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REPUBLIC OF SOUTH AFRICA



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

APPEAL CASE NO: HCA 15/2024

CASE NO: LP/PLK/RC201/2023

(1) REPORTABLE: YES/NO

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

(3) REVISED.

DATE: 09/09/2025

SIGNATURE:

In the matter between:

**I[...] C[...] T[...] M[...]
(Born: R[...])**

Appellant

And

T[...] P[...] 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 **09 SEPTEMBER 2025**.

Coram: Kganyago J et Makoti AJ

JUDGMENT

Makoti AJ

Introduction

[1] A marriage in community of property was concluded between the parties. It has come to the point of dissolution through divorce. At issue in this appeal is the question of forfeiture of benefits arising from the marriage in community of property. Added to that, the Appellant takes issue with the cost order that was granted against her.

[2] The Appellant is the Defendant in the divorce proceedings that were instituted by the Respondent on 08 May 2023. Before divorce action was initiated the parties had spent eighteen (18) months together as a married couple. Before the Court *a quo* the Appellant had sought, amongst other orders, that the Respondent be ordered to forfeit the matrimonial benefits arising out of their marriage in community of property. That relief was not granted by the Regional Court Polokwane (the Court *a quo*). As I indicated, the Court granted absolution from the instance.

[3] Upon hearing evidence the Court *a quo* granted absolution from the instance at the close of the Appellant's case. She was then ordered to pay the costs occasioned thereby. These are essentially the orders that the Appellant is aggrieved by and which she seeks to have set aside. She has raised a number of other grounds for this appeal, which I shall take a moment to deal with below.

Grounds of appeal

[4] The main ground of appeal deals with the order for absolution and costs. To this effect the Appellant contends that the Magistrate erred in granting absolution from the instance in respect of the Appellant's partial forfeiture claim. Connected to that, as indicated, she contends that the Court *a quo* erred in ordering the Appellant to pay the costs without having heard all the evidence and without applying its mind holistically.

[5] Regarding the remaining grounds of appeal deal, the Appellant deals with how the Magistrate failed to properly treat the evidence that was adduced by the parties. The grounds of appeal include the following:

[5.1] That the Magistrate erred in not giving due regard to the fact that the Respondent entered into a credit agreement to purchase a motor vehicle, a Jaguar, without the Appellant's consent;

[5.2] That the Magistrate erred in not giving due regard to the fact that the Respondent would be unduly benefited if partial forfeiture is not granted;

[5.3] That the Magistrate erred in not giving due regard to the fact that, while the Respondent was earning a net salary of R45 567-00 per month, with the Appellant earning a lesser amount of R33 161-00, the Respondent failed to contribute proportionately to the joint household;

[5.4] That the Magistrate erred in finding that the Appellant backtracked under cross examination;

[5.5] That the Magistrate erred in finding that the Appellant did not testify about the alleged misappropriation of funds belonging to the joint household; and

[5.6] That the Magistrate erred in not giving due weight to the Appellant's evidence that she was unable to gather from the Respondent's banking statement how the funds had been used.

[6] The appeal and the grounds thereof are opposed by the Respondent. Amongst others, it is the Respondent's contention that an order for absolution from the instance is not appealable. If correct, this point could be dispositive of the appeal.

Background facts

[7] The parties reside in Polokwane, albeit at different addresses. They both want decree of divorce. Respondent wanted division of the joint matrimonial estate while the Appellant prayed for a forfeiture order to be granted in her favour. In cases for forfeiture of benefits arising from a marriage in community of property the party asking for such order bears the onus of proof. That was the case even in this matter.

[8] It is common cause that the parties were married to each other on 18 January 2022 in Polokwane. As indicated, they chose community of property as the regime to govern their marriage. They do not have any children together. The pleaded grounds for the divorce included that they do not share common interests and that they have no proper communication between them. Also that since 18 March 2023 the parties have been living separately.

