

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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

CASE NO: 84950/2019

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

20 August 2026

Date

K. La M Manamela

In the matter between:

B[...] N[...] D[...]

Plaintiff

and

K[...] C[...] D[...] (BORN 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 20 August 2026.

JUDGMENT

Khashane Manamela, J

Introduction

[1] The plaintiff, Mr B[...] N[...] D[...], is married to the defendant, Ms K[...] C[...] D[...] (born M[...]) in community of property since 1998. Their marriage has reached a stage where they both agree that it has irretrievably broken down and disintegrated with no reasonable prospect of restoration of a normal marriage relationship between them. They both appreciate that divorce is inevitable, but they disagree on the patrimonial consequences of their marriage. The plaintiff seeks an equal division of the joint estate he shares with the defendant. This is a natural consequence of a marriage in community of property. The defendant, on the other hand, seeks that the plaintiff be ordered to forfeit the patrimonial benefits of marriage in community of property, as envisaged in section 9(1)¹ of the Divorce Act 70 of 1979. The main reasons cited to support the forfeiture claim are the plaintiff's extramarital relationships over the years and his dissipation of assets. The plaintiff denies the allegations, but they will form a significant part of the determination of forfeiture, below. The parties also agree that the defendant will be the primary caregiver of their minor child, with the plaintiff allowed reasonable rights as to contact. But, there is no unanimity on maintenance of the minor child.

[2] The parties, married initially by way of customary law during 1998, concluded a civil marriage in community of property on 24 February 1999. Evidently, the marriage had endured for more than twenty-seven years. But, the parties have lived separately since May

¹ Par [24] below on the reading of s 9(1) of the Divorce Act.

2019. The plaintiff says that the defendant chased him out of their marital home, but according to the defendant the plaintiff left of his own accord.

[3] The plaintiff caused summons to be issued against the defendant in November 2019 in terms of which he, primarily, seeks divorce and division of the joint estate. He also sought that the primary care of the minor child be awarded to him and payment of maintenance towards the minor child by the defendant. The parties adopted a minor child (confidentially referred to as TND, the minor child or the child), born during 2009. The minor child is currently under the primary care of the defendant. The plaintiff alleged that the defendant has denied him any contact with the minor child. This was denied by the defendant. But at the commencement of the trial the plaintiff conceded that the defendant should be the minor child's primary caregiver and with him granted reasonable contact rights in respect of the child. The only unresolved issue concerning the child is maintenance.

[4] The matter was enrolled for trial and came before me on 26 November 2025, when Mr DJ Sibuyi appeared for the plaintiff and Ms KJ Matabane appeared for the defendant. The trial continued on 27 and 28 November 2025. On the latter date, the part-heard matter was postponed *sine die* (without (fixing) a day (for a further meeting or hearing))² for closing argument. Closing argument by counsel was by way of written submissions. The last of the submissions was filed on 14 February 2026, when this judgment is deemed to have been reserved.

[5] Although, I am grateful to counsel for the detailed material filed by way of closing argument or heads of argument, I think in some respects the material furnished was unnecessarily duplicated and stretched. Hundreds of pages were filed in this regard. Counsel for the plaintiff filed what he tagged heads of argument, supplementary heads of argument

² VG Hiemstra and HL Gonin, *Trilingual Legal Dictionary* (3rd edn, Juta 1992).

and even replying heads of argument often repeating and remodelling the same facts. Most part of the material filed is argumentative and even represents a contest of virtue between counsel, perhaps less real than imaginary. Counsel strongly criticised each other on the material filed. For example, counsel for the defendant submits that the heads of argument filed by her counterpart for the plaintiff contain several material inconsistencies, inaccuracies, and misrepresentations. She felt strongly that same ought to be brought to the attention of the Court. This is categorically denied by counsel for the plaintiff. I take the accusations and counter-accusations exchanged by counsel very seriously. For the Court should confidently rely on the material filed by counsel – as its officers – especially by way of written submissions. Amongst the tangible benefits that could be yielded by reliable submissions by counsel is expediency. The Court would ordinarily utilise the submissions as reliable pointers and compass to navigate the evidentiary material in the matter and the authorities cited. The by-product of all these is an efficient and speedy outcome. But I will let nothing turn on all these, save to state that I had to tread with extra care when considering the submissions by counsel under the circumstances. These contributed to the regrettable delay in the delivery of this judgment.

Some aspects in the background of this matter

[6] The parties, as stated above, were married in 1998. At that time they resided together in the Mbombela (Nelspruit) area of Mpumalanga. But, when the summons was issued they lived separately in the environ of Pretoria.

[7] In the early to mid-years of the marriage between the parties, the plaintiff worked as a teacher in schools around Mpumalanga. He quit teaching to work for the Mpumalanga provincial government and, thereafter, for a district municipality. The plaintiff says that he is currently unemployed, without a stable source of income and struggles to defray his living

costs. He, further, says that he is dependent on loans and assistance from friends including for the rental of a flat he occupies, situated in Gezina, Pretoria. The flat costs him around R7 500 in monthly rental. He also complained that he is without access to bank accounts or assets capable of generating an income in the joint estate. In fact, the defendant has since around 2017 excluded him or shut him out from the financial affairs of the estate, he adds, despite the divorce proceedings still on-going. On the other hand, the defendant blames the plaintiff for the deterioration of her financial position. She has been materially prejudiced by the plaintiff's continuous and vexatious litigation. This culminated in the freezing of her bank accounts. She has been left without access to income and unable to maintain herself, the minor child, and the plaintiff's other children. This is denied by the plaintiff. He points out to his success or favourable court outcomes in the material litigation to dismiss the defendant's accusation that he has pursued vexatious litigation.

[8] The dispute in this matter being heavily patrimonial in nature, it is vital to state that during the course of the parties' marriage immovable properties were acquired, including the following:

[8.1] A building situated in Granite Street, Nelspruit called Sikhulile Guesthouse. This structure was converted into student accommodation of 22 rooms yielding a monthly rental income of R4 000 per student.

[8.2] A building situated at 1[...] A[...] V[...] B[...] Street, referred to as the White River office park. The plaintiff says that the property was leased between 2017 and 2025 to the provincial government with initial monthly rental of around R75 000. This was disputed by the defendant when she testified. She told the Court that the property was not leased directly to the government but to a third party, named Mr Ronnie. The latter person, in turn, leased the property to the government and received the rental.

[8.3] Tekwane North farm. This is an agricultural property which is said to be generating rental income or to have that capability. The plaintiff accuses the defendant of failing to disclose this property in her financial disclosure documents and discovery affidavit.

[8.4] Erf 6[...] Drum Rock vacant stand. This piece of property is said to have been sold by the plaintiff for around R550 000 in June 2006. The defendant says that the proceeds of sale for the property vanished without the plaintiff accounting to her thereon. In other words, the plaintiff did not consult or inform her, she states.

[8.5] A two-bedroom apartment situated at Eugene Marais Street in Mbombela. The flat is utilised as student accommodation deriving monthly rental. The plaintiff says this money is used towards the minor child's boarding school expenses. Evidently, there is a dispute as to the quantum of the rental amount received on a monthly basis for the property. The defendant also pays monthly levies due to the body corporate; rates and taxes to the local authority, and a mortgage bond.

[9] Other assets of the joint estate include several motor vehicles. The defendant alleges that some of the vehicles were either sold or disposed of in other manners by the plaintiff, or they disappeared at his instance. This is disputed by the plaintiff. But, he admitted having temporarily lent some of the vehicles to third parties, such as a BMW X6 used to secure a loan to pay for basic living expenses. This was around 2017 when he had been excluded from accessing income of the joint estate. He also utilised part of the loan towards mortgage bond repayments for properties in the joint estate. According to the plaintiff it was the defendant who disposed of some of the vehicles.

