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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: HCA05/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 2026-02-18

SIGNATURE:

In the matter between:

T[...] E[...] S[...]

Appellant

And

T[...] S[...] S[...]

Respondent

JUDGMENT

BURNETT, AJ

INTRODUCTION

[1] This is a civil appeal from the Makhado Regional Court, in which the appellant was the defendant and the respondent was the plaintiff.

[2] The parties were married in community of property on the 5th day of January 1987. There are children born of the marriage between the parties, however at the

time that the divorce proceedings were instituted, the children had already attained the age of majority. By the time that the divorce was granted, the parties had been married for 35 (thirty-five) years.

[3] The respondent instituted divorce proceedings against the appellant on 23 May 2019 in which he claimed *inter alia* for a) a decree of divorce, b) division of the joint estate and c) to receive 50% (fifty percent) of the appellant's pension interest. The appellant filed a counterclaim in which she sought an order for the total forfeiture of matrimonial benefits against the respondent.

[4] Following a trial in which both parties gave evidence, the learned Magistrate Kellerman, on 12 December 2022, dismissed the appellant's counterclaim for forfeiture and ordered that: -

[4.1] The marriage between the parties is hereby dissolved.

[4.2] The decree of divorce is granted.

[4.3] The Government Employees Pension Fund (the Fund) is ordered in terms of section 7(8)(a)(i) of the Divorce Act 70 of 1979, read together with section 24A of the Government Employees Pension Law, 1996 (the GEPL) to make payment to the plaintiff in accordance with the provisions of the GEPL, of 50% (fifty percent) of the defendant's pension fund interest due or assignment to the defendant calculated in accordance with the rules of the Fund, as at date of the decree of divorce, being 23 September 2022, which assigned to the Plaintiff.

[4.4] That the Government Employees Pension Fund should pay 50% (fifty percent) of the defendant's pension interest to the Plaintiff within 60 days of the plaintiff submitting a choice form to the fund.

[4.5] That an endorsement to that effect should be made on the records of the fund.

[4.6] Each party pays their own costs].

[5] The appellant, being dissatisfied with the judgment handed down by the learned Magistrate Kellerman, noted an appeal against it in this court.

[6] There was no appearance for the respondent at the hearing of the appeal, even though a Notice of Set Down was properly served on his attorneys of record and a Heads of Argument were filed on his behalf. The matter accordingly proceeded in his absence.

THE LAW

[7] A court cannot use a forfeiture order as a mechanism for deviating from the normal consequences of a marriage in community of property.¹ A forfeiture claim also cannot be used as method to redistribute a joint estate in accordance with principles of justness and fairness.²

[8] A forfeiture of benefits may only be awarded within the boundaries of section 9 (1) of the Divorce Act 70 of 1979.

Legislation

[9] **Section 9 (1) of the Divorce Act 70 of 1979** states that: -

"When a decree of divorce is granted on the ground of the irretrievable breakdown 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 breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

Magistrate's Court Rules

[10] **Rule 6 (8) of the Magistrate's Court Rules** states that: -

¹ *Wijker v Wijker* [1993] 4 All SA 857 (AD).

² *Wijker v Wijker* [1993] 4 All SA 857 (AD).

"A party claiming division, transfer or forfeiture of assets in divorce proceedings in respect of a marriage out of community of property, shall give details of the grounds on which he or she claims that he or she is entitled to such division, transfer or forfeiture."

Case law

[11] In ***Imprefed (Pty) Ltd v National Transport Commission***³ the court stated:

"At the outset it need hardly be stressed that: 'The whole purpose of pleading is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed' (Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082) This fundamental principle is similarly stressed in Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd ed at 113: 'The objection of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.'"

[12] In ***Wijker v Wijker***⁴ it was said that: -

"It is obvious from the wording of the section that the first step is to determine whether 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 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."

[13] It was held in ***Koza v Koza***⁵ that: -

³ 1993 (3) SA 94 (AD).

⁴ [1993] 4 All SA 857 (AD)

⁵ 1982 (3) SA 462 (TPD).

