IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

APPEAL CASE NO: HCA08/2025
COURT *A QUO* CASE NO: LP/PLK/RC-16/15

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED: YES/NO

______________________ 13/04/2026
SIGNATURE **DATE**

In the matter between:

J[...] L[...] M[...] **APPELLANT**

AND

M[...] L[...] M[...] **1ST RESPONDENT**

SANLAM PORTFOLIO PRESERVATION FUND **2ND RESPONDENT**

Delivered: **13 April 2026**

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be 13 April 2026 at 16:00.

Date heard: **06 February 2026**

Coram: **Ngobeni J *et* LB Maphelela AJ**

JUDGMENT

<u>NGOBENI J</u>

[1] *"Like all things in life, like the best of times and the worst of times, litigation must, at some point, come to an end. … for the principles of legality and finality of judgments are the oxygen without which the rule of law languishes, suffocates and perishes[1]".* The quoted extract is

[1] Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021).

appropriate in this case because of the length of time that this matter has been back and forth between the Magistrates' Court and this Division of the High Court on challenge of different judgments and appeals. I will for the sake of completeness outline the history of this case hereunder.

[2] The first respondent instituted divorce proceedings in the Regional Court, for the Regional Division of Limpopo (cited as Polokwane) by way of summons, on 26 February 2015 held at the Polokwane Magistrates' Court, where the first respondent was the plaintiff in those proceedings, and the appellant was the defendant. The matter was heard by Regional Magistrate Reynolds (RM Reynolds), who granted absolution from the instance on 20 July 2017, on the basis that there was no evidence which showed that a valid customary marriage was concluded between the appellant and first respondent (parties).

[3] The judgment of RM Reynolds was appealed by the first respondent to this Division and Judges Phatudi and Semenya (as they were still then known) referred the matter back to RM Reynolds to hear further evidence (first appeal). RM Reynolds dealt with the matter again and dismissed the divorce action with costs. The first respondent again appealed to this Division the dismissal of the divorce action (second appeal), and the appeal came before Judges Muller and Naude, and they held a view that because the order of RM Reynolds for absolution from the instance was

not set aside in the first appeal, that must be done first before the second appeal could be heard. A variation application was successfully brought for the first appeal order to be varied, stating that the judgment of RM Reynolds of absolution from the instance was set aside.

[4] The second appeal was subsequently heard before Judges Muller and Naude, who upheld the appeal by setting aside the decision of RM Reynolds of dismissing the action, and replaced it with an order on 13 June 2023 declaring that the parties entered into a valid customary marriage. After the declaration that a valid customary marriage existed between the parties, the first respondent again approached the Regional Court for the dissolution of her marriage relationship with the appellant and division of their joint estate arising from their marriage regime.

[5] The consideration of the divorce action came before Acting Regional Magistrate M.B. Letsoalo, sitting in the Mankweng Magistrates' Court, in the Regional Division of Limpopo (court *a quo*/trial court/presiding officer). I gave the background of this case up to this stage to qualify the opening statement that indeed litigation cannot go on forever, at some stage it must come to an end. I am saying this mindful of the fact that all avenues open to the litigants must be explored, and if need be, up to the highest court in the land.

[6] The case at hand is therefore an appeal against the decision of the court *a quo.* The court *a quo* dissolved the marriage relationship that existed between the appellant and the first respondent on 17 January 2025. The court *a quo* amongst others ordered that the joint estate of the appellant and the first respondent be divided equally, including the appellant's pension interest, which is held by the second respondent. The court *a quo* in its order specifically ordered the second respondent to effect an endorsement in its records that 50 (fifty) per cent of the appellant's pension interest should be paid to the first respondent (plaintiff in the main divorce action) within 30 (thirty) days after the date of the decree of divorce, which is 17 January 2025. There is no appeal against the order pertaining to the minor child/children born from the marriage relationship.

[7] The appellant had filed a counterclaim for forfeiture by the first respondent of the said 50 (fifty) per cent of the patrimonial benefits in Millionsure Bluestar Balance Preservation Fund (pension interest) held under Sanlam and a 2014 model Polo Volkswagen motor vehicle (motor vehicle). The counterclaim was dismissed by the court *a quo*.

[8] The Full Bench of this Division as *per* Muller *et* Naude-Odendaal JJ declared in an order dated 13 June 2023 that a valid customary marriage was entered into between the appellant and the first respondent. The

particulars of claim in the court *a quo* alleged that the parties entered into a customary marriage in the year 2006 and stayed together as husband and wife for a period of thirteen (13) years.

[9] The marriage relationship between the appellant and the first respondent was declared irretrievably broken down by the court *a quo*. The first respondent approached the court *a quo* seeking amongst others a decree of divorce and equal division of the joint estate. The assets in contention in the divorce proceedings in the court *a quo* was the pension interest and the motor vehicle. The first respondent in the court *a quo* prayed for equal division of the pension interest and the motor vehicle, whereas the appellant prayed for forfeiture of the entire patrimonial benefits arising out of the marriage in community of property in his favour.

