On 3 April 2017, the parties' first child was born. By then the plaintiff had returned to Pretoria from Cape Town. They moved in together and, thenceforth shared – as their home – a house purchased by the defendant. The plaintiff says the parties' cohabitation started, earlier, being briefly after they met. Two more children were born in April 2018 and August 2020.

[9] On 22 September 2018, a delegation comprising Messrs R Ngcobo and L M[...] ('*abakhongi*') representing the defendant's family ('M[...] family') visited the home of the plaintiff's parents in Bela Bela for lobolo negotiations. The representatives of the plaintiff's family ('N[...] family') were Messrs S N[...], C N[...] and J Maserumule, and Ms N Mmatli. Lobolo was agreed in the amount of R64 000 and the defendant, instantaneously, paid R42 000 to the plaintiff's father or parents.

[10] On 7 November 2020, lobolo was fully paid when the defendant settled the balance of R22 000. After lobolo was fully paid and still on the same date, there was a gathering at the N[...] family home in Bela-Bela, attended by more than 200 guests (as estimated by the plaintiff). The defendant solely paid for the expenses for this gathering. The plaintiff says a valid customary marriage (i.e. the marriage) was concluded or celebrated between the defendant and her on this date, as envisaged by the RCMA. According to the defendant what was celebrated on that day was the finalisation of the lobolo negotiations. There were outstanding Zulu customs still to be observed in terms of an agreement between the parties.

[11] In December 2020 (according to the plaintiff) or 12 June 2021 (according to the defendant), the defendant married another woman (conveniently referred to only as 'Ms CM') in terms of custom. The defendant says he paid lobolo to Ms CM's family in the amount of R73 000 during September 2019; handed the required gifts to Ms CM and her family during December 2020, and concluded the ritual or ceremony of sprinkling of bile (from an animal) and Ms CM's handing-over process on 12 June 2021.

[12] On 30 June 2021, the summons for these proceedings was issued. According to the defendant, the plaintiff and the minor children vacated the home they shared in July 2021. In September 2021, the plaintiff brought an application in terms of Rule 43 of the Uniform Rules for, primarily, parental responsibilities and rights in respect of the minor children, including contribution by the defendant towards maintenance. An order was granted on 30 November 2021, *per* Nkosi AJ.

Pleadings (relevant aspects thereof)

General

[13] I consider it necessary to quote from the pleadings, due to the nature and extent of the claims and counterclaims made by the parties in this matter.

Plaintiff's case (extracted from the pleadings)

[14] The plaintiff amended her particulars of claim on 28 February 2022. In their amended form they read as follows in the material part:

- 4.
- 4.1 The parties were married to one another on 7 November 2020, at Bela Bela, Limpopo, by way of customary marriage, in community of property, which marriage still subsists.
- ...
- 4.5 At the November 2020 wedding celebrations, at Bela-Bela, Limpopo, the remaining sum of Lobola in an amount of R22,000.00 was paid to Plaintiff's parents and gifts were exchanged, being gifts for the Plaintiff's family in the form of blankets for Plaintiff's aunt, jackets for Plaintiff's father, Plaintiff's grandfather and Plaintiff's uncle and further groceries for Plaintiff's mother and a blanket for Plaintiff and money for the Plaintiff.
- 4.6 On 7 November 2020, at Bela-Bela, a formal wedding ceremony was held in terms of custom and in terms whereof the Plaintiff was handed over to the Defendant's family.²

[15] The plaintiff sought: (a) decree of divorce; (b) division of the joint estate, including payment to her of half interest in the defendant's pension fund, and (c) in respect of the children, as envisaged by the Children's Act 38 of 2005, the: (i) retention of full parental responsibilities and rights by both parties; (ii) award to her of their care and primary

² CaseLines ('CL') A21 to A23.

residence with the defendant granted specified responsibilities and rights as to contact, and
(iii) payment by the defendant of maintenance of the minor children.

Defendant's case (extracted from the pleadings)

[16] The defendant's plea included a special plea to the effect that the defendant concluded a customary marriage with Ms CM on 12 June 2021 and, therefore, Ms CM ought to be (or have been) joined as a party to these proceedings, as she has a direct and substantial interest in this matter. I dismissed the special plea in terms of an extemporaneous ruling at the start of the trial after listening to argument by counsel.³

[17] The Defendant, further, pleaded over the merits or plaintiff's particulars of claim, including as follows:

- 3.2 Without derogating from the generality of the aforesaid denial and in amplification thereof, the Defendant pleads that:
 - 3.2.1 the Defendant together with, among others, Mr R Ngcobo, Mr L M[...] attended the Plaintiff's family home at Bela-Bela, Limpopo on 7 November 2020 with the sole intention to finalise the payment of the balance of the lobola negotiated and agreed upon on 22 September 2018;
 - 3.2.2 no customary wedding celebration was held, as is required, on 7 November 2020 at the parties' respective homes;
 - 3.2.3 that any celebration that took place on 7 November 2020 was to celebrate the finalisation of the negotiations in respect of the lobola;
 - 3.2.4 the Plaintiff and her family were, on 7 November 2020, informed that there were outstanding rituals and customs that had to be performed and complied with before a valid customary marriage could be deemed to have been conducted;
 - 3.2.5 ...
 - 3.2.6 neither the Plaintiff, nor the Defendant intended to conclude a customary marriage on 7 November 2020, *alternatively* the Defendant did not intend to conclude a customary marriage on 7 November 2020.
- 3.3 The Defendant therefore pleads that no customary marriage was entered into or celebrated as contemplated in Section 3(1)(b) of The Recognition of Customary Marriages Act.⁴

³ Transcript of the trial for 14 April 2025 ('Transcript: Day 1') at p 25 line 6, CL U28 to p 28 line 18 CL U31.

⁴ CL A35 to A37.

[18] The above captures the essence of the defence put forth by the defendant for the dismissal of the plaintiff's action with costs. The defendant's plea also includes a counterclaim for declaration that no valid customary marriage exists between the parties and, also, that should the Court disagree, the plaintiff should forfeit the benefits flowing from a marriage in community of property. The forfeiture is, primarily, on the basis that the plaintiff would unduly benefit without such an order, due to: (a) the short duration of the marriage between the parties at only seven months, and (b) the plaintiff's lack of financial contribution to the joint estate.

[19] The defendant also sought relief as to parental responsibilities and rights relating to the primary residence, contact and maintenance of the minor children. But the parties have in the meantime amicably agreed or resolved some of the issues under this segment of relief, as shall become clear below.

Evidence adduced at the trial (summarised)

General

[20] The plaintiff and her father testified as witnesses in the advancement of her case. The plaintiff also tendered evidence by way of photographs of the gathering on 7 November 2020. The defendant called his brother and father to testify as witnesses. The defendant also testified in the advancement of his defence and counterclaim. Below are some aspects of the testimony of the witnesses and counsel's argument thereon. I will reflect further aspects of their evidence in the discussion of the issues identified as requiring further determination.

Testimonies or evidence in the plaintiff's case

General

[21] The plaintiff was the first witness to testify. She took the stand on the first day of the trial on 14 April 2025 and continued on the second day of the trial on 15 April 2025. She was followed by her father, after which the plaintiff's case was closed.

Ms M[...] C[...] L[...] N[...] (i.e. the plaintiff)

[22] The plaintiff, Ms M[...] C[...] L[...] N[...], was examined on all aspects of her case or claims. I reflect only those aspects of her testimony considered pertinent to the issues to be determined.

[23] She told the Court that she met the defendant on 28 November 2011. They began a love or romantic relationship shortly thereafter. They were then working for the same employer. They moved in together and lived together from 2011 to 2014 when the plaintiff moved to Cape Town for work purposes. Their relationship continued whilst she was in Cape Town. Their first child was born in April 2017. She had by then returned to Pretoria, also workwise, and, again, moved in with the defendant. After she fell pregnant with their second child, the parties moved into what the plaintiff described as their matrimonial home. In 2018, the lobolo negotiations began and ultimately the lobolo amount of R64 000 - payable by the defendant to the plaintiff's father or parents - was agreed. It was paid in two parts, with one part paid immediately on the date of the negotiations on 22 September 2018 and the other at a later stage on 7 November 2020.

[24] On 7 November 2020, the defendant came with his delegates to the home of the plaintiff. In the morning - upon their arrival - they paid the R22 000 outstanding lobolo. After the full payment of lobolo – but still on the same day – there were celebrations and observation of Pedi customs or customary law. Her father had agreed with the defendant's father that the marriage celebration would be in terms of Pedi customs. One of the customs involved three ladies coming out and the defendant having to pick out the bride, being the plaintiff. The M[...] family's delegates were shown a goat.⁵ They requested that the goat rather be slaughtered for them, as they did not want the whole animal. The plaintiff was then taken by the M[...] family to where she was dressed in the attire that they had brought for her,

⁵ Mr Ngoetjana, the plaintiff's father would later testify that the goat symbolised a receipt for full payment of lobolo. See par [26] below.

including a M[...] family 'doek' (loosely, a turban), which symbolised that she was a wife. The celebrations were in the N[...] family home and attended by more than 200 people. There were also performances by traditional dancers from both families. Later, she was handed over to the M[...] family and she left with them back home in Pretoria. There was no objection to her returning with the defendant to reside together. The marriage was concluded properly in accordance with the Pedi culture. Thenceforth, she was referred to as '*makoti*', meaning bride to the M[...] family. During her testimony, the plaintiff identified several photographs of the events on 7 November 2020.