[10] The defendant was a deputy minister in the national government. She appears to have occupied other positions in government before. She, therefore, held interests in the Public

Office Bearers Pension Fund (‘POBPF’). The POBPF is administered by Alexander Forbes. According to the defendant upon retirement by operation of age and not through personal election, Alexandra Forbes transferred or converted her pension benefits into a life annuity. She says that this process is mandatory and does not afford the retiring member a discretion to elect a cash withdrawal or alternative transfer of the pension benefits. She rejects the plaintiff’s criticism that she unilaterally withdrew or transferred her pension benefits after the launch of this divorce action to place same out of his reach. The divorce was launched in 2019 and she only reached compulsory retirement age in early 2025, she points out. The plaintiff also complained about the non-disclosure of the amount or quantum for the pension benefits. According to the defendant only 33% of her pension benefits of around R36 million was cashed from the POBBF. She used the funds towards the mortgage bonds over the immovable properties in the joint estate. The transfer or encashment of her pension benefits led the plaintiff to approach the urgent court in November 2025 to compel Alexander Forbes to disclose the amount of the pension benefits. This was literally a few days before the trial. Be that as it may it is the plaintiff’s case that the automatic transfer or conversion of the pension interests into life annuity does not remove same from the parties’ community of property.³ And that the 33% withdrawal and the timing thereof render the withdrawal a dissipation of an asset of the joint estate by the defendant.

[11] Another aspect which gained prominence in the trial and closing argument is the commission of adultery. In the pleadings, both parties accused each other of extramarital affairs. But in the advancement of her case, particularly her forfeiture claim, the defendant says that the plaintiff dissipated monies and other resources of the joint estate by financially supporting his multitude of concubines during the course of the marriage. The plaintiff denies the allegations and counters that it was the defendant who was involved in an extra-marital

³ Section 7(7) of the Divorce Act 70 of 1979. See *M v M* (022/2022) [2023] ZASCA 75 (26 May 2023) [5], [26].

affair with some young man who was employed at their matrimonial home. More on this below.

[12] As stated above, the plaintiff sought in the summons that the defendant be ordered to pay maintenance for the minor child in addition to seeking the primary care and residence of the child. He had since abandoned the latter part of the relief in favour of the defendant. The defendant did include in her amended counterclaim an order for the plaintiff to contribute towards the maintenance of the minor children according to his means and the children's needs. But no evidence was led at the trial on this aspect. Counsel for the plaintiff submitted that the issue of maintenance of the minor child be referred to the maintenance court for adjudication. And, that such an order may only be crafted upon proper financial disclosure by both parties and a layout of the child's proven needs. I agree. I will deal with this further towards the end.

Plaintiff's case (summarised)

[13] The plaintiff caused summons to be issued against the defendant in November 2019. From the relief originally sought in the particulars of claim the plaintiff now only seeks: (a) decree of divorce; (b) division of the joint estate; (c) reasonable contact with the minor child, and (d) costs of suit. Regarding the division of the joint estate, the plaintiff sought that a liquidator or receiver be appointed - with specified powers and duties - for purposes of the division.

[14] It is common cause between the parties that a decree of divorce should be granted by the Court. The parties agree that the marriage between them has irretrievably broken down, but they differ considerably as to the reasons for the breakdown. According to the plaintiff: (a) the parties have drifted apart; (b) they both had extramarital relationships during the marriage, and (c) he was subjected to emotional, physical and financial abuse.

[15] The plaintiff, also, sought the equal division of the joint estate between the parties pursuant to their marriage in community of property. I dealt with the major assets in the joint estate above, including the plaintiff's pension interests. The plaintiff seeks that the pension funds holding the defendant's interests endorse their records to reflect that he is entitled to 50% thereof. This, as stated above, was met with a forfeiture claim by the defendant, which is vigorously disputed by the plaintiff.

Defendant's case (summarised)

[16] The main feature of the defendant's case is her forfeiture counterclaim. She admits that her marriage to the plaintiff has irretrievably broken down. But, she denied the allegations cited by the plaintiff as the cause of the breakdown, particularly that she had an extramarital relationship during the marriage. It is the greater part of her case that the plaintiff is the one who had numerous extramarital relationships and even cohabited with one of these concubines for a lengthy period. In fact, he left the matrimonial home to go cohabit with the latter concubine.

[17] Advancing her case against the equal division of the joint estate, the defendant denied that the plaintiff is entitled to 50% of her pension interests. This, she pleaded, would render the plaintiff unjustly enriched. An order for his forfeiture of the patrimonial benefits of the marriage should be made for the following reasons: (a) the defendant made a sizable contribution towards the acquisition of most of the assets; (b) the plaintiff made a minimal contribution towards the acquisition of the assets; (c) the breakdown of the marriage was due to the plaintiff's substantial misconduct, particularly in the form of adultery; (d) the plaintiff committed an act amounting to financial misconduct in that, he: (i) took money from the joint estate and used it in purchasing assets for the benefit of his concubines; (ii) took financial loans which were utilised for the benefit of his concubines; (iii) alienated or pledged -

without the defendant's consent - motor vehicles and other assets of the joint estate, as collateral security for financial loans, for his own benefit; (iv) sold cows and motor vehicles of the joint estate for own benefit; (v) used proceeds from the disposal of his interests in two companies for his exclusive benefit; (vi) used exclusively for his own benefit pension money from his resignation from government; (vii) used funds from the joint estate for a traditional wedding of a woman in Pongola, notwithstanding that his marriage to the defendant still subsists; (viii) bought a BMW motor vehicle for a third party using funds from the joint estate; (ix) cashed up an investment policy and used the proceeds for his own benefit, despite the defendant being the one paying monthly premiums, and (x) left the responsibilities for the maintenance, well-being and educational expenses of his own children and those of his elder brothers to the defendant.

[18] The defendant's case also includes that the plaintiff used the parties' flat or apartment in Nelspruit to provide accommodation for his girlfriend. This was done whilst the defendant remained liable for payment of levies, and rates and taxes for the same property. His extramarital relationships numbered at least 40 during the course of the marriage. He even had a cellphone which he concealed from the defendant, which he used to communicate with his girlfriends. The defendant, also, told the Court that the plaintiff confessed his infidelity to her. In 2019, the plaintiff implored the defendant in terms of a letter he wrote to her that they change their marriage to a polygamous one. He, also, concealed the number of children he had fathered in other prior relationships or marriages. Overall, the defendant says that throughout their marriage the plaintiff abused her emotionally, psychologically and financially.

[19] As already stated, the plaintiff conceded to the defendant regarding the minor child's primary caregiving with him to be allowed rights as to reasonable contact with the child. And I have also stated that I share the plaintiff's view that the issue of maintenance be

referred to the maintenance court for a proper financial enquiry as to the child's proven needs and the parties' respective means to meet those needs.

Issues requiring determination

[20] From what appears above, it is clear that what essentially requires determination in this matter is the following: (a) decree of divorce; (b) division of the joint estate; (c) forfeiture of patrimonial benefits, and (d) cost of the action.

