IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCA 18/2023

(1) REPORTABLE: YES/NO

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

(3) REVISED: YES/NO

SIGNATURE: Naude Odendaal J

DATE: 03/12/2025

In the matter between:

M[...] O[...] R[...] (NEE M[...]) **APPELLANT**

and

T[...] J[...] R[...] **RESPONDENT**

In re:

T[...] J[...] R[...] **APPELLANT**

and

M[...] O[...] R[...] (NEE M[...]) **RESPONDENT**

JUDGMENT

NAUDE-ODENDAAL J:

[1] The Appellant and Respondent were entangled in divorce proceedings. On the 3rd of February 2023 the Acting Regional Magistrate for the Regional Court Division of Limpopo, held at Polokwane granted a decree of divorce and ordered that the joint estate of the parties be divided equally including the immovable property referred to as House Number 1[...], Unit G, Mankweng, as well as that the Appellant's pension fund is ordered to pay the Respondent an amount equal to 25% of the Appellant's pension interest within 60 days. The court *a quo* further made orders in respect of the minor child's primary care and residence, as well as contact rights to be awarded to the Respondent (T[...] J[...] R[...]).

[2] The issue before this court on appeal is in respect of orders (b}, (i) and 0) of the court *a quo*'s order, which stated as follows:-

> *"(b) The joint estate be divided equally including the immovable property herein referred to as House number 1[...], Unit G, Mankweng.*
> *(c) - (h) ...*
> *(i) The Plaintiff's pension administrator, the Government Employees Pension Fund is ordered to pay the Defendant an amount equals to 25% of the Plaintiff's pension interest held by it within 60 days of this order.*
> *(j) The Plaintiff's pension administrator, Government Employees Pension Fund is ordered to pay to make the necessary endorsement in its records to reflect same. Plaintiff's ID NO: 7[...]*
> *(k) ...*
> *(l) ..."*

[3] The appeal was instituted at the behest of the Respondent (Defendant in the court *a quo*), wherein he sought a 50% share of the Appellant's pension interest. However, the appeal lapsed due to non-compliance with Rule 49(6)(a) of the Uniform Rules of Court in setting down the appeal for hearing.

[4] The Appellant (Plaintiff in the court *a quo*}, conversely noted and appeal against the court a quo's findings in respect of her claim for forfeiture. It is on the cross-appeal that this appeal is before this Court.

[5] The Appellant submitted that the Appellant instituted divorce proceedings seeking inter alia, dissolution of the marriage, that the Respondent forfeit his 50% share in her pension benefit held by the Government Employment Fund, and division of the joint estate.

[6] Defending the divorce action, the Respondent also prayed for the dissolution of the marriage, but claimed his 50% share of the Appellant's pension interest and sought that the parties' immovable property situated at 1[...] Unit G, Mankweng ("the immovable property"), be awarded to the Plaintiff, subject to it being kept in a trust in favour of their children.

[7] The Appellant submitted that in adjudicating the matter, the court a quo found that the Appellant was only entitled to partial forfeiture of her pension interest as opposed to full forfeiture as she prayed for. Despite the Respondent's request for the immovable property to be awarded to the Appellant for to be held in trust for the benefit of their children, the court ordered equal division.

[8] The Respondent conceded that his appeal lapsed as he failed to prosecute the appeal wherein he sought 50% share to the Appellant's pension fund interest, due to lack of financial resources. In light thereof, the Respondent elected to narrowly focus on the award of 25% instead of 50% share of the Appellant's pension fund only.

[9] It was submitted by the Respondent that he however still opposes the Appellant's appeal for forfeiture of the benefits in terms of Section 7(7)(a) of the Divorce Act, 70 of 1979 which provides that:-

> *"In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall subject to paragraphs (b) and (c), be deemed to be part of his assets."*

[10] The Respondent submitted that what is not in dispute is the value of the pension fund, which is R98 000.00 (Ninety Eight Thousand Rand) to which the

Appellant is entitled to R49 000.00 (Forty Nine Thousand Rand) thereof. It is submitted that the Respondent is therefore also entitled by law to the 50% share of the pension fund of the Appellant.

[11] According to the Respondent's submissions, the Appellant has failed to show that the Respondent would unduly benefit if he is allocated 50% share of the pension fund interest in terms of Section 9(1) of the Divorce Act, 2 of 2024. The Respondent submitted that the parties should equally share in each other's pension fund/provident fund interests.

[12] The Appellant submitted that this court is called upon to determine whether the court *a quo* exercised its discretion correctly and judicially when it declined to grant the Appellant an order that the Respondent forfeit his full (50%) share of the Appellant's pension interest as a benefit arising out of a marriage in community of property and whether the court *a quo* exercised its discretion correctly when it declined to uphold the Respondent's request for the immovable property to be held in trust in favour of the children born from the parties' marriage.

