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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: HCA04/2023

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

In the matter between:

T[...] S[...] S[...]

APPELLANT

And

M[...] A[...] S[...]

RESPONDENT

JUDGEMENT

KGANYAGO J

[1] The appellant and respondent were married to each other in community of property on 18th September 2009. From the said marriage one minor child was born on [...] A[...] 2012. The respondent had instituted a divorce action against the appellant seeking orders for a decree of divorce; equal division of the joint estate; 50% share of the appellant's pension interest; primary residence of the

minor child be awarded to the appellant subject to the respondent's right to reasonable contact; both parties to retain full parental responsibilities over the minor child; both parties to be guardians of the minor child; and the issue of maintenance to be referred to the maintenance court. The respondent's grounds for divorce were mainly the alleged infidelity by the appellant with several men, which resulted in the parties living separately for a period exceeding 2 years.

- [2] The appellant had defended the respondent's action. In her plea to the respondent's particulars of claim, the appellant had conceded that their marriage relationship had broken down irretrievably and there are no reasonable prospects for restoration of a normal marriage relationship between them, but denied the respondent's reasons for the breakdown of the marriage.
- [3] The appellant had filed a counterclaim. In her counterclaim the appellant is also accusing the respondent of infidelity which resulted in the respondent fathering a child out of the wedlock. That the respondent did not support the appellant financially, and also that the respondent's contribution towards the joint household and their joint estate was minimal. Further that when the respondent resigned from Blouberg Municipality around 2016-2017 he had enjoyed his pension pay-out alone and did not share it with the appellant during the subsistence of the marriage. The appellant was seeking orders for a decree of divorce; forfeiture of benefits arising out of the marriage in community of property; and joint custody of the minor child.

- [4] The parties have registered their immovable property into the names of their minor child. At the commencement of the trial the respondent had abandoned his claim in respect of the immovable property, and pursued the claim against the appellant's pension interest. The only issue which the court *a quo* was called upon to determine was whether the respondent should forfeit his 50% share of the appellant's pension interest administered by Government Employees Pension Fund (GEPF). The parties have agreed during their pretrial conference that the appellant bore the onus of prove that the respondent should forfeit his share of the appellant's pension interest.
- [5] The appellant had testified under oath. She testified that she and the respondent were married to each other in community of property, profit and loss on 18th September 2009. Her marriage between her and the respondent had irretrievably broken down and there is no prospect of restoration of a normal marriage relationship in that the respondent is not supporting her financially; they are always quarrelling and have different interest in their marriage; the respondent had adulterous relationships with different woman which state of affairs she finds irreconcilable with the continued normal marriage relationship. That the respondent's adulterous relationship resulted in him having a child out of their wedlock. She was a victim of gender-based violence and had opened a case with the South African Police Services (SAPS). The respondent had told her that he knew that he was not a good husband as he was not doing what a good husband should do to his wife.

[6] The appellant stated that she was the one who was doing most of the financial support for the family. The respondent had resigned from his employment without discussing that with her. After he had resigned, the appellant spent all his pension money without sharing it with her. Even after the respondent had spent his pension money, the appellant continued to support him financially. The appellant would give the respondent money and also provide him with a car to attend to his interviews as a job seeker. Despite the assistance which the appellant was giving to the respondent, when the respondent found employment in Johannesburg he took the mother of his illegitimate child and went to stay with her in Johannesburg. After she discovered what the respondent was doing, she forgave him, but told him that since she was now self-sufficient they must end their marriage. The respondent acknowledged that their marriage was not in its best condition.

[7] When the respondent resigned from Blouberg Municipality in 2013, he received a pension pay-out in the amount of R522 567.82. She never knew how much pension pay-out was paid to the respondent, but only saw that amount for the first time from the documentation presented in court. All that she knew was that the respondent had received a pension pay-out. The only thing that the respondent was doing, was to buy food whenever he wants. Even to support the minor child, the respondent will do so when he wants. When she asked the respondent about his pension pay-out, he told her that part of the payment he had used it to pay his debts. However, when the appellant did her own investigations, she found that the appellant was addicted to gambling and had used his pension money on gambling and also sending some to the mother of

the child born out of wedlock. The respondent only started supporting their minor child faithfully after he had started the divorce process.

