

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

CASE NO: A161/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

DATE 27 November 2023

SIGNATURE

In the matter between:

M[...]: K. R

APPELLANT

and

M[...]: J.M

RESPONDENT

JUDGMENT

MOTHA J,

Introduction

[1] This is an appeal against a portion of the judgment of Magistrate P.W. Nel sitting in the Regional Division of the Magistrate Court, Pretoria North. Following the hearing, the court *a quo* made three orders, namely:

“

1. Decree of divorce is granted (-see attached divorce order).

2. Forfeiture is ordered of the following:

- i. The plaintiff's right to share in the defendant's pension interest benefit held in the Old Mutual Superfund Provident Fund.
 - ii. The immovable property situated at Erf 4[...] B[...] U[...], S[...].
3. That the plaintiff is ordered to pay the cost of suit.”¹

[2] From the outset, it bears mentioning that the appellant abandoned her first ground of appeal, which is against the forfeiture order 2(i). In short, her challenge to forfeit the right to share in the defendant's pension interest benefit held in the Old Mutual Superfund Provident Fund.

[3] Therefore, the only live issue to be adjudicated is the forfeiture order 2(ii), which orders her to forfeit her share in the immovable property situated at Erf 4[...] B[...] U[...] S[...].

[4] Even though the appellant raised nine grounds of appeal and subsequently abandoned six, this court was never in doubt that the bone of contention is about the forfeiture of the S[...] house. For the sake of completeness, the grounds of appeal are:

1. “Found that the plaintiff will be unduly benefited if she receives half share in the immovable property situated at Erf 4[...] S[...] Block U[...], in the circumstances where no evidence was led and it was not proven by the Defendant what the nature and extent of the benefits were the Learned Magistrate could not decide if the benefit were undue.

2. Found that the plaintiff's half share in the immovable property situated at Erf 4[...] S[...] Block U[...] is a benefit that the plaintiff had derived from the marriage. The immovable property was not brought into the marriage by the Defendant. The immovable property was purchased by both parties and that Bond was registered into the name of both parties prior to the marriage. The movable property was an asset that was brought into the marriage by both

¹ Judgement page 5

parties and the plaintiff did not share in the property by virtue of the marriage and as such her half share is not a benefit that can be forfeited in terms of Section 9 of the Divorce Act 70 of 1979 whilst still liable for the bond as per agreement with bondholder (real right holder).

3. In that the court order and judgments should end litigation (lis) between the parties whereas this Court order and judgment does not in that evidence was led in regard to the Plaintiff pension Fund and deaths of both parties mortgage bond included but no order was made and judgment has not referred to the following:

- a) Division of the Plaintiff pension Fund;
- b) How the debt at the mortgage bond of which parties are liable today and in the future.”²

Factual background and court’s findings

[5] The parties got married in community of property on 22 September 2016. There are no minor children born of the marriage. The appellant instituted the divorce proceedings and claimed a decree of divorce with the division of the joint estate. The respondent lodged a counterclaim for forfeiture of matrimonial benefits in terms of section 9(1) of the Divorce Act 70 of 1979 (the Act). He asked for the appellant to forfeit the benefit to the immoveable property at Erf 4[...] S[...] Block U[...], which is still bonded to FNB bank, and pension interest benefit held in the Old Mutual Superfund Provident Fund.

[6] The appellant testified that, on 7 October 2018, she was admitted into the hospital and only got discharged in January 2019. Under cross-examination, she testified that she was employed at the SAPS. She conceded that she was involved in adulterous relationships and that she never disclosed her positive status to the defendant. Following her testimony, the court *a quo* made credibility findings. It expressed that it was not impressed with her testimony, which it found to be contradictory, untruthful and unreliable. On the contrary, the court found that the

² Notice of appeal paras 2, 3 & 7.

defendant left a good impression on the court during his testimony. It also found him to be a reliable and truthful witness.

Legal principles and applicable law

[7] Section 9(1) of the Act stipulates the following:

“Forfeiture of patrimonial benefits of marriage.—(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.”

[8] In *Smith v Smith*³ the court held:

“It is of course clear that what the defendant forfeits is not his share of the common property, but only the pecuniary benefit that he would otherwise have derived from the marriage. *Celliers v Celliers* 1904 TS 926. It is not uncommon to refer to division and forfeiture as alternative remedies open to the plaintiff. On this view forfeiture means that each party keeps what he or she brought into the community. The acceptance of this, view seems to be the explanation of the decision in *Parker’s* case 1921 TPD 289. An alternative interpretation of an order of forfeiture is that, it is really an order for division plus an order that the defendant is not to share in any excess that the plaintiff may have contributed over the contributions of the defendant. This would mean that it could only be ascertained after an investigation into the respective contributions of the spouses whether the forfeiture would operate or not (cf. *Lourens v Lourens* 1914 OPD 74).”⁴

³ 1937 WLD 126.

⁴ Supra at 127-128.

