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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2024-035346

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: NO

DATE 15 JUNE 2026

SIGNATURE

In the matter between:

**M[...] A[...] M[...]
(ID NO: 6[...])**

Plaintiff

And

**D[...] L[...] M[...]
(ID NO: 6[...])**

Defendant

Heard on: 05 – 07 May 2026

Delivered on: 15 June 2026

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is electronically circulated to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **15 June 2026**.

JUDGMENT

KEKANA AJ

Introduction

[1] Before me is an opposed divorce action. The parties got married on 28 November 1998 in community of property. The marriage between the parties still subsists. The existence of the marriage and the matrimonial property regime is not in dispute.

[2] Two children were born out of the marriage, K[...] and M[...] M[...], who have all reached the age of majority. Both parties agree that the marriage has irretrievably broken down and has reached a stage of disintegration. There is no reasonable prospect of the restoration of a normal relationship. Both parties agree on the decree of divorce.

[3] The Plaintiff's case is that the Defendant must forfeit all patrimonial benefits, with each party keeping his/her pension funds and each party keeping movables in his/her possession.

Issues for determination

[4] Whether the marriage has broken down irretrievably, with no restoration of a normal relationship. The crisp issue is whether the Plaintiff has made out a case that the Defendants forfeit patrimonial benefits in terms of section 9(1) of the Divorce Act, Act 70 of 1979 (the Act).

Evidence

[5] Mr M[...] A[...] M[...], the Plaintiff, testified that he and the Defendant have not lived together as husband and wife for more than two years. All attempts to restore the marriage have failed.

[6] He further testified that the Defendant should forfeit all the patrimonial benefits due to the substantial misconduct on her part, as she is the one who caused the breakdown of the marriage. He also testified that the Defendant engaged in extramarital affairs, as a result of which she contracted a certain disease. He further testified that he only became aware of this in 2019, when the Defendant disclosed it to him following a blood test. A medical proof was presented in support of this allegation.

[7] He went on to say that the Defendant received her pension fund, which she did not share with him, nor did the Defendant notify him after she received her pension. He only saw a bank notification message on the Defendant's phone. He further testified that the Defendant used and enjoyed her pension money unilaterally for her sole benefit. The Defendant did not contribute any of her pension money to the joint estate.

[8] M[...] M[...], the son of the couple, testified on behalf of the Plaintiff that he resides with both his parents and his brother, and that all four of them are living in the same house and that no other person or woman lives with them. He went on to say that the Plaintiff invites friends into the house and uses the groceries that are meant for the family to entertain her friends, while she does not contribute to groceries and for that reason, he decided to lock the fridge.

[9] The Defendant, L[...] M[...], testified that she has not been living with the Plaintiff as husband and wife, with the two living in separate rooms. She testified that the Plaintiff has brought another woman to the house, and it is this woman who is causing the Plaintiff to behave in the manner he is behaving, including treating her badly. She also testified that the Plaintiff has not been living with them but is living

with another woman. She went on to say that upon receipt of her pension money, she built outside rooms which have a toilet and shower, and that because of the unscrupulous behaviour of Plaintiff, including his infidelity, she could not finish those rooms.

[10] She went to testify that she bought tins of paint to repaint the driveway. In both instances, under evidence in chief and cross-examination, the witness failed to put any evidence before the court that she shared her pension with the Plaintiff.

[11] There was some dishonesty with the witness (L[...] M[...]) in that it was later established that no such rooms were built. This cannot be a misunderstanding, as claimed by the witness, in that she went at length with the structural design of the rooms which are not even in existence. This affects the reliability of this witness's testimony.

Legal principle and analysis

[12] Section 9(1) of the Divorce Act states that:

“When a decree of divorce is granted on the ground of irretrievable breakdown of the marriage the court may make an order that the patrimonial benefit 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 of forfeiture is not made, the other party will in relation to the other be unduly benefited.”

[13] The subservient enquiry is therefore whether the extramarital affair by the Defendant is so serious as to constitute substantial misconduct as required by the provisions of section 9(1) of the Act.

[14] Much as I agree with the submission made by the Defendant and the authority relied on, **Kritzinger v Kritzinger**¹ that:

“...even if the appellant’s adultery was the immediate cause of the marriage coming to an end, the respondent was by no means free from blame. Human experience suggests that, generally speaking, where there is a breakdown in marriage, the conduct of both parties has contributed to it”.