[25] The plaintiff's evidence is criticised by the defendant's counsel as having being laden with obscurities and uncertainty, as well as for being devoid of factual precision as to what the alleged agreement entailed. I will deal with this, below.

Mr M[...] C[...] N[...]

[26] The following are pertinent aspects of the testimony of Mr M[...] C[...] N[...] ('Mr N[...]'), the plaintiff's father. He told the Court that he made an appointment to go see the defendant's father in Kwa-Zulu Natal. This was arranged through Ms Z[...], the defendant's sister. The reasons for his visit were three-fold: (a) to know the father of the M[...] family or household; (b) to know where his daughter (i.e. the plaintiff) was going to, and (c) to ask how the issue of cultures was to work, given that the N[...] family is Pedi and the M[...] family is Zulu, as well as to ask what was expected from him before the wedding. Further, he told the Court that it was agreed between him and the defendant's father that the wedding would be concluded in terms of the Pedi culture. They 'could carry on with their culture' is what the defendant's father said, according to Mr N[...]. And, on 7 November 2020 when the defendant and his family were at his home in Bela Bela, the outstanding lobolo was paid and a celebration was held. The full payment of lobolo was marked by a goat from the N[...] family given to the *abakhongi* from the M[...] family as a 'receipt' to be taken to the parents in the M[...] family. The goat also demonstrated that the N[...] family was happy with the full

payment of the lobolo and, the plaintiff as their daughter was handed over to the M[...] family. And, *abakhongi* entered the house and, together with the M[...] sisters, requested that the plaintiff be handed over to be taken with as their *makoti*.

[27] In Sepedi culture, Mr N[...] also told the Court, a woman's family would ask for gifts after lobolo is paid by the family of the groom and no gifts were given by the N[...] family to the M[...] family.

[28] Counsel for the defendant submitted that the evidence of both the plaintiff and her father was procured through leading questions by the plaintiff's counsel and, thus, little or no reliance may be placed thereon.⁶ Their evidence ought to be disregarded,⁷ counsel's argument concluded. And 'a presiding judge is not a silent umpire',⁸ as a supine approach to proceedings by judicial officers is unjustified in as far as ensuring a fair trial or efficient use of resources is concerned.⁹

[29] In addition to disputing the probative value of Mr N[...]’s evidence, counsel for the defendant points out that: (a) Mr N[...] was not part of the delegation at the lobolo negotiations, including when an agreement was reached about the processes and (b) his visit to the defendant's father in KwaZulu-Natal ('KZN') was after the lobolo negotiations. Regarding the first point or (a), the plaintiff was criticised for not calling as a witness one of the N[...] family's delegates to lobolo negotiations. One such delegate was seated in the courtroom during the trial, counsel pointed out. And on the second point or (b), Mr N[...] is said not to have testified about a 'wedding' and/or an agreement of a wedding until when

⁶ *Maritime Industries Trade Union of South Africa and Others v Transnet Limited and Others* [2002] 11 BLLR 1023 (LAC); (2002) 23 ILJ 2213 (LAC) (20 September 2002) [75]. See also *S v Rall* 1982 (1) SA 825 (A) at 831D-E.

⁷ *Z v Commissioner for the South African Revenue Service* (13472) [2014] ZATC 2; 78 SATC 103 (18 November 2014), *per* Wepener J ('Z v CSARS').

⁸ *Z v CSARS* [11]; *Sager v Smith* 2001 (3) SA 1004 (SCA) [21]; *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) [3].

⁹ *Z v CSARS* [11]; *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* [2014] 1 All SA 22 (SCA); 2014 (3) SA 96 (SCA) (1 November 2013) [20].

prompted by counsel for the plaintiff to do so. This relates to the submission as to leading questions referred to in the preceding paragraph. I will deal with this below.

Testimonies or evidence in the defendant's case

General

[30] The first witness to testify in the defendant's case was his brother. He took the stand on the second day of the trial on 15 April 2025. On 16 April 2025, the third day of the trial, the defendant's father was also called to testify. He was followed in the witness box by the defendant after which the defendant's case was closed.

Mr L[...] M[...] (i.e. defendant's brother)

[31] Mr L[...] M[...] ('Mr L M[...]'), the defendant's older brother, was the first witness for the defendant. Mr L M[...]’s testimony included what follows. He was involved in the September 2018 lobolo negotiations when an agreement was concluded between the representatives of both families. The terms of the agreement, according to him, were that the customary marriage would be in terms of the Zulu culture, and the stages to be followed or the customs to be observed were, that: (i) the N[...] family were to provide a letter or list of gifts expected from the M[...] family for *umembeso*; (ii) the plaintiff and the N[...] family would perform *umbondo* to the M[...] family at the M[...] family homestead, and (iii) the *umabo* process would be the final stage to conclude the marriage and it is marked by rituals performed at the man's homestead where beasts are slaughtered; the father of the bride would slaughter a beast to inform his ancestors that his daughter is being handed over to the groom's family; the groom's family would accept the bride having slaughtered a beast of their own and inform the groom's ancestors that he has taken a wife and the bride will be rinsed with bile (*inyongo*) of the slaughtered beast.

[32] According to him the custom or ritual that was observed on 7 November 2020 at the N[...] family home is only *umembeso*. *Umbondo* and *umabo* were not held or performed. Before these are completed the plaintiff would be an *ingoduso* (‘fiancée’) of the defendant and not his wife. The N[...] family delegation was reminded on 7 November 2020 of the need to go to the M[...] family’s homestead for both families to attend to the slaughtering of cows. The *abakhongi* offered to retain R10 000 from the R22 000 lobolo balance for the purposes of the M[...] family purchasing a cow on behalf of the N[...] family that would be kept at the M[...] family homestead and used by the N[...] family for the slaughtering ritual at the M[...] homestead. But the N[...] family insisted on the full amount of the lobolo balance of R22 000.

[33] Mr L M [...], further, testified that the prospective spouses could on their own agree to deviate from the handover process. He denied that the plaintiff was handed over to the M[...] family and stated that the handing over process was only possible ‘parent to parent’ after compliance with the rituals.¹⁰ And stated that his father could not have agreed with the plaintiff’s father that the marriage be concluded in terms of Pedi culture without the involvement of the defendant, *abakhongi* and the entire M[...] family. He also told the Court that gifts were given to the N[...] family by the M[...] family, but not vice versa. This included a *doek* given to the plaintiff at the gathering on 7 November 2020. But the event was casual and there were no speeches. The defendant’s father, uncles and aunts were not present, counsel for the defendant would, subsequently, point out. I agree with counsel that the latter fact is common cause between the parties.

[34] Counsel for the plaintiff’s submissions regarding this witness include what follows. Throughout the evidence in chief, Mr L M [...] referred to the plaintiff as ‘*makoti*’. When probed for a reason why he would use such reference if the plaintiff was not the defendant’s wife, he disputed that *makoti* meant wife. He explained that he merely used the reference out

¹⁰ Transcript of the trial for 15 April 2025 (‘Transcript: Day 2’), pp 132-133 at lines 25 to 1, CL U241-242.

of respect. But he conceded that the Zulu word for fiancée is *ingoduso*, it is submitted by the plaintiff's counsel. It is clear that counsel considered this to be one of the unguarded moments in this witness' testimony were Freudian slips truthfully indicating that he accepted that the plaintiff was indeed married to the defendant occurred.¹¹ Further, counsel for the plaintiff submitted, this witness' testimony that the *makoti* was dressed by his sisters was consistent with the testimony of the plaintiff that her being dressed by the defendant's sisters and given a special *doek* marked the conclusion of the marriage and that she was the defendant's wife. But Mr L M[...] would further explain that the Zulu word for wife was 'inkosikazi'.¹²

[35] Counsel further argued that Mr L M[...]’s assertion that goats were not slaughtered was never put to the plaintiff under cross-examination. Neither were the photos depicting an animal being slaughtered disputed. Also, Mr L M[...] did admit that the M[...] family was given meat on the day. It is highly improbable that meat would be given if no slaughtering occurred, counsel argued. Also, that Mr L M[...] persisted in his denials that rituals were not performed on the day in the face of photographic evidence. But, he didn't dispute that the M[...] family gave the plaintiff a *doek*.

[36] Submissions by counsel for the defendant regarding Mr L M[...]’s testimony included what follows. His version regarding how the marriage was to be entered into is unchallenged. He confirmed the agreement on the lobolo amount ultimately paid by his younger brother, the defendant. He also told the Court that it was agreed during the negotiation that the customary marriage was to be by way of the Zulu culture. The plaintiff's parents were instantaneously informed or consulted by a representative of the N[...] family and it was confirmed that the 'Zulu way of doing things' would prevail.¹³ The N[...] family and its delegation agreed.

¹¹ *Mbungela v Mkabi* 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA) ('*Mbungela v Mkabi*') [23].

¹² Transcript: Day 2, p 88 at line 13, CL U197.

¹³ Transcript: Day 2 p 67 at lines 10-11, CL U176.

