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

CASE NO: A80/2022

HEARD: 4 SEPTEMBER 2025

DECIDED: 16 OCTOBER 2025

1. REPORTABLE: **NO** / YES
2. OF INTEREST TO OTHER JUDGES: **NO** / YES
3. REVISED.

DATE 16 October 2025

SIGNATURE

In the matter of:

O[...] E[...] M[...]

Appellant

and

D[...] S[...] M[...]

Respondent

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploaded on Caselines. Its date of hand down shall be deemed to be 16 October 2025.

ORDER

1. The appeal is dismissed.

2. The appellant must pay the respondent's costs.

JUDGMENT

Bam J (SENYATSI J concurring)

- [1] This is an opposed appeal against the order made by the Regional Court for the Regional Division of Madibeng, held at Brits, dated 21 April 2021, in terms of which the Regional Magistrate, Ms Benade, granted a decree of divorce along with an order that the appellant forfeit the patrimonial benefits arising from the parties' marriage in community of property. While the decree of divorce is uncontested, the appellant challenges the forfeiture of patrimonial benefits. The sole issue in this appeal therefore, is whether the court erred in granting this forfeiture order.
- [2] For convenience, the court *a quo*'s order may be summarised as follows:
- 'The appellant (plaintiff) forfeits:
 - 2.1 The benefit arising from the respondent's pension/provident fund.
 - 2.2 The movable assets in the home occupied by the respondent.
 - 2.3 The immovable property known as [...] G[...] Street, Brits.
- [3] I consider it convenient to deal with the issue of the court *a quo*'s reasons and the steps taken by the appellant to progress this appeal. On 25 October 2024, this court—per Thwala J—condoned the appellant's non-compliance with Magistrates Court Rule 51(3)-(7) and directed that the appeal proceed under Rule 50 of the Uniform Rules. The record shows that after the hearing, the Magistrate delivered an *ex tempore* judgment on 21 April 2021. The appellant unsuccessfully requested reasons on 28 April 2021. After making a second request on 22 March 2023, which yielded no result, it appears that the applicant brought the application for condonation.

- [4] In so far as the question whether this court may be inhibited in any way in discharging its role, such question does not arise as the court is in possession of the full record of proceedings. In *Muravha v Minister of Police*, it was said:

‘In *Engelbrecht v Nieuwoudt* 1941 CPD 54 Davis J (Howes J concurring) said at 55: “(T)he record in the magistrate’s court does not purport to reproduce the ipsissima verba of the witness; it does not give questions and answers in the exact words in which the question was put and the answer made; it, at best, gives no more than a summary, and, that being so, the Court of Appeal is at an even greater disadvantage that it would be with a record before it which was an exact transcription of everything that was said in the lower court. It consequently becomes all the more dangerous to attempt to fasten on an odd phrase here or some few words there when one does not know the precise words used in the answer and, what is of equal importance, one does not know the question which elicited that answer.”¹.

Background

- [5] The appellant (as plaintiff) had instituted action against the respondent (defendant) seeking a decree of divorce, division of the joint estate, and a declarator that he was entitled to half of the respondent’s pension fund with the GEPPF. He sought an order directing the fund to endorse its records to that effect. The respondent filed a claim in reconvention, seeking forfeiture of patrimonial benefits and costs. Upon completion of the hearing, the court granted a decree of divorce with forfeiture of the patrimonial benefits as indicated earlier, and costs in favour of the respondent.
- [6] The uncontested evidence presented at trial indicates that the parties were in community of property, in May 1997. The marriage produced one child, a daughter, who had already attained majority status at the time of the hearing. At

¹ (179/2022) [2024] ZASCA 11; 2024 (4) SA 84 (SCA) (30 January 2024), paragraph 16.

the relevant time, the appellant was employed in the automotive industry, while the respondent was employed as an educator by the State. By the time the action was tried in 2021, the parties had been living apart for approximately seven years, following the appellant's departure from the matrimonial home, in 2014. It was common cause that the marriage had broken down irretrievably, with no prospect of reconciliation. In 1999, shortly after their marriage, the appellant was involved in a motor vehicle accident, which led to his resignation from employment. He remained at home for approximately five years and not working. Additionally, it emerged that the insurers of the vehicle that was involved in the accident declined the claim, leaving the joint estate liable for the resulting debt.

- [7] Throughout the period the appellant was unemployed, the respondent was the sole breadwinner. She supported the family, paid the mortgage, covered their child's education expenses, and serviced the family's debts. She purchased multiple vehicles for the family, which the appellant sold, without her consent, and he also withheld the proceeds from her.
- [8] From about 2003, the appellant, with financial help from the respondent, became self-employed doing mainly construction work. He testified that he financially contributed to the household, but he offered no proof to substantiate his claims. The businesses funded by the respondent did not improve his ability to support his family. For example, during cross-examination, the appellant admitted that his workers would sometimes come to the marital home for unpaid wages and the respondent would pay the wages for groups of workers ranging from 5 to 15, as they refused to wait for the appellant's promises that he would pay them after completion of work.