[13] **Section 9(1) of the Divorce Act, 70 of 1979** provides:

> *"When a decree of divorce is granted on the ground of the 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, <u>either wholly or in part</u>, if the court, having regard to the <u>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</u>, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be <u>unduly benefited</u>." (Own emphasis added)*

[14] In **T.S v M.L.S (5483/2022) [2024] ZAGPPHC 289 (19 March 2024) at paras 10 to 13**, the following was stated:-

> *"[10] The dissolution of marriage by divorce is governed by the Divorce Act. The general rule is that when a marriage in community of property*

dissolves by divorce, the parties in that marriage share equally in the joint estate. The Divorce Act, however, provides for forfeiture of patrimonial benefits. It means that in certain circumstances a court may make an order that makes one of the parties not to share equally in the joint estate. The purpose of forfeiture is said to be to ensure that a person does not benefit from a marriage, which they have intentionally broken down. The court may order that a blameworthy party forfeit the patrimonial benefit to which he or she may be entitled by virtue of the chosen matrimonial property system. Hence, parties who are married in community of property may not necessarily share equally in the joint estate.

[11] The relevant legal principles for a claim of forfeiture are found in section 9 of the Divorce Act. Section 9(1) of the Divorce Act, is an exception to the general rule. 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 of 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.

[12] 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. In the Appellate Division in ***Wijker v Wijker 1993 (4) SA 720 (AD) 729E - F*** *it was held that these three factors need not be considered cumulatively, and that none of these factors should be considered as ranking above others. The decision was confirmed in the Supreme Court of Appeal in* ***Botha v Botha 2006 (4) SA 144 (SCA); Mashola v Mashola (02212022) [2023] ZASCA 75 para 29****, wherein that court 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. That court, further held that section 9(1) of the Divorce Act should be construed within the context of the evidence tendered by the parties in court.*

[13] The onus is firmly on the Plaintiff who is the party claiming forfeiture to establish the nature and extent of the benefit to be forfeited. In this instance, it is common cause that the nature of the undue benefit is the Plaintiff's pension interest, which in terms of the provisions of section 7(7) of the Divorce Act, is deemed to form part of the joint estate. The extent of the pension interest is the amount that is to be paid out when the pension benefit becomes due."

[15] The evidence before the court *a quo* in essence is as follows:-

15.1 The parties got married to each other in community of property on 21 January 2011. One minor child was born from the marriage.

15.2 The Respondent stopped contributing towards the Appellant and minor child's daily and living expenses during the year 2016 and utilized his income and benefits of the joint estate for his own benefit and third parties.

15.3 The Appellant took out loans to improve the house and to register the minor child at school. She also single handedly maintained the minor child and paid for the child's education.

15.4 The Respondent assaulted the Appellant, minor child and had extra marital affairs.

15.5 The Appellant obtained a protection order against the Respondent during the year 2018.

15.3 The Appellant left the common household and started a new life of his own without contributing towards the common household and or maintenance of the Appellant or child.

[16] If the law is to be applied to the facts in the present matter, the Appellant managed to prove that she is entitled to a forfeiture order. The parties' marriage relationship lasted for approximately 12 years, however the Respondent stopped contributing towards the common household during 2016 already - only approximately 5 years after their date of marriage. The Respondent's conduct amounts to substantial misconduct. This court is of the view that if the order for forfeiture was not made, the Respondent would have unduly benefitted in relation to the Appellant.

[17] The court *a quo* therefore did not misdirect itself or err when it found that the Respondent managed to prove that the Appellant will be unduly benefitted if an order for forfeiture was not granted. In this court's view, the court *a quo* further correctly found that only a partial forfeiture of the Appellant's Pensions Fund benefits by the Respondent is justifiable.

[18] The court *a quo* further correctly found that the court cannot make an agreement for the parties in relation to the immovable property to be held in trust to the benefit of their child. The parties should reach that agreement and erect a trust for their child. Once the parties reached such a settlement agreement, the settlement agreement could be made an order of court. The appeal therefore stands to fail.

[19] The only issue remaining is the issue of costs. The general rule is that costs should follow success. In the present matter, although the appeal, on the cross-appeal, stands to be dismissed, this court is also mindful of the conduct of the Respondent in the appeal that lapsed. To order any party to pay the costs of the appeal would be unjustified. In our view, each party should pay his/her own costs.

[20] The following order is therefore made:-

1. The appeal is dismissed.

2. Each party to pay his/her own costs.

M. NAUDE-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I AGREE:

G.J. DIAMOND

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

HEARD ON:	22 AUGUST 2025
JUDGMENT DELIVERED ON:	3 DECEMBER 2025

For the Appellant:	Adv. AN Moshiane
Instructed by:	Kuaho Attorneys Inc.
	Polokwane
	Nthabiseng@kuaho.co.za
For the Respondent:	Adv. Z.D. Malueleke
Instructed by:	Mabu Letaba Inc. Attorneys.
	Polokwane
	letabaattorneys@gmail.com