[9] Apparent from their respective pleadings is that they both wanted a decree of divorce to be granted. It was in respect of what happens to their joint estate that they parted company. That is, while the Respondent, as Plaintiff *a quo*, prayed for the division of their joint estate, the Appellant on the other hand asked for an order for forfeiture.

[10] The Appellant who resides at 1[...] G[...] M[...] Street, Welgelegen, Polokwane is also an owner of property known as Section No. 4[...], Theresa Park Gables, which is situated at Theresa Park, Extension 46 Township, in Tshwane. She is employed and currently a member of the National Tertiary Retirement Fund (NTRF). In the particulars of claim the Respondent prayed for an order that he be awarded 50% of the Appellant's pension benefits.

[11] I have mentioned earlier that the Appellant prayed for a remedy to the effect that the Respondent be ordered to forfeit the patrimonial benefits from the marriage in respect of two properties, namely:

[11.1] immovable property, Section No. 4[...], Theresapark Gables, in Tshwane; and

[11.2] her pension interest in the NTRF.

[12] It is common cause that the parties no longer stay together. The Respondent resides at 1[...] F[...], Palmietfontein, R37, Polokwane having moved out of the parties matrimonial home during February 2023. Their matrimonial home is at the address which is currently occupied by the Appellant, which I have already mentioned above. This is one of the grounds that have been listed by the Appellant in the counter-claim as having contributed to the divorce.

Judgment from the Court *a quo*

[13] Only the question of forfeiture¹ of matrimonial benefits was at issue on this occasion. It was the Appellant who had prayed for an order for partial forfeiture of benefits. She wanted the Court to order the Respondent to forfeit an immovable property and a benefit from her pension interest in the National Tertiary Retirement Fund. It was contended on her behalf that the Respondent stood to be unduly benefitted if the order for partial forfeiture was not granted in her favour.

[14] It is trite that the party seeking forfeiture bears the burden of proof. Thus, it was the Appellant only who testified before the Court *a quo*. The Respondent did not testify in rebuttal of the Appellant's case. Once the Appellant was done testifying an application was moved on behalf of the Respondent for the impugned absolution order.

[15] The Court *a quo* considered the evidence that was led orally before it and declined to grant forfeiture order. It instead granted absolution from the instance,

¹ Section 9 of the Divorce Act No. 70 of 1979.

which order gave rise to this appeal. The Magistrate noted her reason for seeking forfeiture as follows:

"[30] When asked why she wanted a different outcome, she said it was because he was accusing her of things: She also did not get a say in the use of the money they got from selling the house. He benefited from that sale hence he must not benefit from her."

[16] As noted by the Court *a quo*, the Appellant accused the Respondent of misappropriating funds but that she did not testify about it in her evidence in chief. It then noted that her basis for the alleged misappropriation was that he had moved funds between accounts, but that she was shown during cross-examination that the funds had never left the joint estate.² The Court also remarked that:

"[49] On her evidence there is no proof of any undue benefit."

[17] The Court *a quo* then remarked that there was no evidence before it upon which it could or might reasonably find in favour of the Appellant. It was on that basis that it granted an order for absolution. It is that order that the Appellant is aggrieved by, and wants to have overturned in this opposed appeal.

Whether an order for absolution from the instance is appealable

[18] On behalf of the Appellant it was contended that the Court *a quo* did not apply the law on absolution correctly. The argument went further to contend, relying on the authority in *Supreme Service Station (1969) (Pty) Ltd v Fox and Gocgridge (Pty) Ltd*,³ that the Plaintiff ought not to be lightly denied of a remedy without hearing the evidence of the Defendant. Further that, '*... where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial judge refuse absolution*'.⁴

² Judgment at para [35].

³ 1971 (4) SA 90 (RA) at 93A.

⁴ Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) at 80.

[18] This case is neither complex nor one about which the legal position is uncertain.

[20] It is appropriate to restate the test for absolution from the instance. An essential inquiry when a Court is to determine whether to grant absolution from the instance is whether there is evidence upon which a court, when applying its mind reasonably, could or might find for the plaintiff. This entails that a court would not grant absolution from the instance where the plaintiff has, at the end of his or her case, presented an answerable case or *prima facie* case.

