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**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO: 11572/2013**

In the matter between:

**N[...] J[...]**

**PLAINTIFF**

and

**O[...] J[...]**

**DEFENDANT**

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**ORDER**

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The following order is granted:

1. In terms of s 28 of the Children's Act 38 of 2005, the defendant's parental responsibilities and rights in respect of the minor child, S[...] O[...] J[...], a minor boy born on 25 June 2009, are terminated.
2. The issue of maintenance in respect of S[...] O[...] J[...] is referred to the maintenance court for hearing.
3. In terms of s 9(1) and (7) of the Divorce Act 70 of 1970, read with s 9 of the Matrimonial Property Act 88 of 1984, the defendant forfeits, in favour of the plaintiff, his entitlement to share in the patrimonial benefits of the marriage in community of property, which shall include:
  - 3.1 the pension benefits of the plaintiff held in the Government Employees Pension Fund;

- 3.2 her benefits in and to her retirement annuity with Liberty Life;
- 3.3 the immovable property described as Portion 528 (of 255) of Erf 1[...] C[...], Registration Division FT Province of KwaZulu-Natal, in extent 186 square meters and physically situated at 3[...] S[...] Road, Westcliff, Chatsworth.
4. The defendant shall sign all such documents and take all such steps necessary to effect registration of transfer into the plaintiff's name of the defendant's rights in and to the property and, should he fail or refuse to do so, the Sheriff or his lawful Deputy is authorised to and directed to sign all such documents and take all such steps necessary on behalf of the defendant to effect registration of transfer into the plaintiff's name of the defendant's rights in and to the property;
5. The defendant is to bear the plaintiff's costs occasioned by the divorce action, including any reserved costs.

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## JUDGMENT

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### Henriques J

#### Introduction

[1] This is a divorce action with a somewhat long and acrimonious history, not too uncommon these days in divorce trials. The action has taken some time to be finalised due to, inter alia, a change in attorneys by both parties, the personal misfortunes of the plaintiff, the amendment of the pleadings, the defendant's lack of legal representation and the Covid-19 pandemic.

[2] On 10 October 2025, I granted the following orders:

- (a) a decree of divorce; and
- (b) the remaining issues for determination, being the parental rights and responsibilities of the minor child, including contact and care, and the division of the joint estate were adjourned *sine die* to be dealt with in a written judgment.

[3] At that stage of the proceedings, having heard the evidence, and the oral and

written submissions of the parties and the curator *ad litem*, I was satisfied that both parties consented to be divorced and were *ad idem* that the marriage had irretrievably broken down, given their separation since 2012. This judgment now deals with the remainder of the relief.

### **Pleadings**

[4] At the institution of the action by the plaintiff in 2013, the plaintiff sought the primary residence of the two minor children, monthly maintenance, a 50% contribution to educational and medical expenses and was amenable to the defendant having reasonable rights of contact.

[5] Additional orders were sought directing that the defendant forfeit the following patrimonial benefits of the marriage in community of property:

10.2.1 the Plaintiff's interests/benefits in and to the Government Employees Pension Fund (the Fund) as contributions to such Fund have been made solely by the Plaintiff and her employers without any contribution by the Defendant;

10.2.2 the Plaintiff's interests/benefits in and to the Plaintiff's Retirement Annuity with Liberty Life as the premiums have been made solely by the Plaintiff without any contribution by the Defendant;

10.2.3 the immovable property described as PORTION 528 (OF 255) OF ERF 1[...] C[...] REGISTRATION DIVISION FT PROVINCE OF KWAZULU-NATAL IN EXTENT 186 SQUARE METERS AND PHYSICALLY SITUATED AT 3[...] S[...] R[...] Road, Westcliff, Chatsworth (the property) which was purchased by the parties from Mrs Amurtham Chetty (the Plaintiff's mother) on the 8<sup>th</sup> October 2008 for the sum of R340 000.00 and the property is registered in the names of both parties and it is the Plaintiff who has undertaken to pay such purchase price whereas the Defendant refuses to do so whereupon the Plaintiff has signed an Acknowledgement of Debt in favour of the Plaintiff's mother for payment of the purchase price.'

[6] The plaintiff also sought ancillary orders relating to the transfer of the immovable property in the event of the defendant refusing to sign such documents.

[7] The defendant, in opposing the divorce, sought the primary residence of the minor children, a similar order for maintenance from the plaintiff and a division of the joint estate.

## Issues

[8] Given the passage of time since the institution of these proceedings, and certain events, the issues which remain for determination in this action are the following:

- (a) the primary residence of the remaining minor child of the marriage, S[...] O[...] J[...] (S[...]), a boy born on 25 June 2009;<sup>1</sup>
- (b) contact, care and maintenance in respect of S[...]; and
- (c) forfeiture of the patrimonial benefits of the marriage in community of property.

[9] I do not propose to deal with all the evidence presented during the trial, as it is a matter of record, and will simply highlight those aspects which are relevant to the determination of the issues. Various exhibits were handed in during the course of the trial, which are a matter of record, to which I will refer in so far as they are relevant. What follows is a brief summary of the evidence.

## Evidence

[10] The parties were married in community of property at Durban on 5 December 2006, and twin boys, S[...] and D[...], were born of such marriage in June 2009. The plaintiff testified that she resorted to fertility treatment to fall pregnant. The plaintiff indicated that from 2009 until 21 June 2012 she, the defendant and their sons resided at the matrimonial residence which was her in-law's residence in Ettrick Road, Bluff. She and the defendant formally separated on 29 June 2012.

[11] After their separation in June 2012, they lived apart, save for a brief period of two weeks when they lived together, but not as husband and wife. Both parties are in agreement that they should be divorced, however, differ as to the reasons for the breakdown of the marriage: the plaintiff contending that she was subjected to verbal, physical, emotional and financial abuse, while the defendant alleges that she had an extramarital affair and was emotionally unstable.

[12] The plaintiff indicated that the marriage has been plagued by both verbal and physical abuse on the part of the defendant, as a consequence of which he made married life intolerable and she was forced to leave the matrimonial home. The former

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<sup>1</sup> It is common cause that twin boys were born of the marriage between the parties. D[...], the other twin, tragically passed away during the course of litigation on 10 October 2018.

matrimonial home is that of the defendant's parents.

[13] When the plaintiff testified, she did not testify about the events in chronological sequence and as a consequence the events will not be detailed in chronological sequence. The plaintiff testified that in February 2011, when she was not residing with the defendant, she received a report of a shooting incident involving the defendant outside a female's house in Merebank. A work colleague had contacted her after seeing her sons at hospital. Concerned for the safety of her sons, and given D[...]’s condition,<sup>2</sup> coupled with the fact that she had been thrown out of the joint matrimonial home in January 2011, she attempted to contact the defendant telephonically to find out why the children were at the hospital. He informed her that he had been shot. When she questioned him further, he responded that she had hired a hitman to shoot him. Despite this response, she was concerned and tried to get information about what had transpired but the defendant was very evasive.

[14] After reporting for work, a colleague transported her to the hospital. The defendant was in the presence of five other patients in the ward and he informed her that he had been shot in the abdomen. She was concerned, because from her experience as a police officer, she was not certain if he would survive, given the location of the wound. In addition, she was concerned that he was in a general ward and did not appear to be receiving the appropriate treatment for someone who had been shot in the abdomen.

[15] She also tried to speak with the defendant's family, who were present, for her to take D[...] and S[...] home with her. Both paternal grandparents refused. The defendant called her a 'bitch' in front of five other patients. She was in uniform at the time and was extremely embarrassed. Her work colleague attempted to intervene to stop the defendant from being abusive, but the defendant continued to hurl abuse.

[16] Whilst at the hospital, she noticed that he was still in the clothes he had been shot in and out of concern, asked him if he had enough clothes for the day and if the surgery had been scheduled. At the time, the defendant was still on her medical aid.

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<sup>2</sup> D[...] had a medical condition known as micro lissencephaly, commonly referred to as 'smooth surface brain'.

Because the defendant was uncooperative and was hurling abuse at her, she left. She did not do anything about the abuse at the hospital. By that stage, she had not seen her children since January 2011.

[17] That Sunday, a neighbour telephoned her to inform her that there was an article published in the newspaper concerning the defendant's incident. She read the article, which reported that the defendant had been outside a female's house in Chattergoon Road, Merebank when he had been shot. She was aware that the defendant had been involved in an extramarital affair since April 2007, four months after they were married, and that he had been providing for this woman financially. Surprised as to what had been reported in the newspaper article, she realised that the defendant had lied, as he had told her the incident had occurred at Punjab Circle at a shop where he went to purchase cigarettes.

[18] For the first couple of years of their marriage, she was on fertility treatment as she was under pressure from the defendant to have a child. All costs for such fertility treatment were paid for by herself, as this was not covered by her medical aid and she worked overtime to pay for this. In June 2008, she discovered that she had conceived after three years of being on fertility treatment. At the time, she had gone to the flea market with the defendant and bumped into a male colleague who greeted her.

[19] The male colleague was with his family at the time. The defendant twisted her hand and asked her 'for how long have you been fucking him'. She tried to avoid the question, but the defendant continued to nudge and twist her arm and she eventually ran to their motor vehicle. The defendant eventually joined her and drove away at a high speed towards their home. As the defendant alighted from the vehicle, he came around and shoved her with both his hands on her chest, causing her to fall backwards. At the time, the defendant was fully aware that she was pregnant and was in the early stages of her pregnancy.

[20] The defendant ran up to his room. She was feeling stressed and tired and realised that she had sustained lacerations to her back. She went inside the house and used the toilet and realised that she had started bleeding. She informed the defendant of this but he was not interested and was more concerned about questioning her about

her supposed relationship with her colleague.

[21] She testified that throughout their marriage, the defendant did not want her to greet any of her colleagues, especially male colleagues, and when she did, he accused her of committing adultery and being in adulterous relationships.

[22] After their separation in 2012, they shared custody of their sons, with her having the boys on her four days off. She testified that during this three-year period, she was forced to leave the matrimonial home on no less than four or five occasions. The defendant often expressed his dissatisfaction with her work arrangements and also continuously questioned her about her relationship with her male work colleagues.

[23] In respect of the abuse by the defendant, the plaintiff testified the first incident occurred a week after their marriage when they were on honeymoon at the Lost City. She was wearing a pair of jeans and a top. She was trying to take a photograph of the defendant when he walked toward her, grabbed her on her arm and squeezed it tightly, hurting her, and asked her 'What fucking clothing are you wearing?' He told her that a man was staring at her because of the manner in which she was dressed.

