FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4411/10

In the matter between:-

NTEBALENG ELIZABETH MOLAPO Plaintiff

and

MPHOKO ABEL MOLAPO Defendant

HEARD ON: 5 MARCH 2013

JUDGMENT BY: KRUGER, J

DELIVERED ON: 14 MARCH 2013

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[1] In this divorce action the only dispute is whether there should be a forfeiture order under section 9(1) of the Divorce Act 70 of 1979 in favour of the plaintiff. In the particulars of claim the plaintiff makes the following allegations:

> "7.
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> 7.1 During the course of the marriage the Defendant in no way whatsoever contributed towards the bond instalment of the property situated at 46 Diederick Street, Ehrlich Park, Bloemfontein;
>
> 7.2 From the purchasing of the property to date it has been the Plaintiff who has attended to the monthly instalment on said property and so too also rates and taxes, water as well as electricity costs.

8.

Having regard to the reasons which gave rise to the irretrievable breakdown of the marriage and more specifically the fact that the Defendant did not attend his obligations pertaining to the financial upkeep of the household or otherwise as well as towards the monthly bond instalment on the property as aforementioned, Defendant would be unduly benefitted if an Order for forfeiture was not granted by the above Honourable Court in relation to the fact that the marriage is one in community of property and furthermore if he were to share in the value of the aforementioned property."

[2] The plea to these allegations is as follows:

"3.

AD PARAGRAPH 7 AND 8 THEREOF

3.1 The contents of this paragraph are denied with the Plaintiff being called upon to provide proof thereof;

3.2 Defendant specifically avers that the proceeds of that:

3.2.1 When he first met the Applicant, he had his own house situated at Phase II where he stayed together with her for about ten (10) years.

3.2.2 At the time, she was in Standard 10 and he paid for her studies until she obtained her teachers qualifications;

3.2.3 After her completion, she at first contributed to the growth of the joint estate and later persuaded him to sell the house, which he eventually agreed to do, after which they bought the current communal house together;

3.2.4 He then bought her a motor vehicle MAZDA 323, among others, from the proceeds of the sale and used the balance to renovate the current communal home.

> 3.2.5 Although the Bond was deducted from the Plaintiff's salary, he contributed in the house in that he was responsible for grocery and other related financial obligations in the house."

[3] In the counterclaim defendant claims "Forfeiture of matrimonial benefit, alternatively, division of the joint estate". The allegations in paragraph 3 of the plea, cited above, serve as justification for this prayer. In the evidence provided in this court and argument by Mr Khang, on behalf of the defendant, did not seek an order for forfeiture in favour of defendant and he submitted that an order for division of the joint estate should be made.

[4] Only the plaintiff and defendant testified. Because of the scant details provided in evidence of the values of the properties, bond instalments paid and income of the parties, I requested the legal representatives to provide details thereof, which they did. The plaintiff is a primary school teacher and the defendant a soldier.

[5] Section 9(1) of the Divorce Act 70 of 1979 reads:

> "(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the 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."

[6] The plaintiff married the defendant on 3 January 1992. She met the defendant in 1988 from which time they had an intimate relationship until they were married. After plaintiff finished school in 1988 she went to the Teachers' College, where she qualified at the end of 1992. In cross-examination it was put that defendant paid her rent while she was studying, which she denied. She said she had a bursary and had some change of that left after her tuition fees were paid. Her mother's employer paid the R40,00 per month for the shack she lived in, whereafter she went to live with her sister. She did not work in 1993 because her eldest daughter was born on 30 March 1993. She started working in February 1994. Plaintiff and defendant bought their first house at the end of 1993 for R49 000,00. Defendant paid the bond, about R500,00 – R600,00 out of his pocket, the balance of the bond payment was a subsidy from his employer.

[7] The parties kept that house until 2002, when it became too small for them. The two daughters could not keep on sleeping on a single bed. Plaintiff wanted to buy a new house and defendant wanted to extend the existing house. They sold the house for R87 000,00. Plaintiff said the profit from the sale was about R40 000,00 which defendant took. Defendant said the net proceeds comprised R17 000,00. Of that he used R10 000,00 to buy plaintiff a Mazda 323 motor vehicle and the rest he used to pay off household debts.