[10] The court *a quo* granted the order in favour of the first respondent (plaintiff) and ordered that the joint estate be divided equally between the parties, in the order dated 17 January 2025. It is this order that is dated 17 January 2025 that is being appealed by the appellant. It is important to highlight that because there were several orders that were made in this case since inception in 2015.

[11] In issue between the parties in this appeal, is whether forfeiture was rightfully granted against the appellant, in favour of the first respondent for the joint estate of the parties or not.

[12] The starting point is therefore that, in terms of section 7(2) of the Recognition of Customary Marriages Act[2] (RCMA), a customary marriage concluded after the commencement of the said RCMA in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the parties, unless such consequences are specifically excluded by the spouses in an ante nuptial contract which regulates the matrimonial property system of their marriage. It is common cause that in this case no ante nuptial contract was concluded between the parties before they entered into a customary marriage.

[13] It is trite that an Appeal Court can only interfere with the decision or judgment of a court *a quo* (lower court) if the lower court misdirected itself on facts of law, acted irregularly or exercised its discretion unreasonably[3]. In view of the fact that the court *a quo* made a finding

[2] 120 of 1998.
[3] Steenkamp and Others v Edcon Limited [2019] 11 BLLR 1189 (CC) (30 April 2019), Hotz and Others v University of Cape Town 2018 (1) SA 369 (CC) (12 April 2017), MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality and Others (747/2021) [2022] ZASCA 167; 2023 (3) SA 521 (SCA) (30 November 2022).

that the marriage relationship between the parties was irretrievably broken down, and in terms of section 9(1) of the Divorce Act[4] (Divorce Act or Act 70 of 1979), the court which grants a divorce order on the grounds of the irretrievable breakdown of the marriage may make an order that the patrimonial benefits of the marriage be forfeited by one of the spouses in favour of the other, as stated by *Heaton J. in "The Law of Divorce and Dissolution of Life Partnership (Juta 2014)".* In terms of section 9(1) of the Divorce Act there are three factors which the court must consider before the court can make an order for forfeiture, which are:

(i) the duration of the marriage,

(ii) the circumstances which led to the breakdown of the marriage,

(iii) any substantial misconduct on the part of either spouse.

[14] The seminal decision of *Wijker v Wijker*[5], clarified that a court may not make a forfeiture order unless that court is satisfied that the spouse against whom the order is sought would be unduly benefited in relation to the other spouse. Once it is held that the party will indeed derive a benefit the court must proceed to determine whether such benefit will be

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[4] 70 of 1979.
[5] 1993 (4) SA 720 (A).

undue. This determination will be done after considering factors mentioned in section 9 (1) of the Divorce Act. It is a value judgment which depends on the assessment of the facts of the matter. Community of property is a universal economic partnership of the spouses, all their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares, as was said in the *Wijker case, supra.*

[15] The court *a quo* evaluated evidence in relation to the factors relating to forfeiture as listed in section 9(1) of the Divorce Act. For the sake of completeness, I will summarise what the findings of the court *a quo* was in relation to the factors that must be considered when a court deals with the claim for forfeiture. The court *a quo* found that the marriage relationship lasted from 2006 to 2025, which is at least 18 (eighteen) years of marriage, which the court *a quo* found to be a marriage of long duration.

[16] The court *a quo* did not find that the first respondent committed adultery as was alleged by the appellant in his counterclaim, but to the contrary the appellant was found to have been the one who engaged in an extra marital affair in which a child was born, and that was found to have been

what led to the breakdown of the marriage relationship between the parties by the court *a quo*.

[17] The court *a quo* further found that the fact that the appellant committed adultery and even bore a child in the said extra marital affair constituted substantial misconduct which eventually led to the breakdown of the marriage relationship. The findings of the court *a quo* on its findings regarding the requirements set down in the provisions of section 9(1) of the Divorce Act cannot be faulted.

[18] The court *a quo* in its judgment referred to the case of *Engelbrecht v Engelbrecht*[6] on the determination of the extend of the benefit sought to be forfeited. Having found that forfeiture cannot be granted in favour of the appellant, the court *a quo* had to determine if there is a benefit that is due or not to the first respondent. On paragraph 29 of the *J.A.L. v C.P.L., case number 3146/2015, judgment delivered on 02 February 2017 by the Eastern Cape Local Division of the High Court (J.A.L. case), sitting in Port Elizabeth,* the court said the following with regard to what the party claiming forfeiture must prove: *"Unless it is proved that the nature and extent of the benefit was, the court cannot determine whether the benefit was undue or not. Only when the nature and extent of the benefit have*

[6] 1989 (1) SA 597 (C).

been proved does it become necessary for the court to consider the factors which determine whether the benefit is undue or not".