[24] He grabbed her away from the area but she ran away and ended up at the car park. When the defendant arrived at the car park, he opened a bottle of water and poured it over her head. He also cut the cord of the camera which was around her neck and started taking pictures of her crying. He cut the mangal sutra sacred chain, which had been placed around her neck when they had married. He broke it and rubbed the sindoor all over her face. She tried to explain to him that what had happened had nothing to do with her but the defendant continuously called her a 'bitch' and abused her verbally.

[25] On the day of the incident when she had been dressed in the jeans and top, she had asked him whether the clothing she was wearing was appropriate and he said he was fine with it. She questioned him as to why he had assaulted her, as her arm had by that stage turned blue. All the defendant did was to refer to her as a 'bitch' and indicated that she was wearing clothing which was attracting other men. She cried herself to sleep the night of the incident. They left the accommodation the next day and

returned home. She was too embarrassed to tell any family member, as she was in shock as to what had happened and also upset about the fact that he had cut the mangal sutra chain off her neck.

[26] She indicated that the mangal sutra chain works in conjunction with the sindoor and a red dot. She further explained that, when the red dot and the sindoor are removed and the mangal sutra chain is cut, is on the day that your husband dies. She confirmed that her marriage to the defendant was arranged. Her arm remained blue for approximately two weeks and she was too embarrassed to seek medical assistance. She was even afraid to inform her mother. The only people, apart from the defendant and herself, who were aware of the incident, were the defendant's parents whom he had already telephoned to say that she had been cheating on him.

[27] When they returned to the matrimonial home, she asked to leave, as she was concerned about being assaulted a week after the wedding and the defendant's conduct in having removed the mangal sutra chain. His parents were, however, not sympathetic. Even on the day of the incident when he telephoned them, calling her a 'bitch', to say she was cheating on him, his parents wanted to take an emergency flight to Sun City. On her return home, she tried to explain to his parents what had transpired but they refused to listen to her explanation and she was instructed to go to her room. She did so, as she was scared the defendant would assault her. She was not allowed to leave the residence and remained there although she and the defendant did not speak to each other for a couple of days. There were approximately 20 incidents during the course of the marriage of such abuse until she left the matrimonial home.

[28] A second incident which the plaintiff highlighted occurred in January 2010. She had been nominated to attend the Police Day in Bloemfontein. On her arrival at home after returning from work, shortly prior to her needing to leave, the defendant gave her her medical aid card and said that S[...] was ill. The defendant said he had a fever and had been vomiting. When she checked S [...], there was nothing wrong with him and she left for Bloemfontein. Prior to her leaving, the defendant was angry and asked 'what kind of mother leaves their sick child at home'. The defendant was angry and whilst travelling to Bloemfontein, constantly telephoned her, and questioned her about the men on the bus, who she was sitting next to and how many of her male colleagues were present. The defendant always accused her of being with other men.

[29] She also testified that when she travelled to Bloemfontein for the Police Day, they arrived at approximately 03h00 in the morning. The defendant was very upset that he was not able to contact her due to the poor signal. He refused to fetch her from the bus stop at Maydon Wharf on her return. One of the captains whom she worked with gave her a lift home. When she entered the house, she went to sleep. The following morning at approximately 07h00, the defendant nudged her to wake her up and questioned her about her 'fucking trip to Bloemfontein'.

[30] The defendant continued to nudge her and went to the cupboard and removed her firearm. She then ran downstairs into his mother's bedroom, where the children were asleep. She requested his parents to calm him down, as the defendant was acting irrationally. His mother responded by saying that she deserved what was happening, as she did not listen and went on the trip. The defendant grabbed her by her hair and placed her between his legs. He was sitting on the bed and pointed the firearm at her left temple. His mother and father watched this and did not intervene at any stage. The defendant then stopped when she pleaded with him not to shoot her.

[31] The defendant, whilst pointing the firearm at her temple, said to her that she must die for not listening to him. He punched her in the stomach and together with his mother, threw her out of the house. He took some of her belongings and threw them out the window. She pleaded with him not to do so, as she was still breastfeeding S[...] but he did not want to listen. He forced her out of the house and locked the door to the main house. She left and went home to Chatsworth where her mother lives.

[32] During the week, she tried to phone him, asking him to allow her to return for the children's sake but he refused. She then told him that she would get the court's assistance. That very afternoon, she was served with a protection order stating that she must not remove the minor children from the house. On the day that she was required to attend at court, she was late and the protection order was confirmed. When the defendant realised that she was going to use alternate means to obtain access to the children, he phoned her and begged her to return and indicated that he would discharge the protection order, which he did. She only returned to the house because of the children.

[33] A third incident occurred in December 2011, when the defendant had asked her to take out a mortgage bond of R300 000 over her mother's home for him to start a new business venture. In 2008, shortly after they were married, her mother wanted to transfer the property into her name, as this was her inheritance. The defendant refused to marry by antenuptial contract when her mother suggested it. As a consequence, the house was transferred jointly into their names. She had promised her mother that she would in no way encumber the property, as this was her inheritance and it was the only asset which her parents could afford to buy. An argument then ensued, as he felt she was not listening to him. After they had argued, she stood up to leave the room. She was standing against the wall when the defendant approached her and punched her in her eye with a clenched fist.

[34] The plaintiff produced photographs of the incident and the assault, which was exhibit 'C1' to 'C4'. Apart from punching her in her right eye, he repeatedly hit her over her head with an open palm as well as clenched fists. The other side of her head was blue as a consequence of being assaulted repeatedly with an open hand. The photographs were taken in December 2011, immediately after the incident. In one of the photographs, her injuries are depicted as a swollen right eye, as well as depicting her hair having been shorn off. The defendant had taken a pair of scissors and cut her hair off at the time. She had also sustained injuries to her left eye, which was blue.

[35] She confirmed that after the incident of assault in respect of which she produced the photographs, she was hospitalised for ten days at St Josephs Hospital for depression. Whilst in hospital, she was seen by a psychiatrist, Dr Miller, who gave her the reports to state that he was aware of the abuse she was suffering at the hands of the defendant. The defendant visited her whilst in hospital and pleaded with her not to open a case. The defendant was also interviewed by one of the psychologists and as a consequence, she did not open a case, as he threatened her that he would take the house away from her as it was in both their names and that he would kick her mother out of the house.

[36] The following morning after the assault incident, when she stood in parade, her commanding officer instructed her to go upstairs until he had finished with the parade,

as although she attempted to hide the injuries with her cap and foundation, she was unable to do so. Her commanding officer requested her to open a criminal case, which she did. Although she was scared, she did so despite the fact that she was still residing with the defendant.

[37] She testified that there were approximately eight criminal cases opened against the defendant. On case, Brighton Beach cas 159/11/2013, related to two counts of *crimen injuria*, one for common assault and one for pointing of a firearm. The defendant was convicted in respect of that case. He was also charged with fraud for using her medical aid without her permission after he had been removed as a beneficiary. Those charges were withdrawn as a consequence of her failure to notify the defendant that he had been removed from her medical aid.

[38] There were two other case dockets, one in July 2013 and another in December 2014, when he denied her access to the minor children. These were not proceeded with, as the prosecutor indicated that they should try and agree on a parenting plan. In October 2013, a further case of common assault was opened against the defendant in respect of an incident which happened at her mother's home at 3[...] S[...] Road. He was convicted in respect of this incident.

[39] On that day, he had arrived at her residence with S[...] and the arrangement was that he would drop S[...] off and leave. The defendant insisted on staying over, failing which he would not leave S[...] with her. She agreed and he started to message her. The three of them were sleeping on the bed with S[...] in the middle. He kept messaging her on her phone saying 'What kind of wife is she if she did not want to be intimate with him'. An argument then ensued to which she informed him that she had no intention of being intimate with him, as she was aware that he was visiting prostitutes and having other relationships. The defendant then got off the bed and started doing a sexual dance, asking her if that is how she enticed men.

[40] Although S[...] was sleeping in the middle of the bed, the defendant reached over and grabbed her by her pyjama top and tried to pull her pants and underwear off. S[...] had woken up by that stage and started crying. The defendant was screaming, shouting and swearing. She then screamed for her mother, who was asleep in the main building,

and asked her to call the police. The defendant responded that he would ensure that she and her mother ended up on the street. The defendant grabbed S[...] and left. From June 2012 until October 2013, she continued to have contact with both children. The defendant stopped her contact with the children in October 2013 when she instituted the divorce proceedings.

[41] The first incident of *crimen injuria* occurred in February 2007, whilst they were in Cape Town for the defendant to undergo his surgery. On the day of the surgery, he had slapped her in the hospital, as the anaesthetist had placed his hand on her shoulder to tell her that all would go well. After the surgery, they returned home and family members were frequenting the house, as he had come back from surgery. They were having supper and the family members were sitting in the lounge and she asked him if she could pour him some juice. He shouted at her and responded saying 'don't tell me what to do'. He swore at her and then threw a plate of food at her.

[42] She walked away and went to the bedroom, but he followed her into the bedroom where he started to shove and push her around. He kept on saying to her 'bitch you are going to die'. She then went into the lounge, where his parents were and instead of his parents correcting his behaviour, they responded and said that she was upsetting him.

[43] The second incident of *crimen injuria* was in April 2007. She had been working overtime because of the defendant's hospitalisation, given the need for her to compensate for the 136 hours that she had taken whilst she was away from work for his surgery. She was also on fertility medication, which was not paid for by her medical aid and she had to pay cash. Although the defendant was running his business, he did not contribute and would take her bank card away. When she had returned from her night shift, she did not bathe and went straight to sleep.

[44] Whilst asleep, she could feel movement between her legs and the defendant was busy interfering with her and he pulled down her underwear to inspect if she was wet. He showed her his fingers and said 'bitch there's evidence of you fucking around'. She woke up completely shocked and before she knew it, he was telling his parents that he had evidence to say that she was sleeping around. She stayed in the room and was too humiliated to face his parents. Most of the time, his parents took his side. They

did not correct his behaviour and would often say that she was the one acting irrationally. Several times during the various incidents, they would walk away, lock the room door and pretend as if nothing had occurred.

[45] In December 2014, the defendant was found guilty of all three counts of *crimen injuria* by the Durban Magistrates' Court and received a R3 000 fine, half suspended, with a six months suspended sentence.

[46] The plaintiff testified that in relation to the house, although it was an inheritance, a purchase and sale agreement was concluded between them and her mother.