[21] Ancillary to the issue of forfeiture is the following: (i) duration of the marriage, (ii) circumstances which gave rise to the break-down of the marriage; (iii) substantial misconduct by either of the parties; (iv) whether the plaintiff in relation to the defendant would be unduly benefited without an order for forfeiture, and (v) whether, if forfeiture is ordered, it should be wholly or partially. These ancillary issues, actually, are the statutory prescripts arising from the provisions of section 9(1) of the Divorce Act.

[22] And during the discussion of these identified issues, further issues may arise. Some of the issues will be discussed together due to being interlinked. But, I first turn my attention to the applicable legal principles.

Applicable legal principles

[23] The primary legal principles in this matter relate to the concept of forfeiture. It is trite that in a marriage in community of property the assets and liabilities in the joint estate ought to be divided equally between the spouses, unless an order in terms of section 9 of the Divorce Act is granted by the court for forfeiture of the patrimonial benefits of such marriage.

[24] Section 9(1) of the Divorce Act, in terms of which the defendant in this matter claims forfeiture, provides as follows:

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.

[25] A court - seized with the determination of a forfeiture claim - ought to probe whether absent a forfeiture order the one party would be unduly benefitted when consideration is given to the factors mentioned in section 9(1). The material factors are: (a) duration of the marriage; (b) any substantial misconduct on the part of any of the parties, and (c) circumstances which caused the break-up of the marriage.⁴ It ought to be borne in mind that this list is exhaustive.⁵ There is no other factor to be considered by the Court beyond those in this provision.⁶

[26] The word ‘undue’ (in the phrase ‘unduly benefitted’ in section 9(1)) was defined in *KT v MR*⁷ by Kollapen J (before his elevation from this Division) using a dictionary to mean ‘unwarranted or inappropriate because excessive or disproportionate’.⁸

[27] In *Moodley v Moodley*⁹ the court relied on the durable explanation of the concept of ‘benefits’ given almost a century ago by Schreiner J (as he then was) in *Smith v Smith*¹⁰ as follows:

It is of course clear that what the defendant forfeits is not his share of the common property, but only the pecuniary benefit that he would otherwise have derived from the marriage . . . [An] order for forfeiture . . . is really an order for division plus an order that the defendant is not to share in any excess that the plaintiff may have contributed over the contributions of the defendant.

⁴ *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) (‘*Botha v Botha*’)[8].

⁵ *Botha v Botha* [8], [17]; *Moodley v Moodley* [9]; *M v M* [27]-[28].

⁶ 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. See also *Botha v Botha* [8], [17]; *Moodley v Moodley* [9].

⁷ *KT v MR* 2017 (1) SA 97 (GP).

⁸ *KT v MR* 2017 (1) SA 97 (GP) [20.17], utilising the South African Concise Oxford Dictionary (2005 ed).

⁹ *Moodley v Moodley* (7241/2002) [2008] ZAKZHC 48 (14 July 2008) [10].

¹⁰ *Smith v Smith* 1937 WLD 126 at 127-128.

[28] The court in *Moodley* went further to hold that:

A “benefit” as envisaged in section 9 of the Divorce Act can take various forms, inter alia “contributions” made by one party towards the joint estate during the existence of the marriage. The court considers the salaries earned by the spouses, what they owned at the time of the marriage, what they received as inheritances, legacies and donations, and so on.¹¹

[29] It was also held in *Moodley* that it was of the utmost importance that the claimant, in respect of a claim for forfeiture, establish some kind of contribution that exceeds the contribution of the other party towards the joint estate.¹²

[30] The Appellate Division (the predecessor to the Supreme Court of Appeal) in *Wijker v Wijker*¹³ has provided an aidful approach to the issue of forfeiture premised on section 9 as follows:

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.¹⁴

[31] Further in *Wijker v Wijker* the Appellate Division 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 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.¹⁵

¹¹ *Moodley v Moodley* [10].

¹² *Moodley v Moodley* [11].

¹³ *Wijker v Wijker* 1993 (4) SA 720 (A).

¹⁴ *Wijker v Wijker* at 727D-F; *M v M* [28], [33]-[34].

¹⁵ *Wijker v Wijker* at 731C-G; *Botha v Botha* [7]-[8]; *M v M* [28].

[32] In *Botha v Botha* the Supreme Court of Appeal ('the SCA') dealt with appeal concerning whether the trial court correctly ordered partial forfeiture order against the appellant who had been married to the respondent for ten years. The partial forfeiture was ordered in respect of the proceeds of insurance policies. The SCA found that the trial judge did not correctly apply the approach laid down in *Wijker* case and had misdirected himself by exercising his value judgment beyond the confines of the triad of factors set out in section 9(1).¹⁶

[33] In another decision of the SCA in *M v M*¹⁷ the court dealt with an appeal against the dismissal of one party's counterclaim for a partial forfeiture relating to the other party's pension benefits and ordered equal division of the joint estate. The appellant had failed before the trial court and full court of the Limpopo Division, Polokwane. The SCA reversed the outcome and ordered partial forfeiture as it found that the appellant had satisfied the requirements of section 9(1) in respect of the applicant's pension interests. It also found that whilst the appellant made a direct financial contribution to the joint estate the respondent deployed almost all of his financial resources towards benefitting his concubine with whom he was in long-existing relationship conducted in 'a brazen and humiliating fashion' to the appellant.¹⁸

[34] The above are the applicable legal principles and authorities highlighted for purposes of the discussion of the issues requiring determination by the Court. I turn to the latter issues in a moment. But these principles are definitely not the only principles and authorities as would become clear in the discussion below.

Decree of divorce and division of the joint estate

¹⁶ *Botha v Botha* [17].

¹⁷ *M v M* (022/2022) [2023] ZASCA 75 (26 May 2023).

¹⁸ *M v M* [40].

[35] It is common cause, as already stated, that a decree of divorce should be granted as the marriage relationship between the parties has disintegrated with no reasonable prospect of restoration of a normal marriage relationship. I am satisfied that the evidence before the Court confirms this common understanding of the parties. Consequently, I will grant a decree of divorce to dissolve the marriage between the parties.

[36] The central point of contention between the parties is the division of the joint estate. The plaintiff seeks equal division whilst the defendant seeks forfeiture of patrimonial benefits by the plaintiff. I commence the discussion with the latter issue, as its disposal may be dispositive of the former.

Forfeiture of the benefits and division of the joint estate

General

[37] The defendant's counterclaim is that the plaintiff wholly forfeits the patrimonial benefits of a marriage in community of property, as envisaged by section 9(1).¹⁹ The forfeiture claim is disputed by the plaintiff.

[38] To order forfeiture of patrimonial benefits by a party, the Court ought to be satisfied that the absence of such an order would render the plaintiff to be unduly benefitted in relation to the defendant.²⁰ The determination is guided by three factors set out under section 9 as follows: (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.²¹ It is common cause that the defendant bears the onus of establishing these factors or the forfeiture claim, itself, as part of her counterclaim.

The plaintiff being unduly benefitted in relation to the defendant: a prologue

¹⁹ Par [24] above, for a reading of s 9(1) of the Divorce Act.

²⁰ *Wijker v Wijker* at 727D-F; *M v M* [28], [33]-[34].

²¹ *Ibid.*

[39] The determination in this regard is binary or two-legged. In the first part, it involves whether a party against whom a forfeiture order is sought will indeed be benefitted. This part of the determination is purely factual.²² Once it is established that the one party would be benefitted, the Court ought to determine whether such party would be unduly benefitted in relation to the other party without the granting of a forfeiture order.²³ This is the second part of the determination. It takes the form of a value judgment by the Court.

