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

Case No. **40230/2020**

(1) REPORTABLE: YES/NO

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

(3) REVISED

DATE:

SIGNATURE:

In the matter between:

M[...] M[...] A[...] N[...]

Plaintiff

and

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

Defendant

This matter was heard in open court and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

RETIEF J

[1] The plaintiff instituted action against the defendant, seeking a decree of divorce, the division of the joint estate and relief pertaining to their minor child O[...] L[...] S[...] (“the minor”).

[2] The division of the joint estate was in essence the contentious issue before Court.

[3] The relief pertaining to the minor child became resolved. Both parties were satisfied that the terms of a rule 43 order granted on 18 February 2021 and that the report filed by the Family Advocate can be confirmed.

[4] The hearing was set down for 2 (two) days commencing at midday on 9 March 2023 and due to the late start on the first day of trial, the matter had to be remanded till 3 April 2023. The defendant closed his case on 3 April 2023. After closing his case, the defendant's Counsel informed the Court that he sought to amend the defendant's plea and counterclaim in terms of Uniform Rule 28(10). Directives were provided for the filing of papers in the substantive application and heads of argument. The application was dealt with on the papers. The defendant's application was dismissed with costs. No appeal lies against such dismissal. In consequence, the issues raised on the pleadings and the respective onus each party attracted in consequence, stand to be determined on the unamended pleadings.

[5] At the commencement of the hearing the plaintiff's Counsel recorded the plaintiff's objection to the admission of evidence which fell beyond the scope of the unamended pleadings. This objection was maintained throughout the hearing of the matter.

[6] The parties were directed to file written closing arguments by 7 July 2023. The defendant's Counsel failed to deliver his written submissions by 7 July 2023. Enquires were made and reasons sought for the delay of non-compliance of the directive. None were forthcoming. The defendant's Counsel's undated written submissions were only filed for the Court's attention on 20 July 2023.

[7] This was done without regard to the directive, without apology, without any explanation for such delay and without a request for an indulgence to accept same under the circumstances. The conduct inexcusable for want of requesting to be excused.

[8] I turn to deal with the determination of the triable issue.

ISSUES FOR DETERMINATION ON THE PLEADINGS

[9] On the pleadings a crisp and narrow issue remained to be determined as was apparent from the following material admitted facts:

9.1 Their marriage took place on 14 February 2015 at Hammanskraal (*“the marriage”*);

9.2 The marriage took place by virtue of customary law, which marriage still subsisted;

9.3 One minor child was born between them;

9.4 The marital relationship had broken down irretrievably and there was no prospect of the restoration of a normal marital relationship between them;

9.5 Request for division of the joint estate; and

9.6 The defendant is a member of a pension fund.

[10] It was common cause that the marriage was not registered at the Department of Home Affairs.

[11] The defendant filed a counterclaim seeking, in addition to the degree of divorce, an order that the division of the joint estate be divided subject to an adjustment in his favour. The defendant sought an adjustment of *“an amount equivalent to 50% of the total amounts plaintiff benefitted from the joint estate-”* as, to his detriment (*“adjustment relief”*).

[12] In support of the adjustment relief, the defendant relied on the plaintiff's conduct in anticipation of the divorce. The defendant alleging that it took place with the intention of diminishing the joint estate by the plaintiff:

- 12.1 unlawfully disposing of immovable property situated at 1[...] B[...], Pretoria (the E[...] property);
- 12.2 relinquishing her interest (directorship and as shareholding) in an entity called Dreamteam in favour of her mother and failed to account to the joint estate;
- 12.3 not accounting for inheritance, she received from the estate of her late previous spouse.

For convenience the conduct above will collectively be referred to as "*the conduct*".

[13] The plaintiff filed a replication to the adjustment relief alleging that no such cause of action in law is disclosed nor is such relief competent. This stance was however not advanced in written argument, the plaintiff conversely arguing that the adjustment relief was in fact the adjustment relief catered for and referred to in section 15(2)(b) of the Matrimonial Properties Act¹ (section 15 adjustment relief).

[14] The defendant on the other hand and only in written argument, argued that the adjustment relief was in fact a claim for forfeiture in terms of section 9 of the Divorce Act² and sought equity relief as a result thereof.

[15] Before determining the issues consideration of the facts is required.