### **Interim contact and interim primary residence**

[47] The plaintiff, a policewoman, works shifts and on being forced to leave the matrimonial home, the two minor children remained with the defendant and his parents. Due to D[...]’s medical condition, he had special needs. After their separation, the plaintiff had access and contact with the minor children for four days of the week, which are her rest days. This contact continued until October 2013, when she instituted the divorce proceedings and the defendant denied her access to the minor children, specifically D[...].

[48] Given that she did not have contact with the children, on 31 January 2014, the plaintiff instituted rule 43 proceedings in which she sought an order that, *pendente lite*, she and the defendant be co-holders of parental rights and responsibilities and that the primary residence of the minor children be with her, with the defendant being entitled to reasonable contact with the minor children.

[49] In the founding affidavit, the plaintiff made reference to the physical abuse she endured during their marriage and the circumstances under which she was forced to leave the former matrimonial home. She indicated that she had access to S[...] from June 2011 to 24 October 2013, as she would exercise contact on her four rest days. Insofar as D[...] was concerned, she would visit him at the former matrimonial home given his medical condition or at hospital when he was hospitalised at various times due to complications arising from his condition.

[50] On 25 October 2013, after the defendant learnt of the divorce action which had been instituted,<sup>3</sup> he came to her home and took S[...] and she had had no contact with the children since such date. Although she worked, she was the primary caregiver of the children while she resided at the former matrimonial home. She alluded to an incident in which the defendant assaulted S[...] by slapping him in his face, pinching his ears and assaulting him on his forehead, so much so that S[...] sustained an injury to the back of his head.

[51] Between 10 and 17 December 2013, D[...] was admitted to Chatsmed Hospital for double bronchial pneumonia. The plaintiff indicated that this was as a consequence of improper care and management by the defendant. Upon D[...]’s discharge from hospital, the prescription for his medication was not filled by the defendant, despite the fact that both children and the defendant were on the plaintiff’s medical aid. She purchased the medication in January 2014 as a consequence of the defendant’s failure to do so.

[52] On 7 January 2014, the defendant and S[...] stayed at her home and an altercation took place. This was as S[...] pleaded with her not to send him back with the defendant and he wanted to remain with her. On 20 January 2014, the defendant took S[...] to school and did not return to her home but returned to their former matrimonial home. Between 9 and 12 January and 17 and 20 January 2014, D[...] stayed with her unsupervised, whilst the defendant went to work.

[53] The defendant opposed the relief sought and in his answering affidavit, submitted that:

- (a) the children have never been apart from him since birth;
- (b) the plaintiff once in 2011 shook S[...] violently;
- (c) the plaintiff has a history of violent conduct;
- (d) the plaintiff has throughout their marriage been physically, emotionally and verbally abusive toward him, to the extent that he had obtained an order in terms of the Domestic Violence Act 116 of 1998 (Domestic Violence Act);
- (e) the plaintiff is emotionally unstable and is on medication for depression, anxiety

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<sup>3</sup> The sheriff attempted to serve summons in the action on the defendant at his residence, being the former matrimonial home.

attacks and a sleeping disorder;

- (f) the plaintiff has attempted suicide;
- (g) the plaintiff is often away from home for long periods of time;
- (h) the home in which the plaintiff resides is not conducive to the best interests of the minor children; and
- (i) given D[...]’s medical condition, the Bluff Medical Centre is closer to his home than that of the plaintiff.

[54] The rule 43 application was argued before K Pillay J, and, on 2 April 2014, she issued the following order *pendente lite*:

‘A.

- i. In terms of Section 18, 19, 20 and 30 of the Children’s Act No.38 of 2005 [ the Act] the parties shall be co-holders and shall exercise co-parental responsibilities and rights in respect of the minor children born of the marriage, namely :-
  - a) D[...] O[...] J[...], a boy born on 25 June 2009; and
  - b) S[...] O[...] J[...], a boy born on 25 June 2009;
- ii. The children shall reside with the Applicant on all her days off and with the Respondent on the remaining days and the Applicant is to inform the Respondent of her off days one month in advance;
- iii. Notwithstanding the above arrangement, the children are to be with the Applicant on Mother’s day and with the Respondent on Father’s day;
- iv. The one parent is to have daily telephonic contact with the children on the days that the children are with the other parent.

B. That the costs of this application be reserved for decision by the court hearing the divorce action under case number: 11572/2013.’

[55] Subsequently, in October 2015, the plaintiff instituted an application in terms of rule 43(6) for a variation of the order of 2 April 2014. The basis for such application was precipitated by the supplementary report of the Family Advocate and the Family Counsellor. The recommendations were that the children reside primarily with her and that the defendant exercises reasonable contact with the children, which contact is defined in the recommendations.

[56] More importantly, the medical practitioners treating D[...] reached an agreement regarding D[...]’s prescribed medication and treatment. The reason for this was the

defendant's refusal to administer Risperdal and Rivotril to D[...] whilst in his care, his refusal that D[...] receives Pediasure, which is a nutritional supplement, and his refusal to administer oxygen when D[...] needed it.

[57] The defendant also opposed this application and indicated that he had obtained medical advice which indicated that the administration of such medication was detrimental to D[...]’s health, hence the reason why he had not administered it. In addition, he had done independent research using the internet via Google and annexed medical inserts indicating the negative effects of the administration of such medication. He, in addition, had stopped D[...] from using the oxygen machine against medical advice, as according to him, D[...] breaths normally and does not need the oxygen machine. He would only utilise it when D[...] was experiencing difficulty breathing.

[58] The matter served before Olsen J on 26 October 2015, at which stage the following order was granted by consent:

‘1. The order granted on 2 April 2014 is supplemented by the addition of the following orders:-

- a) The parties are directed to forthwith arrange that Doctor Nelandra Chetty and Doctor Camilla T John jointly:-
    - i. Consider the current medication prescribed for the minor child D[...], in particular the prescription of Risperdal and Rivotril and the suitability thereof to the minor child’s condition;
    - ii. Confirm or allow the prescribed medication in the best interest of the minor child;
    - iii. Advise the parties of the prescribed medication to be administered to the minor child.
  - b) The parties are directed to administer the prescribed medication, jointly determined in terms of paragraph 1 (a) above, to the minor child and are directed to ensure compliance with the timeframes and quantities determined in such prescription.
  - c) The parties agree that insofar as it is practically feasible the prescribed medication is to be administered by a qualified nurse appointed by the applicant.
2. The order granted on 2 April 2014 is varied by the substitution of paragraph A (ii) thereof with the following:-
- The children shall reside with the Applicant and the Respondent respectively on the dates in Annexure “A” hereto.
3. The costs of the application are reserved for determination by the trial court hearing the

matter on 2 to 4 December 2015.

4. The parties are required to exchange Rule 37 (4) agendas on or before 9 November 2015.
5. The parties are required to exchange Rule 37 (4) replies on or before 16 November 2015.
6. The parties are directed to discover on or before 4 November 2015.
7. The parties are directed to convene a Rule 37 conference on or before 19 November 2015.
8. In the light of the fact that the trial dates 2 to 4 December 2015 have been arranged with the Senior Judge hearing civil proceedings at the time, certification of readiness for trial is dispensed with, and that the trial shall commence on 2 December 2015.'

[59] The plaintiff testified regarding the various interim protection orders that she obtained on behalf of S[...] against the defendant. The first was on 4 November 2016, when the defendant was ordered not to commit acts of domestic violence, ie verbal, physical and emotional abuse, not to enter S[...]’s school and was temporarily refused contact with S[...], pending an investigation by the Family Advocate. Given the report of the psychologist, Dr Chris Venkatsamy, dated 25 February 2017, there was a necessity for the Family Advocate to report once more despite the two enquiries.

[60] The reason for the plaintiff applying for a protection order on behalf of S[...] related to two incidents, one which occurred on 27 September 2016 and one thereafter on 30 September 2016. On 27 September 2016, it was alleged that the defendant slapped S[...] and attempted to smother him with a pillow on 30 September 2016. As a result of these alleged assaults, S[...] was treated by Dr Chetty at Chatsmed Hospital.

[61] A criminal case docket was opened at the Brighton Beach Police Station under cas number 18/10/2016, for assault with the intent to do grievous bodily harm and attempted murder. The plaintiff indicates that subsequent to such criminal complaints being made, she received threatening phone calls from the defendant in which he threatened to remove S[...] and indicated that on the next occasion, he would kill S[...] so as to teach the plaintiff a lesson. S[...] was suffering from restlessness and sleep deprivation as well as emotional stress. He also indicated that he did not wish to have any contact with the defendant and was receiving psychological counselling.

[62] The defendant opposed the interim protection order, denied slapping S[...] or trying to smother him with a pillow and indicated that S[...]’s bleeding gums were due to his age and loss of milk teeth. He admitted telephoning the plaintiff but denied the threatening nature of the phone calls.

[63] The effect of paragraph 2 of Olsen J’s order was for each of the children to reside with their parents on specified days – a form of shared residence.

#### **Appointment of a curator ad litem**

[64] During the course of the trial, given the nature of the evidence which the plaintiff testified about, it became necessary to have legal representation appointed for the minor children to ensure their best interests. As a consequence, on Thursday, 1 September 2016, Ms *S Clarence* was appointed as legal representative of the minor children. The matter was then adjourned for purposes of her perusing the pleadings and specifically for her to consult with the medical practitioners relating to D[...]’s condition. On Thursday afternoon, Ms *Clarence* approached me in chambers and requested that the trial, rather than being adjourned *sine die*, proceed on Thursday afternoon, as she wanted to lead the evidence of Dr Chetty, specifically in relation to the treatment of D[...]. Such request was granted and the evidence of Dr Chetty was interposed during the court of the plaintiff testifying.

[65] Given the urgency of the matter, in particular D[...]’s ill health and the defendant’s constant refusal to administer oxygen and certain of the medication, the curator *ad litem* sought to present oral evidence for a variation in respect of the contact and care arrangements, specifically for D[...]. Dr Chetty provided oral evidence, which resulted in a variation of the order. This resulted in the order of awarding the primary care of D[...] to the plaintiff, with the defendant granted supervised contact, as he remained adamant that he would not give D[...] the medication or administer the oxygen whilst D[...] was in his care.