The Mazda cost R12 000,00. Plaintiff said defendant only gave her R10 000,00 from the proceeds of the house, she had to pay the other R2 000,00. Defendant's testimony was different. He said the seller wanted R12 000,00 for the Mazda, but he gave it to defendant for R10 000,00. Thereafter defendant paid the seller a further R2 000,00. Defendant said that it was not the plaintiff who paid that R2 000,00. Apart from the fact that this version was not put to the plaintiff, it is difficult to understand why the defendant gave the seller a further R2 000,00 if the seller was willing to let the defendant have the car for R10 000,00. This was one of the numerous unsatisfactory aspects of defendant's evidence. Plaintiff testified that defendant used the balance of the proceeds received from the sale of the house to pay off his debts, including cell phone debts and cash loans of which she knew nothing. Defendant testified that he paid off debts of the joint estate. Plaintiff gave particulars, defendant not. I accept her version and accept that the defendant used R7 000,00 from the proceeds of the sale of the house to pay off his personal debts.

[8] Mr Khang says that the plaintiff received the lion's share of the proceeds from the sale of the house. That means R10 000,00 as opposed to R7 000,00. But the matter does not end there. Plaintiff testified in cross-examination that she had the Mazda for a very short while, then defendant took it back, whereafter she and the two daughters had to use public transport. Defendant in his evidence did not deny this evidence by plaintiff that he took back the Mazda and

that she and the daughters had to use public transport. This is another factor which counts against the defendant.

[9] At the end of 2003 the parties bought the current house for R140 000,00. They paid no deposit. They went to the bank to get a bond. Defendant's credit record was checked. The bank realised that the defendant did not qualify for a bond. They then decided that the bond would be taken out by the plaintiff. They agreed that defendant would pay half for the bond, but in the event he did not. He told plaintiff she was working, she could pay the bond. It is not disputed that defendant never contributed to the payment on that bond. The instalment is R1 400,00 and plaintiff receives a subsidy of R900,00 which means that she pay R500,00 per month of her own money on the bond. Defendant said he paid for other household expenses, but plaintiff said he bought the groceries for less than a year and if this cost more than R500,00 he would start fighting. Plaintiff said she paid the children's school fees (this was not disputed).

[10] As to the respective incomes of the parties, the legal representatives agreed that in 1993 the net income of plaintiff was R2 500,00 and that defendant R1 000,00 per month. In 2006 those figures were R8 000,00 and R5 000,00 respectively and at present R10 871,00 for plaintiff and R7 215,00 for defendant.

[11] There is a dispute between the parties as to what each put into the new house. Plaintiff said the only thing defendant

paid for was the fence at the new house which cost him R1 500,00. Defendant says he also paid for taking out the wooden floors and replacing them with tiles, although this was not put to plaintiff in cross-examination. Asked how much he contributed to the new house in cross-examination, defendant said he got his bonus in December each year and then he contributed R8 000,00 on a regular basis. Asked what he did to the house in 2006, defendant said he paid for taking out the wooden floor, the tiling and the fence. Asked what he paid for in 2005, he said the same, you have to keep it up. It was then put to him that in terms of the domestic violence interdict, he was ordered out of the house in October 2006, and therefore could not have used his 2006 bonus. He replied that he paid for the fence. This evidence of the defendant was unsatisfactory, lacking in detail and improbable. I reject defendant's evidence that he made any contribution to the new house except for paying R1 500,00 for the fence.

[12] Relating to the criteria in section 9(1) of circumstances which gave rise to the breakdown of the marriage, and substantial misconduct two incidents can be referred to:

(a) One day during the marriage defendant opened the gas bottle in the house. Plaintiff was lying in the bed. Defendant stood in the door. Plaintiff, since birth, does not have a sense of smell. Then she sneezed. The children shouted to her that there was a gas smell in the house. Plaintiff was sweating. The defendant had

locked both the front and back doors of the house. Plaintiff begged the defendant; she could not get out of the room. She prayed. Defendant sat on the bed. He threw away the matches he had. He was heavily under the influence of liquor and fell asleep. After that plaintiff obtained a protection order against the defendant. He did not change his behaviour after that. This incident of the gas and the apparent attempt to set the house alight, was not disputed in cross-examination or in evidence by the defendant. The fact that a protection order was granted, was also not denied.

