IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1669/07

In the matter between:-

GALEHETE MARRIAM MALOPE Plaintiff
(Born SERANYANE)

and

MATLHOMOLA STEPHEN MALOPE Defendant

HEARD ON: 3 JANUARY 2008

JUDGMENT BY: H.M. MUSI J

DELIVERED ON: 10 JANUARY 2008

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[1] This matter was heard on 3 January 2008 and on the 4th January 2008 I granted an order of divorce and other relief. I indicated that I would give full reasons for the orders in the form of a written judgment to be delivered on 10 January 2008. The bulk of the reasons relate to the prayer for forfeiture of the benefits of the marriage and these follow hereunder.

[2] The plaintiff has instituted an action against the defendant in this court claiming:

(a) A decree of divorce;
(b) Custody and control of the minor child born of the marriage between the parties;

(c) Payment of maintenance at the rate of R500.00 per month for and in respect of the minor child, once the defendant has obtained employment;
(d) Forfeiture of the benefits of the marriage in community of property;
(e) Costs of suit;
(f) Further and alternative relief.

[3] The summons was served on the defendant personally on 25 April 2007. He failed to file a notice of intention to defend within the prescribed period or at all. The matter was, however, only enrolled for trial during November 2007 and it thus became necessary to serve the notice of setdown on the defendant. The notice of setdown was accordingly served on the defendant personally on 27 November 2007 indicating that the matter would be heard on 3 January 2008. The defendant still gave no indication that he wanted to oppose the grant of divorce.

[4] When the matter came before me on 3 January 2008 the defendant appeared in person and indicated that he wanted a postponement in order to obtain the services of a legal representative. The plaintiff opposed the application. I adjourned the matter for 30 minutes in order to give the parties the

opportunity to attempt a settlement or come to some agreement on the way forward. No agreement could be reached and counsel for the plaintiff indicated that he would lead evidence to counter the application for a postponement. Having heard the plaintiff's evidence I then heard the defendant's evidence under oath on the reasons why he had not done the necessary in order to defend the action. I then dismissed the application for a postponement and proceeded to hear the matter as an unopposed divorce. I gave brief reasons for my decision which are on record. I need not repeat them here.

[5] In essence, the plaintiff confirmed under oath the grounds of divorce as set out in her particulars of claim. In a nutshell these are that the defendant abuses alcohol, that he has been unemployed since 1999 and does not show interest in obtaining employment, that he squandered money given to him by the plaintiff for the payment of the couple's liabilities which include monthly bond repayments and school fees for their children, and further that the defendant sold movable assets of the joint estate without the plaintiff's consent. She mentioned, upon questioning by the court, that they are still living in the same house but that they sleep in separate rooms and do not talk to each other. Nor do

they accord each other conjugal rights. This has been the case for the past two years.

[6] I am satisfied that the marriage relationship between the parties has irretrievably broken down and that there are no reasonable prospects of reconciliation. I am also satisfied that the plaintiff has made out a case for custody of the one minor child, namely G, a girl now aged seventeen, who is presently in a boarding school in Bloemfontein. I have no reason to doubt the plaintiff's evidence that the child has expressed the wish that she be placed in the mother's custody rather than that of the father. At any rate there is no claim for custody by the defendant. Moreover, on the evidence, the plaintiff is the sole breadwinner and provides all the needs of the child. Though the plaintiff is temporarily employed in Saudi Arabia as a nurse, she has made proper arrangements for the child to spend time with relatives when she is not at boarding school.

[7] The plaintiff's claim for maintenance in respect of the minor child cannot be entertained. If and when the defendant finds employment, an appropriate claim can be lodged with the Maintenance Court.

[8] I should mention at this stage that the parties were married to each other in community of property on 17 April 1985 and have thus been living together as man and wife for the past 22 years. The plaintiff testified that they initially owned a house in Bloemanda in Bloemfontein which they had jointly acquired. They had sold it and an amount of R68 000.00 came their way from the sale and they used this amount to pay a deposit on the purchase of another house situated at 58 Klaradyn Street, Pellissier, in Bloemfontein. A mortgage bond was registered over this property in order to cover the balance of the purchase price. This is the house that forms the common home of the parties. At the time both parties were employed, she as a nurse and he as a laboratory technician.

[9] In 1999 they both resigned their jobs and each received a monetary package from his/her employers. They had been operating a joint banking account into which they deposited the money which each of them had received. They then withdrew an amount of R150 000.00 and paid it into the bond account, thereby reducing the bond balance to R50 000.00. Subsequently she took up employment in Saudi Arabia while the defendant remained unemployed. The decision to take up employment in Saudi Arabia

had the defendant's blessing and was motivated by the need for the plaintiff to earn more money since she was now the sole breadwinner. Plaintiff further testified that she regularly sent money to the defendant for payment of the bond instalments, school fees for the children and for household necessities, but that the defendant misused the money. At one stage the mortgagee had threatened to sell the movable property in order to recoup arrear instalments, because the defendant had not been paying these. On two occasions the defendant had to raise loans of R42 000.00 and R16 000.00 respectively from relatives in order to pay arrear bond instalments. The loans were granted on the understanding that she would repay them, but she has not done so up to now. The plaintiff said that as a result of the failure to pay the bond instalments punctually, the bond balance has escalated to about R200 000.00 over the years. The plaintiff also testified that the defendant sold some movable assets of the joint estate without her consent. She said that she has a list of such items, but has not handed it up.