[40] Both the factual enquiry and value judgment are pegged upon the three statutory factors mentioned above (i.e. duration of the marriage; circumstances which led to the breakdown of the marriage, and substantial misconduct by either of the parties). I deem it necessary to discuss the evidence in this matter constituting the aforesaid triad of factors, before answering the question whether or not the plaintiff would be unduly benefitted without an order of forfeiture.

Duration of the marriage

[41] The first factor to consider is the duration of the marriage. As with the other factors, there is no statutory guidance as to the relevant considerations for this factor. This means that there is no statutory prescription of what constitutes a short or a long marriage when considering whether to grant or refuse a forfeiture claim.

[42] But the duration of a marriage remains a factor that ought to be evaluated - on the facts of a matter - in the determination of whether a forfeiture claim or order would be just. It is common cause that the parties in this matter have been married for over twenty-seven years since 1998. The parties have lived apart since May 2019, when the plaintiff left the marital home.

²² *Wijker v Wijker* at 727D-F. *Moodley v Moodley* [8].

²³ *Ibid.*

[43] It is also common cause that the marriage between the parties was of a long duration. The parties, though, differ on the significance of this factor for purposes of forfeiture.

[44] According to the defendant the duration factor should not be mechanically construed. For, whilst the marriage between the parties may have spanned more than twenty-seven years this was not accompanied by intertwined financial partnership, as borne by the evidence, but by the defendant being overwhelmingly the sole contributor to the accumulation, maintenance and preservation of the joint estate between the parties. On the other hand, the plaintiff, according to the defendant, conducted himself in ways severely diminishing of the value of the joint estate. Therefore, in the defendant's view, the long duration of the marriage strongly supports the defendant's claim for forfeiture by the plaintiff on the basis of his prolonged misconduct and the defendant's sustained contribution. And the long duration in this matter does not serve to dilute forfeiture or immunise sustained misconduct, but magnifies the inequity of equal division favourable to the plaintiff as the offending dissipator of estate assets and a disproportionate contributor over an extended period of time. The prominent issue cited by the defendant is the plaintiff's extramarital relationships including a long-term one which commenced as far back as 2010.

[45] According to the plaintiff, the long duration of the marriage is a material and weighty consideration against the defendant's forfeiture claim. For, over the course of their long marriage, the parties have acquired and developed several immovable properties and other form of income-generating assets. The assets, even on the defendant's version, were accumulated progressively over the years. Therefore, the duration of the marriage constitutes confirmation that the joint estate came about from shared domestic and economic life on the part of both parties, it is argued for the plaintiff. Also, that although the parties have separated

since 2019, this is irrelevant for purposes of forfeiture as the marriage between them still subsists.

[46] But whether considered from 1998 to date or from 1998 to 2019 (being the year of separation, which consideration would not comport with prevailing authorities), the marriage between the parties is of a long duration. I agree, though, with the view that duration of a marriage should not be construed on the basis of a mechanical or quantitative consideration alone, but also from a qualitative point of view. For, the parties may have been married for what - in calendar years - may be a long duration, but a consideration of the experiences of the parties, the strength of their relationship and the love and affection (or absence thereof) towards each other over the duration of the marriage may point to a marriage whose durability is hollowed by misconduct or circumstances inimical to the institution of marriage. In other words, it is not the years in marriage that count, but the quality of the marriage in the years.²⁴

[47] What is stated in the preceding paragraph clearly confirms that the duration of the marriage cannot be considered alone and separately from the other two factors in the triad (i.e. circumstances which led to the breakdown of the marriage and any substantial misconduct by a party). It is not dispositive of the forfeiture issue or determination.²⁵ I turn, next, to the second factor in the triad.

Circumstances which led to the break-down of the marriage

[48] The second (of the three) factor (after the duration of the marriage) stipulated in section 9(1) in the determination of forfeiture is the consideration of the circumstances which led to the breakdown of the marriage between the parties. As stated above, the parties agree

²⁴ An adaptation of the saying ‘it's not the years in your life that count [but] the life in your years’, attributed to Abraham Lincoln the 16th president of the United States of America.

²⁵ *B.R.B.M v R.K.B.M* [2023] ZAGPPHC 1491; 19279/2019 (5 June 2023) [97].

that their marriage has crumbled and that divorce is inevitable, but disagree on the cause(s) of or circumstances which led to the breakdown.

[49] It is submitted on behalf of the defendant (as part of her counterclaim for forfeiture) that the evidence overwhelmingly establishes that the plaintiff is responsible for the collapse of the marriage. Amongst the reasons given for the contention are the following: (a) plaintiff's numerous extramarital affairs; (b) his emotional and psychological abuse of the defendant; (c) his concealment of the children he fathered and his financial obligations related thereto, and (d) his abandonment of the marital home. Other reasons given by the defendant appear above. It is the defendant's case that each of these reasons or circumstances contributed materially to the erosion of trust, companionship, and emotional stability within the marriage relationship with the plaintiff. The circumstances did not only arise towards the end of the marriage, but spanned more than a decade, it is further submitted, plaguing the relationship with emotional harm and deception. The plaintiff's long-term extra-marital relationship commenced years before the plaintiff disclosed his polygamous ambitions in his 2019 letter to the defendant. The defendant even had to secure protection orders and lodge criminal complaints against the plaintiff to ensure her personal safety. Her attempts to salvage the marriage included securing guidance from pastor(s); seeking intervention by family members; and marital counselling. Evidently, they were all to no avail. She even tolerated the repeated misconduct of the plaintiff's multitude of extramarital relationships hoping for the preservation of a stable marriage relationship for the sake of the children. Save for the minor child, TND, all these children are the plaintiff's. She considers the plaintiff to have reciprocated by way of hostility, betrayal and deceit towards her. But, the 2019 letter signalled the proverbial final straw that broke the camel's back, it is submitted. This, according to the defendant, made her realise that the plaintiff had already exited their marriage from a physical and psychological points of view. He left the matrimonial home

shortly after the 2019 letter. All these, it is submitted on behalf of the defendant, confirm that the breakdown was precipitated by sustained infidelity on the part of the plaintiff which culminated in the abandonment of the parties' common household.

[50] It is material to point out that the evidence establishes that the plaintiff's long-term extra-marital relationship began in 2010. The plaintiff tried during his testimony to put the commencement date of the relationship to be in 2019, but conceded under cross-examination that the date was much earlier in 2014. Documentary evidence confirms that it commenced in 2010.

[51] The plaintiff, on the other hand, cite the circumstances that gave rise to the breakdown of his marriage to the defendant as follows. From around 2017, the defendant progressively excluded him from the financial affairs of the joint estate. The exclusion extended to rental income from their multiple properties. He considers this part of his evidence not to have been meaningfully refuted by the defendant. In fact, according to him, the defendant's own testimony confirms that she exercised control over the administration of the joint estate properties during this period, including over rental income. Regarding the protection orders and criminal complaints against the plaintiff, it is submitted that the evidence do not establish that the processes resulted in the plaintiff being found guilty of any crime. Also, that such complaints or events did not have any patrimonial bearing on the joint estate. They also do not - without more - establish financial misconduct or undue benefit as required by section 9(1). I discuss the factor of serious misconduct under the next rubric.