(b) The other incident relates to what happened after the defendant had already moved out of the house. In 2008 the case of the protection order was finalised and the protection order was set aside. The defendant returned to the house and said: “The boss is back”. He started fighting again. He was there for a few hours. Plaintiff called the police who removed the defendant. He never returned to the house again, except in the company of the police to collect his things.

[13] Later in 2008 a friend of the plaintiff helped her, he was driving her vehicle. The defendant saw them in the street and parked the vehicle he was driving in front of them. Defendant was heavily under the influence of liquor and insulting. There was a fight between the person with plaintiff and defendant. In his evidence defendant said that he saw

plaintiff and this other person together for a second time and confronted them and there was a fight between that man and defendant. Plaintiff said she made a case against the defendant and he pleaded guilty.

[14] Also on these two criteria in section 9(1), reference can be made to the defendant's relationship with his two daughters, born 1993 and 1997:

(i) Plaintiff testified that defendant used to abuse the daughters all the time. He called them names and assaulted them. This evidence of plaintiff was not disputed in cross-examination or in evidence by the defendant.

(ii) The first question in cross-examination of the defendant was where his elder daughter was. His reply was he did not know. He did know she was at university but said she had a scholarship and no-one asked him to contribute. He said it is now 10 years that he has not seen his children. The plaintiff influenced the children to hate him. In her evidence plaintiff said that she would not stop the children seeing the defendant if they wanted to see him.

(iii) Plaintiff went to the Family Advocate several times. Two reports were drawn. The defendant never went to the Family Advocate despite being requested to do so. The evidence establishes that the defendant is not

interested in his daughters and that he treated them badly.

[15] A further point relates to extra marital affairs. Plaintiff testified that she knew of two children of the defendant born out of wedlock who have two different mothers. In his evidence defendant denied that he had children out of wedlock and in support of that allegation he said on his pay sheet there are only deductions for two children (constituting the arrears of the maintenance orders). I found the defendant's denial unconvincing and further proof of his unsatisfactory evidence.

CONTENTIONS OF THE LEGAL REPRESENTATIVES

[16] Mr Stander, for plaintiff, said that at least a partial forfeiture should be ordered against the defendant. He submitted that the defendant's violence was the cause for the breakdown of the marriage. Nothing of the R17 000,00 profit from the first house went into the second house. A car was bought for plaintiff with part of those proceeds, but the car was sold again. She had no benefit from that money. The defendant's evidence as to the money he put into the maintenance of the new house, was unsatisfactory, because he gave no details on the R8 000,00 bonus money he allegedly spent in December each year and the allegation he made in relation to the 2006 bonus could not be correct because the protection order was in place in December 2006. Defendant was a violent person, as the gas incident, which was not disputed, proved his aggressive conduct

caused the breakdown of the marriage. Plaintiff had to care for and pay the school fees of the children. Defendant has no interest in the children and last saw them in 2008. The only thing the defendant paid for of the new house was the R1 500,00 fence. Plaintiff paid the bond instalments and cared for the house. She brought up the two children. The value of the house has increased from R140 000,00 in 2003 to a current value of R500 000,00. The bond at present stands at R100 000,00. The equity in the house is therefore R400 000,00. Defendant would benefit unduly if she were allowed to share equally with plaintiff in the proceeds of the sale of the house.

[17] Mr Khang says that the plaintiff bears the onus to show the values of the property and she must provide details of all the other assets and expenses of the parties. This submission was presumably made with reference to **Koza v Koza** 1982 (3) SA 462 (T) at 465H. In the **Koza** case the pleadings were not formulated to plead the facts justifying forfeiture. The evidence placed before the court in the **Koza** case was insufficient to justify a forfeiture order.