#### **Evidence of Dr Chetty**

[66] Doctor Nelandra Chetty, a paediatrician and allergologist, testified that he is a specialist in children’s diseases and also in immunology. He is in private practice and has his medical rooms at the Chatsmed Garden Hospital. He has been treating D[...] for

approximately three years, since 2013. He has also, in addition, been treating S[...]. He testified regarding D[...]'s medical condition and mentioned that because of his condition, his life expectancy has been affected. D[...] not only suffers from smooth brain syndrome, but cannot function normally on all levels relating to speech, movement and brain function. He experiences involuntary movements and cannot control his hands or feet. In addition, he has painful muscular spasms which arise from different areas of his brain and he has also been diagnosed with epilepsy and often has minor convulsions.

[67] As a consequence, he has been prescribed medication for the treatment of the convulsions, namely Epilim, Kepra, Risperdal and Rivotril. Rivotril controls his convulsions, is also a muscle relaxant and assists in the control of muscular spasms. Because of his severe neurological problems, D[...] suffers from severe gastroesophageal reflux. This means that his body is unable to process any food and this then enters his oesophagus, travels to his lungs, and causes an infection which results in difficulty in breathing.

[68] Because of his brain condition, D[...] is unable to articulate any pain or discomfort and screams and has outbursts of muscular spasms, which also cause arching of his back. The arching of his back has resulted in spinal damage and he has scoliosis of his spine to the extent that it is S-shaped. The severe arching then places pressure on his lungs and compresses them, which also impacts his breathing ability.

[69] The neuroleptics and psycholeptics have a calming effect on his brain, as a consequence of which he does not experience painful muscle spasms if he is taking them. Rivotril assists with the painful spasms, makes them more bearable and is also an anticonvulsive, which assists with the number of convulsions he has. Given the fact that he takes one drop twice a day, which is 0.1mg, this is an extremely mild dose, which does not cause any side effects and it improves his quality of life.

[70] Doctor Chetty testified that it is critical and of vital importance for D[...] to remain on the drugs. Because of his brain abnormality, D[...] cannot on his own say 'I'm irritable or I'm experiencing pain'. Because of the pain, he experiences discomfort and most of the time, the outbursts are an indication of the pain he is experiencing. As a

consequence of the severe chest infection he had in May 2015, he often gets severe respiratory infections. When there is acid aspiration, there is an infection of his lung, and, because of the scoliosis, the lung development is also abnormal.

[71] As he gets older, he experiences difficulty in breathing and they have noticed that his oxygen levels have been reduced. It is exceptionally low in his blood, which then impacts on the blood pH level, which will then impact on his heart function and eventually he will stop breathing. He is aware of the defendant's assertions that Risperdal, Rivotril and the oxygen are not good for D[...] and he does not administer these. He indicates that he confirmed that the defendant has unilaterally had D[...] removed from such medication whilst in his care. He indicated that his first priority is D[...] and to treat him.

[72] These two drugs are used in children with no respiratory problems. It is a minor dose and does not aggravate or intensify the respiratory issues which a child may suffer from. He has confirmed that he was not the first doctor to prescribe the use of Risperdal and Rivotril but that these had been prescribed by a paediatric neurologist who had treated D[...] initially. He knows of no medical findings which indicate that this would aggravate D[...]’s medical condition.

[73] He also commented on the condition of D[...] after he had been with the plaintiff and defendant, respectively. He is aware that the plaintiff administers all the medication and oxygen to D[...] and indicates that he is well taken care of when he is with his mother. When he consulted with D[...] after he had been with his father, D[...] presented as being agitated, hypoxic and ill. He is of the view that this can be attributed to D[...]’s medical condition but also due to the fact that the oxygen was not being administered and that is why he presents as being severely hypoxic with blood pH levels depleted and he gets agitated and irritable. This is also due to the fact that he experiences severe muscle spasms because Risperdal and Rivotril were not being administered by the defendant.

[74] He indicates that given the scoliosis and the muscle issues which D[...] experiences, he has motivated for D[...] to have a special adjustable spinal bed. This is to ensure that he does not develop pressure sores and that he is turned frequently and

a nursing assistant has been appointed to assist on a 24-hour basis. He indicated that a normal bed would not assist, as D[...] needs to be turned frequently and he has lost a lot of muscle mass. A normal bed would apply pressure to his bones and this would result in his skin being torn and pressure sores developing, which would then eventually become infected.

[75] He is also aware of the special nutrition which D[...] requires because of his medical condition and has participated in writing motivations to the medical aid to motivate for a special bed and special nutrition. As an interim arrangement, he was of the view that D[...] requires a stable environment with specialised care 24 hours a day. Oxygen is required to be administered to D[...] when needed and his oxygen levels must be monitored by an oxygen monitor. All medications must be administered for D[...] to function so that his lungs are not compromised.

[76] He has indicated that in view of D[...]’s medical condition and the fact that his life expectancy has been compromised, this would be in the best interests of D[...] on an interim basis.

### **Cross-examination of Dr Chetty**

[77] During cross-examination, he confirmed that the plaintiff first consulted with him about D[...] in 2013. He was questioned extensively regarding the appropriateness of the use of Risperdal and Rivotril, the defendant contending that the use of these drugs was not appropriate given the side effects.

[78] He confirmed that he was fully aware of the defendant’s concerns but there were no side effects, as minimal doses were being administered. In addition, he has been monitoring and treating D [...], who has not had any side effects from the use of these drugs.

[79] Dr Chetty also disputed the suggestion that D[...] was hospitalised in April/May 2015 due to the side effects of the use of the two medications but was rather admitted due to bronchial pneumonia. He indicated that given D[...]’s condition, including Sandifer syndrome, because of the cerebral palsy, his lower oesophageal sphincter did not work properly, leading to reflux into his chest, which caused the respiratory

infections. In his professional opinion, given D[...]’s diagnosis, he was a very sick child and required admissions to hospital given his condition.

[80] He confirmed that both parents were made aware of the treatment and medication required by D[...]. The defendant always objected to the use of certain medications prescribed for D[...] and he was aware that the defendant did not administer them or oxygen on the occasions D[...] lived with him.

### **The rule 43(6) order**

[81] After Dr Chetty testified, Ms *Clarence* made application for the variation of the various rule 43 orders. After hearing submissions on behalf of Ms *Somers* and Mr *Naidu*, I issued the following orders *pendente lite*:

- ‘1. The primary place of residence of D[...] O[...] J[...] shall be the home of the Plaintiff;
2. The respondent shall be entitled to exercise contact with D[...], every alternative weekend for two hours on a Saturday and two hours on a Sunday, such contact is to take place from 10h00 – 12h00 at the home of the Plaintiff and in the presence of the nurse caring for D[...] at the time of such contact;
3. The contact and care provision in respect of S[...] O[...] J[...] shall remain as they appear and unaltered as per the order of 2 April 2014;
4. The costs are reserved for determination by the trial court;
5. The trial matter is adjourned *sine die*;
6. Counsel is granted leave to approach the Judge President to enquire when the trial can be accommodated.’

[82] The contact provisions in relation to S[...] remained in place as per the order of 2 April 2014. Subsequent to the order of 6 September 2016, the defendant attempted to exercise contact on 18 September 2016 and demanded that the plaintiff leave her home when he exercised such contact. She refused. Thereafter, the defendant exercised contact on 19 September 2016 for a period of ten minutes. Subsequently, he has not exercised contact in terms of the provisions provided to him in the aforesaid court order.

[83] At the time, I also gave reasons for issuing such orders, which are a matter of

record.

### **The resumption of the trial**

[84] By the time the trial resumed, the interim order that the primary residence of D[...] be with the plaintiff remained in place. Despite the rule 43(6) order, the defendant has not seen S[...] in ten years nor has he contributed in any way towards his maintenance.

[85] The plaintiff testified further that when D[...] died, the defendant did not contribute in any way to the funeral expenses. She further testified regarding the defendant's behaviour on the day D[...] passed away and his insistence on a post-mortem being conducted. She refused to consent, given D[...]'s long history of illness, and instructed the medical staff that the defendant would have to obtain a court order. This issue of the post-mortem took approximately two to three hours to resolve.

[86] The following morning after D[...]'s passing, the defendant requested to attend at the mortuary, which she agreed to. He insisted on washing D[...]'s body but was unable to correctly handle him. When he lifted D[...] up, he threw up and she had to request him to put him down gently. He almost broke D[...]'s hand when he was trying to put his suit on and she had to stop him.

[87] The defendant insisted on removing a piece of D[...]'s hair as part of his custom and wanted to perform rituals. She refused, as since 2012, she and the children had reverted to Christianity. D[...] had a Christian funeral and the defendant and his family arrived at 13h00. At 15h00, they arrived at the crematorium and performed the last rites before the cremation. The pastor then allowed the defendant to perform the last rites in terms of Hindu rituals.

[88] The family waited for D[...]'s ashes and that is when the problems started. The defendant ran off with D[...]'s ashes. He refused to participate in them jointly dispersing his ashes. Between 16h00 and 20h00 they could not contact the defendant and it was impossible for them to obtain D[...]'s ashes, despite the staff at the crematorium attempting to intervene.

[89] The defendant was insistent on depriving her of dispersing her son's ashes until Raakesh, her brother, stepped in and obtained the ashes. The plaintiff was not challenged on this evidence.

### **Cross-examination of the plaintiff**

[90] The plaintiff was not challenged on most of her evidence. The only challenge related to the reasons for the breakdown of the marriage, namely that she attempted suicide on a number of occasions and that she was emotionally unstable.

[91] She vehemently denied having attempted to commit suicide and being emotionally unstable. She, in effect, indicated that she was often depressed given her abusive marriage. The defendant did not suggest that the plaintiff had engaged in extra-marital relationships.

[92] That then was the case for the plaintiff.

### **Defendant's case**

[93] Despite indicating during an application for an adjournment of the trial in 2016 that he wanted to amend his plea and counterclaim to include an order for the division of the joint estate, and specifically the relief claimed insofar as the immovable property was concerned, at the commencement of the trial, the defendant's representative did not seek any amendment to the pleadings.

[94] The defendant testified that in 2006, when he and the plaintiff married, he financed the entire wedding, as her income was low and she had just joined the SAPS. They had a grand wedding with him having 160 invited guests and the plaintiff only having four members of her family and her work colleagues. After their wedding, he had to attend Constantia Hospital in Cape Town for brain surgery. Prior to the plaintiff and his parents leaving, he took out a R3 million life policy, with his mother as the beneficiary. A specialist neurologist monitored him for three months and found the cause of his seizure attacks to be a blood clot in the brain. The operation was successful.

