

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

**CASE NO: 895/19
APPEAL NO: A3129/19**

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
Date: 31 May 2021

In the matter between

M M M

Appellant

and

Z M

Respondent

JUDGMENT

COWEN AJ

1. This is an appeal against orders made on 2 August 2019 by Regional Magistrate Hoosen of the Regional Court in Kempton Park in divorce proceedings concerning the division of a joint estate. In short, what is at issue is Magistrate Hoosen's dismissal of a claim for forfeiture of the patrimonial benefits of the parties' marriage in terms of section 9(1) of the Divorce Act 70 of 1979 (the Divorce Act).

2. The appellant is M[....] M[....]2 M[....]3. The respondent is Z[....] M[....]3. The appellant and the respondent were married to each other in community of property on 24 December 2005. Together, they have one minor child, a son who was born on 21 August 2006. The parties were married for some 13 years but lived apart for much of this time living separate lives.

3. On 18 August 2016, the respondent (as plaintiff) issued summons against the appellant seeking a decree of divorce, division of the joint estate and a direction that 50% of the appellant's pension interest be assigned to her. She also sought further relief relating to the minor child. On 19 September 2016, the appellant (as defendant) filed his plea and a counter-claim. In his counterclaim he pleaded that the respondent should forfeit the benefits arising from the marriage in community of property in terms of section 9(1) of the Divorce Act.

4. Section 9(1) provides:

'When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.'

5. The divorce action came before Regional Magistrate Hoosen on 2 April 2019. At that stage, a Ms Ratjie appeared for the respondent (the plaintiff) and a Mr Mketsu appeared for the appellant (the defendant). At the commencement of the proceedings, and by consent between the parties, the Court ordered that the defendant's counterclaim be amended to clarify, amongst other things, that he was seeking an order for forfeiture of the patrimonial benefits arising from the marriage in community of property. There was no dispute that the marriage had broken down irretrievably.

6. As matters transpired, the appellant's claim for forfeiture was the only dispute ventilated at the trial. It was common cause during the trial that the 'benefits' that the defendant sought the plaintiff to forfeit were his pension interest and a house in Kempton Park, which is subject to a mortgage bond and which for a period was the marital home.

7. During the trial, only the appellant testified in support of his case and only the respondent testified in support of hers. Magistrate Hoosen delivered his judgment on 2 August 2019 and dismissed the claim for forfeiture. He granted a decree of divorce, division of the joint estate, and orders pursuant to which 50% of the value at the date of divorce of the parties' respective due or assigned pension interests with the Government Employees Pension Fund be paid to the other. Each party was ordered to pay its own costs.

8. The appeal came before this Court on 26 April 2021. Advocate Dube appeared for the applicant. Ms Raji appeared for the respondent. The appeal was heard via videoconference on Microsoft Teams in circumstances of the ongoing Covid-19 pandemic.

9. In substance, the appeal is against the Magistrate's refusal to order a forfeiture of the benefits of the joint estate against the respondent. The appeal was noted late and in the circumstances, the appellant applied for condonation, which the respondent opposed. At the commencement of the hearing, however, Ms Raji confirmed that the respondent no longer opposed the application for condonation, and condonation was thereafter granted. It was granted in circumstances where there was no prejudice to the respondent in its late filing, the merits of the appeal concerning the manner in which the Magistrate exercised a discretion, the interests of justice demand finality of the dispute between the parties. The delay was, in any event, relatively short and fully explained. The interests of justice clearly warranted the granting of the condonation application and finalization of the dispute between the parties.

10. In his judgment, in evaluating the evidence and making factual findings, Magistrate Hoosen found that the respondent would benefit from a division of the

joint estate, noting that it is usual in a marriage in community of property that one party will benefit. Further, Magistrate Hoosen concluded that it could not be found that the respondent did not make any contribution to the joint estate. Rather, he found she did so contribute by way of assisting with various expenses of the household and caring for the minor child.

11. Magistrate Hoosen's judgment focuses on his consideration of whether any benefit was undue having regard to the three considerations mentioned in section 9(1): the duration of the marriage, the circumstances that gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties. After evaluating the evidence, he concluded that there is no reason to find that any benefit would be undue if an order for forfeiture is not granted. His reasons for doing so appear from his judgment and in light of the conclusion reached below, there is no purpose summarizing or repeating these here.

