IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No. 60701 / 2019

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **YES**

DATE 19 February 2026

SIGNATURE

In the matter between:

R[...] E[...] N[...] M[...] Plaintiff

and

M[...] P[...] M[...] Defendant

ORDER

1. A decree of divorce is granted.
2. The joint estate is to be divided.
3. The Defendant is entitled to 50% of the plaintiff's interest in the Government Employees Pension Fund calculated on date of divorce and payable by the Fund directly to the Defendant.
4. An endorsement is to be made against the records of the Pension Fund to give effect to the provisions of 3 above.
5. The Plaintiff to pay the costs of the Defendant on scale B.

JUDGMENT

TOLMAY J:

[1] The parties in this matter were married to one another and now seek to dissolve the marriage. A primary issue between them concerned the nature of their union: whether it was constituted by a customary marriage or by a civil marriage. This distinction was central to the determination of their respective proprietary rights upon termination of the relationship.

[2] The plaintiff alleged that the parties were married on 13 September 2017 out of community of property, subject to the accrual system. The parties entered into an antenuptial contract on 7 September 2017. On this basis, the plaintiff argued that the defendant should forfeit any benefit arising from the accrual. Contrastingly, the defendant asserted that a valid customary marriage existed under section 3 of the Recognition of Customary Marriages Act 120 of 1998 and sought the division of community property.

[3] There were no children born from the marriage, and neither party claimed maintenance from the other. Accordingly, aside from the dispute about the marital regime, the only remaining issue was whether the defendant should forfeit any benefits from the marriage in community of property, or, in the alternative, her share of the accrual.

[4] The defendant bore the onus of proving a valid customary marriage and led evidence on the procedural requirements necessary to establish such a union at the outset of the trial. The crux of the plaintiff's challenge was the alleged absence of the handing over of the bride, though all other requirements were conceded. By the second day of trial, the plaintiff admitted the existence of a valid customary union, acknowledging that the parties' patrimonial regime was thus in community of property. The only unresolved issue at this stage was the potential forfeiture of marital benefits by the defendant.

[5] The parties had been in a relationship since 2012. Prior to marriage, the plaintiff purchased an immovable property at 1[...] C[...] Ext […], Pretoria-North, for R190 000.00. In 2015, while the house was still being built, the plaintiff and one of his children moved into an apartment rented by the defendant, joining her and her child. They cohabited there for two years before their marriage in April 2017. The defendant stated that she was responsible for the rent, electricity, and groceries, as well as household duties and care of the children. The evidence of the parties revealed that both contributed to the household expenses, though they did not agree on exactly how it was done.

[6] To finance the construction of the house, the plaintiff obtained a bond. Additional funding was necessary, leading the defendant to secure three loans in her name, as the plaintiff was not eligible for more credit at that time. The plaintiff also obtained a loan of R50 000.00 from the defendant's sister and another from the defendant's friend, Ms Mphokane, who is her attorney and involved in these proceedings.

[7] The plaintiff left the family home in January 2020, while the defendant stayed on. She testified that the house, initially comprising three bedrooms, was expanded to seven bedrooms with six bathrooms. The plaintiff covered the bond repayments, while the defendant paid for six baths and other household expenses, including a security system costing R80 000.00, as well as rates and taxes. In 2025, the plaintiff sold the house without informing the defendant, who only learned of the sale upon receiving notice from his attorney, giving her one week to vacate. She then launched urgent proceedings to set aside the sale, which is still pending. She was unaware of the sale price. Despite the sale, the plaintiff continued to pay the bond, while the defendant maintained the house and covered the previously mentioned expenses.

[8] The plaintiff claimed to have repaid the loans taken out by the defendant, but evidence suggested that only about R28 000.00 out of more than R100 000.00 had been settled. He acknowledged that he would not have been able to extend the house without the defendant's loans, and he also admitted that he still owes Ms Mphokane about R250 000.00. The plaintiff testified that the house was sold for R1 595 000.00 because he could no longer afford the bond repayments, selling it at a loss of R114 000.00. He did not inform the defendant of the sale, as he believed they were married out of community of property. The plaintiff did not provide any proof of the property's value.