"The attitude adopted on behalf of the appellant, both in the court a qua and on appeal, was that it is competent for a court to order forfeiture of the patrimonial benefits of the marriage out of community of property without specifying the nature or extent of such benefits. That it was indeed competent, and in fact obligatory should the innocent spouse so claim, for a court in granting a decree of divorce to make a general order of this nature, is apparent from the case of Murison v Murison 1930 AD 157. That, however, was the position prior to the enactment of the Divorce Act 70 of 1979. Section 9 (1) of that Act provides as follows:

'When a decree of divorce is granted on the ground of the irretrievable breakdown 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 breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited. '

*A discretion is clearly conferred upon the Court in terms of s 9 (1) whether or not to order forfeiture of the patrimonial benefits of the marriage. That discretion may be exercised in favour of either of the spouses and may relate to the whole or only a portion of the patrimonial benefits. Moreover, the Court is enjoined to have regard to various factors, specified in the said section, in the exercise of that discretion, to determine whether one party will in relation to the other be unduly benefited if the order for forfeiture is not made. (See Hahlo and Sinclair The Reform of the South African Law of Divorce at 51 - 53.) In my view it is therefore necessary that there be placed before the court evidence in respect of the factors mentioned in s 9 (1) and also, in order to establish properly whether there is undue benefit warranting the making of an order, **evidence of the nature and value of the benefits in respect whereof a forfeiture is sought. It follows that a party making a claim of this nature should plead the necessary facts to support that claim and formulate a proper prayer in the pleadings to define the nature of the relief sought.***

In the present case, no doubt because of the approach that a general order for forfeiture was claimable, the pleadings were not formulated along the lines indicated above. That defect might have been cured had the issues been canvassed fully at the trial. However, although there is some evidence to indicate that the appellant worked during the subsistence of the marriage and gave her salary to the respondent, and that she borrowed money from her brother to assist in the building of the matrimonial home of the parties, the evidence (assuming that it is relevant in the determination of the 'patrimonial benefits' of the marriage) is in my view quite insufficient to enable the court to exercise its discretion in accordance with the principles stated in s 9(1) of Act 70 of 1979, or to make an order specifying the nature and extent of the patrimonial benefits, if any, which are to be forfeited by the respondent in favour of the appellant."

[14] In the unreported judgment of **P.P v P.P**⁶ was held that:-

*"But even were one to accept that the counterclaim vaguely makes out a claim for forfeiture, the defendant's onus does not stop there. **To demonstrate that the plaintiff will benefit, she must set out the particularity of that benefit and, moreover, the evidence must support it....** In accordance with the principles laid down above, it is thus necessary for the defendant to plead and prove the nature and value of the benefit sought to be forfeited in her favour so that the court can decide whether or not the plaintiff would be benefitted - she failed to do so. And given this failure, this court cannot move to the second leg of the evaluation, i.e whether or not any benefit would be undue."*

DISCUSSION

[15] In forfeiture claims a court should follow a two-step approach. The first step is to ascertain what the nature and extent of the benefit sought to be forfeited is. The second step is to ascertain whether that benefit is undue to the other party, taking

⁶ (067730/24) [2025] ZAGPPHC 900 (13 August 2025).

into account a) the duration of the marriage, b) the reasons for the breakdown of the marriage c) misconduct on the part of the party against whom the order is sought; and d) in any factor that the court deems appropriate.

[16] Before a court can determine whether a benefit is undue, it must have sufficient evidence before it as to its nature and extent. The nature and extent of a benefit basically means that the benefit must be identified, its fundamental characteristics described and its scope explained.

[17] Insofar as the nature and extent of the benefits are concerned, all the appellant pleaded in its counterclaim was that: -

"Having regard to the duration of the parties' marriage, the circumstances leading to the breakdown and the substantial misconduct of the plaintiff as set out herein above, the plaintiff will be unduly benefited, and the defendant will suffer an injustice should an order for division (including the defendant's pension fund interests) of the joint estate. The defendant seeks an order that the plaintiff forfeits all the benefits arising from a marriage in community of property with the defendant, alternatively such portion as the Honourable Court may deem fit, in favour of the defendant."

[18] The purpose of pleadings is to create certainty between the parties as well as for the court that must adjudicate the dispute. Whilst section 9 (1) of the Divorce Act 70 of 1979 creates the boundaries for forfeiture claims; the pleadings are the self-created boundaries set by the parties insofar as the specifics of their forfeiture case are concerned.