Mr K[...] M[...] (the defendant's father)

[37] The testimony by Mr K[...] M[...], the defendant's father ('Mr M[...] Snr'), included the following. The agreement was that Zulu custom would be applied since the M[...] family are Zulus. And that *umembeso* does not make the bride a wife, but a wedding is concluded only upon completion of *umabo* when the bride is accepted into the groom's family. He, similarly to Mr L M[...], told the Court that the Zulu customary procedures include *umbondo*, which comes before *umabo*. Regarding the visit to his home by Mr N[...], he said that the former wanted to see the M[...] homestead. Otherwise, there was nothing else to discuss, as he had been informed about the ceremony by the M[...] family's *abakhongi*. And, discussions or decisions made by him (i.e. Mr M[...] Snr) were through *abakhongi*. The plaintiff was a fiancée for whom lobolo has been paid and not yet a makoti in the correct way, Mr M[...] Snr also told the Court.¹⁴

[38] Counsel for the plaintiff had the following to say about this witness' testimony. He stated that a woman becomes the bride after being married and becomes a wife after payment of lobolo. And, yet, he also testified that according to him there was no marriage between the parties, due to the non-registration of the marriage and not due to non-performance of the rituals. Regarding the visit to his home by Mr N[...], counsel argued that it is highly improbable - given the distance Mr N[...] had to travel from Limpopo to Kwa-Zulu Natal - that he would have just shown up at the M[...] homestead without any prior arrangement. This would have been at the risk of the meeting not materialising. Counsel, also, finds it highly improbable that - according to Mr M[...] Snr - the meeting with Mr N[...] lasted only 15 minutes when Mr N[...] had testified that it was for more than an hour, again, given the distance Mr N[...] had to travel for the meeting.

Mr V[...] L[...] M[...] (i.e. the defendant)

¹⁴ Transcript, Day 3, p 29 at lines 7-9, CL U297.

[39] Mr V[...] L[...] M[...], the defendant, was the last witness to take the stand as a witness in his case. He told the Court that he moved (ostensibly from KZN) to Johannesburg in 2010 for work purposes. He met the plaintiff in mid-2012 when they worked together for the same employer. He lived then in Faerie Glen, Pretoria. She then lived with her sister in Highveld, Centurion. Later, following the birth of their first child in 2017, they all began residing together in Centurion in the house he had bought. When their love relationship started he informed the plaintiff that he was already in another love relationship with a certain Ms L¹⁵ and that he wanted to be a polygamist. His intention was to take Ms L and another Ms T,¹⁶ as his wives, but the plaintiff was against his polygamist plan. She was involved in fights with these other women. Ms T even obtained a protection order against the plaintiff. Later on, the plaintiff would include Ms CM in his so-called ‘polygamist plan’. Also, the plaintiff could not be his first wife or *umamkhulu*, as her first child was born from a prior relationship. But during his cross-examination he seemed to be equivocating between saying this was a Zulu custom to it being his personal preference and not for ‘any man in the street’.¹⁷

[40] The rest of the defendant’s testimony included that: (a) he went with *abakhongi* to the N[...] family home to negotiate lobolo for the plaintiff, although he was not present in the actual negotiations and only received reports from *abakhongi*; (b) they informed him of a ‘roadmap’ on the cultural observations to be made for the completion of the marriage; (c) it was agreed during these negotiations that the wedding would be in terms of the Zulu custom and that cultural practices of *umembeso*,¹⁸ *umbondo*¹⁹ and *umabo*²⁰ were to be observed once

¹⁵ I consider it unnecessary to reflect the full names of Ms L, as with Ms CM, referred to above.

¹⁶ *Ibid.*

¹⁷ Transcript: Day 3, pp 96-97 at lines 25 and 1-2, CL U364-365.

¹⁸ According to the defendant *umembeso* involves the bringing of gifts to the bride’s family and for the groom to be introduced to the bride’s broader family, neighbours and other relatives. See Transcript: Day 3, p 42 at lines 19-23, CL U310.

¹⁹ According to the defendant *umbondo* is the next ceremony after *umembeso* when the bride, who has now become an *ingoduso* (fiancée), comes to the groom’s homestead to be introduced to the groom’s family and neighbours. See Transcript: Day 3, p 42 at lines 24-25, CL U310, and p 43 at lines 1-5, CL U311.

lobolo is paid in full; (d) *abakhongi* explained to the plaintiff's delegation what these customary practices entailed and the defendant had also discussed with the plaintiff their cultural differences and the processes to occur after the lobolo negotiations; (e) *umabo* would have been conducted on a Friday prior to a white wedding on Saturday, as the plaintiff also wanted the latter ceremony; (f) the handover of the plaintiff would have occurred during *umabo*; (g) no deviation from the cultural processes or stages was agreed, as he was not informed of any and he would have been part of the discussion thereof; (h) what occurred on 7 November 2020 was the process of *umembeso* for gift-giving, also attended by his four sisters and three brothers; (i) no rituals were performed on 7 November 2020, including the slaughtering of a beast, although his senior *mkhongi* addressed the guests when thanking the N[...] family or rendering a vote of thanks; (j) the plaintiff ought to have been taken by the N[...] family to the M[...] homestead for *umbondo* where she would have been introduced to the defendant's aunts and relatives, and (k) the plaintiff ought to forfeit benefits of marriage for the reasons set out in the pleadings.

[41] Counsel for the plaintiff argued that, the defendant's testimony that - in Zulu custom - a woman who has a child born from a prior relationship cannot be a first wife is devoid of the truth. For the defendant could not explain why he paid lobolo for the plaintiff first, if she was prevented by custom to be his first wife. This is devoid of any logic and points to the defendant being untruthful and impedes his credibility. Further, that the testimonies of Mr M[...] Snr and Mr L M[...] did not include this. And, this was not put to the plaintiff or Mr N[...] when cross-examined, counsel further argued.

[42] Further argument by counsel for the plaintiff included that: (a) the defendant was blatantly dishonest for blaming the Court for allegedly restraining him when probed about denying knowing the ritual where he was asked to identify the bride amongst other ladies and

²⁰ According to the defendant after *umembeso* and *umbondo*, the ceremony of *umabo* would follow and it involves the bride being integrated into the groom's family as a wife. See Transcript: Day 3, p 43 at lines 6-7, CL U311.

said he just saw people crawling on the ground; (b) it was highly improbable and impeding of the defendant's credibility his evidence that, after he had paid for a function on 7 November 2020 attended by more than 200 people, 24 of whom had accompanied him, told the Court that he had no prior idea there would be such a large attendance; (c) the defendant lacked an explanation why he paid for the whole function, only intended for his family to pay the remaining part of the lobolo and hand over gifts; (d) as also highly improbable that he had not seen the photo board that stated 'traditional wedding' on the day, despite guests having taken photos by the board; (e) the defendant, after conceding that the plaintiff left with him and his family after the function on 7 November 2020, only to state that this was ('a circumstantial issue') due to lack of space for her and the children at the N[...] family home, but could not explain why this wasn't a problem for their previous night's stay there, and (f) as highly unlikely that the plaintiff - whilst only a fiancée - had given consent to his marriage to Ms CM, his alleged first wife and attended the handing over ceremony.

Issues requiring determination

[43] From what appears above, it is clear that what essentially requires determination in this matter is whether the marriage contended for by the plaintiff to exist between her and the defendant has satisfied the requirements of section 3(1) of the RCMA. Entrenched in such determination are the following issues: (a) whether the parties were married to each other on 7 November 2020 by way of Pedi custom; (b) whether there was an agreement between the two families on the observance of the Zulu customs or application of Zulu customary law; (c) the impact of the defendant's marriage to Ms CM, if any; (d) joinder of Ms CM as a party to these proceedings; (e) parental responsibilities and rights of the parties in respect of the minor children, and (f) costs of suit.

[44] In my view, the majority of the above issues would be traversed or even disposed of through a determination of whether the parties entered into or celebrated a marriage in

accordance with customary law, envisaged by section 3(1) of the RCMA. I favour and will adopt this approach.

[45] As stated above, I disposed of the issue of the non-joinder of Ms CM (raised by the defendant by way of a special plea) extemporaneously at the beginning of the trial.²¹ This, in my view, also disposed of the issue of the possible impact of the defendant's alleged marriage to Ms CM.

[46] Ancillary issues to those in the preceding paragraphs – but which would only arise in the event of this Court finding that there is a valid marriage between the parties, include: (i) decree of divorce; (ii) division of the joint estate, and (iii) forfeiture of benefits of a marriage in community of property by the plaintiff. Further issues may arise in the discussion of those identified. But I, first, turn my attention to the applicable legal principles.

Applicable legal principles

[47] The primary legal principles in this matter relate to whether a customary marriage was entered into by or celebrated between the parties, as envisaged by section 3(1) of the RCMA.²² This provision reads as follows in the material part:

For a customary marriage entered into after the commencement of this Act to be valid-

- (a) the prospective spouses-
 - (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and
- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

[48] Section 1 of the RCMA defines 'customary law', referred to in section 3(1)(b) of the RCMA, quoted above, as 'the customs and usages traditionally observed among the

²¹ Footnote 3 above.

²² *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) ('*Tsambo v Sengadi*') [15]; *Ngwenyama v Mayelane and Another* 2012 (4) SA 527 (SCA); [2012] 3 All SA 408 (SCA) [23].

indigenous African peoples of South Africa and which form part of the culture of those peoples'.²³ This definition is understood, generally, as referring to living customary law.²⁴

[49] The principle of living customary law is attested by the absence in section 3(1)(b) of an indication of which customary law is to apply, including, as in this matter, where there is competing sets of customs. And, the provision does not stipulate the requirements in terms of customary law which ought to be met to validate a customary marriage.