[18] In the present case the plaintiff set out the grounds for her claim of forfeiture in paragraphs 7 and 8 of the particulars of claim and she expanded on those in evidence. The issue of forfeiture has been properly ventilated.

[19] As to the duration of the marriage, Mr Khang submits that generally the duration of the marriage will be relevant where

the marriage was very short. Here the marriage lasted for more than 20 years. I agree with Mr Khang that the duration of the marriage in this case is not a factor which carries great weight in determining whether there should be forfeiture or not.

[20] Mr Khang says that for the first 10 years of the marriage the parties occupied immovable property in respect whereof the defendant paid for the bond. That was a four-roomed house. The second house had only one more room. The defendant paid R500,00 each month for 10 years towards the bond on the first house. As to the proceeds from the sale of the first house, R10 000,00, the lion's share, went to plaintiff to buy her a car. The second house was bought because plaintiff was not satisfied to extend the first house. She created the need to buy the second house. Defendant did not qualify for a bond. Plaintiff paid R500,00 per month for the bond and defendant bought the groceries. Sometimes he brought leftovers from work for the family to eat. On the new property the defendant paid for the fence. Mr Khang said plaintiff was in her initial evidence silent on the replacement of the wooden floor and putting in the tiled floor. Only when defendant said he put in that floor did she refer to it when she was re-called. I must point out that one of the reasons why plaintiff was re-called was because that had not been put to her in cross-examination. Mr Khang says defendant paid R500,00 per month on the bond for 10 years; now plaintiff is paying R500,00 per month. The R500,00 per month he paid was, taking inflation into account, more than

the R500,00 the plaintiff is paying now, in today's money. The first property would also have appreciated in value. Mr Khang says, looking at these circumstances the defendant will not be unduly enriched if he shares equally in the proceeds of the sale of the second house.

[21] As to the conduct of the parties, Mr Khang says the conduct of the parties before the marriage shows character. He says I must have regard to the fact that defendant says he supported the plaintiff before the marriage. However, the plaintiff denied this and said her parents supported her. Defendant was not a good witness and I cannot accept his evidence that he supported the plaintiff before the marriage in the light of her detailed evidence of where she lived and that her mother's landlord paid the R40,00 per month for the shack, whereafter she went to live with her sister. Mr Khang says the problems in the marriage started when the second house was bought. Plaintiff insulted the defendant before her friends. She said he earned peanuts. Kr Khang says the defendant's version is more probable than that of plaintiff. I have difficulty with this submission. I have given reasons above why defendant was not a satisfactory witness. The gas incident is undisputed, as is the fact of the protection order and the leaving of the defendant in 2008. The car-incident in 2008 where the drunken defendant assaulted the person with the plaintiff, is not disputed. The version of the plaintiff is to be preferred over that of the defendant. I did agree with Mr Khang's submission that it cannot be said that the defendant's conduct led to the

breakdown of the marriage. The factors mentioned by the plaintiff, detailed above, are a far more plausible cause for the breakdown of the marriage than the allegations by defendant that plaintiff was aggressive and insulting.

[22] Mr Khang said plaintiff gave no evidence of assets she brought into the marriage. Plaintiff did tell the court of assets defendant brought in, namely the fridge, DVD player, radio and bed. That is correct, but plaintiff also said that defendant could have those. The asset of real value is the house, and defendant made practically no contribution to the house.

THE LAW ON FORFEITURE OF BENEFITS

The principles can be set out as follows:

(1) The starting point when dealing with a marriage in community of property is that the parties agreed before the marriage that they would share in the proceeds of the marriage equally. The principle is *pacta sunt servanda*, agreements must be honoured. (See **"Die Onbehoorlike van Huweliksvoordele en *pacta sunt servanda*", J.C. Sonnekus**, **TSAR** 1993 774 at 779.)

(2) The legislature in the 1979 Divorce Act unambiguously set its face against the element of guilt at divorce. This rejected element of guilt cannot be smuggled in via the backdoor at section 9. (**Klerck v Klerck** 1991 (1) SA 265 (W) at 269C – D).

(3) The first step is to determine whether the party against whom the order is sought, will in fact be benefitted. This is a purely factual issue. (**Wijker v Wijker** 1993 (4) SA 720 (A) at 727E).