[9] It is, indeed, a factual exercise to determine whether a party will be benefited. To arrive at the conclusion that the benefit is undue requires a value judgment, which is exercised with due regard to the three elements mentioned in section 9(1) of the Act. This point was elucidated in *Wijker v Wijker*,⁵ where the court held:

“It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be purely a factual issue. Once that has been established the trial Court must determine, having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefited if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial Court after having considered the facts falling within the compass of the three factors mentioned in the section.”⁶

[10] Nothing outside the three factors should be considered in arriving at the value judgment. In *Botha v Botha*⁷ the court held:

“[8] The three factors governing the value judgment to be made by the trial Court in terms of s 9(1) thus fall within a relatively narrow ambit: they are limited to (a) the duration of the marriage; (b) the circumstances which gave rise to the breakdown thereof; and (c) any substantial misconduct on the part of either of the parties. Conspicuously absent from s 9 is a catch-all phrase, permitting the Court, in addition to the factors listed, to have regard to ‘any other factor ...’

The trial Court may therefore not have regard to any factors other than those listed in s 9(1) in determining whether or not the spouse against whom the forfeiture order is claimed will, in relation to the other spouse, be unduly benefited if such an order is *not* made.”

[11] The court in *Klerck v Klerck*⁸ stated that all the factors mentioned in section 9(1) need not be simultaneously present. Kriegler J held:

⁵ 1993 (4) 720 (A)

⁶ Supra 727D

⁷ 2006 (4) SA 144

⁸ 1991 (1) SA 265 (W).

“that it was not the intention of the Legislature that substantial misconduct or any of the other factors mentioned in s 9(1) had to be present before the Court could grant an order of forfeiture: what the Court had to do was to ask itself whether one party would be unduly benefited if an order of forfeiture was not made and in order to answer that question regard should be had to the duration of the marriage, the circumstances in which it broke up and, if present, substantial misconduct on the part of one or both parties.”⁹

[12] Having discussed the facts and law, the court is of the view that it cannot be said that the appellant will be unduly benefitted at the expense of the respondent when we do not possess the knowledge of when the property was bought. It is clear, to this court, that it was not purchased during the marriage. Before arriving at a value judgment that the appellant would be unduly benefited, if forfeiture is not granted, the court *a quo* needed to have engaged on a fact-finding mission geared at establishing, *inter alia*, the date of the acquisition of the property. Bolstering this proposition is the writing in LAWSA vol 16, 2nd ed par 90. If it transpires that the appellant acquired the property, or share thereof, before the marriage the ineluctable question is: can she forfeit what she brought into the marriage?

[13] This exercise, of necessity, involves factual findings which zero in on the date of the registration of the property, the purchasers and the likes. Regarding the forfeiture of Erf 4[...] S[...] Block U[...], we are of the view that there was a misdirection occasioned by the failure to canvass the afore-mentioned issue.

[14] One cannot forfeit the property one brought into the marriage. One only forfeits pecuniary benefits that one would otherwise have derived from the marriage. In short, the benefits constitute an excess of the party's contribution to the joint estate over and above the other party's contribution. To this end it is apt to refer to page 157 of Family Law in South Africa where it is written “The court may grant an order of complete forfeiture. In this case, the party will lose everything except the assets that he or she brought into the marriage.”¹⁰ Therefore, it would be unjust to

⁹ Supra at 265-266.

¹⁰ Skelton, A et al *Family Law in South Africa* (2010) at 157.

order a forfeiture of matrimonial benefit of an asset that a party brought into the marriage.

[15] The court *a quo* did not explore the factual position around the ownership of the property. This court's hands are tied to the four corners of the record. We are of the view that it would be just and equitable to remit the matter to the court *a quo* in terms of section 19 (c) of the Superior Courts Act 10 of 2013, which reads as follows;

“(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary.”

[16] Consequently, this matter is remitted to the court of first instance for a hearing on the narrow issues of the acquisition and ownership of the property. The hearing must be rooted in the language and logic of the three factors mentioned under section 9(1) of the Act. Whereafter, the court would determine whether forfeiture of Erf 4[...] B[...] U[...], S[...], is still competent.

[17] Regarding costs, section 10 of the Act provides “In a divorce action the court shall not be bound to make an order for costs in favor 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, makes such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.” The way counsel for the appellant conducted these proceedings left much to be desired. It was not a question of being rough around the edges, counsel was simply ill-prepared. Not only did counsel fail to address the court appropriately, but also could not find his references; and the court had to wait endlessly for him to locate his references, at great expense to the court’s valuable time. Having said that, this court is of the opinion that each party should pay its own cost.

In the result the following order is made

Order

1. The matter is remitted to the court *a quo* to establish the factual position around the acquisition of Erf 4[...] S[...] Block U[...]. Following the proper establishment of those facts, the court *a quo* should adjudicate the question of forfeiture of Erf 4[...] S[...] Block U[...].
2. Each party to pay its own costs.

M MOTHA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

COETZEE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Date of Hearing: 31 October 2023

Date of Judgment: 27 November 2023

APPEARANCES

FOR THE APPELLANT : MR JACKSON MASNGO
INSTRUCTED BY : FUCHS ROUX INC

FOR THE RESPONDENT : ADV BT MATHATHE
INSTRUCTED BY : KP SEABI & ASSOCIATES