[50] The Supreme Court of Appeal ('the SCA') in *Mbungela v Mkabi* explained that 'the legislature left it open for the various communities to give content to section 3(1)(b) in accordance with their lived experiences'.²⁵ The SCA echoed the caution by the Constitutional Court that the courts be conscious of the fact that customary law regulates people's lives and that the need for the courts to remain flexible and the requirement to facilitate the development of customary law 'be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights'.²⁶ Further, that the courts ought to strive towards the recognition and giving effect to the principle of customary law which is living, actually observed in order to accord with its development which comport with the 'spirit, purport and objects' of the Constitution of the Republic of South Africa Act, 1996 ('the Constitution') within a community, 'to the extent consistent with adequately upholding the protection of rights'.²⁷

²³ *Mbungela v Mkabi* [17].

²⁴ Fatima Osman, Sky Kruger, Micaela Lara Bebington, Jaime Lilleen Uranovsky 'Left in Limbo: The Status of the Handing Over of the Bride in Customary Marriages Post *Sengadi v Tsambo*' *PER / PELJ* 2025(28) ('Osman *et al* 'The Status of the Handing Over of the Bride') at 3 and the authorities cited there. See also Chuma Himonga 'Chapter 7 The Dissolution of a Customary Marriage by Divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta Cape Town 2014) ('Himonga 'The Dissolution of a Customary Marriage by Divorce') at 232.

²⁵ *Mbungela v Mkabi* [17]. See also Osman *et al* 'The Status of the Handing Over of the Bride' 3-4.

²⁶ *Mbungela v Mkabi* [18], partly relying *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008) ('*Shilubana v Nwamitwa*') [47]. See also *Mabena v Ramonaka and Others* (2529/2022) [2025] ZAGPJHC 128 (13 February 2025) *per* Minnaar AJ [12].

²⁷ *Mbungela v Mkabi* [18] relying on *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) [49]. See also *Mabena v Ramonaka* [2025] ZAGPJHC 128 [12].

[51] In *MN v MM and Another*²⁸ the SCA recognised the fact that the requirements for the celebration of a customary marriage are not specified in the RCMA, as the legislature had purposefully deferred to the customary law buoyed by its living nature.²⁹ In other words, section 3(1)(b) is met when the celebrations in terms of customary law, generally, comport with the applicable customs to a given set of circumstances.³⁰ But, the fulfilment of the three requirements in section 3(1) gives rise to a monogamous or polygamous customary marriage.³¹

[52] A paramount consideration ought to be that customary law is a dynamic system of law.³² It, naturally, is a system which is continuously evolving,³³ within the realm of norms and values consistent with the Constitution in a quest to cater for changing needs of those observing those norms.³⁴ The Constitutional Court in *Shilubana v Nwamitwa* aidfully held that the determination of the content of the customary law system requires that reference be made to current and historical practices of the material community.³⁵

[53] It has always been pragmatic and flexible and '[s]trict adherence to ritual formulae' is not always required in 'close-knit, rural communities, where certainty was neither a necessity nor a value'.³⁶ Compliance with ritualistic practices or customs may be waived, as customs are not static in nature, but develop and modify as with the society in which they are practised.³⁷ And the principle of living customary law dictates that a marriage is not rendered

²⁸ *MN v MM* 2012 (4) SA 527 (SCA); [2012] 3 All SA 408 (SCA), also reported as *Ngwenyama v Mayelane and Another* 2012 (4) SA 527 (SCA); [2012] 3 All SA 408 (SCA) ('*MN v MM*').

²⁹ *MN v MM* [23]; *Shilubana v Nwamitwa* [81]; *Tsambo v Sengadi* [18].

³⁰ *MN v MM And Another* 2012 (4) SA 527 (SCA) [23].

³¹ *Ibid.*

³² *Moropane v Southon* (755/2012) [2014] ZASCA 76 (29 May 2014) [36], [38]; *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) [153]; *Tsambo v Sengadi* [15]; *MN v MM* [23]; *Mbungela v Mkabi* [17].

³³ *Shilubana v Nwamitwa* [45]; *Tsambo v Sengadi* [17]; *Mbungela v Mkabi* [17].

³⁴ *Mbungela v Mkabi* [17], relying on *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) [52]-[53]; *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) [81], [86]-[87].

³⁵ *Shilubana v Nwamitwa* [44]-[46]; *Mbungela v Mkabi* [17].

³⁶ *Tsambo v Sengadi* [17], relying on TW Bennett *A Sourcebook of African Customary Law for Southern Africa* (2004) at 194.

³⁷ *Moropane v Southon* (755/2012) [2014] ZASCA 76 [36]; *Tsambo v Sengadi* [18].

invalid by lack of strict compliance with all ceremonies and rituals historically to be observed where such marriage ‘has otherwise been negotiated, concluded or celebrated in accordance with customary law’.³⁸

[54] Of particular significance to the facts of this matter is the process or ceremony concerning the handing over of the bride. This ceremony is purely intended to mark the start of a marital consortium by way of the customary marriage of the spouses and introduction of the bride to the bridegroom’s family, as the bride’s new family.³⁹

[55] In *Tsambo v Sengadi*, the SCA dealt with an appeal from this Division concerning whether a valid customary law marriage existed between the deceased, Mr Tsambo and the respondent, Ms Sengadi. The appellant, as the father of the deceased, contended that there was no handing over of the respondent as the bride in accordance with the customary law envisaged in section 3(1)(b). The SCA relied on the academic view that the Sotho-Tswana people celebrate the wedding at the family home of the bride, which also serves as the venue for lobolo negotiations.⁴⁰ And that some communities effect the handing over of the bride physically on wedding day.⁴¹ The customs observed upon fulfilment of the lobolo agreement are that: (a) the guardian of the bride would provide a beast to be slaughtered; (b) each of the two parties would receive half share of the meat; (c) the entrails of the slaughtered beast would be used to perform certain ceremonies.⁴² The slaughtering of the animal denotes the completion of the agreement on lobolo and the consummation of the customary marriage.⁴³ The point of this custom is not blunted by the fact that the bride – as it is usually the case - may not have left with the delegation of the bridegroom on the day of the occasion.⁴⁴

³⁸ *Tsambo v Sengadi* [18], partly relying on *Shilubana v Nwamitwa* [81].

³⁹ *Mbungela and Another v Mkabi and Others* [25], [30]; *Tsambo v Sengadi* [26]. See also TW Bennett *Customary Law in South Africa* (Juta Cape Town 2004) at 213.

⁴⁰ *Tsambo v Sengadi* [12], relying on J C Bekker *Seymour’s Customary Law in Southern Africa* Juta 5 ed (1989) (‘*Bekker Seymour’s Customary Law*’) at 109.

⁴¹ *Tsambo v Sengadi* [12], relying on Bekker Seymour’s *Customary Law* at 109.

⁴² *Tsambo v Sengadi* [12], relying on Bekker Seymour’s *Customary Law* at 113-114.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

[56] In *Mbungela v Mkabi*, the SCA upheld an appeal against the decision of this Division which declared the marriage between Mr Mkabi, the first respondent, to the late Ms Mbungela as compliant with section 3(1)(b) and, thus, rejecting the claim by the appellant (i.e. Mr Mbungela, the deceased's elder brother and head of her family) that the deceased was never handed over by her family as required by custom. The SCA held that it is significant to observe traditional usages and customs serving as the ingredients and definition of the provenance of African culture and to keep in mind the value to the bridal transfer custom.⁴⁵ But the quest ought to be the avoidance of potentially untenable outcome of an inflexible approach that a valid customary marriage would not exist even if only a single ritual - amongst other requirements of section 3(1) - has not been observed.⁴⁶

[57] The reference 'integration' is preferable than the phrase 'handing over'.⁴⁷ For integration denotes a series or number of rituals symbolising the final acceptance of the bride into the family of the groom.⁴⁸ 'Handing over', as a concept used by the courts, refers to both handing over of the bride in the narrow and wide senses, but the two are different in meaning.⁴⁹ In its wide sense, it is a process constituted by various rituals.⁵⁰ One of the rituals is the actual transfer of the bride to the family of the groom, which denotes 'handing over' in the narrow sense.⁵¹ Integration in the wide sense, constituted by a series of rituals, renders the bride a member of the family of the bridegroom, as opposed to integration in the narrow sense, comprising a single act of physical transfer of the bride.⁵² The latter takes 'different forms and hues across various communities'.⁵³ Bakker warns that confusion of the wide and narrow senses of the concept may lead to integration of the bride being incorrectly taken to be

⁴⁵ *Mbungela v Mkabi* [27].

⁴⁶ *Ibid.*

⁴⁷ Bakker 'Integration of the Bride' 4-5, 9-10.

⁴⁸ Bakker 'Integration of the Bride' 4-5.

⁴⁹ Bakker 'Integration of the Bride' 4-5, 6.

⁵⁰ Bakker 'Integration of the Bride' 4-5.

⁵¹ Bakker 'Integration of the Bride' 4-5, 8, 26.

⁵² Bakker 'Integration of the Bride' 10.