[15] I, however, disagree with the Defendant that this is an ordinary case of adultery. The Plaintiff discovered that the Defendant committed adultery, secondly, that she contracted a disease, thirdly, that the Plaintiff had been secretly living with this disease since 2004, and he only came to know about it in 2019. The Plaintiff also had to discover that their son, who was born in 2004, has been living with the same disease which he contracted since conception. The Plaintiff only became aware that his son had been living with the disease when the son got sick.

[16] I am of the view that this is not an ordinary case of adultery, as stated in **Kritzinger**, it goes beyond a mere act of adultery. This is a case where the Defendant not only committed adultery but was also reckless in that she failed to protect the health of the Plaintiff and that of her family as a whole. The Plaintiff crossed it when she engaged not only in an adulterous affair but also was so reckless as to risk the health of the Plaintiff and that of their son in contracting the disease. Not only did she contract the disease, but continued with her life as normal without alerting the Plaintiff of her status, while she was aware thereof.

[17] This, to me, was a unilateral act on the part of the Plaintiff. This unilateral act and the breach of trust were the proximate cause of the marriage breakdown, and I do not see how any blame can be attributed to the Plaintiff. I conclude that this was the substantial misconduct on the part of the Defendant which led to the marriage breakdown. Furthermore, another case of breach of trust is when the Defendant received her pension fund money and decided not to notify the Plaintiff and

¹ 1989 SA 69 (A).

continued to enjoy the money alone without sharing it with the Plaintiff or making any contribution to the household.

[18] It is not correct, as contended by the Defendant, that the Plaintiff did not plead HIV; the Plaintiff, in his papers, mentions a disease, and refers to a medical report from Ampath as evidence of the referred disease. The Plaintiff may not have mentioned the said disease by its name, but the accompanying annexure, “the medical report,” clearly identifies the disease he is referring to. He went to the extent of highlighting the part that deals with HIV in yellow. To me, this is enough to demonstrate that HIV is the disease referred to.

[19] There is evidence of substantial misconduct on the part of the Defendant and that is enough for the Plaintiff to bring an application for forfeiture. What is needed is for the Plaintiff to prove, as stated in the case of **JW v SW**² that:

“the Defendant bears the onus of proving that the Plaintiff will be unduly benefitted if forfeiture is not granted. The Court can only order forfeiture if the factual evidence is led on the nature and extent of the undue benefit”.

[20] As regards an application for forfeiture as brought by the Plaintiff, one must consider the case of **Wijker v Wijker**³ where it was held that:

“a party seeking an order for forfeiture of benefits does not have to prove all three factors in section 9(1) cumulatively. The question to be asked by the Court is whether one party will be unduly benefitted if an order of forfeiture was not made. It held further that “substantial misconduct is one that is found to be so obvious and gross that it would be repugnant to justice to let the guilty spouse get away with the spoils of the marriage.”

[21] I make a distinction between the immovable, movables and pension funds between the couples. As regards the immovable and movable properties, I am of the view that the marriage relationship between the parties has been so long that it will

² 2011(1)SA 545.

³ 1993 (4) SA 720 (A) para (28).

be unfair for the Defendant, even though she committed an act regarded as being substantial misconduct, not to have a share in the immovables and movables.

[22] In *Engelbrecht v Engelbrecht*⁴, the court held that it could never have been the intention of the legislature that a wife, who had for 20 years assisted her husband faithfully, should, because of her adultery, forfeit the benefits of their marriage. This case was cited as an authority in support of the proposition that a spouse's misconduct does not automatically lead to forfeiture of benefits.

[23] The Plaintiff agrees that before 2019, the Defendant had been contributing to the marriage. This contribution cannot be ignored. The Defendant contributed more than twenty years of her life to this marriage, and her adultery, her misconduct, does not automatically lead to a complete forfeiture of benefits.

[24] The Plaintiff managed to place before this Court evidence that the Defendant withdrew her pension fund money, and she did not share even a cent with him. The Defendant did not even tell the Plaintiff that she received her pension money. Upon receipt of the money, she only bought a few tins of paint to be used in painting the driveway. The amount used for painting the driveway does not even make 3 per cent of the pensions she received.

