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REPUBLIC OF SOUTH AFRICA



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

CASE NO: HCA 08/2023

COURT A QUO: LP/LEP/RC-61/2020

(1) REPORTABLE: YES/NO

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

(3) REVISED.

DATE: 14 July 2025

SIGNATURE:

In the matter between:

P[...] M[...] J[...]

Appellant

And

P[...] P[...] M[...] [NEE M[...]]

Respondent

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **14 July 2025**.

JUDGMENT

Makoti AJ

Introduction

[1] This is an unopposed appeal against the orders granted by the Divorce Court sitting in the Regional Magistrate Court, Lephalale (the Court *a quo*). It was previously postponed at the instance of the Respondent, on 23 February 2024. Despite that, she was not present [personally or through representation] in Court when the appeal was heard. The divorce between the parties was finalized at the Court a quo for the district of Lephalale under case numbers **LP/LEP/RC61/2020**.

[2] After seven years of marriage the Appellant and the Respondent encountered difficult times which led to its dissolution through divorce. The parties participated in the divorce action and after considering their respective sides, the Magistrate granted the orders which the Appellant seeks to have set aside in this appeal.

[3] For the sake of completeness, it is common cause that the parties were married on 02 July 2013 and their relationship culminated in the divorce following action proceedings that were instituted by the Appellant on 10 June 2020.

The orders granted by the Divorce Court

[4] When the matter was decided before the Magistrate's Court the following orders, amongst others were made:

[4.1] Decree of divorce;

[4.2] Division of the joint estate; and

[4.3] That the Defendant was entitled to 50% of the Plaintiffs' pension interest as at the date of divorce.

[4.4] The Court also gave primary care and residence of the parties' minor children to the Respondent.

[5] The Appellant raised no issue with the order for decree of divorce but is aggrieved by the balance of the orders.

The Appellant's grounds of appeal

[6] I paraphrase the grounds of appeal noted by the Appellant which are the following:

[6.1] That the Court *a quo* erred in its order granting the Respondent 50% of his member's interest in the Government Employee Pension Fund, up to the date of divorce.

[6.2] Further, that the Court below erred in its finding or conclusion that the duration of the parties' marriage, which was over six years at the date when the divorce action was instituted. He contends that the marriage had a short life span and that the Court ought to have concluded so.

[6.3] Though there are other grounds listed, they are merely intended to support the notion that the Respondent ought to have been ordered to forfeit the benefits arising out of the marriage in community of property.

[7] The Appellant contends that the correct order ought to have been one of forfeiture of benefits arising out of their marriage in community of property. Not just that, but also that the Respondent ought to have been denied a share of his pension benefits. And finally, he contends that he was entitled to be given the rights of care and residency with their minor children.

Brief summary of facts

[8] I have already indicated that the parties were married on 2 July 2013, and in community of property. During the existence of their marriage the parties owed reciprocal obligations to each other and had a combined responsibility to build a household for themselves and their children. They were blessed with 2 minor children who were born on 12 October 2013 and 26 November 2017, respectively. Due to the children's age of minority, I do not record their names in this judgment, to

preserve their privacy. The circumstances of the children were at the time of trial the following:

[8.1] Evidence adduced at the hearing of the divorce was that the parties' daughter T[...] is in boarding school since 2020. The Respondent was accused of taking the decision without consulting the Appellant, which she denied. She added, when denying the accusation, that she also had to consider the child's best interest by removing her out of what was already a tense situation.

[8.2] The younger child was, at the time in question [2020], yet to reach three years in age. On his evidence the child was attending day care during the day. He prayed for guardianship, daily care and that the primary residence of the children be granted to him.

[9] Further, on the evidence adduced at the trial it emerged that the parties' matrimonial relationship, or cohabitation, started after the payment of lobola on 16 December 2011 and before they sealed their civil union. They started staying together as husband and wife after payment of lobola.

[10] Both were gainfully employed, though the Appellant was earning higher remuneration than the Respondent. Amongst other acquisitions they purchased a house to make a home for themselves. According to the Appellant they had agreed when purchasing the property that they were both going to contribute towards the bond repayments and for the property upkeep. Before they purchased the property, they had agreed to put savings to pay deposit for the house.

[11] About the use of the savings he was asked if he used the money to erect a tombstone for his farther who had passed in November 2023, and his answer was:

"Not the whole amount, the portion of that money in contributed. It was myself and my sister who had contributed to buy groceries and the drinks for the upbringing of the tombstone."

[12] Even though they had agreed after their marriage to put savings together, as I will show later in this judgment, the Appellant alleged in the divorce summons that the Respondent failed to make contributions into their joint estate. However, as it emerged at the trial, this was incorrect. They both contributed to the savings.

[13] During or about 10 June 2020 the Appellant instituted divorce action to dissolve the marriage. By then the parties had been married for about seven years. The cause of the breakdown of the marriage, he alleged, included the following:

[13.1] that he was subjected to emotional and financial abuse by the Respondent;

[13.2] that they had irreconcilable differences; and

[13.3] that, as a result, they have lost all love and respect for each other.