⁵³ Osman *et al* 'The Status of the Handing Over of the Bride' 5.

synonymous with the handing over of the bride in a narrow sense and, thus, capable of waiver. This may lead to customary law marriage being wrongly perceived to be similar to a transaction of sale with the bride relegated to a commodity capable of being physically handed over to the family of the groom after being purchased by money (represented by *lobolo*).⁵⁴

[58] The author Bakker criticises (as inapplicable to the essential living customary law requirements for a customary marriage and, also, as being wrong) the holding that bridal transfer ceremony or custom may be waived or treated as an optional or non-essential element of a customary marriage.⁵⁵ But the SCA considered its approach as not being ‘constitutionally reprehensible or repugnant’ to the principle of practised living customary law of marriage in a continuously evolving society.⁵⁶ The attainment of this ideal would signify the development of the system and protection of the interests of affected vulnerable parties - in deserving cases – as dictated by the spirit, purport and objects of the Constitution.⁵⁷

[59] In Bakker’s opinion how integration of the bride into the groom’s family unfolds, in terms of ritual(s), may be agreed upon by the families, either explicitly or implicitly, for example, by replacing the bile anointment ceremony with a church wedding.⁵⁸ And, that the SCA adopted a correct approach in shunning the advocacy of strict observance of all rituals before recognition of a customary marriage as valid, particularly where the parties have satisfied the formal requirements under section 3(1)(a) of the RCMA.⁵⁹ Further, Osman *et al* opine that, depending on the community involved, integration may be virilocal or patrilocal

⁵⁴ Bakker ‘Integration of the Bride’ 7.

⁵⁵ Bakker ‘Integration of the Bride’ 6, 7-8, 14-15, 18-19. See also TW Bennett *Customary Law in South Africa* (Juta Cape Town 2004) at 216, as cited with approval in *Mbungela v Mkabi* [29].

⁵⁶ *Mbungela v Mkabi* [29].

⁵⁷ *Mbungela v Mkabi* [29].

⁵⁸ Bakker ‘Integration of the Bride’ 15, 16-17.

⁵⁹ Bakker ‘Integration of the Bride’ 20, critically analysing *Tsambo v Sengadi* [15]-[18]; *Ngwenyama v Mayelane* 2012 4 SA 527 (SCA) [23]. See par [47] above, for a reading of s 3(1)(a) of the RCMA.

(i.e. at the home of the groom) on the day of the wedding or uxrilocal (at the home of the bride) with the father or guardian of the bride slaughtering a beast.⁶⁰

[60] Overall, the authors Osman *et al* remind us that the integration of the bride forms part of the requirements embedded in section 3(1)(b) of the RCMA that a valid marriage be negotiated and entered into or celebrated according to customary law, and it is not a requirement to be additionally and extraneously imposed on parties.⁶¹

[61] I turn to the concept of cohabitation. Cohabitation after celebration is considered a significant feature which comport with the existence of a marriage and is a useful aid to infer the intention of the parties, especially where there is no objection from the woman's father or guardian.⁶² It is common cause in this matter that the parties cohabited prior to and after 7 November 2020.

[62] Another set of legal principles relevant to this matter relates to the concept of forfeiture. It is trite that in a joint estate, the assets and liabilities ought to be divided equally between the spouses, unless an order in terms of section 9 of the Divorce Act 70 of 1979 is granted by the divorce court for forfeiture of the benefits of the marriage in community of property. The defendant claims forfeiture in accordance with section 9, which provision reads as follows in the material part:

(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.

[63] Section 8(4) of the RCMA renders section 9 (and a cohort of other provisions) of the Divorce Act applicable to the dissolution of a customary marriage under the RCMA.

⁶⁰ Osman *et al* 'The Status of the Handing Over of the Bride' 5 and the authorities cited there.

⁶¹ Osman *et al* 'The Status of the Handing Over of the Bride' 4.

⁶² *Mbungela v Mkabi* [25], [30]; *Tsambo v Sengadi* [27], relying on T W Bennett *A Sourcebook of African Customary Law for Southern Africa* (2004) at 195, 219; Bekker *Seymour's Customary Law* at 108-109.

[64] When determining whether to grant an order of forfeiture the Court ought to answer the question whether without such an order being made the one party would have unduly benefitted when consideration is given to the factors mentioned in section 9(1) of the Divorce Act, namely, the duration of the marriage, substantial misconduct on the part of one or both of the parties, if any, and the circumstances which led to the break-up of the marriage.⁶³ There are no other factors to consider beyond those in this provision.⁶⁴

[65] In *KT v MR*,⁶⁵ Kollapen J (whilst still in this Division) - using a dictionary - held that the word 'undue' (in the phrase 'unduly benefitted' in section 9(1)) means 'unwarranted or inappropriate because excessive or disproportionate'.⁶⁶

[66] In *Wijker v Wijker*⁶⁷ the Appellate Division (the somewhat predecessor to the SCA) held regarding section 9 of the Divorce Act:

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.⁶⁸

[67] And further (still in *Wijker v Wijker*) it was held:

The only remaining factor which persuaded the Court *a quo* to grant the forfeiture order is that it was considered unfair that the appellant should share in the company and its assets while he had made hardly any contribution towards its management, administration and profit-making. The finding that the appellant would be unduly benefited if a forfeiture order was not made, was therefore based on a principle of fairness. It seems to me that the learned trial Judge, in adopting this approach, lost sight of what a marriage in community of property really entails...
The fact that the appellant is entitled to share in the successful business established by the respondent is a consequence of their marriage in community of property. In

⁶³ *Klerk v Klerk* 1991 (1) SA 265 (W); *Botha v Botha* 2006 (4) SA 144 (SCA); [2006] 2 All SA 221 (SCA) (9 March 2006) [8].

⁶⁴ Jacqueline Heaton 'Chapter 4 The Proprietary Consequences of Divorce' in Jacqueline Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta Cape Town 2014) at 92.

⁶⁵ *KT v MR* 2017 (1) SA 97 (GP).

⁶⁶ *KT v MR* 2017 (1) SA 97 (GP) [20.17], utilising the South African Concise Oxford Dictionary (2005 ed).

⁶⁷ *Wijker v Wijker* 1993 (4) SA 720 (A).

⁶⁸ *Wijker v Wijker* 1993 (4) SA 720 (A) at 727D-F.

making a value judgment this equitable principle applied by the Court *a quo* is not justified. Not only is it contrary to the basic concept of community of property, but there is no provision in the section for the application of such a principle.⁶⁹

[68] Just over a decade later - imbued by the constitutional dispensation, the SCA explained in *Bezuidenhout v Bezuidenhout*:⁷⁰

[27] A thesis which obviously weighed heavily with the Court ... was that it would be in conflict with the anti-discrimination provisions in s 9 of our Constitution... to undervalue the role of housewife and mother traditionally conferred upon women by society. In developing this theme, Pincus AJ referred, for example (in para [45]), to the following statement by the Supreme Court of Canada in *Moge v Moge* [1992] 3 SCR 813:

'Fair distribution does not, however, mandate a minute detailed accounting of time, energy and dollars spent in the day to day life of the spouses What the Act requires is a fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown for both spouses, regardless of gender. The reality, however, is that in many if not most marriages, the wife still remains the economically disadvantaged partner. . . .

[28] I find myself in agreement with the thesis that the traditional role of housewife, mother and homemaker should not be undervalued because it is not measurable in terms of money.⁷¹

[69] A while back in the KZN Division in *Moodley v Moodley*⁷² it had been held that what the defendant forfeits is not his share of the common property, but only the pecuniary benefit that he would have otherwise derived from the marriage. It was further held that it was of the utmost importance that the claimant, in respect of a claim for forfeiture, must prove some kind of contribution that exceeds the contribution of the other party towards the joint estate.⁷³

Is there a marriage entered into or celebrated in accordance with customary law?

General

[70] Section 3(1) of the RCMA, as stated above, set out three requirements for a valid customary marriage, that the parties: (a) be above 18 years of age; (b) consent to a marriage

⁶⁹ *Wijker v Wijker* 1993 (4) SA 720 (A) at 731C-G.

⁷⁰ *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 SCA.

⁷¹ *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 SCA at 198 (pars [27]-[28]). Section 9 of the Constitution provides for the right to equality, including as follows: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms... (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth...'

⁷² *Moodley v Moodley* (7241/2002) [2008] ZAKZHC 48 (14 July 2008).

⁷³ *Moodley v Moodley* (7241/2002) [2008] ZAKZHC 48 [11].

under customary law; and (c) negotiate and enter into or celebrate the marriage according to customary law.

[71] Section 3(1)(a) contains what is described as the formal or ‘formalistic’ requirements for a valid customary marriage.⁷⁴ But, there is no dispute about the parties having attained the age of 18 years. What is unclear, though, is whether the defendant disputes that there was consent by him to be married to the plaintiff under customary law.⁷⁵ What is clearly disputed by the defendant is that a marriage between the plaintiff and him was ‘entered into or celebrated in accordance with customary law’.⁷⁶

[72] Section 3(1)(b) contains what is described as the customary law requirements,⁷⁷ which incorporates into the RCMA the essential living customary law requirements.⁷⁸ The defendant, among others, says that there were Zulu rituals and customs still outstanding for a valid customary marriage. But, the disposal of the latter issue would equally dispose of the issue of consent.

[73] It is common cause between the parties that the plaintiff is Pedi and the defendant is Zulu. This confirms that there is no commonality of customs nor a singular customary law applicable between them. It is, therefore, not surprising that each of the parties alleged the existence of an agreement for the marriage or intended marriage (to be) entered into or celebrated in terms of the party’s respective customs or customary law.

[74] On the pleadings, the defendant’s case is that the plaintiff and the N[...] family were informed on 7 November 2020 of outstanding rituals and customs still to be performed before a valid customary marriage comes into being. But, it was only during the trial that the

⁷⁴ Pieter Bakker ‘Integration of the Bride and the Courts: Is Integration as a Living Customary Law Requirement Still Required?’ PER / PELJ 2022(25) (‘Bakker ‘Integration of the Bride’) 3, 7.

