IN THE HIGH COURT OF SOUTH AFRICA

(FREE STATE HIGH COURT, BLOEMFONTEIN)

CASE NO.: A201/2013

Date heard: 16-04-2014

Date delivered: 19-06-2014

In the matter between:

N[...] W[...] P[...] Appellant

And

M[...] H[...] P[...] Respondent

CORAM: WILLIAMS J et MBHELE AJ:

JUDGMENT

WILLIAMS J:

1. This is an appeal which lies against the refusal of the Regional Court, Bloemfontein, to grant an order of forfeiture of the benefits in a divorce action. Preliminary to the appeal there is an application for condonation for the late prosecution of the appeal and the late filing of the-record.

2. Judgment was delivered in the court a *quo* on 7 September 2012. The appeal was noted on 26 October 2012. In terms of Uniform Rule of Court 50(4) an applicant shall within 40 days of noting the appeal apply to the registrar in writing for the assignment of a date for the hearing of the appeal. The appeal shall then be deemed to have been duly prosecuted in terms of Rule 50(4)(c). Simultaneous with the lodging of the application for the date for the hearing of the appeal, the applicant shall in terms of Rule 50(7)(a) lodge with the registrar two copies of the record.

3. The appellant who is an attorney by profession, attended to the prosecution of the appeal personally and

only applied for a date for the hearing of the appeal and filed the record on 19 September 2013, almost one year after the noting of the appeal. An appeal which is not prosecuted within 60 days of the noting of such an appeal is deemed in terms of Rule 50(1) to have lapsed.

4. The appellant blames the delay in prosecuting the appeal on problems encountered in obtaining the transcribed record and his attempts thereafter at correcting the record. The affidavits of the appellant and his candidate attorney in support of the application for condonation set out the course of events as follows:

> 4.1 On 31 October 2012 and on the instruction of the appellant, the candidate attorney personally attended on the offices of Krino Transcribers to request a copy of the transcribed record of the proceedings. He was informed that it still needed to be transcribed.
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> 4.2 On 15 February 2013, three and a half months later, after being informed that the record was ready, the candidate attorney discovered that only the judgment had been transcribed. He again requested the whole record of the proceedings.
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> 4.3 On 4 March 2013, the candidate attorney was informed by an employee of the transcribers that the record was available, but again only received the judgment.
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> 4.4 After several (undetailed) further visits to the transcribers the candidate attorney was told to speak to "*Suzette"* from the magistrates court who informed him subsequently that the transcribed record would only be handed over upon payment of R1000, 00 security for the costs of appeal.
>
> 4.5 Security was given on 13 March 2013 whereafter, despite personally attending on the offices of the trancribers on several (undetailed) occasions thereafter, the candidate attorney only received the transcribed record on 12 June 2013.
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> 4.6 The appellant, who was an acting Judge in the Free State High Court at the time, only received the record on his return to his attorney's practice on 1 July 2013.
>
> 4.7 From 1 July 2013 the appellant attempted to have the record corrected until he was advised by counsel to lodge the record as is, which he then did on 19 September 2013.

5. The account in paragraph 4 above is the extent of the explanation for what can only be termed as a flagrant breach of the rules relating to the noting and prosecuting of appeals. No explanation is given of any attempts made to obtain the record from the transcribers within the 60 days allowed for the prosecution of appeals, other than the initial request for the transcription. One can therefore safely assume that absolutely no effort was made during this time to obtain the record. In *Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carriers*

CC 2010(5) SA 340(GSJ), a matter in which delays in the prosecution of an appeal were also attributed to transcribers, the following was stated at 344 F-G thereof;

> "*[28] Applicants for condonation in our High Courts must take note of two fundamentally important issues which arise from this judgment, i.e.:*
>
> *[28.1]The entire period of the delay has to be explained thoroughly and the longer the period of delay, does not detract from this fact; and*
>
> *[28.2]if the reason for the delay is the non-cooperation by the contracted transcribers, then substantial delays such as the one herein will not constitute a sufficient reason/explanation for the delay, without proof of attempts to compel the transcribers to provide the transcripts.* "