THE RELEVANT FACTS

[16] The plaintiff and defendant married each other on 14 February 2015 at Hammanskraal. The defendant having paid the last payment of the lobolo on the same day. The validity of the customary marriage was not in dispute. The parties

¹ 88 of 1984.

² 70 of 1979.

did not sign an antenuptial agreement prior to concluding their customary marriage and the customary marriage was not registered with the Department of Home Affairs.³

[17] At the time of their marriage in 2015, the plaintiff was pregnant with their minor child who was born on 23 April 2015. At the time of the marriage the parties initially stayed in a rented townhouse situated in Karenpark in Pretoria North. The parties continued to rent the townhouse in Karenpark until the defendant acquired a property in A[...] Ext 1[...] on 22 November 2016 (*“family home”*) (*“A[...] property”*).

[18] Prior to the marriage the plaintiff was a widower, having lost her husband, the late S[...] E[...] N[...] (*“the deceased”*) on 12 May 2011 as a result of a motor vehicle accident. The plaintiff, at the time, who was pregnant with their son, S[...] E[...] J[...] (*“E[...] J[...]”*). E[...] J[...] was born on 12 October 2011.

[19] At the time of the deceased’s demise, they stayed on property referred to in evidence as *“these plots”*. The First and Final Liquidation and Distribution account (*“L&D account”*) refers to agricultural holdings’ homelands situated in the Emfuleni Municipal district. The plaintiff’s mother moved in with her on *“these plots”* after E[...] J[...]’s birth.

[20] On 10 November 2017, the executrix filed the L&D account (Exhibit “C”). The deceased died intestate. According to the L&D account the plaintiff, by virtue of her customary marriage the plaintiff inherited by virtue of in community of property. This is an important fact as the patrimonial consequences of being married by virtue of customary union was clear, albeit to the plaintiff, prior to her marriage to the defendant.

[21] The plaintiff by virtue of being the only surviving spouse in an intestate estate, inherited R 543 184.72. Her inheritance was distributed to her in cash and movable property (four motor vehicles). The value of the movable property was R 194 000.00 and the remainder in cash. The cash portion appears, *inter alia*, to

³ See section 9 Recognition of Customary Marriages Act, 120 of 1998, as amended.

have been made available by the realization of the agricultural holdings which were sold on 1 March 2015. From the plaintiff's testimony both she and the defendant wanted to "*-sell these plots so that the estate would be consolidated.*" The plaintiff in consequence never acquired immovable property from the estate.

[22] It is a common cause fact, established on the evidence, that both the plaintiff and the defendant enjoyed the use of the motor vehicles she inherited and that they during the subsistence of their marriage bought further motor vehicles. The inheritance forms part of the defendant's adjustment relief.

[23] With the realization of the agricultural holdings in March 2015, the plaintiff testified that she had to find a place for her mother to stay. She, on 14 June 2016, purchased a townhouse known as Erf 1[...], E[...] Ext 2[...] ("*E[...] property*") in her own name. The property was later bonded as indicated in Exhibit "A".

[24] It is a common cause on the evidence that the defendant was aware of the plaintiff purchasing the E[...] property and the fact that his mother-in-law *de facto* lived there. The defendant testified that in retaliation of the plaintiff's action in acquiring the E[...] property on her own, he went ahead and purchased the A[...] property on his own, which was bonded on 17 March 2017 for R 1 435 500.00.

[25] The plaintiff testified that the E[...] property was later sold due to the strife it caused in the marriage, including the fact that the defendant's mother was unhappy that she did not have a property of her own too. Both the plaintiff and defendant took care of their mother's needs, including financial. The alienation of the E[...] property forms part of the defendant's adjustment relief.

[26] According to the documentary evidence, the E[...] property was sold on 6 December 2018 and the plaintiff received the proceeds of R 66 758.15 on 27 February 2019 (Exhibit "A"). The plaintiff, with the defendant's knowledge then moved her mother and built her a home on a property referred to as "*in Legalome*" by the defendant.