[8] The respondent did not make any contribution towards her pension interest held at GEPF. According to the statement from GEPF her pension interest is valued at R1 602 639 plus lump sum gratuity payable to the beneficiaries valued at R1 000 000.00. For the reasons that the respondent had not been a good husband; the respondent had not been financially supporting her; the respondent had resigned from Blouberg Municipality without consulting her; the respondent had spent his pension pay-out after resigning from the municipality alone; and as she is having two children, she had intended her pension interest to take care of them, the respondent will unduly benefit should an order for forfeiture of his 50% share in the appellant's pension interest not be ordered.

[9] During 2017 she and the respondent went to VVV Motors as she wanted to buy a car. The car she wanted to buy was priced at R52 000.00. She paid for the car from her own bank account and there was short of R12 000.00 from what the dealership was requesting. She borrowed R12 000.00 from her cousin, and her cousin paid that amount into the bank account of the respondent. The respondent in turn transferred that amount into the account of the dealership. The respondent is economical with the truth when he alleges that the R12 000.00 was his money that he had contributed towards buying the car.

- [10] During 2020 the appellant had caught the respondent red handed with the mother of his illegitimate child despite the respondent having told her that he and his girlfriend have separated. The respondent had even employed his girlfriend as his assistant in one of the companies he was working for. The respondent was not honest as he kept on going backward and forward with her girlfriend, and the appellant felt that she could not be in a relationship with the respondent.
- [11] The appellant was cross-examined and she stated that she wanted to divorce the respondent during 2013 but could not do so as she was financially constraint, and when she tried to do online divorce the respondent refused to accept the divorce papers. Even though it could not be proven, the respondent was using traditional herbs on her which was to make sure that his malicious plans were working for him. Everyone in their families knew that their marriage had long ended, and that they did not have a happy marriage. The appellant stated that she will not dispute that the appellant had used a portion of his pension pay-out to settle his motor finance loan in the amount of R95 000.00 and ABSA credit card loan in the amount of R45 000.00 as she was not aware of that.
- [12] The appellant stated that the respondent never bought a television set, sofas and dishwasher with his pension pay-out, or at any stage during the subsistence of their marriage. That the only thing that the respondent bought during 2013 after he had resigned was a geyser, but at that time he was already employed at another company. The appellant stated that she and the

respondent have been married together for 13 years, but during that 13 years period, they have separated from each other on several occasions. The appellant denied that she had applied for a protection order against the respondent as the respondent had caught her being involved in extra marital affairs with one S[...] N[...], T[...] M[...] and P[...] V[...]. The appellant denied that when she and the respondent finally separated in 2019 was because the respondent had discovered that the appellant had recently went on vacation with his boyfriend T[...] M[...]. The appellant stated that the reason why the respondent had left their common home was that she had chased him out of their common home since he was continuing to be dishonest.

- [13] The appellant conceded that the R12 000.00 was paid into the dealership bank account by the respondent, but denied that it was part of the portion of the pension pay-out to the respondent. The appellant conceded that she is not saying the respondent never gave her money during the subsistence of their marriage, but that he had spent his pension pay-out alone. The appellant stated that during their 13 years marriage relationship, she and the respondent were helping each other, but that she did not receive a cent from the respondent's pension pay-out. The appellant conceded that during 2013 the respondent had arranged a holiday vacation for him and her, but denied that the respondent had used the pension pay-out for that trip, but that he had used the complimentary tickets he received for gambling, and that if he had used the pension money, it was for the benefit of both of them. The appellant conceded that it is possible that the respondent might have used his pension pay-out for

the benefit of the of the entire family, but she did not know. That concluded the appellant's evidence.

[14] The plaintiff applied for absolution from the instance, which application was dismissed. The respondent testified under oath and stated that one minor child was born from his marriage relationship with the appellant. When he and appellant started staying together as husband and wife he had rented a property for them and was paying R4000.00 per month. The minor child was born during 2012, and he and the appellant were both taking care of the minor child. The respondent alleges that he was giving the appellant R1 800.00 to R2 000.00 as contribution towards the maintenance of the minor child.

[15] During 2013 the respondent had resigned from his employment at Blouberg Municipality. After his resignation, he paid all the debts that he was having with the pension pay-out from the municipality. He paid R95 000.00 which was the residual amount for the Nissan hardbody and R45 000.00 for the ABSA credit card. The appellant never chased him out of their common home because of having spent the pension pay-out. The respondent stated that one day during 2011 he was surprised whilst at work to receive a call from Bochum SAPS telling him that the appellant had obtained a protection order against him. However, on the date on which they were supposed to appear in court the appellant did not come to court, and the protection order was cancelled.