12. The appellant appeals against the judgment on multiple grounds. Importantly each of the grounds raised in the notice of appeal relate to the correctness or otherwise of Magistrate Hoosen's findings or evaluation of the three considerations referred to above. Again, in light of the conclusion reached below, it is not necessary to summarise these grounds.

13. The appeal can be disposed of without considering the three considerations referred to above. This is because the appellant failed to discharge the onus of proof that rested on him to demonstrate the extent of the benefit the respondent would derive from a division of the joint estate. In turn, this means that there is no evidence that enables the Court properly to evaluate whether such benefit is undue in light of the three considerations stated in section 9 of the Divorce Act.

14. The fact that a spouse married in community of property is entitled to share in the joint estate of her spouse is a consequence of the marital property regime that governs the marriage. Such benefit, even if substantial, cannot be regarded as *per*

se undue: rather it is an inevitable consequence of the marital property regime.¹ Under South African law, community of property is the default marital property regime and parties to a marriage must opt out of it by mutual consent should they wish to. This legal position protects gender equality.²

15. In *Engelbrecht*, Conradie J of the Cape High Court held, for a full bench:

‘Tensy bewys word – en dit is myns insiens duidelik dat die bewyslas rus op die gade wat the verbeurigbevel aanvra – wat die aard en omvang van die bevoordeling was, kan ‘n Hof nie beslis of the bevoordeling onbehoorlik was of nie. Eers as die aard en omvang van die bevoordeling bewys is, word dit nodig om te kyk na die faktore wat by the beoordeling van die onbehoorlikheid daavan in aanmerking geneem moet word.’

16. The benefit in issue in *Engelbrecht* was, similar to this case, a marital home which was not fully paid off, and was thus both an asset and a liability in the joint estate.³ As in this case, no evidence was led as to the value of the asset or the liability at the date of summons or divorce. The court concluded that in those circumstances, the aggrieved spouse had not established the extent of the benefit: “*a fortiori* het hy nie bewys dat daardie bevoordeling onder die omstandighede onbehoorlik, met ander woorde, ontstellend onbillik was nie.”⁴

17. The Court followed a similar approach in *JW v SW*,⁵ to which Ms Raji referred the Court. In that case the plaintiff had proved the value of the house in question only when the divorce proceedings were instituted and not when the parties entered into the marriage. After considering *Engelbrecht*, Makgoka J concluded that the plaintiff

¹ *Wijker v Wijker* 1993(4) SA 720 (A) at 731 E-G; *Engelbrecht v Engelbrecht* 1989(1) SA 597 (K) (*Engelbrecht*) at 601F-G.

² *Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC); *Sithole and Another v Sithole and Another* (CCT 23/20) [2021] ZACC 7 (14 April 2021).

³ See 602A-E

⁴ See 602E-F

⁵ 2011(1) SA 545 (GNP) at paragraphs 16 to 24.

had not proved the extent of the defendant's benefit on the dissolution of the marriage and that in those circumstances it could not be concluded that any such benefit was undue.

18. In this case, there is no evidence regarding the value of the house (and the extent of the associated liability) either at the commencement or at the dissolution of the marriage. There is similarly no evidence on the value of either of the pension benefits and the extent to which the respondent would be benefited if an order of forfeiture is not granted. In these circumstances, the appellant has failed to discharge the onus that rests on him to make out a case for forfeiture of benefits arising out of the marriage in community of property. In the circumstances, and on the facts of this case, this Court is unable to give any proper regard to the question whether the benefit that the respondent would derive from a division of the joint estate is undue having regard to the three considerations referred to in s9 of the Divorce Act.

19. In the result the appeal must be dismissed. There is no reason why costs should not follow the result.

20. The following order is made:

20.1.1. The appeal is dismissed.

20.1.2. The appellant shall pay the respondent's costs.

Cowen AJ

I agree.

Tsoka J

Heard: 26 April 2021

Delivered: 31 May 2021

APPEARANCES:

For the appellant:

Mr Dube instructed by Mketsu and Associates Inc

For the Respondent:

Ms Raji instructed by Matojane Malungana Inc.