[27] Prior to the deceased's death, and on 7 July 2002, a closed corporation known as Dreamteam Trading 785 ("*Dreamteam CC*") was registered. The plaintiff and the deceased were one of the founding members of Dreamteam CC. The plaintiff remained a member until her resignation on 27 August 2018 (2 years before divorce proceedings were instituted). According to Exhibit "E", a deed search of Dreamteam CC requested on 17 February 2022, the plaintiff had resigned and the only recorded member was a one, Khawar Javaid with identity number 0[...]. The plaintiff's mother was not recorded as ever being a member. The defendant's adjustment relief relates to a company called Dreamteam from which the plaintiff relinquished her interest to her mother.

[28] The plaintiff also acquired an interest in a company called Dreamteam Civils (Pty) Ltd for her mother. The plaintiff testified that she used some of E[...] J[...]s money to purchase such interest for her mother.

[29] The defendant on 26 May 2016 on his own, too purchased an unbonded property for R 590 000.00 known as K[...], Unit D. Not much evidence was led pertaining to this property.

[30] In 2009 prior to the marriage, the defendant was the owner of unbonded immovable property known as Erf 9[...] in K[...], Unit 1. He testified that he transferred 50% ownership of the property to the plaintiff, but that it was meant for the benefit of the minor. The transfer date is unclear from the documentary evidence. The defendant however, testified that the plaintiff wished to be removed "*after some time, before her late husband's proceeds were to be paid*". Confusingly, the plaintiff and E[...] J[...] finally received their inheritance proceeds in 2017, being 2 (two) years before the plaintiff transferred her 50% share in the K[...], Unit 1 property back to the defendant. The transfer was recorded in November of 2019. The plaintiff testified that such removal was not at her request, but that she felt forced to do so.

[31] The defendant was silent on the minor's remaining benefit in the K[...] Unit 1 property after the 50% transfer back into his name. The timing of the transfer in November 2019 took place shortly before the plaintiff and the defendant signed an

antenuptial contract with the exclusion of the accrual (“*the ANC*”) in January 2020. Curiously, the ANC was signed some 5 (five) years after they concluded their marriage and also took place in the same year the plaintiff initiated divorce proceedings.

[32] Both the plaintiff and the defendant, notwithstanding their marriage at times, to third parties stated that they were “unmarried”.

[33] Before I deal with the defendant’s onus on the pleadings in respect of the adjustment relief, it is important to deal with ‘the elephant in the trial’, the ANC.

THE ANC DATED 28 JANUARY 2020

[34] Notwithstanding the admitted common cause facts, both the parties in their respective trial bundles incorporated a copy of a duly signed and registered ANC. The ANC was concluded on 28 January 2020, the content was not in dispute.

[35] The Court, on the papers, was not seized with the task of determining the validity of or the enforceability nor the consequences thereof. Nor were the facts pertaining to the ANC pleaded by either party. Notwithstanding the aforesaid, the relevance of the documentary evidence lay in the following demonstration:

35.1 It demonstrated that the ANC was not signed prior to the conclusion of the marriage in 2015 and could therefore, logically, not be the ANC envisaged in terms of section 7(2) of the Recognition of Customary Marriages Act⁴. It was not in dispute that the Notary at the time, in 2020, understood the parties signing before him had already concluded a valid customary marriage. The Notary was not called to testify.

35.2 It demonstrated that the ANC tendered into evidence could not automatically, *ex facie* be the document referred to as the post-nuptial contract in the pre-trial minute and in the record. Referral of

⁴ 120 of 1998.

a post-nuptial contract was mentioned on numerous occasions by the defendant's legal team, in a pre-trial minute in which the defendant's version was recorded and in the record when Counsel for the defendant addressed the Court on what evidence would be tendered, stating as follows: *"Lastly there is then a post-nuptial agreement that the plaintiff is fully aware of that is the document that would clearly point M'Lady's direction ..."*.

- 35.3 No post-nuptial agreement was pleaded nor tendered into evidence during the hearing. Nor did the defendant's Counsel deem it necessary to explain nor correct such reference to it. However, what became abundantly clear was that a *faux pas* had occurred which triggered the defendant to conjure up conflicting versions. Such versions later, under cross-examination evolving into the defendant's unwillingness, on several occasions when dealing with the ANC, to acknowledge that the plaintiff was his wife. Reference by the plaintiff's Counsel to the plaintiff as "*Your wife*" was met with "*if you say so*". Unfortunately, the defendant became increasingly evasive, argumentative and unable to make the simplest of concessions during cross-examination. His position was not alleviated by an explanation in reply.
- 35.4 It demonstrated that if the ANC was actioned with the intent to change their marital regime, then no evidence was before Court that the parties had *de facto* lawfully changed their marital regime as statutorily regulated in terms of the Customary Act read together with the section 2[...] of the Matrimonial Properties Act.⁵
- 35.5 It demonstrated that both the parties possessed knowledge of the patrimonial consequences of a customary marriage for the want or need for change.