[95] For a period of three years after the operation, he noticed a vast difference in the

plaintiff. She had 'psychological needs', was creating arguments for no apparent reason and had gone to the extent of trying to commit suicide. In mid-2006, in June or July, the exact date he could not recall, was the first incident of her attempting suicide. On one occasion, at a premises at 6[...] E[...] Road, Bluff, the plaintiff tried to drown herself with a rope tied to a block, with the other end of the rope tied to her ankle. She did not know how to swim and threw the block into a pool and his brother, A[...] J[...] (A[...]), witnessed it. She refused to seek professional help.

[96] He was at work at the time and approached the plaintiff to ask her to seek professional help. Because she was working for the SAPS, she was concerned that she could lose her job. He testified that, in his opinion, a person in the right frame of mind would not attempt to kill themselves and they could both seek professional help. He offered to accompany her to a doctor, which she refused. The plaintiff, instead, approached a pharmacist and bought over-the-counter medication and he was present at the time, although he could not recall the names of the medication.

[97] He confirmed that they had difficulty conceiving and that the plaintiff had gone on fertility treatment. He loved kids and had doted on his brother's kids and gave them love and attention. In 2009, they conceived and she gave birth to their twin boys.

[98] His children were approximately three months old when, one afternoon, the plaintiff approached him and told him that she did not want to live 'like this' in 2009. This surprised him and he told her to give it to him in writing. Three weeks later, the plaintiff had to go to Soweto for a police gathering. She left with her work colleagues and when she returned, she was given two days off and on the third day, he took her to work. He dropped her at work and returned home. He called her to ask her what to take out of the freezer for supper. Her phone rang in the bedroom under her pillow. She had forgotten to take her phone. It was a Blackberry and there was a message from a Commander Meth. He called the station in Maydon Wharf and Commander Meth came on to the phone and he questioned him as to how long he had been having an affair with his wife. Commander Meth denied that he and the plaintiff were having an affair.

[99] He confirmed that there were issues in relation to access to his children and that the plaintiff had restricted him from seeing the children. After the various interim orders,

he was allowed to see his children for two hours on a Saturday and a Sunday. The plaintiff resided in a house at S[...] Road with the children. He was allowed to see D[...] in the presence of a nurse. After a period of half an hour of him exercising contact, the plaintiff created a scene. On three occasions, he was served with a protection order. He did not, therefore, return to see the children in 2017. In March 2018, the order was confirmed. He has over the years attempted to obtain legal assistance to see his children and for the divorce proceedings to be finalised.

[100] He testified that throughout the marriage, he had contributed to the joint estate, especially the joint maintenance of the children. He did repairs and maintenance to her mother's home, and in 2011, after their separation, his mother-in-law decided to transfer the property into both their names. He took full responsibility for his mother-in-law and was purchasing groceries. However, it emerged that the defendant was using his mother-in-law's own pension money to buy her groceries.

[101] He had a successful business, however, he ultimately lost his business. His father provided him with food and a roof over his head. He had attempted to find work but was unable to do so. Most of his income was cash. He was unable to produce any proof of income. He did not have any deposit slips and his invoices were with his accountant. In 2020, his earnings averaged R20 000 per month and in 2021 and 2022, his earnings averaged R1 000 per month. He did not submit any tax returns and he has not signed anything in relation to his SARS obligations since Covid-19. It also became evident when he testified that he did not know his tax number or bank account numbers and was quite economical with the truth in relation to his income, expenses and work history.

[102] During cross-examination, it was pertinently disputed that the plaintiff attempted suicide during or after the marriage. Although he was adamant that she did, he conceded that he could not provide any dates for the alleged attempted suicides. It was also pertinently disputed that the defendant ever contacted her commander in relation to an alleged affair. He indicated that although he was entitled to visit his children, this was supervised by a nurse. He did not dispute when it was put to him that he was not denied access to and contact with his children but that he had suspended the visits unilaterally. This was specifically as these were supervised visits. In addition, he did not

dispute that the plaintiff avoided contact with him when he exercised supervised visits to the children.

[103] He confirmed during cross-examination that for a period of approximately eight to nine years, he had done nothing about enforcing the order for contact. He responded that he felt that he was wasting his time. He disputed that he did not do any maintenance and that the plaintiff and her brother did all the maintenance on her mother's property at S[...] Road but indicated that he did not keep a record. He disputed that he made no contribution to the property. He indicated that he had informed his previous attorneys of his contributions to the joint estate but they had done nothing. What emerged from the defendant's evidence was that he was in agreement with the plaintiff that the marriage was at an end and wanted to be divorced.

[104] The defendant's brother, A[...], testified for the defendant and he confirmed that he observed the plaintiff attempting suicide in 2007, although he could not recall the date. He confirmed that no attempts were made to obtain an affidavit from him confirming this. He then changed his version and indicated that he did make an affidavit in 2007 but he had forgotten. The defendant reminded him two days prior to him testifying that he had deposed to an affidavit, but no such affidavit was produced.

[105] He confirmed that the defendant had informed him that he needed to come to court and testify. Although he brought the defendant to court, he had remained seated in the vehicle. They did not discuss the evidence that had been presented. He confirmed that he observed the defendant's wife tie a rope to her leg in an attempt to commit suicide. He also recalled a second incident where she attempted to jump over the balcony but he grabbed her. In addition, on the second occasion, his father also stopped her from committing suicide.

[106] During cross-examination, he could not explain the difference in the period in which the incident is alleged to have occurred, as he said it was in 2007 and the defendant said that it was in 2006. He indicated that he was the one who saved her from drowning in the pool. He indicated that the plaintiff was lying if she denied the allegations.

[107] That then was the evidence.

### **Closing submissions**

[108] The respective parties, including the curator *ad litem*, made submissions at the end of the hearing. This was necessary given the passage of time and as events had overtaken the relief initially sought.

[109] The plaintiff, given the change in circumstances, sought forfeiture and questioned whether the defendant, given his failure to maintain contact with S[...] for the past nine years, ought to have contact with him. In the written submissions, she highlights the abuse she and S[...] experienced at the hands of the defendant, which resulted in numerous criminal cases and protection orders being obtained against the defendant.

[110] She indicates that he has not contributed in any way to the financial well-being of the minor children and that the defendant has had no contact with S[...]. The defendant has not contributed to the immovable property situated at S[...], Chatsworth and the property was registered in both their names purely as a matter of convenience, as the defendant refused to marry with an antenuptial contract.

[111] Although the parties married in 2006 and separated in 2012, they lived separately at various stages throughout. The marriage was of a short duration. Given the defendant's conduct throughout their marriage and his failure to contribute in any way to the estate, an order of forfeiture is justified.

[112] The defendant filed written submissions in which he attempted to introduce evidence by way of affidavits and documents not presented at the hearing. I did not have regard to these, as they were not presented during the trial and the plaintiff had not had an opportunity to deal with their contents.

[113] In addition, he prepared a document entitled 'Terms of Consent to divorce by defendant'. In terms thereof, he agreed to a divorce, that the primary residence and care of S[...] be awarded to the plaintiff, with him having reasonable contact, that he be

ordered to pay maintenance of R1 per annum until he gains meaningful employment and that the court refrain from making an order of forfeiture.

### **The children and the reports of the curator *ad litem***

[114] It is also necessary to deal with the investigations of the curator *ad litem* and the contents of her report in detail.

[115] In her initial report, the curator *ad litem* dealt with the various rule 43 applications in relation to the minor children. Prior to the institution of the rule 43 application in January 2014, the plaintiff was entitled to exercise contact with the minor children on her days off, save that S[...] was permitted by the defendant to see the plaintiff for two extra nights at a time. The plaintiff reported she had not had any contact with D[...] for a period of three months and the defendant permitted her to have contact with him for two days per month.

[116] The curator had specific regard to the plaintiff's affidavit and the defendant's refusal to allow her contact to D[...]. The plaintiff dealt with the defendant's pattern of physical abuse in respect of S[...], as he is alleged to have slapped S[...]’s face and pinched his ears. S[...] was allegedly physically attacked by the defendant with his hands, resulting in a swelling to the back of his head, which required medical attention. In relation to D[...], the plaintiff recorded that the defendant's failure to properly administer D[...]’s prescribed medication, to purchase prescribed medication and his improper care and maintenance of D[...], resulted in a week of hospitalisation in December 2013.

[117] The defendant's affidavit made allegations of the plaintiff being violent towards S[...] by, inter alia, 'shaking him violently'. As a consequence of the plaintiff's history of violence, he had obtained a final order in terms of the Domestic Violence Act against her, in terms of which he alleges she is not to remove the children from his care.

[118] As regards his financial contributions for the minor children, he submitted that although the children are on the plaintiff's medical aid, financially, he does everything for both children and both financial commitments are borne by him.

[119] At the time of the interview with both the plaintiff and defendant, the curator required updated financial information from both parties to assess the quantum of any maintenance payable by the one party to the other. The curator expressed some suspicion regarding the defendant's allegation of his net income being such a minimal amount and required the defendant to provide his bank statements and/or any documents relating to his income, given that he is self-employed.

### **Family Advocate's reports**

[120] The curator also had regard to the various reports of the Family Advocate and their recommendations and interviews and interactions with the parties and S[...].

[121] The Family Advocate compiled a report dated 1 April 2014, in which it recommended that both parties retain full parental responsibilities and rights in respect of the children and a shared residence. The plaintiff, at the time of the completion of the Family Advocate's report in April 2014, indicated that she earned R7 000 per month and the defendant indicated that he earned approximately R35 000 per month.

[122] At the time the Family Advocate completed their report, a psychologist had provided a report indicating that S[...] was missing his mother. It was also reported that the defendant unilaterally removed S[...] from L[...] D[...] E[...] Centre, without consulting with the plaintiff and placed him at the P[...] R[...] P[...] School. The Family Advocate also noted that the defendant was not familiar with D[...]'s chronic medication, notwithstanding the fact that he lived with him. This was in direct contrast to the plaintiff, who was not only aware of his medication but also the dosages required to be administered.

[123] The Family Advocate in their recommendations was of the view that the plaintiff would be in the best position to monitor S[...]'s school work during her off days, that the defendant did not present as being fully involved in the minor children's care, allowing his parents to take the major responsibility therefor, that he was using the children as a tool against the plaintiff in his matrimonial battle with her and that S[...] appeared to be alienated from the plaintiff by the defendant. Interestingly enough, the Family Advocate's office reported that the plaintiff had not hurt or harmed the minor children in any way and therefore there was no reason to remove her from their lives. This then resulted in the order of K Pillay J on 2 April 2014, which accorded with the

recommendation of the Family Advocate.