(4) The next step is a value judgment after having considered the facts falling within the compass of the three factors mentioned in section 9 (**Wijker** 727E – F).

(5) All the factors mentioned in section 9, namely (i) the duration of the marriage, (ii) the circumstances which gave rise to the breakdown thereof; and (iii) any substantial misconduct on the part of either of the parties must be considered. The court must look broadly at the three categories (**Klerck** 269D – G confirmed in **Wijker** 729A – G).

(6) It is not a prerequisite for making a forfeiture order that all three factors mentioned in section 9(1) must be present (**Klerck** 268B – 269G; **Binda v Binda** 1993 (2) SA 123 (W) at 127C – D).

(7) The court can order that a percentage of the estate or an asset be forfeited, as was done in **Singh v Singh** 1983 (1) SA 781 (C).

(8) The misconduct contemplated in section 9(1) is of a more serious nature than what is contemplated in

section 7(2), where the court is dealing with redistribution. (**Singh** at 788H).

(9) The forfeiture order is confined to patrimonial benefits, under section 9(1) the court cannot order a redistribution of capital and property. (**Singh** 788E – F; Hahlo, **The South African Law of Husband and Wife**, 5th Ed (1985) 376.)

(10) The facts and circumstances on which a party relies for a forfeiture claim must be pleaded and canvassed in evidence (**Koza v Koza** 1982 (3) SA 462 (T) at 465H).

(11) The legislature has given no direction as to the relative importance of the three factors (Sonnekus at 777, **Klerck** at 268I). The factors have been defined in a wide-ranging and vague manner (**Klerck** 268H).

(12) To determine whether one spouse will benefit if the order is not granted the court must determine the respective contributions by the spouse to the joint estate (**LAWSA**, vol 16, 2nd Ed par 90, footnote 11) where it is stated that the court considers the salaries of the parties and what they owned at the time of the marriage. The court has regard to the household duties of the spouses as a contribution (*loc cit*).

(13) It has been said obiter that the benefit is "undue" if it can be described as disturbingly unfair (**Engelbrecht v**

Engelbrech 1989 (1) SA 597 (C) at 602F; see Sonnekus at 777).

(14) The purpose of a forfeiture order is not to punish the guilty spouse. The element of fault has been removed from our divorce law and exists only in the limited extent circumscribed in section 9(1).

(15) Courts are reluctant to make forfeiture orders because the fault principle is no longer part of our law. Forfeiture orders made by trial courts were set aside in **Wijker** and **Engelbrecht**. In **Klerck** the court refused to make a forfeiture order. In **Koza** the trial court's refusal to make a forfeiture order was confirmed on appeal. In **Singh** a forfeiture of only 20% was ordered (at 791E – F).

FACTS OF CASES

[23] 23.1 **Wijker v Wijker**

The trial court, Heyns J, granted a forfeiture order with regard to certain assets, comprising the shares of a company and certain assets purchased by the respondent (wife) with income derived from the company. The marriage was reasonably happy from 1956 until 1980 when the respondent's estate agency started to flourish. The trial court found that the husband hardly made any contributions to the management and administration of the respondent's company and did not help it to earn profits. On appeal

Van Coller AJA held that even if it is assumed that the husband made no contribution to the success of the business of his wife, it did not follow that the husband would be unduly benefitted if a forfeiture order was not made. The appeal court considered that the marriage lasted 35 years and the appellant (husband) was the only breadwinner for 20 years. The court found that no substantial misconduct was proved against the appellant. The appeal court set aside the forfeiture order.

23.2 **Klerck v Klerck**

The court found no evidence of any substantial misconduct on the part of either party. The marriage did not last longer than two years. The court made no order under section 9.

23.3 As is said by Clinton Light in "*Binda v Binda*: a final nail in the coffin for the fault principle?" **DR** (1993) 1088 at 1089, unless a party can prove that division would be inequitable in the particular circumstances of the case, the parties should be held to the proprietary regime into which they contracted. A value judgment must be made to determine whether the benefit will be undue (Cronjé and Heaton, **Die Suid-Afrikaanse Familiereg**, 2nd (2004) 136).