Forfeiture of patrimonial benefits: The payout from the provident fund

- [9] The record indicates that several factors contributed to the finding of substantial misconduct by the appellant. However, the main consideration, it would appear, was the appellant's failure to account to the respondent for his provident fund

resignation benefit and the surplus apportionment payout. These were two separate benefits provided by the appellant's then provident fund. The respondent became aware of these payments by chance when a letter arrived through the post from the Auto Workers Provident Fund advising of a surplus apportionment payment of R 12,549.16 that was to be paid to the appellant. The letter was handed in court and accepted by the court as evidence of payment of the benefit to the appellant. In the end, the court concluded, on a balance of probabilities, that the appellant had been paid his resignation benefit well before the surplus apportionment payout, both of which were assets of the joint estate, and for which the appellant had failed to account to the respondent.

Immovable property given to the appellant's children from his previous marriage

[10] A further factor which weighed heavily with the court in its finding of substantial misconduct had to do with the appellant's 'alienation' of an immovable he owned from his previous marriage. During cross examination, it came to light that at the time of concluding the marriage with the respondent, the appellant was the owner of an immovable property which he decided to give to his children from his previous marriage. Although the details as to how he had dealt with the property remained unclear, it was apparent from his answers that he no longer owned the property. He confirmed that the property had no title deed and that it is situated in a village. His evasive answers showed he had alienated the property without consulting the respondent.

Appellant's Grounds of Appeal

[11] It is now apposite to interrogate the appellant's grounds. They are contained in his notice of appeal filed on 22 July 2022. They read: The court erred in finding that the whole of the patrimonial benefits be forfeited in favour of the defendant in that:

- i. The court did not have regard to the duration of the marriage of 17 years;

- ii. The court did not provide any reasons for its judgment indicating any circumstances that gave rise to the breakdown that would warrant such forfeiture. The appellant contends that there are none that would justify forfeiture.
- iii. The court did not make any finding of any substantial misconduct on the part of the appellant that would warrant such an order. The appellant contends there are no legal and factual grounds to justify forfeiture;
- iv. There was no finding by the magistrate that if the forfeiture is not made, the appellant would have been unduly benefitted, despite the fact that there were no reasons furnished. In so far as the court may have found that the appellant would be unduly benefitted, the court erred.
- v. The court did not have regard to the fact that the appellant had contributed financially to the marriage and that he had an accident that somehow inhibited him from financially contributing.
- vi. In as far as the court may have elevated general fault by the appellant in so far as such may be present to substantial misconduct that would warrant forfeiture of the entire benefits of the marriage, the court erred.

The law

[12] Section 9 (1) of the Divorce Act of 1979 provides:

‘When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage, including a Muslim 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.'

[13] It is trite that the factors set out in section 9 (1) need not be considered cumulatively before the court makes an order of forfeiture². As regards the approach to be followed by a court of appeal when entertaining an appeal dealing with forfeiture, the court in *Botha v Botha*, with reference to *Wijker v Wijker*, reasoned:

"6. In *Wijker v Wijker*, this court considered the question whether proof of 'substantial misconduct on the part of either of the parties' was an essential requirement for a forfeiture order. It answered this question in the negative, holding that the context and the subject-matter of s 9(1) made it abundantly clear that the legislature never intended the three factors mentioned in the section to be considered cumulatively. As regards the approach to be followed by a court of appeal when hearing an appeal in respect of a forfeiture order, Van Coller AJA stated 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 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 made. Although the second determination is a value judgment, it is made by the trial Court after having considered the facts falling within the compass of the three factors mentioned in the section."³

² *Wijker v Wijker* (325/92) [1993] ZASCA 101; [1993] 4 All SA 857 (AD) (26 August 1993), paragraph 26.

³ (393/04) [2006] ZASCA 6; 2006 (4) SA 144 (SCA) ; [2006] 2 All SA 221 (SCA) (9 March 2006), paragraph 6.