[14] Concerning the devolution of the joint estate, the Appellant claimed forfeiture of benefits arising out of the marriage, alleging *inter alia* that the Respondent had not contributed to their common household. He pleaded that the Respondent failed to maintain their children and that she used her income only for herself.

[15] The Respondent denied the allegations of substantial misconduct. While also seeking decree of divorce, she opposed the orders for forfeiture of benefits arising out of the marriage in community of property including forfeiture of the Appellant's pension benefits.

[16] During Court proceedings the Appellant also testified amongst others that:

"T[...], I was paying her school fees up until she removed her without consulting with me after the schools closed for festive [...]. The only child she was paying for day care is K[...]. I think it was around R700 or R800 if I am not mistaken, she can confirm that [...]"

[17] This creates a difficulty for me to understand the Appellant's contention that the Respondent used her income for herself and did not maintain the children, or

contribute to the joint estate. It is not necessary to deal more with what came out of the trial at this stage.

The law on forfeiture of benefits from marriage in community of property

[18] Parties entering into a civil marriage have a choice to conclude it in one of two ways. They may conclude it in community of property or out of community of property, with or without accrual system. In a marriage in community of property the spouses' assets are combined to form one common estate. That is the system that was chosen by the parties in this appeal case. From the date of marriage they shared profits and losses in equal share.

[19] A claim for forfeiture of benefits arising from a marriage in community of property is regulated in statute. The law grants the Court discretionary powers to decide whether forfeiture is to be granted or not. At section 9 of the Divorce Act¹ the following is provided:

"(1) When a decree is granted on the ground of irretrievably breakdown of the 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 or any substantial misconduct on the part of either of the parties, is satisfied that, if the order of forfeiture is not made, the one party will in relation to the other be unduly benefited."

[20] For a Court granting decree of divorce to grant forfeiture, as the statute provides, it must be satisfied that its refusal to grant such order will lead to one of the parties being unduly benefitted. To arrive at such conclusion the Court takes into account the duration of the marriage and the conduct of the parties during marriage. It engages with the question whether there had been substantial misconduct by either of the parties.

¹ Act No. 70 of 1979.

[21] What the Appellant contends to be constituting substantial misconduct is the fact that the Respondent removed the children from the matrimonial home when she left it. And that she did this without his consent. According to him, she did this unlawfully and out of bitterness, without giving due regard to the children's views.

[22] The Appellant placed reliance on section 31(2)(a) and (b) of the Children's Act ² to support the contention that the Respondent committed substantial misconduct. He also sought to support his contention on the fact that their child "T[...]" had informed the Family Advocate that it was nice to reside with both of them. I am not certain how these allegations, even if true, amount to substantial misconduct.

[23] In *Engelbrecht v Engelbrecht*³ (Engelbrecht) the Court explained amongst others that:

"the court has the discretion when granting a divorce on the grounds of irretrievably breakdown of the marriage or civil union to order that the patrimonial benefits of the marriage or civil union be forfeited by one party in favour of the other. The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited. The court has a wide discretion, and it may order forfeiture in respect of the whole or part only of the benefits".

[24] Though the Court is endowed with a wide discretion, according to *Engelbrecht*, it may not exercise it to order forfeiture unless it is satisfied that one of the parties will be unduly benefited if forfeiture is not granted. Only those factors listed in the legislative provision may be taken into consideration when the Court decides on the question of forfeiture.⁴ In this case the Court *a quo* did not find that there was substantial misconduct as it was alleged by the Appellant.

² Act No. 38 of 2005.

³ 1989 (1) SA 597 (C).

⁴ Botha v Botha 2006 (4) SA 144 (SCA).

[25] The alleged failure to contribute towards the upkeep of their estate talks to lack of management of the household by one or both parties. It does not in my view constitute substantial misconduct as contemplated in the statutory provision. It is trite that onus rests on the party seeking forfeiture to demonstrate that in the event an order of forfeiture is not granted the party against whom the order is sought will, in relation to the other, be unduly benefited if the order is not made.⁵

[26] Decoding the question whether proof of substantial misconduct was an essential requirement the Court in *Wijker v Wijker*⁶ held the following:

"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 be 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 in made. Although the second determination is a value judgment, it is made by that court after having considered the facts falling the compass of the three factors mentioned in the section." (Emphasis added)

[27] What comes out of the above authority is that, even where substantial misconduct is found to exist, the Court would still be required to determine whether or not the party against whom a forfeiture order is sought would be unduly benefited if the order is not granted. If the answer is yes, then the Court may exercise its wide discretion to grant or to refuse to grant the sought forfeiture order. This is because the existence of substantial misconduct is not, on its own, a ground to justify an order for forfeiture.⁷

[28] In this case the Magistrate did not find substantial misconduct. It is difficult to fault the finding, more so due to the fact that what the Appellant complained about

⁵ Engelbrecht, *supra*.