[52] Further, on the issue of adultery or extramarital relationship, counsel for the plaintiff submits that whether the extramarital relationship started in 2010 and overlapped with many years of the marriage, is of no consequence as the parties nevertheless continued their marriage relationship to date. This constitutes a historical misconduct which the defendant

may have tolerated and cannot now be invoked to support her claim for forfeiture without proof of financial prejudice caused by same. It is also the plaintiff's case that the alleged relationships did not deplete the assets of the joint estate, through for example, funds of the joint estate being deployed towards the maintenance of a parallel household or an extreme systematic diversion of assets. The same applies to the 2019 letter proposing a polygamous marriage authored by the defendant. The 2019 letter only serves to demonstrate that the plaintiff was not secretive, but frank about his marriage intentions. Also, the plaintiff's departure from the matrimonial home, did not lead to financial dissipation or undue benefit. Overall, it is the plaintiff's case that no facts or evidence have/has been placed before the Court by the defendant to demonstrate that the circumstances of the breakdown of the marriage with the plaintiff render equal division repugnant to justice.

[53] It ought to be mentioned that the defendant considers these contentions by the plaintiff and submissions on his behalf to be an attempt at retrospective minimisation of the effect of the duration of the extramarital relationship.

[54] Bearing in mind what is stated above and the evidence in this matter, I consider the following to be the circumstances which led to the breakdown of the marriage between the parties: (a) the plaintiff's numerous extramarital affairs, which included a long-term relationship which commenced in the early years of the marriage, and (b) the plaintiff's concealment of the total number of children he fathered. These are not the only circumstances or material events towards the breakdown of the marriage between the parties, but I consider them to have been the direct causes of the breakdown. The defendant says these conditions eroded her trust and caused her emotional harm, especially given the fact that the events or conditions were not one-off event but endured for a substantial part of the marriage. I agree. I reject any connotation that there is anything commendable with the plaintiff's ill-fated

attempt to formalise his infidelity into polygamous marriage in terms of the 2019 letter. I, also, do not accept that these relationships had no financial bearing on the joint estate. Available evidence does not support the plaintiff's claim that he was perhaps frugal in maintaining these relationships. The defendant testified that he allowed a girlfriend to occupy a flat or apartment in Nelspruit whilst the defendant remained liable for payment of levies, and rates and taxes for the same property. The property was meant to generate rental income. Besides, these relationships were covert and in a multitude. It would be unreasonable to expect that the defendant would have kept a logbook (of sorts) to record the costs of the plaintiff's extramarital relationships to the joint estate. It is for substantially similar reasons that I do not accept that the defendant's control over the administration of joint estate, its properties and other financial aspects of the joint estate, led to the breakdown. The defendant appears to have been motivated by a quest to preserve the assets than their dissipation. And, she may have been more allowing in the past or gave the plaintiff the benefit of doubt prior to 2019 regarding his management of (or lack thereof) or unrestrained access to the resources of the estate, especially those he had exclusive control of or unrestrained access to, but this does not mean that he was excluded the moment the defendant regained control of management thereof. The latter may have led the plaintiff to realise that things have changed and that the good old days were a thing of the past. The launch of this divorce action may have been part of this realisation.

Substantial misconduct by either of the parties

[55] The third and last factor in the determination of forfeiture involves the consideration of any substantial misconduct on the part of either of the parties.

[56] The phrase 'substantial misconduct' in section 9(1) suggests that not every misconduct would constitute a relevant factor for the determination. Only misconduct of a

‘substantial’ nature would suffice. The dictionary synonyms of the word ‘substantial’ include ‘considerable’, ‘enormous’ and ‘extensive’.²⁶ The antonyms of the word are ‘small’, ‘tiny’ and ‘little’.²⁷ In my view, misconduct of a non-substantial nature may still be relevant to the determination of a forfeiture claim as a circumstance which may have caused the breakdown of the marriage. Of course a serious misconduct is, naturally, such a circumstance. These confirm the three factors in section 9(1) are interlinked.

[57] It is part of the defendant’s case that the plaintiff committed misconduct at the substantial threshold. Prominent, amongst the misconduct the defendant accuses the plaintiff of having committed, is that of adultery. This has also featured prominently in the discussion of the circumstances which led to the marriage breakdown, discussed in the preceding subheading. The evidence establishes that the plaintiff has sustained extramarital affairs at least since 2010. The defendant testified that the plaintiff started cheating on her even earlier, in 2007. The affairs continued uninterruptedly throughout the marriage until the separation of the parties in 2019. But even then they did not stop. It is submitted on behalf of the defendant that the affairs were in complete disregard for the dignity, emotional wellbeing and marital rights of the defendant.

[58] The defendant’s testimony involved other extramarital affairs which counsel for the defendant tabulated as the first to fourth affairs as follows. The first affair came to light in 2007. It involved a married woman also known to the defendant. It was so serious that the woman’s husband formally complained to the plaintiff in writing and demanded compensation from the plaintiff for the humiliation to his family. The second affair also involved a married woman from the defendant’s political and professional circle. The woman was a colleague or associate known to the defendant and formed part of the defendant’s

²⁶ Cambridge Dictionary <<https://dictionary.cambridge.org/thesaurus/substantial>>, accessed 14 August 2026.

²⁷ *Ibid.*

political organisation. This affair and location of its pursuit (i.e. within the defendant's workspace) made it an egregious form of humiliation. The embarrassment, being of public and professional form, was continuous as the defendant had to continue working in the same environment or organisation. This affair went beyond infidelity and tarnished the defendant's dignity and public standing. The third affair is considered by the defendant to, perhaps, be the most devastating of the plaintiff's marital affairs. The plaintiff pursued a sexual relationship with the aunt of one of his children. A child was born from this relationship, although this was concealed from the defendant for some time. The defendant came to know of the existence of the child when the mother contacted the defendant's stepdaughter (i.e. the plaintiff's own daughter) seeking money after the plaintiff had abandoned her. This affair confirms the plaintiff's complete disregard for both women and children, it is also argued. For the defendant it constitutes both emotional betrayal and financial misrepresentation perpetrated within the marriage. The fourth affair or extra-marital relationship cited by the defendant is of very long duration. It began in 2010 and endured for more than a decade. The plaintiff used assets belonging to the joint estate, including money, to support the lifestyle of the woman in this long-term relationship. The plaintiff accommodated the woman in apartment belonging to the joint estate which was supposed to be rented out. This robbed the estate of rental income from paying tenants for several years. The defendant made the discovery of all these after the plaintiff left the matrimonial home to co-habit with the woman.

[59] The plaintiff is also accused of concealing the number of children he had fathered. This appears to be a reference to the children from other relationships or marriages prior to the marriage to the defendant. According to the defendant the plaintiff has concealed or failed to disclose seven or eight children in addition to those already disclosed. It was only later during the marriage that the plaintiff disclosed that he is a father of eleven children and not

just three children. The initial non-disclosure is baffling since the majority of these children were born prior to the conclusion of the marriage with the defendant. The defendant considers the concealment to be a material misrepresentation with financial consequences. It led to a reduction of available resources of the joint estate. Also, the defendant couldn't plan the financial future of the household, as there was always going to be unexpected and unexplained financial shortfalls emanating from the defendant's obligations towards the additional children. She was forced to bear the financial burden of raising several of the plaintiff's children without knowing the full nature and extent of the material obligations. The non-disclosure had remained intact, despite the defendant residing with some of the plaintiff's children and continuously supporting and caring for them over the years, single-handedly. All these have a bearing on the value judgment of whether the plaintiff would be unduly benefited, it is submitted.