⁷⁵ Section 3(1)(a)(ii) of the RCMA.

⁷⁶ Section 3(1)(b) of the RCMA.

⁷⁷ Bakker ‘Integration of the Bride’ 3.

⁷⁸ Bakker ‘Integration of the Bride’ 7-8 and the authorities cited there. See pars [48]-[53], [58] above on living customary law.

defendant's case morphed to include that an agreement on the application of the Zulu customs was reached earlier during the lobolo negotiations of September 2018.

[75] The plaintiff's case on the pleadings is that between 22 September 2018 and 7 November 2020 at Bela Bela, Limpopo, the parties – whilst cognisant of their Zulu and Pedi customs for a valid marriage – waived and dispensed therewith.⁷⁹ But during the trial, the evidence led in the plaintiff's case was that an agreement was reached between Mr M[...] Snr and Mr N[...] that Pedi customs will be observed. This, which was labelled a 'special arrangement' by the plaintiff and/or defendant's counsel during the trial,⁸⁰ was elaborated upon by Mr N[...] when he testified, but denied by the defendant, Mr M[...] Snr and Mr L M[...] when they gave evidence.

[76] What is evident from the above is that both parties are alleging negotiated agreements to observe customs or apply their respective customary law. I don't understand this to denote a waiver of certain processes or deviation from any customs or customary law. Simply put the plaintiff's case is that an agreement was reached with the defendant or on his behalf to and enter into or celebrate her marriage to the defendant in terms of customary law applicable to the Pedi people. And the defendant says the agreement was for the application of customary law applicable to the Zulu people. I must immediately state that, this confirms that both parties, the defendant included, consented to their marriage under customary law in accordance with section 3(1)(a)(ii) of the RCMA.⁸¹ Therefore, what remains is a determination of the customary law in terms of which the parties agreed celebrate their marriage.⁸²

[77] To dispose of the latter issue the plaintiff will have to establish her alleged agreement for application of the Pedi customary law. Should the plaintiff succeed in doing so, there

⁷⁹ Plaintiff's plea to defendant's counterclaim pars 91 and 11.1, CL A72-73 and CL A74-75; Plaintiff's replication par 17.1, CL A93-94.

⁸⁰ Transcript: Day 1 p 89 lines 7-8, CL U92.

⁸¹ Par [47] above for a reading of the provision.

⁸² Section 3(1)(b) of the RCMA, quoted in par [47] above.

would be no need to determine whether it was agreed that Zulu customs would apply, as contended for by the defendant. But, I admit that it will be almost impossible to selectively review the evidence to pinpoint the elements or absence of the elements for the plaintiff's agreement without traversing those for the defendant's agreement. A silo approach should yield to a holistic one in this regard. With this in mind, I approach the issues sequentially.

Was an agreement on observation of Zulu customs concluded in September 2018?

[78] Mr L M[...], the defendant's older brother and constituent member of *abakhongi*, told the Court that an agreement was concluded between the representatives of both families in September 2018 for marriage in terms of Zulu customs (i.e. the 'September 2018 agreement'). This was still during the lobolo negotiations.

[79] The September 2018 agreement was very prominent in Mr L M[...]'s mind, despite the lapse of over six years (by the time of his testimony) that he vividly remembered that someone was instantaneously sent to go and inform or consult the plaintiff's parents on the issue.⁸³ But, Mr N[...] told the Court that his family's representatives did not report to him about the culture issue, but only on the discussions about lobolo. And everything discussed is recorded in the book (ostensibly referring to the lobolo letter), which was also signed on behalf of the M[...] family, he pointed out.

[80] The September 2018 agreement, obviously, is different from the defendant's own assertion in the pleadings that the N[...] family including the plaintiff were informed on 7 November 2020 of the outstanding rituals and customs which had to be performed for a valid customary marriage. During the trial, in his evidence in chief, the defendant said that on 7 November 2020, *abakhongi* amplified 'the discussion that happened in [2018] because this is

⁸³ Transcript: Day 2 p 67 at lines 1-11, CL U176.

a process'.⁸⁴ He repeated this when cross examined.⁸⁵ He explained the position in the pleadings to possibly 'an omission [by] the lawyers'.⁸⁶

[81] But, whether the September 2018 agreement is established is dependent on other issues, including what I turn to, next.

Was an agreement on the observation of Pedi customs concluded between Mr N[...] and Mr M[...] Snr ('the KZN agreement')?

[82] Despite, the September 2018 agreement allegedly concluded with him and his family (through the intermediary of the delegates to the lobolo negotiations), Mr N[...], the plaintiff's father, told the Court that he subsequently travelled from Limpopo to KZN for a meeting with the defendant's father, Mr M[...] Snr. The purpose of the visit or meeting was three-fold: (a) to know the defendant's father and the family; (b) 'to know where [his] daughter is going to',⁸⁷ and (c), due to cultural differences (him being Pedi and them Zulus), 'to discuss with the father about our cultures; how are we going to work [and what they are] expecting from us before the wedding'.⁸⁸

[83] According to Mr N[...], he agreed with Mr M[...] Snr that because he is Pedi and they (i.e. the M[...] family) are Zulu, the N[...] family can carry on with its culture as he 'does not see anything wrong'⁸⁹ ('the KZN agreement') I must state that counsel for the defendant submitted that Mr N[...] was impermissibly led by the plaintiff's counsel when he rendered the above part of his testimony. I disagree, as that's clearly incorrect. Those words by Mr N[...] were not choreographed.

[84] Mr M[...] Snr denied the KZN agreement. He also denied prior notice or knowledge of Mr N[...]’s visit to him in KZN; estimated the duration of the meeting to be 15 minutes against the one hour by Mr N[...], and told the Court that he had informed Mr

⁸⁴ Transcript: Day 3, p 69 at lines 5-9, CL U337.

⁸⁵ Transcript: Day 3, p 105 at lines 14-16, CL U373.

⁸⁶ Transcript: Day 3, p 105 at lines 20-21, CL U373.

⁸⁷ Transcript: Day 2 p 36 at lines 21-25, CL U145.

⁸⁸ Transcript: Day 2 p 37 at lines 8-11, CL U146.

⁸⁹ Transcript: Day 2 p 37 at lines 14-20, CL U146.

N[...] he has people from his family whom he would send for the bride and not himself personally.⁹⁰ Despite the latter statement, he denied that a discussion on the wedding or marriage took place. I find this an illogical response or reaction when Mr N[...]’s visit was only for observation of the house for the future accommodation of his daughter.

[85] I gained the impression that Mr M[...] Snr was in no mood to admit anything. He even denied matters with no particular significance. For example, after telling the Court of not knowing that Mr N[...] was coming to visit,⁹¹ he complained that Mr N[...] was ‘actually supposed to inform my daughter [i.e. Ms Z[...]], then my daughter would have informed my son’ and that Mr N[...] was not ‘supposed to go past me, speak to my daughter, then speak to me’.⁹² If this suggests his quest for compliance with the minutiae of the Zulu culture, such quest appears to be absent when he insisted on the production of an outstanding document from a court of law to establish the marriage between the parties⁹³ The ‘registration’ issue was echoed by the defendant when he told the Court that the process of lobolo is only completed when the parties have registered their marriage,⁹⁴ at the Department of Home Affairs.⁹⁵ The position of our law is that there is a duty on both spouses in a customary marriage to ensure registration of their marriage,⁹⁶ although failure to register a customary marriage has no bearing on the validity of the marriage.⁹⁷

[86] Based on what appears above, I do not accept the submission by counsel for the defendant that Mr N[...]’s version ought to be disregarded on its veracity, and that of Mr M[...] Snr be accepted as most probable, to resolve any possible conflict between their versions. For, I find it highly improbable that Mr N[...] would have travelled from Limpopo

⁹⁰ Transcript: Day 3, p 5 at lines 9-12, CL U273.

⁹¹ Transcript: Day 3, p 4 at lines 12-16, CL U272.

⁹² Transcript: Day 3, pp 18-19 at lines 23-25 and 1-3, CL U286-287.

⁹³ Transcript: Day 3, p 17 at lines 20-25, CL U285. See also Transcript: Day 3, p 29 at lines 13-16, CL U297.

⁹⁴ Transcript: Day 3, p 87 at lines 15-20, CL U355.

⁹⁵ Transcript: Day 3, p 88 at lines 14-21, CL U356.

⁹⁶ Section 4(1) of the RCMA.

⁹⁷ Section 4(9) of the RCMA.

to KZN to discuss matters which did not include the wedding. It is common cause that this was before 7 November 2020, the date on which lobolo was (to be) fully paid. I also find it improbable that Mr N[...] would have still decided to visit his counterpart in KZN to discuss the same issue agreed upon in terms of the September 2018 agreement. If the September 2018 agreement existed – in all probabilities – he would have had to start the discussion by explaining to Mr M[...] Snr why he wanted to depart from its agreed terms. No doubt, Mr M[...] Snr would have reminded him of its terms and, perhaps, insisted that Mr N[...] and his family was bound by its terms. For this would be an agreement reached through *abakhongi* (i.e. people from his family whom he had sent for the bride) as he does not personally attends to this type of matters.⁹⁸ He would no doubt, had been looking forward to welcome Mr N[...] again in KZN for the *umbondo* and *umabo* ceremonies,⁹⁹ so a discussion on these latter issues may probably have featured. Mr N[...] did not give me the impression that he would have given his word (i.e. September 2018 agreement) and then – without any cause or, even, suggestion of ill-feeling between him and the M[...] family or his prospective son-in law, who was also visiting – turned around and insisted on a new deal or agreement (i.e. the KZN agreement). The plaintiff was also visiting the same household on the day of her father's visit. She even cooked or prepared food for him. These all suggest that things and relationships were cordial or normal, for Mr N[...] to have pursued a partisan agenda. Therefore, on the critical aspects I find Mr M[...] Snr's evidence to have lacked credibility and I reject same, whilst accepting that of Mr N[...]. Therefore, there was indeed a meeting of the minds from both sides to reach the KZN agreement that the Pedi customs or customary law would apply.