[16] The appellant stated that when he resigned from Blouberg municipality, he had discussed that with the appellant. He had told the appellant that at his employment he was having political issues with his employer and was afraid that they were going to suspend him and was scared that if that happens he will never get employment again. The respondent told the appellant that it will be in his best interest if he resigned in order to protect his integrity so that one day he will be able to get employment somewhere. The appellant did not have any problems with the respondent resigning from his employment. At the time of his resignation the value of his pension interest at the Municipal Employees' Pension Fund was R522 167.82. R89 940.20 was tax amount paid to SARS, and he was paid R432 152.67.

[17] The respondent alleges that he had left their matrimonial home during December 2019. It was not for the first time that he had to leave their common home. The first time he left when he was served with the protection order, and later returned to their common home. The respondent denied that the appellant had allowed him to return to their common home because he was using traditional herbs against her. The appellant stated that when they were facing challenges in their marriage, they both used to consult a Zionist priest at the appellant's home place in Mpumalanga. The respondent denied ever taking the appellant to traditional healer.

[18] The reasons why he left the common home in December 2019 was that on 5th August the appellant travelled to Thailand and spent a week there with T[...] M[...] without informing him. When he came back home, he found that the

appellant had left their minor child with the lady who was looking after the minor child after preschool. He could not reach the appellant on her cell phone, but sometimes he could only be able to reach her on the WhatsApp chat. He only knew that the appellant was in Thailand on her return. The appellant started posting the photos of T[...] on her profile status, and when he commented on that, the appellant will respond by saying “more still to come”. The respondent saw that it was in their best interest for him to leave their common home in order to avoid a fight, or killing of each other.

[19] When the appellant was inviting him to go on vacation with her in Durban, she was trying to soften him. By then the respondent had already make up his mind that he will never travel together with her to any of her destination, and he decided to quit their marriage. That is when the appellant confirmed to the respondent that she was in love with that boy. On 3rd December 2020 the respondent met the appellant with that boy at Saskia Fusion Boutique and they told him that they were in love, and there was nothing he could do. The appellant told the respondent that he can file for divorce.

[20] The respondent alleges that when he was still employed and Blouberg Municipality, one day he found the appellant talking on her phone with S[...] N[...] the ANC secretary at Ehlanzeni region. After they finished talking, the appellant told him that it was her brother who had phoned her and had booked at Bolivia Lodge. The appellant was having the keys for the room of Bolivia Lodge. He went with the appellant at Bolivia Lodge and she gave the keys to N[...]. In the morning the appellant took the respondent's body lotion and told

him that N[...] had forgotten his. In order to avoid a fight, he allowed the appellant to take his lotion and to deliver it to N[...], but had suspicions that something was happening. The appellant's mother told the respondent that the relationship between the appellant and N[...] is a thing that happened a long time ago, and that confirmed the respondent's suspicions.

[21] P[...] V[...] was a member of SACCAWU national and was working for Government Pension Administration. The appellant was the chairperson of SACCAWU in Polokwane, and V[...] used to phone the appellant at night. When V[...] was visiting regions, the appellant will travel with him and they will sleep together. One day the respondent phoned the appellant, and the appellant told him that she was in Thabazimbi, but when he went to her workplace he found the appellant. The appellant confessed that she was in a love relationship with V[...] and that they will end it.

[22] The incident of T[...] M[...] in 2019 was the last straw, and that is when the respondent thought that the marriage between him and the appellant was over. According to the respondent, the appellant was also trying his patience, as in 2019 the appellant had assaulted him with an open hand, and he got scared, worried and was asking himself what the appellant was trying to achieve.

[23] On 14th October 2017 the appellant wanted to buy a small bakkie that was costing R52 000.00. The appellant had R40 000.00 and was short of R12 000.00. The respondent paid the shortfall of R12 000.00 to Tripple V Motors,

and that money was not paid into his bank account by the appellant's cousin. The appellant loved touring and when they were touring it was not only through complimentary tickets. They have travelled to Swaziland, Zimbabwe via Zambia, Mozambique 2 times, Cape Town and KwaZulu Natal. Some of the trips were through complimentary tickets, but not all of them. They were both contributing equally for their trips.