[36] Applying the law and having regard to the pleadings, the inescapable patrimonial consequences of a marriage in community of property must flow. In consequence, the division of the joint estate upon a decree of divorce.

[37] As a result of the admitted facts, the conceded relief in respect of the minor and the relief sought by the plaintiff, I now only need to turn to the defendant's onus in respect of the adjustment relief.

ADJUSTMENT RELIEF

[38] The defendant in his counterclaim relies on the plaintiff's conduct referred to in paragraph [9] hereof to demonstrate how his share in the community estate was unduly diminished. The defendant's share in the community estate can only be unduly diminished if, as a result of such transactions, the joint estate suffered a loss. In which case, the loss must be pleaded and proved. If successful, an adjustment can be effected in his favour in the amounts proved⁶ (section 15, adjustment relief).

[39] The defendant seeks an adjustment in his counterclaim but does not seek declaratory relief by relying on pleaded particulars of each transaction referred to in section 15(2) and (3),⁷ nor by pleading the quantum sought, but rather relies on equity relief couched in a percentage, that being "*...equivalent of 50% of all the **amounts Plaintiff benefited from the joint estate** (own emphasis) to his detriment*". The plaintiff's complaint in the replication that the defendant failed to disclose a cause of action for an adjustment becomes clearer.

[40] The plaintiff in written argument dealt with the section 15 adjustment relief and the defendant's failure to plead and discharge his onus. However, the defendant's Counsel in written argument states that the defendant does not seek section 15 adjustment relief, but forfeiture in terms of section 9 of the Divorce Act.⁸

[41] The difficulty with the argument lies in the pleaded facts of the defendant's counterclaim in that no reliance is placed on the plaintiff's conduct to demonstrate

⁶ In terms of Section 15(9)(b) of the Matrimonial Properties Act

⁷ Matrimonial Properties Act.

⁸ See footnote 2.

that the plaintiff is not entitled to share in the benefits (excess benefits), Such excess being that he may have contributed to the joint estate over the contributions of the plaintiff thus triggering forfeiture of such benefits. Conversely the defendant alleges that the conduct caused undue diminishment of his half share, warranting an adjustment.

[42] However, in an attempt to understand the argument of forfeiture now relied upon one must have regard to the nature and formulation of a forfeiture claim.

[43] A misconception exists that an order for forfeiture where parties are married in community of property means that the party against whom such an order is made (in this case the plaintiff), forfeits the right to share in the division of the joint estate, or part thereof, as claimed. This is an incorrect interpretation. The proper position is that such a party forfeits the right to share in a “benefit” of the marriage in community of property. In **Smith v Smith**⁹ Schreiner J (as he then was) where Hahlo is quoted in the decision states:

“What the defendant forfeits is not his share of the common property but only the pecuniary benefits that he would otherwise have derived from the marriage. It (the order of 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.”

[44] “Benefits” therefore constitutes the excess of the one party’s contribution, i.e. in this case for the defendant to plead and to demonstrate that his contributions to the joint estate were over and above that which the plaintiff contributed and as such he seeks that the plaintiff forfeit (give-up) those benefits.

[45] Various authorities exist that stipulate that the factors upon which a party claiming an order for forfeiture of benefits of a marriage in community of property should be properly pleaded and proved.¹⁰ Therefore, to obtain an order for forfeiture of benefits the defendant must:

⁹ 1937 WLD 126 at 127 to 128.

¹⁰ **Matyila v Matyila** 1987 (3) SA 230 (W); **Binda v Binda** 1993 (2) SA 123 (W); **Koza v Koza** 1982 (3) SA 642 (T); **Singh v Singh** 1983 (1) SA 781 (C); **Wijker v Wijker** 1993 (4) SA 270 (A).

45.1 Set out the grounds which led to the irretrievable breakdown.

The defendant did set out grounds, including relying on the plaintiff's conduct and extreme extravagance. The conduct was specified, such relating to the E[...] property, Dreamteam and inheritance.¹¹

Reliance must be met with the evidence.

