

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

Case No. **5483/2022**

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHERS JUDGES: NO/YES

(3) REVISED

DATE: 01 AUGUST 2024

SIGNATURE

In the matter between:

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

Applicant

and

M[...] L[...] S[...]

Respondent

JUDGMENT: LEAVE TO APPEAL

KUBUSHI J

[1] The application for leave to appeal emanates from a divorce claim instituted by the applicant, in the court *a quo*. The applicant was the plaintiff therein, and the respondent the defendant. In that divorce claim, the applicant sought an order for a decree of divorce coupled with an order for forfeiture by the respondent of the applicant's pension benefits. The respondent had in addition to the relief for a decree of divorce, counterclaimed for spousal maintenance. The court *a quo* in granting the decree of divorce dismissed the applicant's claim for forfeiture and the respondent's counterclaim for spousal maintenance.

[2] The applicant's counsel, repeatedly during argument, emphasised that leave to appeal has been sought in order to give the applicant another bite at the cherry. This, however, is not the test. Leave to appeal can only be sought in terms of section 17(1) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act"). Section 17(1)(a) of the Superior Courts Act provides that leave to appeal may be granted where, in the opinion of the judge or judges concerned the appeal would have reasonable prospects of success; or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[3] The applicant raised a number of grounds upon which she based the application for leave to appeal. However, in oral argument, the applicant's counsel mainly highlighted the failure by the court *a quo* to not appreciate that, even though the physical assault of the applicant happened a long time before the divorce (some sixteen years ago), the *sequelae* of the injuries sustained by the applicant, are still with her. According to counsel, the applicant has been rendered unable to make use of the hand that was injured during the physical assault by the respondent and she will still require medical attention, going forward. Counsel, argued further that it will not be fair that the respondent be allowed a share in the applicant's pension benefits as he is the cause of such injuries. Sharing in the pension benefits will, according to counsel, unduly benefit the respondent.

[4] The relevant legal principles for a claim of forfeiture are found in section 9 of the Divorce Act 70 of 1979. The section provides that when a decree of divorce is granted on the ground of irretrievable breakdown 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 breakdown 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] It is trite that the question of whether a person has unduly benefited must be determined having regard to the three factors set out in section 9 of the Divorce Act,

namely: the duration of the marriage, the circumstances that give rise to the breakdown, and any substantial misconduct on the part of either of the parties. This is what the court *a quo* considered when it came to the decision that was made.

[6] The Supreme Court of Appeal in *Botha*,¹ confirming the decision in *Wijker*,² remarked 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 section 9 of the Divorce Act. The argument by the applicant’s counsel that the court *a quo*, in its judgment, failed to appreciate the *sequelae* of the injuries sustained by the applicant more than sixteen years ago, goes against the grain of this finding of the Supreme Court of Appeal. The physical assault that caused the injuries, as the court *a quo* found, is not conduct and/or substantial misconduct that gave rise to the breakdown of the marriage. As such, to consider the *sequelae* thereof as a factor that will cause the respondent to be unduly benefited, is unjustified under the circumstances of this case.

[7] As regards the issue of the cost order that the applicant seeks to appeal, it is trite that costs are always in the discretion of the court. The cost order of the court *a quo* was granted based on the fact that, except for the relief sought for the decree of divorce, neither of the parties were successful in their respective cases.

[8] Applying the test stated in section 17(1)(a) of the Superior Courts Act, when considering all of the grounds raised by the applicant in the application for leave to appeal, in this court’s opinion, there are no reasonable prospects that the appeal will succeed; and there are no compelling reasons, presented to this court, why the appeal should be heard.

[9] In respect of the cost of the application for leave to appeal, costs should follow the successful litigant who is the respondent. The respondent’s counsel argued for a cost order on level C scale, which is unwarranted. The application is neither complex nor is the relief sought of any significant importance, to warrant a level C scale of costs. The respondent is, as a result, only entitled to level A scale of costs.

¹ *Botha v Botha* 2006 (4) SA 144 (SCA); *Mashola v Mashola* (022/2022) [2023] ZASCA 75 para 29.

² *Wijker v Wijker* 1993 (4) SA 720 (AD) 729E – F.

[10] The application for leave to appeal is dismissed with costs, such costs to be on level A scale.

KUBUSHI J
Judge of the High Court
Gauteng Division

Appearances:

For the Applicant:

Adv A V Duma

Instructed by:

Mutavhatsindi Attorneys.

Tel: 012 323 5330

Email: fulufhelo@mutavhatsindi.co.za

For the Respondent:

Adv H Scholz

Cell: 082 635 3972

Instructed by:

Couzyn Hertzog & Horak.

Tel: 012 460 5090

Email: derikl@couzyn.co.za

Date of argument:

31 July 2024

Date of judgment:

01 August 2024