[24] The appellant knew all of the respondent's children. The respondent is having two children not with the appellant, and were born on [...] J[...] 1997 and 3[...] M[...] 2006. All these children were born before he got married to the appellant. He and the appellant got married on 18th September 2009. The respondent denied that he was addicted to gambling. The respondent denied that he only started supporting their minor child regularly after he had instituted the divorce proceedings against the appellant, but that he had been maintaining the minor child properly even before the institution of the divorce proceedings. From June 2017 up to December 2020 he had given the appellant more R130 000.00 as maintenance for the minor child, and was paying that voluntarily. The appellant had never taken him to the maintenance court. Their pension interest held at GEPI should be shared equally.

[25] The respondent was cross-examined and he denied that he had spent his pension pay-out on the mother of her other child without using it for the benefit of their joint estate, but that even the appellant during her testimony had testified that they were doing thing together and helping each other. The respondent stated that after he had resigned from Blouberg Municipality in

2013, he was staying with the appellant until he found another employment during 2015. Therefore, it is not true that he had spent his pension pay-out with his concubines. The respondent stated that he had filed for divorce as the appellant was abusing him, not because he wanted her pension money. The respondent denied that he is having a child who was born during 2012 as a result of his extra marital affairs. The respondent denied that the appellant had chased him out of their common home because of his infidelity. The respondent stated that he had left the common home permanently in 2019 because he had discovered that on 5th August 2019 the appellant had gone to Thailand with another man. That concluded the evidence of the respondent and he closed his case.

- [26] The court *a quo* found that both parties have contributed towards the breakdown of their marriage relationship, the respondent after receipt of his pension pay-out had utilised it without accounting to the appellant but had made some contribution towards the growth of their joint estate which the appellant regards as minimal. The court *a quo* concluded that the respondent will not unduly benefit if the court orders that he share one half of the pension interest of the appellant. The court *a quo* made orders granting decree of divorce, equal division of the joint state, that both parties pension interest held at GEPF be shared equally, together with other ancillary orders. The appellant is aggrieved by the order that the respondent is entitled to a share of her pension interest and is appealing against that order.

[27] The court *a quo* in refusing to grant the appellant a partial forfeiture order in respect of her pension interest was exercising a discretion provided for in section 9 of the *Divorce Act*¹ (The Act). Section 9 of the Act gives the Court discretion when granting a divorce on the ground of the irretrievable breakdown of the marriage to make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other party. In *Wijker v Wijker*² the Court held that the benefit that will be received cannot be viewed in isolation, but in order to determine whether a party will be unduly benefited the court must have regard to the factors mentioned in the section of the Act. Those factors are duration of the marriage, the circumstances which gave rise to the breakdown and any substantial misconduct on the part of either of the parties.

[28] In *Botha v Botha*³ the court held that the three factors governing the value judgment to be made by the trial court in terms of section 9(1) fall within a relatively narrow ambit, and that the catch-all phrase permitting the Court, in addition to the factors listed, to have regard to 'any other factor' was conspicuously absent from the section. It was further held that the trial Court may therefore not have regard to any other 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 order is not made.

¹ 70 of 1979

² 1993 (4) SA 720 (A) at 731G

³ 2006 (4) SA 144 (SCA) at para 8

[29] The issue which this court is called upon to determine is whether the appellant is entitled to a partial forfeiture order in respect of her pension interest held at GEPF. The basis upon which the appellant is seeking a partial forfeiture order is that she alleges that when the respondent resigned from Blouberg Municipality during 2013, he had expended his pension pay-out alone.

[30] It is trite that an appellate court can only interfere in the exercise of the discretion by the trial Court in limited circumstances like, where it is shown that the court *a quo* has misdirected itself by taking irrelevant considerations into account; that it has exercised its discretion for no substantial reason; that the discretion was not exercised judicially or was exercised based on a wrong appreciation of the facts or wrong principles of law. (See *Giddy No v JC Barnard and Partners*⁴).