Both parties testified that, notwithstanding their customary marriage they agreed to run their lives fairly independently, 'She has her stuff and I have my stuff and we have joint family commitments'. Although providing consent to enter into section 15(2) and (2) transactions was not common place, knowledge of such transactions were. In amplification and on the evidence:

43.1.1 The defendant testified that as he was aware of the plaintiff acquiring and disposing of the Elorete property.¹²

43.1.2 As far as the reliance on the plaintiff's conduct in relinquishing her interest in a company Dreamteam, The defendant did not set out any particularity of the company. According to the evidence, the only Dreamteam company the plaintiff relinquished Dreamteam CC in that the plaintiff testified that she allowed the entity to "die" as it was not performing. The documentary evidence demonstrated that the plaintiff's mother never held an interest in Dreamteam CC. The defendant never presented any evidence regarding Dreamteam Civils (Pty) Ltd.

43.1.3 As far as the plaintiff's not accounting to the joint estate when she inherited from her the deceased's estate, the defendant conceded that he used the motor vehicles as

¹¹ Para [9].

¹² Section 15(2)(b).

and when he needed them. The defendant did not deny that the couple lived a lavish lifestyle and he readily conceded that the plaintiff did pay for their holiday in Mozambique. He too conceded in cross examination that he did benefit in some way by stating: *“maybe indirectly it happened, but straight to me that this is the money inherited, come on, let’s enjoy the money. That has never been”*.

45.2 The nature and extent of “the benefits”.

The nature and formulation of the extent of the benefit was not pleaded nor proved. In fact, no benefit by the defendant was identified nor established.

45.3 The nature of the order sought.

The nature of the order sought by the defendant was for an equity finding and not based on pleaded grounds upon which a Court could exercise its judicial discretion as provided for in section 9 of the Divorce Act.

[46] Having regard to the above, the defendant has not only failed on the papers, but on the evidence to establish grounds upon which a Court can exercise a discretion in his favour and moreover, the defendant has failed to provide authority justifying the reliance of an equity relief, a departure from section 9.

[47] The defendant’s counterclaim must fail.

[48] In the premise the following order is granted:

1. A decree of divorce;
2. That both parties retain full parental responsibilities and rights in terms of section 18, 19 and 20 of the Childrens Act, 38 of 2005 in respect of the

minor child born of the marriage between the parties, subject to the provisions of prayers 3 and 4 hereunder;

3. That the care and primary residence of the minor child, O[...] L[...] S[...] born on 23 April 2015, both between the parties be awarded to the plaintiff;
4. That specific parental responsibilities and rights with regard to contact of the minor child born between the parties as contemplated in section 18(2)(b) of the Childrens Act, 38 of 2005 be awarded to the defendant on the basis that the defendant shall be entitled to exercise reasonable rights and contact to the minor child, which contact will be exercised as follows:
 - 4.1. The right to remove the minor child for one night sleepover visits every alternate weekend from a Friday, after school to a Saturday until 18h00, when the child is to be returned to the care of the plaintiff.
5. The defendant shall pay maintenance in respect of the minor child as follows:
 - 5.1 Making a cash contribution towards the maintenance of the minor child in the sum of R1 000.00 per month, which sum is to be paid on or before the 1st day of every month;
 - 5.2 Continue to make payment in respect of the minor child's school fees and to retain the minor child as a dependant on his current medical aid scheme, at his own expense, and to pay all medical expenses in respect of the minor child that are not covered by the medical aid scheme he is a member of, at the relevant time.
6. Division of the joint estate;

7. That the defendant pay to the plaintiff one half of the defendant's pension interest in the defendant's pension fund at his place of employment at Sibanye Stillwater Mine, calculated as at date of divorce and payable in terms of section 37D of the Pension Fund Act, 24 of 1956 and that the defendant's said pension fund be and is hereby authorised and ordered to give effect to the provisions thereof;
8. That an endorsement be noted against the record of the defendant's aforesaid pension fund in terms of the provisions of prayer 7 hereof;
9. The defendant pays the costs of suit.

**L A RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

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Date of closing arguments for the plaintiff:	7 July 2023
Date received closing argument for the defendant:	20 July 2023
Date of judgment:	11 August 2023