[19] *Van Niekerk P.A. in his book, A Practical Guide to Patrimonial Litigation in Divorce Actions, 2017, on paragraph 7.2* opines that for purposes of determination of 'means' in a divorce action, it is suggested that an asset consists of the rights, title or interest which a person may have in any corporeal or incorporeal thing, which is capable of being valued in monetary form. He further on paragraph 3.3.2 opines that "benefits" constitute the excess of the one party's contribution to the joint estate over and above the other party's contribution.

[20] The concept of "benefits" is properly explained in the old case of *Smith v Smith 1937 WLD 126 at 127-128*, where the following is stated:

"What the Defendant forfeits is not his share of the common property but only the pecuniary benefits that he would otherwise have derived from the marriage…. It is really an order for division plus an order that the defendant is not to share in any excess that the plaintiff may have contributed over the contributions of the defendant."

[21] For a court to be able to determine whether there is a benefit which the other party stands to gain or not, the court must determine as to what assets are there in the joint estate of the parties which are capable of

being divided. In the case at hand the submission by the appellant was first that the first respondent is not entitled to share in his pension interest and the motor vehicle because she did not contribute to the accumulation of those assets, but he eventually conceded that contribution is not only monetary but can be by other means. It might be so that one party might have contributed more than the other party, but that doesn't automatically mean that because one has contributed above the other, then the one who contributed less must forfeit the benefits of a marriage in community of property, or that the benefit that is due to that party is undue.

[22] The court must still determine whether the party against whom a forfeiture order is sought will benefit unduly if a forfeiture order is not made. The court must therefore still be shown the undue benefit which the party against whom the forfeiture order is sought will benefit which is out of the ordinary share that the other party is entitled to by virtue of a marriage in community of property. The court *a quo* found that the first respondent also contributed to the joint estate by being a housewife who even nurtured their three children[7].

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[7] *Beaumont v Beaumont 1987 (1) SA 967 (A), Bezuidenhout v Bezuidenhout 2005 (2) SA 187 (SCA*), In *V v V, supra*, Maumela J. on paragraph 38 of the judgment, found that the fact that the husband did not contribute to the pension fund or the bond account did not mean that he would be unduly enriched at the expense of the wife if the forfeiture order was not granted. Consequently, the court found that allegations of undue benefit have not been pleaded and proven by the wife. In *Wijker v Wijker, supra*, the court emphasised that that the determination of undue benefit involves an exercise of judicial discretion, considering factors such as the duration of the marriage, the circumstances leading to its breakdown, and any substantial misconduct by the parties. It was also clearly stated and settled in *Wijker v Wijker*, that fairness is not a factor for consideration when deciding whether forfeiture should be granted or not.

[23] The appellant in his evidence in the court *a quo* disclosed that he worked for about four institutions. He purchased a Polo motor vehicle with the money that he received as pension from one of the institutions he worked for and invested an amount of 2.7 million to Sanlam Glacier, which is managed by the second respondent. These transactions took place during the time of the subsistence of their marriage relationship. These are therefore the assets of the joint estate.

[24] In *V v V (3389/2017) [2020] ZAGPPHC 154 (Judgment handed down on 4 March 2020), the court on paragraph 40 of the judgment said the following: "Our case law dictates that a forfeiture order may not be granted simply to balance the fact that one of the spouses or partners has made a greater contribution than the other to the joint estate. Our courts have also held that the 'principle of fairness' was not one of the criteria mentioned in s 9(1), and therefore should not be considered in deciding whether to grant a decree of forfeiture"*

[25] In my view the *Wijker* case, *supra,* settled the issue of proportionality of contributions in a marriage that is in community of property by stating that in determining whether a benefit will be undue, the court cautioned that the equitable principle of fairness cannot be used to justify an order

of forfeiture as it runs counter to the basic concept of community of property.

[26] In the *Wijker* case, *supra,* again the court in that case quoted *H.R. Hahlo in 'The South African Law of Husband and Wife, 5th edition, at pages 157 and 158 describing community of property as follows: "Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares"*

[27] The court *a quo* fully considered, evaluated and made findings on issues that it had to deal with in as far as the claim for forfeiture is concerned. The verdict by the court *a quo* for dismissing the forfeiture prayer or claim by the appellant cannot be faulted by this court. This is an appeal, and I see no reason why costs should not follow the result.

[28] In the result the following order is made:

(i) the appeal is dismissed with costs.

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J.T. NGOBENI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

I AGREE

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L.B. MAPHELELA

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION; POLOKWANE

APPEARANCES

For the appellant:	Adv. Z. Marx
Instructed by:	Shapiro & Ledwaba Inc.
For the 1st respondent:	Mr. H. Masindi
Instructed by:	H. Masindi Mandiwana Attorneys Inc.
For the 2nd respondent:	No appearances
Heard on:	06 February 2026
Judgment delivered on:	13 April 2026