[31] In terms of section 7(7) of the Act pension interest are deemed to form part of the parties' joint estate. A party seeking forfeiture must prove that the other party is not entitled to the portion of the pension interest. (See *M v M*⁵). In the case at hand the appellant bore the onus to prove that the respondent had to forfeit his entitlement to a portion of her pension interest. Both parties are members of GEPF. As at 31st March 2021 the appellant's pension interest was valued at R1 602 639.00, whilst that of the respondent as at 27th September 2021 was valued at R399 695.00.

⁴ 2007 (5) SA 525 (CC) at para 19

⁵ [2023] ZASCA 33 (31 March 2023) at para 22

[32] As at the date of divorce, the parties have been married to each other for 13 years. The parties have therefore been married to each other for long period of time. In the pleadings the parties are accusing each other of infidelity. The court *a quo* has found that both parties have contributed to the irretrievable breakdown of their marriage. That issue is not been challenged on this appeal. In fact, during the appeal hearing counsel for the appellant had conceded that the court *a quo* had correctly found that both parties have contributed towards the breakdown their marriage.

[33] The grounds upon which the appellant is seeking partial forfeiture is based on the allegations that when the respondent resigned from Blouberg Municipality during 2013, he resigned without the appellant's knowledge, had enjoyed his pension pay-out alone and did not share it with her. When the respondent resigned from Blouberg the parties were still living together as husband and wife. If the respondent was no longer going to work it was easy for the appellant to have noticed that. It was not the appellant's version that even after the respondent had resigned, he was waking everyday pretending as if he was going to work. The probable version is that of the respondent that he had told the appellant that he was going to resign due to political pressure at the workplace.

[34] It might be that the respondent had not disclosed to the appellant how much pension pay-out did he receive after his resignation. However, the respondent

during trial in the court *a quo*, had given a detailed account of how much he had received and how he had expended his pension pay-out. The appellant herself had testified that she and the respondent were doing things together. It was not disputed when the respondent testified that they used to tour together, and when they undertook those tours, they will contribute equally for those trips. If during that period the respondent was not employed, but was able to do things together with the appellant for the enhancement of their joint estate, and also contribute equally with the appellant on the trips that they were undertaking, the only inference to be drawn is that the respondent was using his pension pay-out which was used for the benefit of both parties.

- [35] There is the issue of R12 000.00 which was paid from the account of the respondent when the appellant was purchasing a small bakkie. According to the appellant's testimony that amount was from the appellant's cousin. However, the appellant could not explain why her cousin did not pay that amount directly to the dealership account since she had already paid the dealership R40 000.00, or why was that amount was not paid into her account. The appellant did not call her cousin to testify in order to corroborate her on this version. It was not explained why her cousin was not called. The only inference to be drawn is that she was afraid that her cousin might contradict her on that version. The respondent had testified that R12 000.00 came from his account and was part of the pension pay-out that he had received when he resigned from Blouberg Municipality. In my view, the appellant is one who is economic with the truth. If indeed the R12 000.00 was from her cousin, the appellant had failed to give any reasons why there was a need to use the respondent as a

middleman, and not pay that amount directly to the dealership or into her bank account.

[36] The appellant had testified that the respondent was maintaining their minor child as and when he wishes. She is not saying that respondent was totality failing to take care of their minor child. There is no evidence that there was a stage when the respondent was taken to the maintenance court due to his delinquent behaviours. Even during the period after resignation, there was no complaint that the respondent was failing in his duties of taking care of the minor child. The respondent had testified that he was giving the appellant a certain amount of money as a contribution towards the maintenance of the minor child.

[36] In my view, even though the respondent might have not disclosed to the appellant how much he had received as his pension pay-out, part of the pay-out was used to settle the debts of their joint estate, used for both their enjoyment, enhancement of their joint estate, and also for the maintenance of their minor child. It can therefore not be said that the respondent had enjoyed his pension pay-out alone without sharing it with the appellant. Taking into consideration the totality of the evidence placed before the court *a quo*, there are no reasons to fault it in the manner in which it had exercised its discretion. Therefore, there is no basis upon which this court may interfere with the factual findings or discretion of the court *a quo*. It follows that the appeal stands to fail.

[37] In the result the following order is made:

37.1 The appeal is dismissed with costs.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION,

POLOKWANE

I AGREE

DEANE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the appellant	: Adv KP Mokwena
Instructed by	: Mamogo Mogale Attorneys
Counsel for the respondent	: Adv Sefudi
Instructed by	: Ntene Attorneys
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