[21] The test for absolution was confirmed in *Gordon Lloyd Page & Associates v Rivera and Another*⁵ with reference to *Claude Neon Lights (SA) Ltd v Daniel*⁶ in the following manner:

"When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."

[22] Counsel for the Respondent contended that an order for forfeiture from the instance is not appealable. For this contention he relied on the authorities in *CJ Steenkamp v South African Broadcasting Corporation*,⁷ *H.J v P.J and H Jordaan v The Bloemfontein Transitional Local Authority and Another*.⁸ He argued that, based on the principles espoused in these authorities, this Court should simply dismiss the appeal or strike it off with costs.

⁵ 2001 (1) (SCA) at 92E-93A.

⁶ 1976 (4) SA 403 (A) at 409G-H.

⁷ 2002 (1) SA 625 (SCA).

⁸ 2004 (3) SA 371 (SCA).

[23] The Court in *H.J v P.J*,⁹ supra, dealt with the principles on appealability of judgments or orders in the following manner:

"[9] It is trite that an application for a request for further particulars is purely interlocutory. In advancing 'the interests of justice' in this appeal as a basis for the high court proceeding with the merits of this matter, the respondent's counsel overlooked this Court's recent decision in *TWK v Hoogveld Boerderybeleggings (TWK)*. In *TWK*, this Court interrogated the notion thoroughly after carefully analysing several decisions of this Court which had been willing to part from the *Zweni v Minister of Law and Order (Zweni)* judgment and said the following:

'Even if this is so as a matter of principle, as the defendant's counsel reminded us, a number of decisions of this Court have been willing, with different degrees of separation, to part from *Zweni*, or subsume *Zweni* under the capacious remit of interests of justice. I do not here essay a general account of appealability. I do affirm, though, that the doctrine of finality must figure as the central principle of consideration when deciding whether a matter is appealable to this Court. Different types of matters arising from the high court may (I put it no higher normatively) warrant some measure of appreciation that goes beyond *Zweni* or may require an exception to its precepts. Any deviation should be clearly defined and justified to provide ascertainable standards consistent with the rule of law. Recent decisions of this Court that may have been tempted into the general orbit of the interests of justice should now be approached with the **gravitational pull of *Zweni*. [Emphasis added]**

[24] The point by the respondent is well-made and I accept it. Absolution from the instance may be granted at the end of the plaintiff's case if the plaintiff has failed to adduce sufficient evidence upon which a reasonable court might grant judgement in his or her favour. Also, such order may be granted where the plaintiff has not

⁹ (285/2023) [2024] ZASCA 55 (19 April 2025).

produced sufficient evidence to establish a *prima facie* case. In other words, absolution may be granted where the plaintiff has not advanced a case in respect of which all the elements of the claim have been proven.

[25] The question of appealability of a Court order or judgment was canvassed by Harms AJA in *Zweni v Minister of Law and Order of the Republic of South Africa* as follows:

"[F]irst, the decision must be final in effect and not be susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

[26] The order for absolution in this case is not dispositive of the case, just one aspect of the case in that the court refused to grant a forfeiture order. That order has no final effect, is not a definitive proceeding, and does not have the effect of disposing of at least a substantial portion of the relief claimed in the pending divorce action between the parties. The order does not affect the rights of the parties. On that basis, the appeal should fail. Having reached this conclusion, I do not proceed to deal with the merits of the appeal.

Order

[27] The following order is made:

[a] The appeal is dismissed with costs.

**MZ MAKOTI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE**

I AGREE

**MF KGANYAGO
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES

**FOR APPELLANT : M DE KLERK
DDKK ATTORNEYS
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**FOR RESPONDENT : ADV F MARX
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**RESERVED ON 21 FEBRUARY 2025
DELIVERED ON 09 SEPTEMBER 2025**