Credibility findings made by the court against the appellant

- [14] It is necessary to start with the credibility findings made by the court against the appellant, given his contention that the court did not have regard to his financial contribution towards the common household during the marriage. In so doing, I am mindful of the caveat set out in *Santam Bpk. v Biddulph* (105/2003) [2004] ZASCA 11; [2004] 2 All SA 23 (SCA), paragraph 5. The court was not impressed with the appellant as a witness. He was said to be evasive and vague in several key aspects of his testimony. For example, on this very claim that he contributed towards the joint household, the appellant failed to substantiate his claims. He could not remember the dates of the payments nor the amounts he paid. The fact is, the appellant was running a business at the time. He needed to keep track of what was coming in and going out, even if he maintained an elementary book keeping. Based on his evasive answers, the court dismissed his claims.
- [15] A further striking example is the case of the appellant's evasive answers concerning his failure to account for his provident fund resignation and surplus benefit payouts. The letter that was handed into court contained his full names, identity number, provident fund number and bank details, and, as confirmed by the appellant, it was sent to his chosen post office box. The appellant left his employment in 1999. The court concluded that it was highly improbable that the appellant would be paid a surplus apportionment benefit in 2008 without having been paid his resignation benefit.
- [16] I may add that it would have been a simple matter for the appellant to contact his former employer's provident fund to obtain the full details of payments made to him in respect of his provident fund. He chose not to do so because the truth would in all probability have been exposed. In the circumstances, I see no basis to interfere with the court a *quo's* conclusions on the appellant's alleged contribution towards the common household. The adverse credibility findings in our view were appropriately made.

The finding of substantial misconduct

[17] The failure to account for the defendant's pension benefit was found to constitute substantial misconduct by this court in *Tsebe v Tsebe*⁴, the facts of which are in line with the present case. There the court made the following remarks:

'[14] The sum total of the above is that very little is known about how the defendant's pension money was utilized, except the defendant's bald, sparse and vague *ipse dixit*. What is more, the defendant also vacillated on the issue. In one breath he said that he used part of the money for an undisclosed business venture, and in another, that he had used part of the money for building a house in Mankweng, for which no details as to the amounts, were furnished...

[15] By failing to account properly as to how he utilized the money for the benefit of the joint estate, I come to the inescapable conclusion that the defendant used his pension money exclusively for his own benefit, to the detriment of the joint estate, and in particular, of the plaintiff. That, to my mind, constitutes substantial misconduct as contemplated in s 9(1). I find that the defendant would, in relation to the plaintiff, be unduly benefitted if an order for forfeiture in respect of the 50% of the plaintiff's pension interest is not made.'⁵

[18] In the present case, the appellant, as the court *a quo* had found, failed to account for both the resignation benefit and the surplus apportionment payouts.

Forfeiture and conclusion

[19] At the outset, it is plain from reading the judgment that the court *a quo* was guided by the factors set out in section 9 (1) of the Divorce Act. Contrary to the appellant's contentions, the court made a finding of substantial misconduct. It

⁴ (39138/2014) [2016] ZAGPPHC 575.

⁵ (39138/2014) [2016] ZAGPPHC 575 (24 June 2016), paragraph 14- 15.

specifically asked the question whether given the finding of substantial misconduct, the appellant would be unduly benefitted in the event an order of forfeiture is not made. Thereafter, it made such order, as shown in the extract below:

‘When the court look[s] at the [patrimonial] benefits as laid down in Section 9(1) of the Act...If the court grant[s] a forfeiture, the court must establish if any party will unduly benefit if the court [does not make] such an order. To establish this, the court must look at the duration of the marriage, the factors that have [led] to the disintegration of the marriage and any misconduct by any of the parties. [T]he court will consider these factors cumulatively and separately based on the evidence submitted to the court and based on the law of evidence...

The plaintiff resigned from his work in 1999 after an accident. He told the court patently that he did not receive any pension money. By chance and by accident maybe, the defendant in this matter was contacted by the Auto Workers Provident Fund and they told her that there are surplus apportionment money that must be paid to him. The court is satisfied that the plaintiff patently lied to this court...

The court is therefore satisfied that he did not play open cards with the court and did not take the court into his confidence. After considering the all the evidence submitted to the court in total, the court is satisfied that in terms of Section 9 (1) of the Divorce Act, his behaviour can be nothing else but substantial misconduct during the marriage. Should this estate therefore be divided equally, the plaintiff will benefit unjustifiably. The court therefore grant[s] the decree of divorce and grant[s] the order as requested by the defendant...’

Conclusion

[20] Having considered the foregoing, I am satisfied that there was no misdirection in the manner the court exercised its discretion. Accordingly, the appeal must fail.

Order

1. The appeal is dismissed.
2. The appellant must pay the respondent's costs.

BAM J
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

I agree

SENYATSI J
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Date of Hearing: 4 September 2025

Date of Judgment: 16 October 2025

Appearances:

Counsel for the Appellant:	Adv R.A Arcangeli
Instructed by:	Isaac Teke Mothibe Attorneys Pretoria
Counsel for the Respondent:	Adv J Möller
Instructed by:	Jan van Rensburg Attorneys Brits