[60] The plaintiff dismisses the defendant's laments regarding the undisclosed additional children. It is submitted on his behalf that her testimony confirms that she knew of the alleged extramarital children and accepted them. She testified that she maintained a fruitful relationship with these children and even financially supported them for their needs over a prolonged period. I think there may be a confusion in this regard between the children which the plaintiff disclosed to the defendant and the undisclosed ones. The defendant complains about concealment of the latter from her. Overall, it is submitted on behalf of the plaintiff, that the non-disclosure of the children should not be characterised as substantial misconduct for purposes of forfeiture. The defendant does not say that all these led to the dissipation of assets of the joint estate or financial prejudice to her. After all, the defendant voluntarily assumed financial responsibility towards these children. Therefore, the issue is a serious matter only at the personal level devoid of any impact on the forfeiture of benefits.

[61] Another aspect cited by the defendant is the disparity of the plaintiff's contribution towards accumulation of the assets in the joint estate when compared to hers. She mentioned that the plaintiff has made no meaningful contribution toward the maintenance and upkeep of the joint estate since he departed from the matrimonial home in 2019. She, further, states that the White River property, valued at around R2, 99 million, was financed exclusively by her. The plaintiff, in turn, asserts that his contribution to the joint estate was substantial. The contribution did not reduce since he departed from the matrimonial home in 2019, as he had remained economically active. I hasten to point out that this is contradictory to the plaintiff's case of financial exclusion, which brought him financial misery, and of lately being a pauper, surviving on handouts. But the defendant considers the issue an irrelevant consideration for a marriage in community of property. Community of property represents a universal economic partnership of the spouses of which they are equal shareholders, regardless of their individual contribution. For, contribution disparity does not transform equal division into undue benefit. Regarding the alleged use of an apartment to house his concubine, he argues that there is no proof of lost rental income solely attributable to him. Besides, the immovable properties, business interests and other assets accumulated over decades still form part of the joint estate. There is no proven systematic stripping of estate assets similar to that in *M v M*, referred to above.

[62] The defendant also cites an incident which occurred during the parties' attempt to narrow issues in the divorce dispute through mediation. This was directed by the Court. During a sitting of the mediation, attended by the parties and their legal teams, the plaintiff is said to have been aggressive and even threatened the defendant with a chair he attempted to throw at her or to intimidate her thereby. This aggressive or violent conduct by the plaintiff endured despite intervention by his legal team. The 'chair incident', it is submitted, was not just an isolated behavioural anomaly on the part of the plaintiff, but a feature of his consistent

long-term psychological aggression. But the plaintiff is dismissive of the ‘chair incident’. It is submitted on his behalf that the determination of existence of substantial misconduct on the part of a party in a marriage for purposes of statutory forfeiture envisaged in section 9(1), does not incorporate courtroom behaviour or mediation breakdown. The plaintiff accuses the defendant of conflating moral wrongdoing and substantial misconduct.

[63] Another misconduct cited by the plaintiff involves the N[...] D[...] Family Trust (‘the Trust’). The plaintiff testified that he was the sole trustee of the Trust and, thus, controlled the Trust. At some stage the Trust had around R6 million in its bank account. The plaintiff says the money was proceeds of disposal of his investment in a mining and other forms of companies. He admitted using part of the Trust funds (transferred in tranches of around R1 million and R3 million from the bank account) to purchase immovable property known as Stone Age Guesthouse and the house next to it. But the defendant disputes this on the basis that there is no documentary proof. According to her it is apparent that the funds were deployed towards the plaintiff’s personal indulgences and to sustain his extramarital affairs. Even the immovable property acquired was meant to create the plaintiff’s exclusive patrimonial control, it is submitted for the defendant. Therefore, this constitutes reckless dissipation and a substantial misconduct for purposes of section 9(1) of the Divorce Act. This is denied by the plaintiff, particularly on the basis that the defendant failed to place before the Court the Trust constitutive documents and proof that the withdrawals by the plaintiff were unauthorised. Besides, the impugned funds constituted trust property not forming part of the joint estate of the parties. And, there is no proof the funds were misappropriated by the plaintiff to qualify as a substantial misconduct which arises only if there is erosion of the patrimony in the joint estate, the argument concludes.

[64] Other issues raised by the defendant to support her case that the plaintiff committed substantial misconduct include what appears next. The plaintiff secretly took out in 2000 a policy with Sanlam. He maintained it for nearly two decades and even increased the monthly premium from R250 to R6 000 over the years, but did so covertly. He managed to do all these, despite the defendant unwittingly paying the premiums until she became aware of the debit order going off her personal bank account. Sanlam confirmed that the policy was taken out and maintained without her consent. The plaintiff, ultimately, cashed out the policy and used the proceeds for his personal ends. The defendant says she still has no idea of the value of the policy, as the plaintiff has kept this a secret. According to the defendant the policy itself signifies financial manipulation for personal enrichment by the plaintiff. The deployment of the money received from cashing-up the policy for personal objectives constitutes dissipation of a joint asset and, thus, misconduct disqualifying the plaintiff from an equal share of the assets accumulated by the defendant. The defendant, further, states that the plaintiff is guilty of misconduct in respect of the following: (a) proceeds of R500 000 from a business transaction and property sale; (b) dissipation of around 22 motor vehicles; (c) disposal of 120 head of cattle (of which the plaintiff only admitted eight); (d) removal of the defendant as a signatory or access-holder on the ABSA account, which the plaintiff claims was a personal account and not a joint one, and with the misused by the plaintiff. The plaintiff denies the veracity of these issues and argue that there is no proof by way of accounting or documentary records.

[65] It is my view that, the plaintiff committed the following substantial misconduct: (a) by being a perpetrator of a series of extramarital affairs, and (b) concealment of some of his children with financial implications for the joint estate.

[66] Adultery or an extramarital affair by its very nature is a substantial misconduct, especially one committed over a protracted period of time.²⁸ From a view internal to the marriage it seriously hurts and betrays the victim-spouse. It, also, weakens the bonds of marriage and the relationship between the spouses. From the outside, it cheapens the marriage and attracts disrespect for the spouses. In this matter, the plaintiff appears to have been very committed and loyal to his adulterous life. More so than in 2019, being around 21 years of marriage to the defendant, he still couldn't let go of his hurtful ways. He, unsuccessfully, tried to recruit the defendant to join him as a willing participant in his multi-partner life through his 2019 letter, suggesting they adopt a polygamous marriage. This was not in any way meant to serve the interests of the defendant, but his selfish interests. From one or more of his extramarital relationships he even fathered a child with a relative. There was no place out of bounds for him. He pursued sexual relationships with a married woman in 2007 whose husband even demanded compensation for the humiliation to his family. He also egregiously humiliated the defendant through the extension of his extramarital conquests to another married woman closely connected to the defendant's political organisation and professional circle. I accept the defendant's argument that these relationships, particularly the long term one, were maintained with the resources from the joint estate. The defendant remains the steadfast contributor of these. All these show that the plaintiff was never really committed to the defendant. In my view, these constitute 'substantial misconduct', envisaged in section 9(1).

[67] Equally, I find the fact that the plaintiff concealed some of the children he had fathered to constitute a substantial misconduct. The defendant testified that she has no biological children of her own. She, jointly, with the plaintiff adopted the minor child, TND. But she had already accepted as her own the plaintiff's children, at least those revealed to her.

²⁸ *M.J.L v L.O.L* (22341/19; A288/2023) [2025] ZAGPPHC 331 (27 March 2025) *per* Kooverjie J at [41].