6. The appellant, as an experienced attorney, could furthermore not have been unaware of the fact that security for the costs of the appeal had to be paid. Magistrates Court Rule 51(4) specifically provides that:

> "*An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the amount of R1000:*

The noting of an appeal is not complete until both the delivery of the notice of appeal and giving of security have occurred. See *O'Sullivan v Mantel 1981(1) SA 664(W) at 668 B-C.* Therefor, even in noting the appeal properly there was an inordinate and unexplained delay of about six months.

7. The delay of a further three months after eventually receiving the record is also woefully inadequately explained. There is no reason why the appellant could not have attended to his appeal while he was an acting judge. The explanation of attempting to correct the record is vague and does not account for the two and a half months wasted during this process. Condonation for non-compliance with the Rules is not a mere formality. In *Uitenhage Transitional Local Council v South African Revenue Service 2004(1) SA 292 (SCA)* the following is stated at 297 l-J thereof: "*One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court.Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.* "

8. Moreover in his application for condonation the appellant failed to deal at all with the prospects of success on appeal, which is an important consideration in deciding whether, even though the explanation for the

delay is inadequate, the prospects of success are such that it would be in the interests of justice to grant condonation. We have however, as is the practice, heard argument on the merits and it is therefore appropriate to deal with it notwithstanding the attitude expressed in *LTA Construction Ltd v Minister of Public Works and Land Affairs*

1994(1) SA 153 (AD) at 157E, where the following is stated:

> "*In cases of flagrant breaches of the Rules, especially where there is no acceptable explanation, the indulgence of condonation may be refused whatever the merits of the appeal are*; *and this applies even where the blame lies solely with the attorney.* "

9. The respondent, who was the plaintiff in the court *a quo*, instituted action against the appellant for a decree of divorce on the grounds of an irretrievable breakdown of the marriage. She claimed *inter alia* a division of the joint estate. The appellant defended the action, admitted that the marriage had broken down irretrievably and in his counterclaim, apart from claiming a divorce, claimed *inter alia* an order for forfeiture of the benefits of the marriage in community of property. After hearing the evidence of both parties, the court *a quo* at the end of the trial granted an order of divorce and the division of the joint estate. The appeal is directed solely at the court a *quo's* refusal to grant a forfeiture order.

10. The parties were married in community of property on 5 December 1991. Three children were born of the marriage of whom two had already at the time of the divorce obtained majority.

11. At the time of the marriage the appellant was a candidate attorney who after being admitted practised as an attorney throughout the marriage. The respondent completed matric and during the early stages of the marriage obtained a certificate in home nursing. It does not appear as if she had ever been employed as a home nurse though. The only noteworthy employment she had during the course of the marriage was for six months, when she was employed by Spoornet to destroy old files. Her evidence was that she from time to time cleaned houses to earn some money and from the proceeds started an informal small loan business. This business appears to have been started after the parties separated.

12. Both parties conducted extra-marital affairs during the marriage. The respondent's evidence was also that the appellant physically abused her during the course of the marriage and at times chased her out of the common home. The final straw was during January 2010 when the appellant kicked her out of the house at night while she was only wearing her night clothes. The parties had been separated ever since.

13. The appellant based his claim for forfeiture on the conduct of the respondent i.e. that she conducted an extra-marital affair and left the common home for long periods without reason, and more specifically the fact that she refused to take up employment as a result of which she failed to contribute towards the building of

the joint estate.

14. The appellant's claim for forfeiture was not directed at a specific benefit but was a general claim for forfeiture of the benefits of the marriage in community of property. The only assets the appellant referred to in his evidence were a house in Pahameng which was purchased for R30 000,00 and a used Kia motor vehicle of which the purchase price in 2006 was about R120 000,00. The house mentioned was bought as an investment to which the appellant contributed R10 000,00 and his mother R20 000,00. According to the appellant his mother did not want the property registered in her name since she already owned two RDP houses. The result was that the property was registered in the names of the parties by virtue of them being married in community of property and not because of any financial contribution by the respondent.

