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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
HELD AT PRETORIA**

CASE NO: 096891/2024

DOH: 10 November 2025

DECIDED: 12 January 2026

- 1) REPORTABLE: NO
- 2) OF INTEREST TO OTHER JUDGES: NO
- 3) REVISED.

SIGNATURE

DATE 12 JANUARY 2026

In the matter between:

E[...] M[...]

Plaintiff

And

S[...] M[...]

Defendant

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 12 January 2026.

ORDER

The following order is granted:

1. Decree of divorce;
2. Division of the Joint Estate, provided the Plaintiff forfeits the benefit arising from the Defendant's Pension Fund;
3. Permanent residence of the minor children is awarded to the Plaintiff;
4. Parental responsibility and Rights in respect of care of the minor children as set out in Section 18(2) (a) of the Children's Act 38 of 2005 is awarded to the parties jointly;
5. Parental responsibility and Rights in relation to contact of the minor children as set out in Section 18(2) (b) of the Children's Act 38 of 2005, is allocated to the Defendant in the following terms:
 - 5.1 The Defendant is entitled to contact the minor children every alternative weekend from Friday at 17h00 till Sunday 19h00. Should the Defendant's contact weekend fall on a long weekend, the Defendant is entitled to contact for the entire long weekend;
 - 5.2 The Defendant is entitled to contact the minor children every alternative short holiday;
 - 5.3 The Defendant is entitled to contact the minor children every half of June/July school holiday and December/January school holiday respectively on annual rotation basis;
 - 5.4 The Defendant is entitled to contact the minor children on the Defendant's birthday and Fathers' Day from 09h00 to 20h00 subject to the minor children attending school;

- 5.5 The Defendant is entitled to contact the minor children on every alternative minor child's birthday from 09h00 till 20h00, subject to the minor children attending school;
- 5.6 The Defendant shall pay R2000, 00 per child, per month towards maintenance of the minor children, payable on or before the 7th day of each month;
6. Each party pays their own costs.

JUDGMENT

Bam J

Introduction

1. The sole issue to be decided in these proceedings is whether the plaintiff should forfeit the benefit arising from the defendant's pension fund. The parties were married in community of property on 10 January 2011, and the marriage still subsists. During August 2024, the plaintiff issued a divorce summons seeking, *inter alia*, a decree of divorce and division of the joint estate. The original marriage certificate was handed in from the bar and marked Exhibit A. The parties confirm that their marital relationship has broken down irretrievably and there is no way of saving it. They want a divorce.
2. They agree that the joint estate be divided equally amongst them save for the defendant's pension. The defendant seeks an order that the plaintiff forfeit the benefit arising from his pension fund, owing to what he says is substantial misconduct. It is common cause that the parties have not been living together as husband and wife since 2020. It is not in dispute that the plaintiff has a third child, XX, born on 11 December 2023, whom is a product of a romantic relationship between her and a third party.

The case for forfeiture

3. Only the defendant testified. The plaintiff called one witness. In summary, the defendant's case, which went uncontested, was that while they were living together as husband and wife, the plaintiff was engaged in a romantic relationship with his friend. When he discovered the relationship, he chased the plaintiff away from the marital home as he found the situation intolerable. He stated that from the time the parties were married, the plaintiff was not employed. The defendant was responsible for the family's financial needs. He learnt of the third child when he came across a posting of the plaintiff on Facebook, stating that she had a baby shower. He further confirmed that he was a member of the Municipal Gratuity Fund, with a fund value of R2.3 million as at the date of trial.

Applicable legal principles

4. Statutory provision for forfeiture of patrimonial benefits is provided for in Section 9 of the Divorce Act¹. The provision reads in the relevant parts:
 - (1) When a decree of divorce is granted on the ground of the irretrievable break-down of a 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 forfeiture is not made, the one party will in relation to the other be unduly benefited.'
5. Sections 7(7) (a) of the Divorce Act reads:

¹ 70 of 1979.

‘In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled; the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.’

6. The factors set out in Section 9 of the Divorce Act need not be considered cumulatively. In *Botha v Botha*, the court reasoned the issue thus:

‘[6] In *Wijker v Wijker*, this court considered the question whether proof of ‘substantial misconduct on the part of either of the parties’ was an essential requirement for a forfeiture order. It answered this question in the negative, holding that the context and the subject-matter of s 9(1) made it abundantly clear that the legislature never intended the three factors mentioned in the section to be considered cumulatively. As regards the approach to be followed by a court of appeal when hearing an appeal in respect of a forfeiture order, Van Coller AJA stated the following:

‘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.’

[8] The three factors governing the value judgment to be made by the trial court in terms of s 9(1) thus fall within a relatively narrow ambit: they are limited to (a) the duration of the marriage; (b) the circumstances which gave rise to the breakdown thereof; and (c) any substantial misconduct on the part of either of the parties.’²

7. Courts, however, should guard against focusing on an isolated issue as opposed to considering the factors set out in section 9 of the Divorce Act wholistically. In *Mashola v Mashola* it was said:

² (393/04) [2006] ZASCA 6; 2006 (4) SA 144 (SCA); [2006] 2 All SA 221 (SCA) (9 March 2006), paragraphs 6-8.