The acceptance wasn't just an informal declaration but she embraced the children as hers and contributed resources, including financial ones, towards their upbringing. This, she did even as the tally of the children increased and even when she was separated from their father: the plaintiff. Therefore, the fact that the plaintiff kept secret from the defendant other children, is not only seriously hurtful, but constitutes betrayal and a material misrepresentation with financial consequences. The cost of bringing up these other children is a liability borne by the joint estate. It served as a reduction of available resources of the joint estate. I do not accept the plaintiff's testimony that the non-disclosure of the children should not be characterised as substantial misconduct for purposes of forfeiture. It is. The defendant may have not been able to quantify the amount of financial harm all these caused or how assets of the joint estate may have been dissipated, but there is clearly financial prejudice to her. I did not understand the case of the plaintiff to be that he did not maintain his children or that he did so from some funds he had access to which were ring-fenced from the joint estate.

[68] The issue of the disparity of the plaintiff's and defendant's contributions forms part of the value judgment under section 9(1) whether the defendant will or will not be unduly benefitted by the absence of a forfeiture order. I do not agree with the plaintiff's view or submission on his behalf that disparity of contributions is an irrelevant consideration in a marriage in community of property.²⁹ The disparity may be the result of other issues such as a party's secret life which brings about secret obligations with financial consequences. But for the purposes of this matter, I do not consider it to constitute a substantial misconduct. Perhaps, something or circumstance which may have consciously or unconsciously led to the breakdown of the marriage between the parties. But it remains relevant to the ultimate determination: forfeiture.

²⁹ *Wijker v Wijker* at 731C-G; *Botha v Botha* 2006 (4) SA 144 (SCA) [7].

[69] The evidence before me is unclear as to the affairs of the Trust. It appears both parties were trustees, although the plaintiff testified that he was the sole trustee. Nothing turns on this. Available evidence confirms that the plaintiff controlled the Trust to the exclusion of the defendant. He had access to the R6 million in the Trust's bank account. He says he used part of it to acquire immovable properties, although this is disputed by the defendant. I do not have enough to consider this a substantial misconduct. It may well be misconduct which contributed to the breakdown of the marriage between the parties, but it is not necessary to rule on this. The same applies to other forms of misconduct the plaintiff may have committed, such as the maintenance and encashment of the Sanlam policy; dissipation of motor vehicles; disposal of cattle and the termination of the defendant's access to the ABSA account and subsequent misuse of the funds therein.

[70] This concludes the individual discussion of the triad of factors set out in section 9(1). I will summarise the conclusions reached on each of them as part of the conclusion, which is the next subheading for the discussion.

Conclusion (on whether the plaintiff would be unduly benefited without forfeiture)

General

[71] Considering what appears under the triple factors appearing above, the question to be answered is whether the plaintiff will be unduly benefited in relation to the defendant if the order for forfeiture is not made against him.

[72] To recap, my conclusions on the triad of factors are substantially as follows: (a) the marriage between the parties, subject to what is stated next in (b), is of a long duration; (b) the marriage between the parties broke down after being - for the most part - plagued by conduct and circumstances inimical to the institution of marriage, attributable to the plaintiff (including his numerous extramarital affairs), and (c) substantial misconduct committed by

the plaintiff by way of his perpetration of a series of extramarital affairs and concealment of some of his children from the plaintiff.

[73] These conclusions will – no doubt – aid the purely factual determination of whether the plaintiff will be benefitted if forfeiture is not ordered, and, if so, the value judgment whether the plaintiff would be unduly benefitted in relation to the defendant without an order for forfeiture. The approach by the Court under section 9(1) ought to be holistic and the enquiry is not mechanical, but structured and confined.³⁰ And, at the outset, it is important to bear in mind that the word ‘undue’ in the phrase ‘unduly benefitted’ is explained in the dictionary as meaning ‘unwarranted’ or ‘inappropriate’ due to being excessive or disproportionate.³¹

Will the plaintiff be benefitted?

[74] The first step, in terms of the durable approach to the issue of forfeiture premised on section 9 in *Wijker*, is in the form of pure factual enquiry whether or not the plaintiff will in fact be benefitted. It ought to be borne in mind that the plaintiff before the forfeiture claim is determined entitled to half (or 50%) share of the joint estate by virtue of the law governing his marriage to the defendant in community of property. Therefore, forfeiture represents a statutorily derived exception to the aforesaid legal dispensation.

[75] From the facts or evidence before the Court in this matter, there is no doubt that the plaintiff will be benefitted. The assets in the joint estate comprising the immovable properties and the defendant’s pension interests appear to be of considerably high value. There is a number of immovable properties which appear to be worth millions, referred to above. Some of them, such as the one in which the plaintiff housed his concubine, appear to have been paid off. The defendant only mentioned paying rates and taxes for the latter property.

³⁰ *B.R.B.M v R.K.B.M* [97].

³¹ *KT v MR* 2017 (1) SA 97 (GP) [20.17], utilising the South African Concise Oxford Dictionary (2005 ed).

Although, the liabilities (whose quantum is unknown) in the joint estate are to be first met before the proceeds could be divided between the parties, the financial position or net value of the estate appears positive. For illustrative purposes, it is also material to point out that a substantial portion of the assets in the estate were yielded by the efforts of and contribution by the defendant. Therefore, there is no doubt that equal division of the value or proceeds of the assets of the joint estate would benefit the plaintiff. To complete the determination, I turn next to the value judgment part thereof: whether the plaintiff would be unduly benefited by equal division of the joint estate in the absence of a forfeiture order.

Will the plaintiff be unduly benefited?

[76] I have found above that the plaintiff will indeed be benefitted by the equal division of the joint estate. This, I emphasise, is a natural consequence of the law governing a marriage in community of property.³²

[77] The determination then proceeds to the value judgment of whether the plaintiff will be unduly benefitted in relation to the defendant should forfeiture of patrimonial benefits not be ordered.

[78] It is submitted on behalf of the defendant that the plaintiff will be highly unduly benefited by sharing equally in the joint estate considering, among others, that: (a) he made no meaningful contribution to the estate from a financial or non-financial point of view; (b) he financially drained the estate through his reckless dissipation; (c) he destroyed the marital relationship through repeated adultery, deceit, and emotional abuse of the defendant; (d) he purposely concealed some of his external children and the expenditure related thereto, and (e) he obstructed mediation, frustrated the processes of the Court, and resolution of the marital dispute. It is further submitted that each of these factors is independently serious and that

³² *Wijker v Wijker* at 731C-G.

collectively they rule out the plaintiff's equitable participation in the benefits of a marriage in community of property, lest his enrichment is judicially sanctioned. The cumulative effect of the plaintiff's conduct should be considered in this regard. For, a spouse who actively removes or diminishes the assts of the estate should be visited upon with forfeiture in order to prevent unjust enrichment.

[79] The plaintiff seeks an order dismissing the defendant's claim for forfeiture, whether partial or total. It is submitted, among others, that any benefit to the plaintiff will not be undue, given the circumstances of this matter. And partial forfeiture should feature only in the event that the Court finds forfeiture competent. An order made in the latter respect, it is submitted, should be strictly limited, proportionate and confined to clearly proven patrimonial benefit. It should not amount to a punitive redistribution of the joint estate, the submission concludes.