[10] I am satisfied that, on the uncontested evidence of the plaintiff, she has established substantial misconduct on the part of the defendant, which contributed towards the breakdown in the

marriage relationship between the parties. It is also clear from the evidence that since 1999 the defendant has not contributed financially towards the upkeep of the common household as well as maintenance for their children, including the payment of their school fees. (I use the word "financially" advisedly in order not to rule out the possibility that the defendant may have contributed in other ways, like managing the household and caring for the children.) It is also clear from the evidence that the defendant has caused the joint estate financial loss in the sense that the bond balance has escalated when it should probably have been liquidated. However, all these considerations are not in themselves sufficient to warrant the grant of a forfeiture order.

[11] It has been laid down that the correct approach to the question of whether to grant an order of forfeiture of the benefits of the marriage in community of property in terms of section 9(1) of the Divorce Act, 70 of 1977, is first to determine the benefit in relation to which the one party would be unduly benefitted in relation to the other if the order of forfeiture is not granted. Once this has been determined the court must then deal with the question of whether the party against whom the order is sought, would be unduly benefitted if forfeiture is not granted. See **ENGELBRECHT v**

ENGELBRECHT 1989 (1) SA 597 (NPD) at 601H; **WIJKER v WIJKER** 1993 (4) SA 720 (AD) at 727E. This requires that the nature and extent of the benefit be established and the onus of doing this, as well as showing that the other party would be unduly benefitted, rests on the party claiming forfeiture. In this regard, the following was stated in **KOZA v KOZA** 1982 (3) SA 462 (TPD) at 465H:

> "In my view it is therefore necessary that there be placed before the court evidence in respect of the factors mentioned in s 9 (1) and also, in order to establish properly whether there is undue benefit warranting the making of an order, evidence of the nature and value of the benefits in respect whereof a forfeiture is sought. It follows that a party making a claim of this nature should plead the necessary facts to support that claim and formulate a proper prayer in the pleadings to define the nature of the relief sought."

See also **ENGELBRECHT v ENGELBRECHT**, *supra* at 602E.

[12] Besides, a reading of the authorities reveals that a party to a marriage in community of property cannot forfeit something that he/she has brought into the marriage or something in respect of whose acquisition she or he has contributed. What is to be forfeited is a benefit brought into the joint estate by the one party

or acquired through the sole efforts of the one party and in which the other party would ordinarily share but for the forfeiture order. Compare **SINGH v SINGH** 1983 (1) SA 781 (C) at 790C – D.

[13] Applying these principles to the facts of the instant case, it becomes immediately clear that the plaintiff's case falls short of the requirements for the grant of a forfeiture order. Firstly, her particulars of claim do not aver the necessary facts to support the claim. In particular, they do not identify the benefit in respect of which the defendant would be unduly benefitted. Instead, the plaintiff merely seeks a blanket order of forfeiture. Even in her evidence, the plaintiff was not able to pinpoint the asset or assets of the joint estate in respect of which the defendant would be unduly benefitted if forfeiture is not ordered. Secondly, on the plaintiff's own evidence, all the assets of the joint estate were jointly acquired. The main asset, the immovable property, was jointly acquired and both parties contributed funds towards the reduction of the bond balance in relation to it. Regarding the movable assets, no details have been provided as to the nature and extent thereof. Some sketchy information was given during the evidence but there is no information as to their value.

[14] What is plain is that the defendant has not been contributing

towards the payment of the bond instalments for some considerable period. On the contrary, by squandering the money entrusted to him to pay the instalments, he has impoverished the joint estate. It is in this respect that one could say that he would be unduly benefitted in the sense that, if forfeiture is not ordered, he would share equally with the plaintiff in the joint estate. But then again it is not known by how much precisely has the joint estate been set back, because the plaintiff has not said how much was squandered. The problem with the plaintiff's case is that no documentation whatsoever was furnished. As a result, she could not even say how much is presently owing on the bond. Even if it was known precisely how much had been squandered by the defendant, it would be anomalous to say that he should forfeit funds that have been lost.

[15] I conclude that the plaintiff has not made out a proper case for the grant of a forfeiture order. Nor would it be appropriate for this court to exercise its discretion in favour of such order.

[16] The proper order to grant in these circumstances is division of the joint estate. However, in doing so I cannot loose sight of the fact that the defendant has squandered money that would probably have liquidated the bond liability or at least substantially reduced it. In these circumstances it would be inappropriate and unjust that he be allowed to share equally in the distribution of the joint estate. I consider that he would be entitled to no more than 40% of the joint estate. I accordingly ordered that the joint estate should be divided on the basis of 60% for the plaintiff and 40% for the defendant. Since the matter was unopposed, I considered it

inappropriate to make any costs order.

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H.M. MUSI, J

On behalf of the plaintiff:	Adv. H. Cilliers Instructed by: McIntyre & Van der Post BLOEMFONTEIN
On behalf of the defendant:	No appearance

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