[87] The objective facts also support the existence of the KZN agreement, including the following: (a) a wedding on 7 November 2020 in Bela Bela, Limpopo attended by more than

⁹⁸ Transcript: Day 3, p 5 at lines 9-12, CL U273.

⁹⁹ Footnotes 18-19 above.

200 people, 24 of whom accompanied the defendant; (b) the defendant's solely paying for the expenses for a function hosted by the N[...] family, despite his declaration of philanthropic motivations; (c) the custom to identify the plaintiff amongst other women, as depicted on the photograph the defendant described as 'people falling and stuff like that'; (d) photographs of the wedding and the board referring to a wedding at the venue; (e) goat being offered as receipt for full payment of lobolo and goat meat shared with the M[...] family, as confirmed by Mr L M[...], a *mkhongi*; (f) the plaintiff being handed over to the M[...] family after the wedding on 7 November 2020, although the defendant said that she followed them back to Pretoria uninvited and to find accommodation.

[88] Another issue raised by the defendant is the aspect of integration. The contention in this regard is to the effect that the plaintiff was not integrated into the defendant's family. And that the Pedi culture does not dispose of the integration of a woman into the family of a man. But the same argument carries with it the concession that integration of the woman – although an integral part of a customary marriage - can be waived. Obviously, this is only possible in the narrow sense of the concept of integration.¹⁰⁰

[89] Submissions by counsel for the plaintiff included that, the following confirmed integration of the plaintiff into the defendant's family on 7 November 2020: (a) reference to her by Mr L M[...] as '*makoti*', despite him saying the plaintiff is still *ingoduso*; (b) the plaintiff being donned in a special *doek* by the defendant's sisters; (c) goat being offered to the M[...] family and then – at their request or direction - being slaughtered and meat shared, and (d) other rituals depicted on the photographic evidence.

[90] I am satisfied that on the basis of the evidence before the Court, assessed against the authorities including those cited above, that, indeed, integration of the plaintiff has taken place in both the narrow and wide senses. In the wide sense, it is as submitted by counsel for

¹⁰⁰ Par [57] above on both the narrow and wide senses of integration.

the plaintiff in the preceding paragraph. Added to that, is the fact that the plaintiff stayed with the defendant as husband and wife from 07 December 2020 until she moved out of the matrimonial home in June or July 2021. There is no indication that during this period the defendant or anyone considered her to be anything less than the defendant's wife. Integration in the narrow sense was met when the N[...] family allowed the plaintiff to depart following the wedding with the M[...] family. This accorded with the Pedi living customary law applicable to the N[...] family and extended in application to the M[...] family – albeit that they are of a Zulu heritage - in terms of the KZN agreement. And this sufficed for a valid customary marriage.

[91] The formal introduction of the plaintiff to the defendant's wider family and other rituals may have still been allowed to take place, but those – in my respectful view – would have been superfluous for purposes of the requirements in section 3(1)(b) of the RCMA and terms of the KZN agreement. This finding, also, disposes of the defendant's counterclaim for declaration that no valid customary marriage exists between him and the plaintiff. It will be dismissed with costs.

Decree of divorce and division of the joint estate

[92] Therefore, pursuant to my finding above that the parties were validly married in terms of customary law on 7 November 2020, a decree of divorce is possible. Such order is attainable where the Court is satisfied that the marriage relationship between the parties has disintegrated with no reasonable prospect of restoration of a normal marriage relationship between them.¹⁰¹ I am satisfied that the evidence for such an order is before the Court and, thus, find that the customary marriage between the parties have suffered an irretrievable breakdown.¹⁰² Consequently, a decree of divorce will be granted for its dissolution.¹⁰³

¹⁰¹ Section 8(1)-(2) of the RCMA.

¹⁰² Section 8(1)-(2) of the RCMA. See also Himonga 'The Dissolution of a Customary Marriage by Divorce' 242.

¹⁰³ Section 8(1)-(2) of the RCMA.

[93] On 7 November 2020 none of the parties or spouses was ‘a partner in any other existing customary marriage’¹⁰⁴ and, thus, the proprietary consequences of the parties’ customary marriage is that of a marriage in community of property and of profit and loss between the spouses.¹⁰⁵ Approached from another angle, neither of the parties has produced an antenuptial contract. Therefore, a division of the joint estate may be in the offing, depending on the outcome of the next issue to be determined: forfeiture.

Forfeiture of the benefits and division of the joint estate

General

[94] The defendant’s counterclaim includes that this Court makes an order for the whole forfeiture of the benefits of a marriage in community of property by the plaintiff, as envisaged by section 9 of the Divorce Act.¹⁰⁶

[95] As stated above, this Court may only make an order for forfeiture if satisfied that, in its absence, the plaintiff would be unduly benefited in relation to the defendant. This determination is guided by the three factors under section 9, namely: (a) the duration of the marriage; (b) the circumstances which gave rise to its breakdown, and (c) substantial misconduct on the part of either of the parties, if any.¹⁰⁷

[96] The first part of the determination is whether a party against whom a forfeiture order is sought will indeed be benefited.¹⁰⁸ The determination is, purely, factual. And, if it is shown that the impugned party would be benefitted, the Court ought to determine whether such party would be unduly benefited in relation to the other party without a forfeiture order.¹⁰⁹ This second part of the determination constitutes a value judgment to be reached by the Court

¹⁰⁴ Section 7(2) of the RCMA.

¹⁰⁵ *Ibid.*

¹⁰⁶ Par [62] above, for a reading of s 9 of the Divorce Act.

¹⁰⁷ *Ibid.* See also *Klerk v Klerk* 1991 (1) SA 265 (W).

¹⁰⁸ *Wijker v Wijker* 1993 (4) SA 720 (A) at 727D-F.

¹⁰⁹ *Ibid.*

after consideration of the facts falling within the remit of the abovementioned three statutory factors.¹¹⁰

Would the plaintiff be benefited in relation to the defendant?

[97] As stated above, it is first to be determined whether the plaintiff will be benefited without the order for forfeiture, based on the facts in this matter.¹¹¹

[98] All the defendant furnished to pivot his case for forfeiture is a list of assets in the joint estate which, probably, he bought or acquired from what he considers to be his ‘exclusive’ resources.¹¹² The plaintiff, either, has not – for this purpose – provided a list of the assets in the joint estate which, probably, she bought or acquired from her ‘exclusive’ resources.¹¹³ She, obviously, is moving for an order for the equal division of the joint estate.

[99] The plaintiff, no doubt, also made a financial contribution. This mostly – it appears – was with regard to meeting expenses of the children. There is no suggestion that she was frugal in her expenditure, but only that her financial resources are limited. The defendant – no doubt – appreciated that the circumstances between the parties dictate this when he sought to explain why he exclusively paid for the wedding on 7 November 2020.¹¹⁴ In fact, the plaintiff’s contribution was mostly in non-financial means. She appears to have made contribution ‘her way’ by bearing responsibilities for the general upkeep of the household and the primary caregiving of the children.¹¹⁵ Often, this type of contribution is not given a commensurate value or is even ignored when the determiner of fact is preoccupied with commercial considerations. But – no doubt - this is a very valuable contribution with a direct impact on the household, particularly the upbringing of minor children.

¹¹⁰ *Wijker v Wijker* 1993 (4) SA 720 (A) at 727D-F.

¹¹¹ *Ibid.*

¹¹² Defendant’s counterclaim at par 14.3, CL A54-55.

¹¹³ *Ibid.*

¹¹⁴ Transcript: Day 3, p 122 at lines 15-17, CL U390.

¹¹⁵ Transcript: Day 3, p 146 at line 7, CL U414.

[100] I do not think that it broaches any meaningful argument that the defendant has contributed more into the joint estate than the plaintiff when viewed from only a financial or asset point of view. But there is no evidence of the value of the assets and estimate of the liabilities in the estate or at least the quantum of the alleged undue benefit he urges that be forfeited by the plaintiff in his favour.

[101] On what is before the Court, I am satisfied that the plaintiff would be benefitted by an equal division of the joint estate. This is purely from a factual review of the facts, although it still needs to be emphasised that it is mammoth task to value contribution as to the primary caregiving of children or other non-financial contribution. In this matter, there are three minor children one or more of them with known challenges.

[102] But, it is inescapable at this stage of the determination to steer far away from shores of matters of rands and cents. Perhaps, non-financial contribution features strongly in the determination of whether the benefitted party would be unduly benefitted, which is discussed next.

Would the plaintiff be unduly benefitted in relation to the defendant?

General

[103] Determination of whether the plaintiff would be unduly benefitted when compared to the defendant, if the Court does not grant a forfeiture order, as stated above, constitutes a value judgment.

[104] This ought to be based on consideration of the facts in this matter falling within the scope of the abovementioned three statutory factors.¹¹⁶ And the dictionary meaning of ‘undue’ will be of some aid.¹¹⁷

Duration of the marriage

¹¹⁶ Pars [62], [95] above.