[80] Considering what is stated above, I am convinced that to a greater extent the benefit to be derived by the plaintiff can be described as 'unwarranted or inappropriate' and, thus, undue. The plaintiff's conduct, including the substantial misconduct, described above, renders him a spouse not worthy of the full patrimonial benefits of the marriage between the parties. But there is a challenge in this regard from a quantification point of view. It is true that when dealing with issues relating to assets or patrimony the financial values thereof are immensely useful. But, the absence of such values shouldn't serve as an impediment for the determination. In some instances the values may not just be absent, but impossible to determine or capable of determination only through a resource-intensive exercise, such as forensic accounting or investigation. For example, substantial misconduct such as adultery similar to that perpetrated by the plaintiff, does not suggest the absence of a negative impact on patrimony, but proving such impact may be unreasonably intensive. And may require co-

operation between the spouses and full disclosure of their past activities. This, no doubt, would be impossible and may require intervention by the Court. But, co-operation that is continuously enforced or ‘policed’ by the Court - through orders - may deplete the very same resources to be divided. This may also emotionally drain the parties the longer it persists, especially the victim of the misconduct perpetrated, such as the defendant in this matter. However, neither does the absence of the values call for the victim of the misconduct to be unsuited or to suggest the lack of merit in her forfeiture claim. Section 9(1) of the Divorce Act does not impose such constraint on the words ‘substantial misconduct’ and neither should an interpretation thereof have the same effect. Such interpretation would not comport with the modern tenets of statutory interpretation urged upon by the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.³³

[81] Bearing in mind what I have just stated above, I am of the view that the plaintiff should only be entitled to a twenty five percent (25%) share of the total divisible value of the joint estate he shares with the defendant, including the defendant’s pension interests. From a rudimentary angle this means that he forfeits half or 50% of his normal share (which is 50% of the entire joint estate). I arrived at this outcome, generally, as follows. I explained above that although the marriage between the parties is of a long duration it lacked the qualitative traits of a normal and affectionate marital relationship due to the plaintiff’s philandering for over 15 years since 2010. It could be more if reckoned from 2007 in terms of the defendant’s account. He then left the defendant to live with a concubine since 2019. This means that the qualitative years of the parties’ marriage was only 12 years. This represents less than half of the duration of the marriage, reckoned from 1998. Considered together with the other identified misconduct and the plaintiff’s stated contribution to the causes of the breakdown of the marriage, I find that his benefit should be limited to half of what it should normally be.

³³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (16 March 2012) [18].

This, to me, represents an appropriate figure or share given under the circumstances. The plaintiff's patrimonial benefits, no doubt, will still be substantial given the size of the defendant's pension interests and the other assets in the joint estate, but the partial forfeiture will rid them of their undue traits.

[82] Therefore, I find that the plaintiff would be unduly benefitted when compared to the defendant if the Court does not grant a partial forfeiture of half his patrimonial benefits of marriage in community of property. The defendant's counterclaim for a forfeiture order sought against the plaintiff is partially successful and forfeiture will be partially ordered, as already stated.

Primary care, residence and maintenance of the minor child

[83] As stated above, the primary care and residence are not in dispute. The plaintiff accepts that primary residence of the minor child should be with the defendant, subject to him being afforded reasonable contact with the child. The child is currently under the primary care of the defendant and it appears that this has been the case since 2019. It appears that this has offered the child a supportive and stable environment. I do not have anything before me to suggest that the best interests of the child would not be served by maintaining the *status quo*.

[84] Although the parties agree that the plaintiff should be afforded reasonable contact with the minor child, they have not provided the details of how this is to be exercised. I have considered what was contended for by the defendant in her counterclaim before the plaintiff conceded this part of the counterclaim. I find what was pleaded there appropriate and in the interests of the minor child. I will substantially incorporate the pleaded regime in the order.

[85] Regarding maintenance for the minor child, the Court is merely requested to direct that the plaintiff pay an amount considered appropriate by this Court. No further details are

provided regarding the child's needs and the plaintiff's means, especially given the fact that he says that he is currently unemployed and indigent. Unless, I am to rely on the benefit the plaintiff is to receive from the division of the joint estate. But such division may take years before it yield cash which is the conventional commodity for satisfaction of maintenance needs. Therefore, I agree with the plaintiff, albeit based on different considerations, that the issue of maintenance of the minor child should be referred to the maintenance court for proper adjudication. I will include this direction in the order to be made.

Conclusion and costs

[86] The plaintiff is unsuccessful in his claim in convention, save that the parties have agreed that a decree of divorce should be granted. The plaintiff is partially successful in fending off the defendant's counterclaim. This renders the defendant also partially successful. The lack of substantial success on both ends renders the convention to award the costs of suit to the successful party inapplicable or difficult to apply.

[87] The defendant, though, contends that the plaintiff should be held liable for costs of suit, even on an attorney-and-client scale, based on other considerations. These are to do with the plaintiff's conduct in this litigation. It is submitted on behalf of the defendant that the plaintiff conducted the litigation in these proceedings in a dishonest manner and even abusing the process of the Court by creating unnecessary disputes, which conduct is both financially and emotionally prejudicial to the defendant. The plaintiff is said to have launched multiple overlapping court applications without substantial merit and, thus forcing the defendant to incur unnecessary legal costs. The Court should mark its disapproval of the plaintiff's conduct of weaponising litigation in this manner by granting a punitive costs order against him. The plaintiff is also said to be the reason the Court-directed mediation did not yield the desired outcomes. The 'chair incident' referred to above is cited in this regard. All these are

denied by the plaintiff. But I find it opportune to add that even during his testimony the plaintiff has to be cautioned on his mannerism, his words and the tone of voice towards the defendant's counsel.

[88] Although, I have lamented the nature and extent of the written closing argument or heads of argument at the beginning of this judgment, which lamentation is shared by the defendant, I do not view this and the defendant's complaints as warranting a punitive costs order. This is not to say that I see nothing wrong with the plaintiff's conduct, including the 'chair incident' and its undertones of gender-based violence. As for the plaintiff's conduct in interlocutory or related proceedings before the Court, I consider the presiding judges in those proceedings to have been the best placed to direct where the liability for costs should land or to impose other forms of censure. Considering all these, I will order that each party be liable for his/her own costs. I find this appropriate and befitting the outcome of this matter appearing in the order, below.

Order

[89] In the premises, I make the order, that:

1. a decree of divorce is granted dissolving the marriage between the parties;
2. the plaintiff partially forfeits the patrimonial benefits of the marriage and is to receive only 25% of the total value (after all liabilities are settled) of the joint estate, inclusive of the defendant's pension interests in any pension fund, upon division of the joint estate;
3. subject to 4 and 5 hereof, both parties retain full parental rights and responsibilities and guardianship in terms of section 18 of the Children's Act 38 of 2005 in respect of the minor child TND (hereafter the minor child');
4. the primary residence of the minor child shall vest with the defendant;

5. the specific parental responsibilities and rights with regard to contact with the minor child, as contemplated in section 18 of the Children's Act 38 of 2005, is awarded to the plaintiff, in the following manner:
 - 5.1 every alternate weekend from Friday at 17h00 to Sunday at 16h00;
 - 5.2 every alternate school holidays, subject to the following:
 - 5.2.1 short holidays are to be alternated between the parties;
 - 5.2.2 long holidays are to be alternated between the parties; and
 - 5.2.3 Christmas and New Year to be shared and minor child is to rotate between the parties.
 - 5.3 reasonable telephonic contact.
6. either of the parties may approach a maintenance court with jurisdiction for an order regarding maintenance of the minor child; and
7. each party shall be responsible of his or her own costs of suit.

Khashane La M. Manamela
Judge of the High Court

Dates of Hearing	:	26, 27 and 28 November 2025
Date of Final Closing Argument	:	14 February 2026
Date of Judgment	:	20 August 2026

Appearances	:	
For the Plaintiff	:	Ms DJ Sibuyi (Trust account advocate) Mthunzi Chambers, Arcadia, Pretoria
For the Defendant	:	Ms KJ Matabane
Instructed by	:	Makoma Selane Attorneys, Pretoria