[25] As regards pension money received and a spouse's claim to it, I am of the view that to the extent that the Defendant did not see it fit to tell the Plaintiff or to even notify him upon receipt thereof, she should conversely not have a claim to the Plaintiff's pension money. It is not a question of the amount, nor is it a question of having to set off that which the Plaintiff received with that which the Defendant received; to me, it is a question of fairness. A party that felt that the other spouse should not have a claim to her pension should also not have a claim to his spouse's pension money. This Court is convinced that the Defendant would "unduly benefit" if they received a share of the Plaintiff's pension fund, while they enjoyed their share without sharing same with the Plaintiff. The Defendant had already benefited at the

⁴ 1989 (1) SA 597 (C).

time when she received her pension money, which she unilaterally enjoyed without the Plaintiff.

[26] The pension money referred to above will include the lump sum and the annuity that the Plaintiff is receiving. This now brings me to the issue of the monthly allowance claimed by the Defendant. The fact that the Defendant has already benefited from her pension money alone has a ricochet effect on her claim, even on the monthly allowance she is claiming from the Plaintiff. The Defendant has lost any claim against any benefit or rights arising out of the pension money to which the Plaintiff is entitled to. In the case of **B M v S M**⁵ reference was made on the importance of establishing the factual basis for the undue benefit.

[27] The Defendant, by failing to notify the Plaintiff upon receipt of her pension money, deprived the Plaintiff of their statutory right to a share of the pension money, and this can only happen through a successful, court-ordered application for forfeiture, which was not attained in the present case. The Defendant's conduct warrants stripping of her right to share in the Plaintiff's pension. The unilateral use of her pension was "to the detriment of the joint estate" and constituted a breach of the partnership.

[28] The Plaintiff was able to state the amount of pension money he received, and evidence was adduced as to the amount received by the Defendant. Of importance in establishing undue benefit is the evidence that the Plaintiff did not benefit from the Defendant's pension. I'm satisfied that the Defendant, now seeking to benefit from the Plaintiff's pension money, will result in her benefiting unduly. It is for that reason that the Plaintiff was successful in laying the factual basis for the undue benefit.

[29] Much as I agree with the Defendant and the authority relied on that the value of the assets ought to be established at the time of the issuance of summons, it is my view that a distinction should be made between a case where the Plaintiff seeks a forfeiture order because he alleges that the other spouse has not contributed, and an instance where the Plaintiff relies on substantial misconduct as the basis for the forfeiture order. In the former, the value of assets is important, and as such, it must

⁵ (29933/2017) [2020] ZAGPHJC 91 (26 March 202) para 26.

be pleaded at the time of issuance of the summons, but in the latter, what ought to be pleaded at the time of the issuance of summons is substantial misconduct, value of assets comes subservient, if not pleaded at the time of the issuance of the summons, can be addressed by way of discovery.

Conclusion

[30] Having considered that both the Plaintiff and the Defendant agree that the marriage has irretrievably broken down and that all attempts to save the marriage have failed, I am convinced that the marriage should be dissolved.

[31] Having considered the substantial misconduct committed by the Defendant, this Court cannot just turn a blind eye to the contributions made by the Defendant during the duration of the marriage. While things started to be atrocious from 2019, contributions made by the Defendant for the period of twenty years cannot be ignored. Authority on this duration dictates that a forfeiture order may not be warranted. This court is not in favour of a complete forfeiture.

[32] My conclusion is that it will be disturbingly unfair for the Defendant who did not share her pension with the Plaintiff to claim a share in the Plaintiff's pension and any pension-related benefits. And it is for that reason that the Defendant should forfeit her claim in the pension and related benefits of the Plaintiff.

Order

[33] The following order is made:

1. The decree of divorce is granted.
2. The joint estate, excluding the parties' respective pension funds to be divided equally between the parties.
3. The Plaintiff succeeds partially in his application for forfeiture.

4. The Defendant to forfeit any claim on the Plaintiff's Pension funds, including forfeiture of any claim of monthly allowance on the monthly annuity received by the Plaintiff.

5. Each party to pay its own costs.

ND KEKANA
ACTING JUDGE OF THE HIGH COURT