¹¹⁷ *KT v MR* 2017 (1) SA 97 (GP) par 20.17. See par [65] above.

[105] The first factor to consider is the duration of the marriage. The defendant says the marriage was for only seven months and, thus, of a short duration. This will be a duration calculated from the date of the wedding on 7 November 2020 to, perhaps, June 2021 when the plaintiff instituted these divorce proceedings. And the plaintiff urges the Court to consider, that the parties had a previous love or romantic relationship since 2012 before their marriage in November 2020, and three children were born between April 2017 and August 2020 from their relationship.

[106] There is no statutory guide as to relevant considerations for the issue of duration. Actually, the legislature has not stated that a short or long marriage is a consideration which should satisfy the Court to grant or refuse – as the case may be - a forfeiture order.

[107] In this matter, the parties have actually decided to get married by the time the lobolo negotiations were held on 22 September 2018. Although dates are necessary as they promote certainty of time in modern times, the intricacies of a customary marriage renders it not always sensible to pinpoint one day on the Gregorian calendar as the commencement of a customary marriage. Unfortunately, where there is a dispute as to the consummation of a customary marriage or those of similar nature, as in this matter, the Court has to reach for the calendar.

[108] Another consideration is that, the parties have been cohabiting for years before the plaintiff walked out of the matrimonial home in 2021. It is common cause that the parties lived under one roof by the time of the birth of their first born child in April 2017. The plaintiff placed the cohabitation to far earlier than 2017. But, I find April 2017 to be a reasonable pinpoint in this regard. And even if one assumes that the notion of marriage has by April 2017 not yet crossed either of the parties' mind, in September 2018 it had settled there, given the lobolo negotiations. Therefore, given all these, the marriage between the parties cannot be considered to be of a short duration.

Circumstances which led to the break-down of the marriage

[109] Moving on to consider the circumstances which led to the break-down of the marriage. The plaintiff cited various grounds in this regard, including infidelity or adultery on the part of the defendant with other women. Although, the defendant denied this, he admitted to having relationships with women he considered potential wives and to a pursuit of a polygamous lifestyle. This appears to be the main factor in the disintegration of the marriage beyond any reasonable prospect of restoration of a normal marriage relationship between the parties.

Substantial misconduct by either of the parties

[110] Regarding the possible substantial misconduct in the breakdown of the marriage, I must state that I am not (and was not made) aware of any substantial misconduct, let alone of a serious nature, committed by the plaintiff.

[111] On the part of the defendant, what comes to mind is the defendant's admitted relationships with other women, one of which is said to have led to a 'customary marriage'. But, amidst all other facts, I do not consider it necessary to determine whether this constitute substantial misconduct on the part of the defendant. It has already featured prominently in the preceding subheading.

Conclusion

[112] Considering what is stated above, I am not convinced that the benefit to be derived by the plaintiff is 'unwarranted or inappropriate' due to its excessive or disproportionate nature.¹¹⁸

[113] The plaintiff appears to have started working after he relocated to Johannesburg in 2010 for work purposes. He purchased a house on some undisclosed date into which the plaintiff moved in around April 2017 when they welcomed their first child. The plaintiff would have had the house and pension fund membership for hardly five to six years by then and

¹¹⁸ *KT v MR* 2017 (1) SA 97 (GP) [20.17], referred to in par [65] above.

six to seven years around the lobolo negotiations in September 2018. No values have been provided, as lamented above. The house would probably be subject to an encumbrance in favour of a financial institution. Beyond these assets, there are only motor vehicles and household furniture.

[114] In my view the growth or accumulation of the assets now forming part of the joint estate at the instance of the defendant, without the contribution of the plaintiff is not substantial. The defendant was for most of this duration supported by the plaintiff, including through her non-financial, but still immensely valuable, contribution.

[115] Therefore, I find that the plaintiff would not be unduly benefitted when compared to the defendant if the Court does not grant a forfeiture. The defendant's counterclaim for a forfeiture order sought against the plaintiff will be dismissed with costs.

Division of the joint estate

[116] The dismissal of the counterclaim for forfeiture clears the way for the division of the joint estate. This will be ordered. The order will also specify that payment is to be made to the plaintiff of half or 50% of the pension interest of the defendant pension fund.

Parental rights and responsibilities in respect of the minor children

[117] In the written closing argument by their counsel, the parties indicated to the Court that they have agreed on an order to be made regarding retention of the parental rights and responsibilities in respect of the three minor children born between them, as provided by the Children's Act.

[118] The Family Advocate made recommendations in respect of the defendant's contact with the children which are to be incorporated in the order to be made by the Court, including the appointment of a parental coordinator for purposes of execution of the order.

[119] The issue of contribution towards the maintenance for the children by the defendant is still in dispute. The plaintiff seeks no maintenance for herself. In the summons the plaintiff had sought that the defendant contribute maintenance through monthly payment of R10 000

(ten thousand rand) for each child. But on 29 November 2021 the Court provisionally ordered that the defendant pay R15 000 (fifteen thousand rand) per month for each child in the Rule 43 proceedings. During the hearing the amount increased to R20 000 (twenty thousand rand) per child each month. But plaintiff counsel – in her written closing argument – urged the Court to retain the R15 000 in the Rule 43 order, with the proviso that either of the parties may approach the maintenance court with jurisdiction for either increment or reduction in the amount. The defendant is not agreeable to this.

[120] I find the facts before the Court to justify the retention of the amount of R15 000 per month as the defendant's contribution towards maintenance for each of the three minor children. This will be ordered, including payment by the defendant of any shortfall in the medical expenses incurred for the children not met by the medical aid scheme and all reasonable expenses incurred in respect of the education of the minor children. Details on all these appear in the order below.

Conclusion and costs

[121] The plaintiff is substantially successful and – as per the convention – she will be awarded costs of suit.

[122] I have noted the defendant's view that an appropriate order would be that each party be responsible for his/her own costs, given the parties' continuous parental relationship. But, I am not swayed to depart from the convention. Therefore, the defendant will be held liable for the applicable costs at the scale of party and party.

[123] I will allow either of the parties to avail a draft order on the exact terms of the order appearing below.

Order

[124] In the premises, I make the order, (which may also appear in a signed draft order as stated in par [123] above), that:

1. a valid customary marriage in community of property was entered into between the

parties on 7 November 2020;

2. a decree of divorce is granted;
3. the joint estate of the parties shall be divided;
4. the defendant shall pay to the plaintiff one half of the defendant's pension interest in the defendant's pension fund at the defendant's place of employment at THE SAFETY

AND SECURITY SETA, calculated as at date of divorce and payable in terms of Section 37D of the Pension Fund Act, Act No 24 of 1956;

5. an endorsement shall be noted against the records of the defendant's pension fund in terms of the provisions of paragraph 4 hereof;
6. both parties retain full parental rights and responsibilities and guardianship in terms of section 18 of the Children's Act 38 of 2005;
7. the primary residence of the minor children is awarded to the plaintiff;
8. the defendant is to exercise contact with the minor children as follows:
 - 8.1 contact every alternate weekend from Friday at 17h00 to Sunday 17h00;
 - 8.2 alternate short and half of every long school holidays, Christmas and New Year to be shared and rotate between the parties;
 - 8.3 contact with both parties on special calendar days such as birthdays of the children, mother's day and father's day and birthdays of both parties, and
 - 8.4 regular telephonic contact between the minor children and the defendant as arranged between the parties.
9. the parties have agreed to the appointment of Ms Heske Sangster as Parental Coordinator with the powers and duties as set out in Annexure 'A' to this order or judgment;
10. the defendant shall pay maintenance for the minor children to the plaintiff as follows:
 - 10.1 an amount of R15 000 (fifteen thousand rand) for each child from the first day of the month following the granting of this order and thereafter on or before the first day of each and every successive month;
 - 10.2 the defendant is to pay the shortfall incurred for and in respect of medical expenses for the children that are not covered by the medical aid scheme on demand. In the event of plaintiff making payment thereof, the defendant shall reimburse the plaintiff for any such payment she has made within seven days after date of presentation to the defendant of an invoice therefor.

- 10.3 the defendant is to pay all reasonable expenses incurred in respect of the minor children's education, such costs to include, without limiting the generality of the foregoing, all school fees, holiday-care fees, additional tuition fees, as well as the costs of all extra-curricular school and sporting activities (including school tours and outings) in which they may participate, as well as the costs of all books, stationary, school uniforms, equipment and attire relating to their education and/or the sporting and/or extra-mural activities engaged in by them. The defendant shall reimburse the plaintiff for all expenses so incurred in respect of which she has made payment or shall make payment directly to the service providers, as the case may be within 5 (five) days of the plaintiff providing the defendant with proof of payment and/or the relevant invoice.
- 10.4 the parties agree that either of them may approach a maintenance court with jurisdiction for an increase or decrease in the amount payable for maintenance, as ordered in this paragraph 10, without either party having to show good cause, and
11. the defendant is liable to pay the plaintiff's costs of suit.

Khashane La M. Manamela
Acting Judge of the High Court

Dates of Hearing	:	8 and 14 May 2025
Date of Final Closing Argument	:	01 July 2025
Date of Judgment	:	13 November 2025

Appearances	:	
For the Plaintiff	:	Ms M Fabricius
Instructed by	:	Shapiro Ledwaba Attorneys, Pretoria

For the Defendant	:	Ms Z Qono
Instructed by	:	Zikalala Attorneys, Durban c/o Makula Attorneys, Pretoria