[124] On 15 July 2015, a supplementary report was produced by the Family Advocate and Family Counsellor. The change in recommendation was that the minor children reside primarily with the plaintiff and set out contact for the defendant with the minor children. In addition, the Family Advocate recommended that the parties' medical representatives come to an agreement with regard to D[...]’s prescribed medication and treatment. The supplementary report is comprehensive and refers in detail to a number of collateral sources as well as expert evidence. What is noteworthy are the diametrically opposed versions of the plaintiff and defendant insofar as their respective care of the minor children was concerned.

[125] At the time the Family Advocate made the observations, they had interviewed S[...], who was 5 years and 11 months old. S[...] reported that he was upset with the defendant, who had hit him the day before as a consequence of the defendant saying he was naughty and had not wanted to wash his face. S[...] indicated that the plaintiff assisted in his personal hygiene, helping him wash his face and brush his teeth.

[126] S[...] also intimated to the Family Advocate that he wanted to stay with his mother for the following reasons:

- (a) his mother loves him the most and secondly his brother;
- (b) his mother does most things for him and second his paternal grandfather;
- (c) his mother buys him things and reads him stories when he is sick;
- (d) she sleeps in the middle of the bed with the two of them and he likes it;
- (e) his mother prepares a variety of different foods for his lunch at school, whereas when he is with his father, he mainly takes polony sandwiches; and
- (f) his father and paternal grandfather sometimes hit him and that should he be in any sort of trouble, his mother would help him.

[127] He also indicated that he shared a close relationship with his twin brother, D[...]. In conducting the My World exercise, S[...] identified his mother, brother, cousin and paternal grandfather as the significant people in his life.

[128] During his interview with the Family Advocate, the defendant admitted that he

could not remember the names of all of D[...]’s medication and that he was unaware that D[...] had been prescribed Risperdal and Rivotril and had only recently become aware of it. He also reported to the Family Advocate that he was not administering the two medications to D[...] and that he had conducted his own research relating to the side effects of Risperdal and Rivotril. He reported that he had approached Dr Nelandra Chetty, a specialist paediatrician and allergologist, who has treated D[...] since 2013, to demand that he desist from prescribing these two medications for D[...]. However, Dr Chetty refused and indicated that it was necessary to treat D[...]’s condition.

[129] As a consequence, the defendant approached an advocate, Mr Shane Govender, who addressed correspondence to Dr Chetty, alleging that the defendant had taken professional medical advice from a medical expert and insisting that Dr Chetty desist in prescribing the medication. The expert whom the defendant had consulted with was identified as Dr Camila T John, a specialist paediatrician. On the alleged advice of Dr John, the defendant indicated that he had stopped D[...] from being placed on the oxygen machine, which Dr Chetty indicated was necessary as a result of D[...]’s inability to breathe adequately on his own accord.

[130] The plaintiff, when questioned regarding D[...]’s medication, indicated that Dr Egnar, a paediatrician, had treated D[...] and prescribed Risperdal for him when he was six months old and a general practitioner had referred D[...] to a neuro-specialist, namely Dr R Govender, who had prescribed Rivotril for D[...] in 2010. In 2013, when she consulted with Dr Chetty, he approved the aforesaid medication that had been prescribed.

[131] What also became evident was that the plaintiff’s medical aid, Polmed, had provided significant assistance, given the motivations of medical practitioners from Polmed. They provided full time professional nurses to assist the plaintiff in her care of D[...], as well as a specialised bed for him and special diapers, specialised food and a nebuliser.

[132] The Family Advocate, in its recommendations, recorded that much of the defendant’s behaviour was motivated by the acrimony between him and the plaintiff and he does not divert his energy and effort into his parental role, even at the worst times

for the children. He was using the children as a means to his end, and consequently, concerns were expressed that if the children were resident with him, he would not meet his parental obligations. This is what appears to have warranted the supplementary report and the revised recommendations.

[133] When the curator interviewed S[...] on 24 March 2017, she did so in the presence of the plaintiff, although it was indicated that the plaintiff did not participate at all in her interaction with S[...] but sat at the end of the table and remained silent. When S[...] arrived at her chambers, he expressed interest in the ships in the harbour and was very excited, jovial and happy. S[...] indicated that he was keen on sports and boy scouts. He also indicated that he enjoyed karate and had a white belt but aspired to an orange belt.

[134] When questioned by the curator as to why he had a keen interest in karate, S[...]’s response was that he would be able to ‘block’ if someone tried to fight or hurt him. When she questioned S[...] about the incident regarding the defendant assaulting him, S[...] indicated that the defendant ‘slapped across my face and on my left cheek’. In relation to the incident where the defendant is alleged to have attempted to smother him, S[...] was clear in his explanation to the curator that he had been lying on his bed when the defendant took a pillow and put it over his head. He described the defendant pressing harder when S[...] could not breathe. Although S[...] attempted to kick himself free, he was struggling to do so. He reported to the curator that his paternal grandfather attempted to justify the defendant’s conduct by saying he was just playing. S[...], on his own accord, also indicated that the defendant had threatened to take him away from his mother and from his school. S[...] indicated that he did not want any contact with his father.

[135] S[...] confirmed that E[...] Primary is close to the plaintiff’s place of residence, whereas his current school is in Merebank and takes approximately 45 minutes in the morning to get there. S[...] indicated that he also had a good relationship with the nurses who care for D[...] and they also make him cereal. He has a cellphone and is able to contact the plaintiff telephonically should he so wish. When asked to engage further about the defendant, S[...] informed the curator that the defendant would often

shout at him if he tried to play with his cousins and would take away his toys, namely his PlayStation Vita and PlayStation Portable. The defendant did not assist him with his homework.

[136] S[...] also recounted an incident in which the defendant had assaulted the plaintiff by hitting her and giving her a blue eye. He indicated that the defendant reported that his mother had hurt herself in the bathroom. S[...], however, reported that he had seen his father assaulting the plaintiff and it made him want to cry. S[...] also reported how the defendant would prevent him from playing with D[...]. When she questioned S[...] about D[...], it was clear that he loved his brother and that they shared a very close bond and ought to live with one another.

[137] At the end of the interview when the curator asked S[...] to draw a picture of his family, what was noteworthy was that the picture omitted the defendant and rather included all of his pets.

[138] The curator *ad litem* provided some corroboration for the plaintiff's evidence relating to the criminal charges against the defendant and his criminal conviction. She records that there had been no less than nine criminal charges laid against the defendant by the plaintiff, some of which pertained to criminal conduct against the plaintiff herself and others pertaining to the minor children. The defendant was found guilty of common assault against the plaintiff on 26 February 2014 under cas number 159/11/2013. The defendant paid the fine, as the sentence was imprisonment for a year, of which six months were suspended for five years, alternatively a fine of R3 000. The remaining charges had either not been investigated, or never prosecuted, or not placed before the relevant courts to hear the matter.

[139] Of concern to the curator *ad litem* were the charges proffered by the plaintiff under cas 159/11/2013, in which she sought a conviction of child abuse, with the defendant, inter alia, being accused of taking pornographic photographs of S[...]. In support of the charge, the plaintiff indicated that the defendant had taken multiple photos of S[...] and texted them to her, stating that he was training him to be a 'player' like his mother. Annexed to the charge sheet in this criminal docket were the naked photographs of S[...], certain of which depict him playing with his genitals. The curator

*ad litem* was concerned that despite a request by the plaintiff, there has been no intervention by the Child Protection Unit.

[140] The plaintiff had sought the intervention of an attorney when obtaining the record, who wrote to the National Prosecuting Authority, requesting intervention in respect of the previous cases involving the minor children, as well as an intervention for the latest case under cas number 18/10/2016.

[141] In April 2016, charges were laid against the defendant for contravening the Children's Act in relation to the defendant's failure to administer the medication to D[...], which had been prescribed by Dr Chetty. These charges were withdrawn.

[142] In the curator's interview with Dr Chetty, he confirmed that S[...] had been a patient of his since 2012 and that he had been admitted to hospital on a number of occasions for health reasons. S[...] was examined by Dr Chetty on 30 September 2016, pursuant to the allegation that the defendant attempted to smother him. S[...] reported this incident to Dr Chetty. S[...] was also treated by a psychologist, Dr Venkatsamy who prepared a report dated 25 February 2017. Despite the provisions of the interim protection order, the plaintiff had agreed that the defendant be permitted to exercise supervised contact with S[...] on the same basis as the order permitting him contact with D[...]. Notwithstanding this agreement, the defendant has not exercised contact since 30 September 2016, as reported by Dr Venkatsamy.

[143] Clinical interviews were conducted by Dr Venkatsamy with S[...] over an extended period between April 2016 and February 2017. S[...] intimated that he did not wish to spend four days of visitation with each parent and wanted to reside with the plaintiff. Dr Venkatsamy also recommended that the primary residence of S[...] be with the plaintiff, as it is in his best interests and that the defendant have supervised access to S[...], owing in particular to S[...] being afraid of the defendant.

[144] The curator interviewed S[...] on 27 May 2025 and compiled a subsequent report in July 2025. He was in grade 11, about to turn 16 years old. He indicated that he had been selected to play cricket in England and there was a potential for him to receive a bursary from the England Embassy, which would afford him the opportunity to study

abroad. Although this was a wonderful opportunity, which excited S[...], he expressed concern that he would require both parents' permission to obtain a passport for him to leave South Africa.

[145] S[...] related to the curator how he and the plaintiff had been invited to attend a cruise on the MSC Symphonia with his aunt and uncle. The plaintiff had requested the defendant to consent to S[...] applying for a passport. The defendant flatly refused, resulting in the plaintiff and S[...] losing out on this holiday. S[...] expressed to her that this would occur again, as he would only be 17 when he completes matric.

[146] He confirmed that the last time he had seen his father was at D[...]’s funeral on 11 October 2018. Prior to the funeral, S[...] had last seen the defendant on 19 September 2016 for a period of ten minutes. Despite the fact that S[...] has his own cellular telephone, the defendant has never made enquiries regarding S[...] and has never exercised telephonic contact. S[...] indicated that he would not want to see the defendant, as the defendant has never contributed to his life and he had no bond with him.