‘[31] In *BS v PS* [2018] ZASCA 37; 2018 (4) SA 400 (SCA) para 10-11 (*BS v PS*), this Court in considering an appeal from the Eastern Cape Division of the High Court, Grahamstown, found that the court below should not have focused on an isolated incident of adultery by one of the spouses instead of considering the duration of the marriage and circumstances which gave rise to the breakdown of the marriage.’³

Application

8. During cross examination, the defendant was questioned about a property belonging to the joint estate which he sold during December 2020 and the reasons the title deed recorded that he was unmarried. The defendant stated that he fell ill during the year 2020 and exhausted his medical scheme benefits. To fund the mounting medical bills, he sold the property for R65 000.00 to his younger sister. In response to the proposition that he misrepresented his marital status to exclude the plaintiff from the sale of the house, the defendant denied the suggestion stating that at that stage, he was very ill. In any event, he continued, the plaintiff was ‘in another marriage at that time.’ I accepted the answer to mean that the plaintiff no longer cared as she was minding her own business with a third party at that point.
9. The defendant was further questioned about an alleged extra marital relationship with one L[...], which he denied. He further denied having fathered a child or children with L[...]. He was questioned about a mediation session held at the marital home where a relative had been asked to mediate. In that meeting, a woman by the name of L[...] was present and she was allegedly introduced as the defendant’s girlfriend. The witness confirmed the mediation session but denied that L[...] was his girlfriend, stating that he knew L[...] as a person who lived in the area where he lived and regarded her as a friend. After cross examination, there was no re-

³ (022/2022) [2023] ZASCA 75 (26 May 2023, paragraph 31.

examination. The defendant closed his case after cross examination. I had no reason to doubt the credibility of the defendant. His answers did not strike me as far-fetched. He spoke candidly about the circumstances surrounding the breakdown of his marriage.

10. As already indicated the plaintiff did not testify. Instead, she called a family member, the man who played the role of a mediator at the parties' family home. It transpired that this witness had been sitting in court throughout the defendant's testimony. As such, the defendant protested when he was called to the witness stand. I ruled that I would allow his testimony and then determine and provide reasons as to whether his evidence was admissible, along with the weight to be accorded to his evidence. As it turned out, the witness said no more than that he was called to mediate between the parties and that a woman by the name of L[...], whom was referred to as the defendant's girlfriend, was present during the mediation session.
11. The question that must now be answered is whether, given the evidence, the plaintiff will be unduly benefitted. At the time the parties ceased living as husband and wife, they had been married for nine years. I consider the duration of their marriage to be a neutral factor. The defendant was responsible for the financial needs of the family. But that does not mean that the plaintiff made no contribution to the marriage. There is a whole system that runs in the background to making most family homes stable. In most instances, the management and coordination of these activities reside with the party who stays at home. To the plaintiff's credit, without her testimony, I am prepared to accept that as a mother who stayed at home, she was responsible for the upkeep of the family home, supporting the defendant and the children in their daily life.
12. Evidence before the court suggests that the parties' relationship broke down because of the plaintiff's involvement in an extra-marital relationship with the defendant's friend. A few years after the plaintiff left the marital home, she gave birth to the third child. No matter what troubles the parties may have

had while living together as husband and wife, the effect of procreating with a third party must have put paid to any prospects of salvaging their relationship. The plaintiff, as the defendant puts it, is now a party to a different relationship, along with the benefits from that relationship. The answer to the question in my view is a clear yes, the plaintiff will certainly be benefitted in the event the court does not make an order of forfeiture.

13. The next question is whether, having regard to the relevant circumstances of this case, the plaintiff will be unduly benefitted in the event this court does not grant the forfeiture order sought by the defendant. I note that the only relevant detail that the defendant testified to as the reason for the breakdown of the parties' marital relationship was the plaintiff's involvement in an extra-marital relationship with his friend. What I regard as misconduct is not only the plaintiff's involvement with a third party but the act of procreating with a third party and then publicizing the birth by posting messages of her baby shower on Facebook. That must have humiliated the defendant. The combination of all these events amounts to misconduct. On this basis, the plaintiff will be unduly benefitted were the court not to make the forfeiture order of the defendant's pension.

Conclusion

14. The defendant has succeeded in his claim.

Costs

15. I am of the view that notwithstanding the defendant's success with his claim of forfeiture, it is in the interests of justice that each party pays their own costs. It is trite that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*⁴.

Order

⁴ (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995), paragraph 3.

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 - 5.3 The Defendant is entitled to contact the minor children every half of June/July school holiday and December/January school holiday respectively on annual rotation basis;
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 - 5.6 The Defendant shall pay R2000, 00 per child, per month towards maintenance of the minor children, payable on or before the 7th day of each month;
6. Each party pays their own costs.

BAM J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Date of Hearing:

10 November 2025

Date of Judgment:

12 January 2026

Appearances:

Counsel for the Plaintiff

Mr T.G Malange

Attorney with right of
appearance at the High Court

Counsel for the Defendant:

Mr M.D Hlatshwayo

Attorney with right of
appearance at the High Court