[9] The only other significant assets were the parties' pension funds. The plaintiff is a member of the Government Employees Pension Fund (GEPF) and retired in 2020 at the age of 55. He received half of his pension when he retired. The remainder was retained by the fund pending the conclusion of the divorce, following another urgent application brought by the defendant The plaintiff claimed the outstanding value of his pension was approximately R2 000 000.00, though no proof was provided. He also testified to have outstanding debts of around R700 000.00. The defendant is also a pension fund member, her fund was valued at R500 000.00, the details of her pension fund was not provided during evidence.

[10] Ultimately, the plaintiff's claim for forfeiture rested on alleged 'financial misconduct' and the short duration of the marriage.

[11] Section 9(1) of the Divorce Act 70 of 1979 provides the statutory basis for orders of forfeiture of assets. The court exercises a discretion based on three primary factors: the duration of the marriage, the circumstances leading to the breakdown of the marriage, and any substantial misconduct by either party. The court must be satisfied that, if forfeiture is not ordered, one party will be unduly benefited relative to the other.

[12] In *Wijker v Wijker*[1], the court explained that section 9(1) does not require the listed factors to be considered cumulatively. The starting point for any forfeiture order is to determine whether there will in fact be an undue benefit to one party if forfeiture is not granted. The court held:

> *"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.'*[2]

[13] In *Engelbrecht v Engelbrecht*[3], the court explained that joint ownership of property arises automatically upon marriage in community of property, and a greater contributor cannot complain unless the benefit to the other party is undue. The court cannot determine whether a benefit is undue unless the nature and extent of the benefit

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1 1993 (4) SA 720 (A)
2 p727 D - F
3 1989 (1) SA 597 (C)

are clearly established. Only if the benefit is proven does the court proceed to consider the other factors relevant to forfeiture.

[14] The plaintiff failed to provide evidence of any undue benefit that would accrue to the defendant if the estate was equally divided. No evidence was led to enable the court to determine the benefit or why the benefit would be undue. Following the reasoning in *Engelbrecht*, the absence of such proof means the court need not consider the further requirements for forfeiture.

[15] Out of an abundance of caution however it must be stated that the plaintiff also failed to prove substantial misconduct, financial or otherwise. The marriage relationship broke down, and both parties contributed to that. Ironically the plaintiff's evidence revealed that the dispute about the proprietary regime that should apply to the marriage caused conflict. It would seem that this dispute ultimately led to the breakdown of the marital relationship.

[16] Reliance was placed on behalf of the plaintiff on *Swanepoel v Swanepoel*[4] to support the argument that the short duration of a marriage could justify a forfeiture order. The duration of the marriage is a significant factor in determining whether a forfeiture order should be granted. Short marriages may lead to unfair benefits for one party, especially when contributions to the joint estate are unequal. In *Seth v Seth*[5] , the court considered the short duration of an eight-month marriage as a key factor in granting a forfeiture order. The court adopted a fault-neutral approach, focusing on whether the benefit to one party would be undue rather than assigning blame for the breakdown of the marriage.

[17] Although the duration of the marriage was brief, both parties continued contributing to the estate even after they no longer lived together. The defendant

[4] [1996] All SA (3) 440 (SE)

[5] [2018] JOL 40665 (GJ).

contributed to the maintenance and improvement of the property for a period of nearly ten years. The fact that she stayed on in the house and that the plaintiff paid the bond is not disregarded, but that in and of itself cannot be the only determinative factor, she contributed to the maintenance and improvement of the property while staying there.

[18] The plaintiff should pay the costs of the action not only because he failed to prove forfeiture, but also because one day was spent to prove the existence or not of the customary marriage. On the second day of the trial the plaintiff conceded that there was a valid customary marriage.

ORDER

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4. An endorsement is to be made against the records of the Pension Fund to give effect to the provisions of 3 above.
5. The Plaintiff to pay the costs of the Defendant on scale B.

RG TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 February 2026.

APPEARANCES:

For the plaintiff	:	Adv Masipa
Instructed by	:	Sekonya Attorneys
For the defendant	:	Adv Breytenbach
Instructed by	:	Mphokane Attorneys
Matter heard on	:	4 & 5 February 2026
Judgment date	:	19 February 2026