[19] The claim for forfeiture, in my view, has not been properly pleaded in terms of Rule 6 (8) read together with Section 9 (1) of the Divorce Act 70 of 1979. The appellants seek a blanket forfeiture without pleading the nature and extent of the benefits that the respondent stands to forfeit. The appellant ought to have at the very least, listed all the assets within the joint estate that were subject to forfeiture and their corresponding values.

[20] As with the *Koza*⁷ judgment, the respondent had grounds to file an exception to the counterclaim, however for whatever reason, did not do so. Had the respondent filed an exception to the counterclaim, he would likely have succeeded, and the entire course of the litigation would have been different. However, the respondent did not file an exception, and the question becomes whether failure to plead properly has been cured by the evidence that was led during the trial.⁸

[21] In this matter during the trial proceedings, great emphasis was placed on whether the matrimonial benefits would be undue having regard to the reasons for the breakdown of the marriage and the respondent's alleged misconduct. The evidence was very sparse regarding the actual benefits of the joint estate that the appellant seeks to have forfeited. Save for some furniture, the only assets within the joint estate are an immovable property and pension fund.

The immovable property

[22] The following evidence was led during the appellant's cross examination in respect of the immovable property: -

Mr. Maluadzi: "You were asked when did you ... when did you establish the, the home? When was your home established?"

Ms. S[...]: The stand was bought for us and there was a "rondawel" and a one room house.

Mr. Maluadzi: Who bought the house?

Court: Just a minute, when was that Ma'am, when was the stand with the one roomed house and the "rondawel" bought for you?

Ms. S[...]: It was during December 1986.

Court: The one roomed house and the rondawel, have already been erected on the stand when it was brought in December 1986?

Ms. S[...]: Yes, it was other people's house.

Court: Yes, that is what the witness had attested to her in her testimony in chief

⁷ *Koza v Koza* 1982 (3) SA 462 (TPD).

⁸ *Koza v Koza* 1982 (3) SA 462 (TPD).

Mr. Mulaudzi: Who bought you the house Ma'am?

Ms. S[...]: It was bought by my mother-in-law, and it was under the names of my husband.

Mr. Mulaudzi: In whose name is the said ...is the said stand today?

Ms. S[...]: It is in my names... the stand is under my names.

Mr. Mulaudzi: Who changed the names?

Ms. S[...]: After the Plaintiff has burnt the house and left, I went to the chief Tony Mpepo and explained my story as I was in need of the springbok.

Court: Just for clarity sake what is the Springbok?

Ms. S[...]: It was for the PTO Your Worship, permission to occupy.

Mr. Mulaudzi: Ma'am, I put it to you that the stand was not brought to you by the plaintiff's mother, however it was actually the plaintiff that bought the stand, hence it was in his name.

Ms. S[...]: I dispute that.

Mr. Mulaudzi: I also put it to you that for ... I also put it to you that the said stand is still in the plaintiff's name.

Ms. S[...]: I dispute that because the one who bought the stand was myself, together with my mother-in-law, my husband was in Gauteng. When he came back, he found me staying in that new stand and he was told ... and he...on his arrival he arrived at his parents' homestead. He was told that your wife is at the new stand there.

Ms. S[...]: The reason why I am saying that the stand it is in my names, it is because after I have visited or I went to the chief, they told me to wait for a period of five years, and after this five years if my husband would not, would not come back, the I should go back to them, so that they may be able to arrange a PTO for me, permission to occupy, which I, I do have at the moment. It is just unfortunate that today I forgot it, but if the court wants or they want it, I can send my child to go and take it."

[23] From this exchange it can be gathered that the parties lived on a stand, however after the dwelling on the stand was burnt down in a fire, the Chief of the area allocated a new stand to the appellant, and she was given permission to occupy it.

[24] There is no evidence to suggest that the parties own this land. It can be inferred from the reference to the "Chief", that the immovable property is tribal land, in which case neither the parties can be registered titleholders. The appellant seems to only have permission to occupy the property. The right to occupy a property, or permission to occupy as the appellant puts it, is a benefit that can be forfeited.⁹ The appellant has, however, not given evidence on the terms of the agreement that was entered into between her and the Chief. To overcome the first leg of the forfeiture hurdle, the appellant would have to have a) specifically identified the benefit (i.e. description of the property); b) set out the terms of the agreement entered into between her and the Chief, pertaining to the conditions on which she is entitled to occupy the property; and c) to what extent the respondent has a right to occupy the property having regard to the conditions of the occupation. In absence of this evidence, the appellant has not proven that the "*permission to occupy*" is a benefit within the context of section 9 (1) of the Divorce Act 70 of 1979.