23.4 **Singh v Singh**

The marriage lasted 20 years. The defendant's misconduct was substantial (791C – D). The duration of the marriage was 20 years (791C – D). The circumstances which gave rise to the breakdown were 50/50 (791D – E). A forfeiture of only 20% of the joint estate was ordered.

THE FACTS CONSIDERED IN THE LIGHT OF THE REQUIREMENTS FOR FORFEITURE

[24] 24.1 **Duration of the marriage**

This marriage lasted 20 years. For the first 10 years the defendant paid the bond. The plaintiff started working in February 1994, two years after the marriage, because she had a child in March 1993 and only completed her studies at the end of 1992. In 1994 plaintiff earned R2 500,00 as opposed to. Defendant's R1 000,00 per month. From 2003, when the new house was bought, plaintiff paid the bond (with the help of her work subsidy, as had been the case with defendant when he paid the bond). Serious problems between the parties arose in October 2006, when the plaintiff obtained a protection order against the defendant and he was put out of the house. He only returned for a few hours in 2008. His only contribution to the new house was that he paid R1 500,00 for a fence. Since 2006 the plaintiff has been living in the house with her two daughters and paying all expenses for the house. That is a period of six years that the

defendant has made no contribution to the household, except his R300,00 maintenance for the children in terms of a court order of which he is also paying off arrears.

Two important aspects of the duration of the marriage are that the defendant paid the bond for 10 years on the one hand, but on the other hand has made no substantial contribution to the new house, about which the dispute really is concerning the capital growth thereof.

24.2 **Substantial misconduct**

The substantial misconduct alleged by defendant against the plaintiff is that she belittled him in front of her friends and told him he earned peanuts. He alleges she has a boyfriend, the person whom the defendant assaulted in 2008. Further he holds it against plaintiff that she wanted to buy a new house in 2003. There is no substance in any of those allegations. The defendant was not a satisfactory witness. Even if she said in front of her friends that he earns peanuts, that remark loses significance if compared to defendant's action in attempting to blow up the house and family with gas in 2006; his lack of care for his children and family; his assault in 2008 of the person who assisted the plaintiff with her car and his failure to support his family. I find that the

defendant made himself guilty of substantial misconduct.

24.3 **Circumstances which gave rise to the breakdown of the marriage**

The facts establish that the misconduct of the defendant led to the dissolution of the marriage.

CONCLUSION

[25] The first enquiry is whether the defendant will be benefitted if an order for forfeiture is not made. The equity in the house is R400 000,00. Defendant will receive R200 000,00 (gross) if a forfeiture order is not made. That constitutes a benefit.

[26] The next enquiry involves a value judgment taking into account the three factors mentioned in section 9. In my view the scale is tipped heavily, but not entirely in the plaintiff's favour. Just as in **Singh** I believe, because of the principle of *pacta sunt servanda*, the agreement to share equally between the parties, and that the defendant paid the bond for 10 years, the defendant is entitled to salvage something from this marriage. His substantial misconduct and the fact that he made no meaningful contribution to the new house and put no money from the old house into the new house, reduce his rights.

[27] In my view a fair order would be that the proceeds of the sale of the new house be shared between the parties on the

basis that the plaintiff gets two thirds and defendant one third.

ORDER

[28] 28.1 A decree of divorce is issued.

28.2 As agreed the defendant is to receive the fridge, radio, DVD player, television set and bed referred to by plaintiff in her evidence.

28.3 The defendant's benefits of the marriage in community of property are forfeited to the extent that the house of the parties situated at 46 Diederick Street, Ehrlich Park, Bloemfontein is to be sold and the plaintiff is to receive two thirds of the net proceeds and defendant one third.

28.4 Each party is to pay its own costs.

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A. KRUGER, J

On behalf of plaintiff:	Mr H.J. Stander Instructed by: Stander Venter & Kleynhans BLOEMFONTEIN
On behalf of defendant:	Mr Khang Instructed by: Mphafi Khang Inc BLOEMFONTEIN

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