15. The appellant who conducted his own case in the court *a quo,* emphasised very strongly during his evidence that the most important factor underlying his claim for forfeiture was the fact that the respondent had made no meaningful contribution to the joint estate. He obviously had regard solely to financial contributions and ignored the substantial contribution made by the respondent over 20 years of marriage in terms of raising children and housekeeping.

16. Section 9(1) of the Divorce Act 70 of 1979 (the Act) provides as follows

> "*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. ''*

17. In *Wijker v Wijker 1993(4) SA 720(AD)* it was stated that it is obvious from the wording of s9(1) that the first step in determining whether or not there should be a forfeiture is determine whether or not the party against whom the order is sought will in fact be benefited.' Once that is established the second step is to determine whether or not that party will in relation to the other be unduly benefited if an order of forfeiture is not made. Then only do the factors such as the duration of the marriage, circumstances leading to the break-down and substantial misconduct come into play.

18. The court a *quo,* having regard to the approach set out in the *Wijker* matter, found that the appellant's counterclaim and evidence failed to establish the specific benefits of the marriage in community of property and that it was therefore not necessary to proceed to the second step of determining whether or not the respondent would be unduly benefited. As a result the court a *quo* did not consider the evidence of the

alleged misconduct of the respondent. In my view the court a *quo* cannot be faulted in this regard. See also *Engelbrecht v Engelbrecht 1989(1) SA 597 (CPA) at 601H.*

19. The appellant who bears the onus to prove the nature and extent of the benefits failed to place evidence of the value of the immovable property at the time of the divorce before court, which could of course also be subject to a claim by his mother thereto. He has likewise failed to place evidence of the value of the vehicle at the time of the divorce before court. The appellant therefor, has failed to overcome the first hurdle of proving a benefit to the respondent and cannot succeed with a claim for forfeiture of the benefits..

20. Mr Williams who appeared for the appellant in the appeal, urged us to consider granting absolution on the appellant's counterclaim for forfeiture instead of dismissing the claim, as was the effect of the order in *MG v RG 2012(2) SA 461 (KZP),*in order to allow the appellant the opportunity to place the necessary evidence before court. I am of the view however that there can be no justification for such an approach *in casu.* The *MG v RG* matter related to an unopposed divorce and issues of prejudice towards the respondent did not arise. *In casu* the divorce action was instituted during May 2011, some three years ago. The finalisation of the issues between the parties has already been unreasonably delayed through the dilatory conduct of the appellant in the prosecution of the appeal. It has become imperative that this matter be finalised.

21. I am of the view in any event that even if the appellant had placed sufficient evidence before the court a *quo* to prove a benefit, he had failed to show that the respondent would be **unduly** benefited should an order for forfeiture not be granted. The parties had been married for 20 years. The evidence relating to the misconduct of the respondent, in that she on several occasions left the common home for long periods of time and had conducted an adulterous relationship is countered by the evidence of the respondent that the appellant physically abused her, which caused her tojeave the common home on a few occasions and her evidence that he also had extra-marital affairs. The finger of blame for the breakdown of the marriage can therefore not be pointed at one particular party on the evidence recorded. The respondent's alleged reluctance to work can also not be considered as substantial misconduct as envisaged by s(9)(1) of the Act. See *Matyila v Matyila 1987(3) SA 230 (WLD) at 236 I.*

22. In my view the appeal cannot succeed. The application for condonation should therefore be refused.

The following order is made:

The application for condonation is refused with costs.

C C WILLIAMS

JUDGE

I concur

N M MBHELE

ACTING JUDGE

For Appellant: Adv. A Williams

P[...] & Partners

For Respondent: Adv. W.A. Van Aswegen

Mcintyre & Van Der Post