⁶ 1993 (4) SA 720 (A) at 727 D-F.

⁷ JW v SW 2011 (1) SA 454 GNP.

was the failure of the Respondent to contribute to the upkeep of the household. It should be recalled that on the Appellant's own version the Respondent had contributed to the joint estate. Above I mentioned two instances of such contributions, which information came out the Appellant's own mouth.

[29] It is significant for me that the Appellant even used savings of the joint estate, which were intended as deposit to purchase a house to erect a tombstone for his late father. I do not suggest that it was wrong. to erect a tombstone, but the parties had to agree to employ the savings for that purpose. This claim for substantial misconduct cannot succeed.

Whether the marriage was for a short span or duration

[30] Persons when entering into a marriage in community of property create universal economic partnership.⁸ They bring assets that they may have into it and upon so doing the assets belong to their joint estate, including future assets. For the period that I have already mentioned, the parties have lived together as husband and wife for just under seven years before the Appellant filed for divorce in June 2020.

[31] One the established facts they did not get married as soon as they first met, having exchanged lobola on 16 December 2011. Upon the payment of lobola the Appellant himself told the Court a quo that they started staying together as husband and wife in 2012. Thus before they agreed to marry by western rights, they with the intention of solidifying their union exercised an important choice to formally marry and elected community of property as their marital regime.

[33] The period of more than a year in which they lived together prior to concluding a civil marriage is noteworthy. In *Soupionas v Soupionas*⁹ it was held that:

"if people, after finding solace and satisfaction in each other's physical company for a period of years, decide to marry, the legal consequences of marriage must be an important motivating factor for that contract of

⁸ KT v MR 2017 (1) SA 97 (GP).

⁹ 1983 (3) SA 757 (T).

marriage and, consequently, all the material consequences of that marriage must have been thoroughly contemplated between the parties and it would be sound public policy to enforce such contractual views of the parties against each other."

[34] What this entails is that the consequences of the parties' decision to marry in community of property should be respected. This is because they entered into the marriage with full consciousness and intentionality, to conclude a union of profit and loss. In *Klerck v Klerck*,¹⁰ the Court affirmed the proposition that the longer the duration of the marriage, the less likely it would be for a forfeiture order to be justified, quite possibly as both parties would have contributed to the joint estate over time.

[35] From 2012 they were living together. One may argue that they were already married by then. I do not advance this further. What I consider to be important is that, if one takes into account that they have been together living as husband and wife even before they concluded their civil union, it can hardly be argued that their marriage was so short-lived as to warrant forfeiture of matrimonial benefits. In fact, by living together after payment of lobola shows that the respondent had been handed over to the appellant's family which satisfy the conclusion of a valid customary union. The effect of the customary union is marriage in community of property. When they got married by civil rites they were merely changing their matrimonial regime. I am unpersuaded, least not on the authorities relied upon by the Appellant, that the duration of the marriage was so short as to warrant an order for forfeiture of matrimonial benefits.

[36] I am minded to mention the case of *Tlou v Ralebipi*¹¹ which was also relied upon by the Appellant. There the marriage had been for a very short period of less than two years when it collapsed. A period of twenty one (21) months is factually incomparable with the total span of the marriage in this case, which, discounting the period of lobola, endured for six years and eleven months. The notion that the Appellant made larger contributions cannot sway the Court as he conceded to the fact that he was earning significantly higher remuneration than the Respondent. It

¹⁰ 1991 (1) SA 265 (W).

¹¹ 2017 (1) SA 97 (GP).

was expected that his contributions would be proportionally higher than those of the Respondent.

[37] After all, whether forfeiture is to be granted is not merely a numbers game. It is justified only when one party, against whom forfeiture is sought, will be unduly benefitted by the refusal to grant such order, that the Court would grant forfeiture. The parties in this case had made a conscientious choice to marry in community of property, and to share the profits and losses arising out of their marital regime. As a result, and on this ground too, the forfeiture claimed by the Appellant must fail.

[38] I earlier alluded that the Respondent was not in attendance to oppose the appeal. Thus, even though the appeal fails, the Respondent is not entitled to the costs. The application was initially set down for hearing on 23 February 2024. I do not have any information on whether it was postponed simply by agreement between the parties or whether an order of Court was granted to that effect. As a result, I am unable to make any determination of costs with regard to that date.

Court's order

[39] The following order is made:

[i] The appeal is dismissed with no order as to costs.

M. Z. MAKOTI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

I AGREE

F KGANYAGO
JUDGE OF THE HIGHCOURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

JUDGMENT RESERVED : 21 FEBRUARY 2025

JUDGEMENT DELIVERD : 14 JULY 2025

APPEARANCES:

**FOR APPLICANT : MR MJ MOTHIBA
MJ MOTHIBA ATTORNEYS
POLOKWANE**

FOR FIRST RESPONDENT: NO APPEARANCE