The pension fund

[25] The respondent does not have a pension fund, however the appellant does. The only evidence in relation to the ***nature and extent*** of the appellant's pension fund can be found in the appellant's examination in-chief, and a small reference to it in her cross-examination. The evidence was: -

Mr. Maleka:	Are you a member of any pension fund?
Ms. S[...]:	Yes. GEPP.
Mr. Maleka:	Which is Government Employees Pension Fund?
Ms. S[...]:	Yes.
Ms. S[...]:	I am supposed to go on pension with my children having not completed their schools and I know I would not come out with money to an amount of R 1 million."

⁹ *Persad v Persad* 1989 (4) SA 685 (D).

[26] Save to state that the appellant's pension fund may be less than one million rand, no evidence is led on the value of the fund. It is not clear how she made this calculation, whether it is before or after-tax deductions, or before or after she divided it with the respondent.

[27] This is not sufficient evidence to satisfy the first part of the enquiry. The appellant ought to have a) specifically identified the fund and the fact that it is a registered pension fund in terms of the Pension Fund Act, 24 of 1956; b) the value of the pension fund; and c) the rules of the pension fund in terms of Section 13 the Pension Fund Act, 24 of 1956, insofar as it may be relevant. In absence of this evidence, the appellant has not proven the nature and extent of the pension interest as a benefit. This is not difficult evidence to lead and there is no explanation as to why it was not led. The appellant simply had to discover a pension fund statement and the fund rules, and lead the necessary oral evidence thereon

[28] As with the immovable property and the pension fund, insufficient evidence was led in respect of the household furniture that was in the appellant and respondent's possession at the time of hearing.

COURT A QOU

[29] The learned Magistrate Kellerman stated in her written reasons that: -

"It firstly had to be established that the party against whom the order for forfeiture is sought would in fact benefit the if the order were not made. This could only be done if the nature and ambit of the benefit were proved. The court indicated that the forfeiture of patrimonial benefits will become operative if there are in fact patrimonial benefits of the marriage in existence at the time of the action for divorce. Through the testimony of both the plaintiff and the defendant it was clear that there were patrimonial benefits, to wit the house, the pension fund, as well as movable properties at the house.

[30] The learned magistrate was partially correct in this finding. She was correct in that she identified the two different legs of enquiry and that the first leg required "the

nature and ambit of the benefit" had to be proven. The learned Magistrate, however, erred in the application of that first leg.

[31] The learned Magistrate incorrectly considered the respondent's contribution to the joint estate under the first leg of the enquiry. She stated in her judgment that: -

"In conclusion the evidence of both the plaintiff and the defendant shows that the plaintiff had made his contribution to the joint estate. If the defendant wants the forfeiture, she should therefore exclude the contribution made by the plaintiff. Without the contribution of the plaintiff quantified the forfeiture of the benefit as prayed for by the defendant will be difficult to grant as the Court will not be able to know whether there is any excess which the defendant had contributed more than the plaintiff and vice versa."

[32] The meaning of "*nature, and extent of the benefit*", means the benefit that the appellant wants the respondent to forfeit, it has nothing to do with the nature and extent of the respondent's contributions to the joint estate. The quantification of the respondent's contribution to the estate should only have been considered under the second part of the enquiry, i.e. whether the benefit received by the respondent would be undue.

[33] Despite the incorrect application of the first leg of the enquiry, it would not have changed the result.

CONCLUDING REMARKS

[34] In accordance with ***P.P v P.P***, having regard to the lack of clear evidence on the nature and extent of the benefits of the marriage in community of property, the court must not venture into the second part of the enquiry.

ORDER

[35] The following order is accordingly made: -

[35.1] The appeal is dismissed.

[35.2] The Appellant is to 'pay the Respondent's taxable party and party costs on Scale B.

E.J BURNETT
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

I agree,

G.C MULLER
JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

APPEARANCES

FOR THE APPELLANT:- ADV. KEKETSO MALEKA
INSTRUCTED BY:- LESHILO INC. ATTORNEYS

FOR THE RESPONDENT:- NO APPEARANCE

DATE OF HEARING:- 15 NOVEMBER 2025

DATE OF JUDGMENT:- 18 FEBRUARY 2026