[147] The curator conducted an interview with the plaintiff on the same day, who confirmed S[...]’s narration of the events. She confirmed that the defendant has not exercised contact with S[...] since 19 September 2016. Due to his failure to exercise contact with S [...], he has accordingly been absent for over half of his S[...]’s. The defendant’s behaviour towards S[...] and D[...] has been abusive, as the defendant poked S[...] in the cheeks stating ‘do you know who I am, I am your father’. After D[...]’s cremation the defendant made snide remarks towards S[...] and said to him ‘you live in Chatsworth which means you will be drug addict’. The plaintiff confirmed that the defendant has made no contribution towards S[...]’s life or D[...]’s while he was alive. He has not contributed any maintenance since their separation in 2012 and she confirmed that S[...] is terrified of his father.

[148] The curator interviewed the defendant at court prior to the commencement of the divorce trial, as she was not prepared to permit the defendant to attend at her chambers in light of his previous threatening and aggressive behaviour toward her. When she questioned him as to why he had not exercised contact with S[...] since September

2016, the defendant responded by saying 'I walked away' after he was not able to obtain a further enquiry from the family advocate and expressed his dissatisfaction in exercising supervised contact.

[149] When questioned as to why he made no contributions to maintenance for the children, his response was that there was no court order requiring him to do so. When questioned further regarding this, the defendant indicated that he is not prepared to pay maintenance, as he will not get the access he desired. When questioned as to whether he would provide permission for S[...] to obtain a passport, the defendant's response was 'Why would S[...] want to leave the country?' And that he would think about it after the case.

[150] The plaintiff also reported that on the one occasion the defendant exercised contact with D[...] in terms of the 2016 court order, he accused S[...] of stealing R30. After the interim protection order was issued, the defendant's firearm was removed and it was made final in 2017.

### **Analysis**

[151] As indicated, the only issues for determination relate to the division of the joint estate and whether or not the plaintiff is entitled to an order that the defendant forfeit the patrimonial benefits of the marriage and the primary residence and contact and care arrangements in respect of the parties' only surviving son, S[...].

[152] The plaintiff impressed me as a witness. I did not gain the impression that she was lying or trying to paint the defendant in a bad light. Although she often became emotional during the initial stages of the trial, she maintained her version and had a good recollection of the incidents, which spanned a considerable period of time.

[153] The defendant and his brother did not impress me when they testified. It was obvious that the defendant's brother, A[...], was biased and was supportive of his brother. He did not, in my view, testify honestly and said whatever he had been schooled to say by his brother. This view is reinforced by the fact that he testified that when he and the defendant had a discussion on the Sunday preceding the trial, the defendant 'reminded' him that he had deposed to an affidavit regarding the plaintiff's alleged 'suicide attempts'. He did not produce such affidavit nor could he recall when and where he

made the affidavit.

[154] What is noteworthy about his evidence is what emerged during cross-examination, namely that he had obtained a protection order against the defendant for his abusive behaviour toward him and his son. He indicated that he and the defendant were estranged for a long period of time and reconciled shortly before the trial reconvened. This corroborates the plaintiff's allegations of abusive behaviour by the defendant directed at her, their children and the defendant's family members as well.

[155] The defendant, in my view, was dishonest when he testified. He could not recollect specific incidents nor could he remember the dates when events occurred. What was evident is that he made no contribution to the joint estate and was supported by the plaintiff. He indicated that he ran a successful business and was registered for tax. When he was questioned as to why he had not discovered these documents, he indicated that they were with his accountants. He attempted to downplay the income he received from the business, which did not tie in with his evidence. When he was 'caught out', he then changed his version several times.

[156] It is also apparent that he made no contribution to the support of the plaintiff or the minor children. The plaintiff had testified that he and the minor children were on her medical aid until she removed the defendant as a consequence of fraud.

[157] Most notably, the transcript will reveal that none of the plaintiff's evidence of abuse and the incidents she testified about was disputed by the defendant. In fact, I gained the impression that he falsely accused her of having affairs to justify his abusive behaviour. That there were instances of physical abuse was not denied nor were the photographs depicting such abuse denied.

[158] Interestingly enough, it also emerged during the cross-examination of A[...] that both he and his child, who both reside with the defendant in their parents' property in Bluff, had interim protection orders against the defendant. A[...] was evasive regarding the details of the order and refused to divulge the exact details of what prompted him to obtain an interim protection order for himself as well as his son. He stated that the reason was verbal abuse by the defendant and indicated that he was going to withdraw

them.

[159] What corroborates the plaintiff's version of abuse by the defendant over the years is his brother's evidence that he had to apply for and obtained a protection order against the defendant for himself and his son. Such an order was still in place at the time he testified. When questioned about it, he responded that he intended to attend at court and have the orders discharged. What was quite apparent was that he had been persuaded by the defendant to testify on his behalf and that he had no independent recollection of the so-called suicide attempts.

[160] The plaintiff's evidence was not really challenged during cross-examination, the only aspect that was challenged by the defendant was the alleged abuse of S[...], which the defendant avers was simply a pillow fight. The plaintiff's evidence was not challenged by the defendant and consequently this court must accept her version as being true.

[161] What is evident is that from February 2011, the plaintiff was no longer residing at the matrimonial home, as the defendant had effectively evicted her and she was not permitted to have contact with the children. This was canvassed in detail in the curator *ad litem*'s first report. The circumstances precipitated the rule 43 application for her to exercise specified and defined contact with the minor children. Subsequent to the rule 43(6) order and the interim protection order, which the plaintiff obtained on behalf of S[...], the defendant's rights of contact were limited to supervised contact at the home of the plaintiff.

[162] Despite this, between 2016, when the rule 43(6) order was granted, and 2018, when D[...] passed away, the defendant only visited D[...] on one occasion. Before the plaintiff obtained the interim protection order on S[...]s behalf, the defendant was entitled to exercise contact with S[...] on a four days on, four days off basis. Despite the court order, S[...] was extremely upset at having to spend time with the defendant and confirmed that this was as a consequence of the defendant ill-treating him but more specifically attempting to smother him.

[163] It was only after the interim protection order in respect of S[...]’s interdict was confirmed that the defendant’s firearm was removed. When the interim protection order was made final in 2017, the defendant never visited S[...]. It is common cause and not disputed that the defendant made no financial contribution to S[...] or D[...], specifically S[...]’s educational costs, from the time that he attended L[...] D[...] D[...] Centre until present. The defendant made no payments of maintenance to the plaintiff and did not contribute to any other expenses pertaining to the children, at the very least since 2016, if not prior thereto. It is also undisputed that, apart from the defendant’s say-so that he contributed to the paving at the immovable property situated in Chatsworth, such property has been maintained solely by the plaintiff with no contribution by the defendant.

[164] A similar situation pertains in relation to the plaintiff’s pension fund interest as well as her retirement annuity.

[165] As already indicated, the plaintiff’s evidence was not challenged in cross-examination by the defendant. What was challenged was the alleged abuse of S[...]. The plaintiff also gave evidence regarding the defendant’s contact when D[...] died. Although the defendant had not exercised contact for some two years prior to D[...]’s passing, the plaintiff still contacted him to advise him of D[...]’s passing. The plaintiff’s evidence in relation to the defendant’s conduct at the time of D[...]’s passing and funeral was not challenged. A full-hour dispute resulted in a tussle over D[...]’s ashes, as the defendant attempted to steal them.

[166] The evidence of the defendant was that he financed the parties’ wedding in 2006, that after the marriage and as a consequence of brain surgery, the beneficiary of his life cover of R3 million was changed from his mother to the plaintiff and that the plaintiff attempted to commit suicide in 2006 on several occasions. The suicide incident, which the defendant testified to, occurred in 2006 when she allegedly jumped into the pool at his parents’ home on the Bluff, after trying to drown herself with a rope, which was tied to a block and the other end tied to her ankle. The defendant’s evidence was that his brother, A[...], witnessed the incident and that the plaintiff refused to seek professional help after the incident.

[167] On the defendant's version, he exercised contact on three occasions in 2016 and 2017 in respect of the children. On his version, his contact with the children was untenable as a consequence of the plaintiff's alleged verbal abuse during the contact. He testified that he wanted rights over S[...] at least every second weekend. When it was pointed out to him that there was a court order entitling him to see S [...], his response was that he had not seen him in ten years.

[168] Although under cross-examination the defendant acknowledged that the plaintiff played no role in his visitation, as D[...] was being supervised and D[...] was handed over whilst the plaintiff allegedly kept S[...] upstairs, the defendant contradicted himself, as he indicated that the plaintiff verbally abused him and the children. This is obviously a lie, as she could not do so if she was upstairs and not involved in his contact with the minor children.

[169] The defendant's evidence in relation to why he ought to share in the joint estate was that for a period of six years, he took full responsibility for the children, including food, nappies and essentials. His contribution to the immovable property in Chatsworth was in 2006 when he allegedly attended to the cementing of the yard. What is also noteworthy is that the defendant testified that he took full responsibility for the plaintiff's mother and would buy her groceries. However, it emerged during cross-examination that he had access to the mother's grant card and used that money to buy her groceries. The defendant confirmed that he cancelled the life policy in favour of the plaintiff, and that at present, he has no income and is totally reliant on his father and brother to assist him financially, as he lost his business. He was unable to provide any details in relation to the business, could not remember the Capitec Bank account, or his tax number and indicated that he had not submitted any tax returns since Covid-19. In relation to the immovable property and any other financial contributions, there was a bleak reference to an agreement with his attorney, Ramesh Luckychand, but he could provide no details in this regard.

[170] The defendant was challenged in relation to his evidence regarding the plaintiff's alleged suicide, with her denying it. In response, the defendant was unable to provide specific dates upon which he alleged her suicide attempts occurred.

[171] To corroborate his version in relation to the plaintiff's suicide attempts, the defendant called his brother, A[...], to testify. He allegedly produced an affidavit relating to the plaintiff's suicide attempt. What emerged during the course of cross-examination was that he did not produce the affidavit but was reminded of the existence of such an affidavit by the defendant approximately two days prior to him testifying.

[172] A[...] was vague and his evidence parroted that of the defendant. A[...]’s version was that the incident occurred in 2007, which contradicted the defendant’s version. On A[...]’s version, both his parents were at home and it was his father who stopped the plaintiff from jumping into the pool. A[...] also attempted to relate another incident on an unknown date where the plaintiff attempted to kill herself at the matrimonial property.

[173] At the resumed hearing this year, Ms *Clarence*, the curator *ad litem* for S[...], placed on record that she would file a report and seek a termination of the defendant's parental rights to S[...], given that he has not seen him in ten years and has not contributed to S[...]’s maintenance in any way.

[174] The defendant never visited S[...]. The plaintiff confirmed that she has been solely responsible for S[...]’s educational costs from the time that he was at L[...] D[...] E[...] Centre to date. The defendant had made no payment of any maintenance to the plaintiff nor contributed to any other expenses pertaining to the children since at least 2016.

### **Termination of parental responsibilities and rights**

[175] Ms *Clarence* had prepared two reports in this matter, the latest of which is most relevant to these proceedings. Although the plaintiff did not plead a termination of the defendant’s parental responsibilities and rights, such order is being sought upon the application of the curator *ad litem* and the plaintiff.

[176] Section 28 of the Children’s Act 38 of 2005 (Children’s Act) deals with, inter alia, the termination of parental responsibilities and rights. Section 28(1) provides as follows:

‘(1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order-

(a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or

- (b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.’

[177] As to who may bring such an application, the provisions of s 28(3) apply and may be brought by:

- ‘(3) An application for an order referred to in subsection (1) may be brought-
  - (a) by a co-holder of parental responsibilities and rights in respect of the child
  - (b) by any other person having a sufficient interest in the care, protection, well-being or development of the child;
  - (c) ...
  - (d) in the child's interest by any other person, acting with leave of the court...’

[178] Section 28(4) enumerates the factors which a court is to take into account when considering an application to terminate parental responsibilities and rights, namely:

- ‘(a) the best interests of the child;
- (b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;
- (c) the degree of commitment that the person has shown towards the child; and
- (d) any other fact that should, in the opinion of the court, be taken into account.’

[179] Section 29(4) of the Children’s Act provides that a court hearing any application, including an application in terms of s 28, ‘must be guided by the principles set out in Chapter 2 to the extent that those principles are applicable to the matter before it’. Chapter 2 of the Children’s Act includes s 7, which provides for the best interests of the child standard. Section 7(1) lists various factors to take into account, namely: the nature of the personal relationship between the child and the parent; the attitude of the parent towards the child; the capacity of the parent to provide for the needs of the child, including emotional and intellectual needs; the need for the child to maintain a connection with his parent or extended family; the child’s age, maturity and stage of development, gender, and background; the child’s physical and emotional security; the need for a child to be brought up within a stable family environment; and the need to protect the child from physical or psychological harm and any family violence involving the child or family member of the child.

[180] Our courts have terminated parental responsibilities and rights in certain

instances, applying the factors referred to in ss 7 and 28(4) of the Children's Act. In *LRJ and Another v JBJ*,<sup>4</sup> the court identified financial neglect, emotional neglect and abuse, and physical neglect and abuse as reasons for terminating parental responsibilities and rights. In *F v F*,<sup>5</sup> the court had regard to the fact that the father failed to financially support the children, was absent from their lives, failed to consent to the children applying for passports and failed to attend bonding sessions. The further fact which the court was of the view justified the termination of parental responsibilities and rights was that the children had expressed the view that they did not want a relationship with their father.

[181] In *OMLM v KKCM*,<sup>6</sup> the court considered the following factors, namely:

- ‘ - the substance and drug abuse of the respondent;
- his unwillingness and/or inability to contribute towards the maintenance of the minor child ;
- his lack of commitment to get medical and psychiatric treatment;
- his tendency to attempt suicide;
- his obsession with the applicant's private and romantic life;
- his lack of interest in contact with the minor child and his failure to honour visitation rights;
- his lack of interest in the child's well-being, schooling and life in general...’

The court, however, did not issue an order for the termination of parental responsibilities and rights, as the initial order was amended to a suspension of parental responsibilities and rights.

[182] In dealing with the first issue in relation to the termination of parental rights, what is evident is that at a very young age, the defendant both verbally and physically abused S[...]. He confirmed the plaintiff's evidence in relation to what S[...] had related to her and Dr Chetty as to how the pillow incident occurred, save to say that he described it as being a pillow fight. That the interim protection order was confirmed points to a contrary explanation. S[...], at a very young age, was unequivocal in his decision that he wanted nothing to do with the defendant. This was voiced not only to the plaintiff but also to the Family Advocate and the Family Counsellor, as well as Dr Venkatsamy, who was treating him.

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<sup>4</sup> *LRJ and Another v JBJ* [2025] ZAGPJHC 16 para 54.

<sup>5</sup> *F v F* [2025] ZAGPJHC 174.

<sup>6</sup> *OMLM v KKCM* [2020] ZAGPPHC 615 para 65.

[183] It is common cause that the defendant has had no contact with S[...] for approximately ten years, apart from seeing him at D[...]’s funeral. S[...] is 16 years old and in terms of s 10 of the Children’s Act, his voice must be heard. The defendant failed to contribute to S[...]’s well-being both in a financial sense as well as in an emotional sense by failing to exercise contact with him, despite the existence of a court order entitling him to do so.

[184] S[...] will turn 17 in his matric year and it is imperative that the plaintiff be in a position to make major decisions on his behalf without the consent or co-operation of the defendant. This is especially so if he obtains financial assistance to study abroad and needs travel documents. The defendant, on a prior occasion, refused to consent to a passport and attempted to use this as a bargaining tool to have contact with and access to the minor children. Even at the resumed hearing, he indicated that he was non-committal and the clear impression I got from his answer to the question was that he would not consent to a passport for S[...], thereby placing his interests above that of his son.

[185] The defendant, in addition, has not contributed in any way to S[...] or D[...] financially since 2016 and the plaintiff has solely been responsible for him. Given the conduct of the defendant, the lack of an emotional bond to S[...], his failure to contribute to his financial and emotional well-being and the psychological impact he has had on S[...], I am of the view that I ought to grant an order terminating the defendant’s parental responsibilities and rights in accordance with s 28 of the Children’s Act towards S[...], as it is in the best interests of S[...]. As upper guardian of the minor child, I do not believe that it is in S[...]’s interests to be forced to maintain contact or a relationship with someone who has made no emotional or financial effort to be in his life. The making of such an order does not preclude the plaintiff from approaching the Magistrates’ Court for maintenance for S[...].

[186] When the plaintiff instituted the divorce proceedings against the defendant in 2013, an order was sought in terms of the provisions of s 9(1) of the Divorce Act 70 of 1979 (Divorce Act) for forfeiture by the defendant of the patrimonial benefits of marriage. In the interim, the section has been amended on 14 May 2024 by the Divorce Amendment Act 1 of 2024, which deals with the forfeiture of patrimonial benefits. Section 9(1) now 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.'

[187] The only difference between the original version of the section and the amended version is the inclusion of the reference to 'including a Muslim marriage'. The section does not refer to a specific type of marriage but rather refers to the forfeiture of the patrimonial benefits. It is common cause that the parties were married in community of property.

[188] In addition, the plaintiff is the sole contributor to her pension and was also solely responsible for the maintenance and upkeep of the immovable property at Chatsworth. Save for a vague allegation of contributing to the paving in 2006, the defendant has made no contribution to such immovable property. I do not believe his assertions that he made any contributions at all to the upkeep, maintenance or the acquiring of such a property in any way. It was never the intention for him to benefit in any way – it was only the plaintiff who signed the acknowledgement of debt and her evidence that her mother did not want him to benefit was unchallenged. It was only registered jointly in their names, as the defendant refused to register an antenuptial contract.

[189] Given the defendant's conduct throughout the short marriage and his failure to contribute to the joint estate, it would be just and equitable in the circumstances if this court grants an order wherein the defendant forfeits his right, title and interest in and to the plaintiff's pension fund, retirement annuity and the immovable property situated at S[...] Road, Chatsworth. I am fortified in this view having regard to the facts of the matter and the authorities I have had regard to.<sup>7</sup>

[190] The plaintiff also confirmed that the immovable property in which she resides with S[...] at S[...] Road, Chatsworth is maintained solely by her without any

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<sup>7</sup> *M v M* [2023] ZASCA 33 at paragraph 24; *Wijker v Wijker* 1993 (4) SA 720 A at 729

contributions by the defendant. In addition, she and her employer have been the sole contributors to her pension fund. She has also solely contributed to her Liberty policy.

### **Costs**

[191] It is trite that the award of costs is a matter which falls within the discretion of the court, which discretion must be judicially exercised having regard to the facts of a matter. The costs which must be determined relate to the divorce action, the various interlocutory applications which were adjourned and the rule 43 and rule 43(6) applications.

[192] Section 10 of the Divorce Act provides as follows:

'In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.'

[193] The plaintiff has been successful in obtaining certain costs orders against the defendant during the proceedings.

[194] Given the history of the matter and the defendant's intransigent behaviour, I am of the view that the most appropriate order would be to direct that the defendant is to bear the plaintiff's costs of the action.

### **Order**

[195] The following order is issued:

1. In terms of s 28 of the Children's Act 38 of 2005, the defendant's parental responsibilities and rights in respect of the minor child, S[...] O[...] J[...], a minor boy born on 25 June 2009, are terminated.
2. The issue of maintenance in respect of S[...] O[...] J[...] is referred to the maintenance court for hearing.
3. In terms of s 9(1) and (7) of the Divorce Act 70 of 1970, read with s 9 of the Matrimonial Property Act 88 of 1984, the defendant forfeits, in favour of the plaintiff, his entitlement to share in the patrimonial benefits of the marriage in community of property, which shall include:

- 3.1 the pension benefits of the plaintiff held in the Government Employees Pension Fund;
  - 3.2 her benefits in and to her retirement annuity with Liberty Life;
  - 3.3 the immovable property described as Portion 528 (of 255) of Erf 1[...] C[...], Registration Division FT Province of KwaZulu-Natal, in extent 186 square meters and physically situated at 3[...] S[...] Road, Westcliff, Chatsworth.
4. The defendant shall sign all such documents and take all such steps necessary to effect registration of transfer into the plaintiff's name of the defendant's rights in and to the property and, should he fail or refuse to do so, the Sheriff or his lawful Deputy is authorised to and directed to sign all such documents and take all such steps necessary on behalf of the defendant to effect registration of transfer into the plaintiff's name of the defendant's rights in and to the property;
  5. The defendant is to bear the plaintiff's costs occasioned by the divorce action, including any reserved costs.

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**HENRIQUES J**

**Case Information**

Dates of hearing:	31 August 2016; 01 September 2016; 06 September 2016; 03 June 2025; 10 October 2025
Date of judgment:	24 March 2026
Counsel for plaintiff:	Mr A Luckan
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This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 9h00 on 24 March 2026.