IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

APPEAL CASE NO: HCA04/2015

Court a quo: P352/10

28/10/2016

(1) REPORTABLE: **NO/YES**

(2) OF INTEREST TO OTHER JUDGES: **NO/YES**

(3) REVISED.

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DATE SIGNATURE

In the matter of:

M M S **APPELLANT**

And

J M S **RESPONDENT**

JUDGMENT

NDLOKOVANE AJ

INTRODUCTION

1. This is an appeal against the judgement and order of the Regional Court, Thabamoopo regarding the division of the joint estate in a divorce action.
2. The order amongst other things granted by the Regional Magistrate P.W Modipane in the *court a quo* amounts to a partial forfeiture order in respect of the Respondent's pension interest. The appellant is dissatisfied with the said order as it stands and contends that the court a quo should have gone a step further and specifically ordered that the division of the joint estate shall include the Appellants' 50% entitlement to the Respondent's pension interest.

FACTUAL BACKGROUND

3. The appellant instituted divorce proceedings against the Respondent in the Regional Court of Limpopo sitting at Lebowakgomo. She prayed for a decree of divorce, division of the joint estate and ancillary relief. Equally, the Respondent counter claimed for a decree of divorce and a forfeiture in respect of the parties' common home situated at 3843 D Zone 2 Seshego and his pension interest held with Transnet.
4. At the time of divorce, the Respondent was employed at Transnet for almost thirty years and has been a contributor to a pension fund thereat. The details of the pension fund are not disclosed. The same cannot be said of the Appellant, although she was employed for most part during the existence of the marriage, she never contributed to any pension fund.
5. Although the divorce proceedings were launched on the 4 March 2010,the matter finally proceeded to trial on 16 September 2011,where-in both parties sought the services of legal representatives. The Appellant was represented

by Ms. De Klerk on instruction of Kgatla Attorneys and the Respondent was represented by Adv. I.A. Van der Eynde on instruction of Sakkie Van Zyl. The matter was finalised at the court a quo on the 03 August 2012.

6. In the result, the court a quo gave judgement in the very terms prayed for by the parties in their respective prayers regarding the division of the joint estate. However, the court a quo in coming to its decision not to award the Appellant 50% entitlement in respect of the Respondent's pension interest is as follows:

"*On this issue taking into account the duration of the marriage especially the issue that they have been in separation for the past 12 or 13 years, I am unable to accede 100% to this prayer. In other words she succeed only in part to the extent that she is entitled to only 20% of the Defendant's pension interest"*

THE ISSUES

7. The legal issue/question to be decided in this appeal is as follows:

7.1 Whether the *court a quo* in exercising its discretion in terms of section 9(1) of the Divorce Act 70 of 1979 misdirected itself with regard to its application of the provision of section 9(1) of the Act in granting the partial forfeiture order.

THE LAW

8. The issue of forfeiture is provided for in section 9(1) of the Divorce Act 90 of 1979 and reads as follow:

"When a decree of divorce is granted on the grounds 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 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 in relation to the other will be unduly benefitted".

9. In **Van Niekerk,A Practical Guide to Patrimonial Litigation in Divorce Actions, Issue 12 at Chapter 3 page 4,paragraph 3.3.2** he writes and I quote:

"*Writer suggests that the principle relating to forfeiture in respect of a marriage in community of property are probably the most misunderstood aspect of matrimonial litigation. A misconception exists that an order for forfeiture where parties are married in community of property means that party against whom such an order is made, forfeits the right to share in the division of the joint estate. This is obviously incorrect and the proper position is that such a party forfeits the right to share in any* ***BENEFITS*** *of the marriage in community of property. What constitutes benefits? The concept of benefits is properly explained by* ***Hahlo in the South African Law of Husband and Wife 5th edition at page 378 where Schreiner J*** *(as he then was) is quoted in the decision of* **Smith v Smith 1937 WLD 126 at 127-128** *that the benefit constitutes the excess of one's party contribution to the estate over and above the other party's contribution".*

THE TEST

10. The court in **JW v SW 2011(1) SA 545 GNP** has emphasised that the party who seeks a forfeiture order must first establish the nature and extent of the benefit. If this is not proved the court cannot decided if the benefit was undue or not.
11. Then the party claiming forfeiture must show the court that the other party will be UNDULY benefitted if the order for forfeiture is not made. It will not be sufficient especially in marriages in community of property to prove that the other party will be benefitted-the nature of a marriage in community of property will of its very nature benefit the parties. The benefit must be undue.
12. The first part of this enquiry is a factual one and the second part is a value judgement. See **Wijker v Wijker 1993(4) SA 720 (A)** at para19,it is at this stage where the court will consider the criterion as set out in section 9(1) of the Divorce Act.
13. In **Klerk v Klerck 1991(1) SA 265(W)**, *Kriegler J* decided that all factors mentioned in section 9(1) need not be present. For example, misconduct on the part of the parties may exist independently of the other factors. At page

2**67 G**-**H**, he stated that the principal factor to be considered by the court, is if one party will be unduly benefitted if forfeiture is not granted. Whether one party will be unduly benefitted at the expense of another is a value judgement to be made by the court. In determining whether one party will be unduly benefitted at the expense of the other, the three factors referred to in section 9(1) should be considered individually or collectively in coming to a decision.

14. In the case of **Kgololesego Keonang Tlou v Matome Solomon Ralebipi, In the High Court of South Africa, Gauteng Division, Pretoria, case number 4081/2013, Kollapen J, dated: 10/08/2016.** The court held that :

"*While not cast in stone, it must therefore follow that in the determination of whether a benefit is undue, a court is more likely to make such a determination where the marriage is of short duration as opposed to circumstances where the marriage was of a long duration. Simply put, the longer the marriage the more likely it is that the benefit will be due and proportionate and conversely, the shorter the marriage the more likely the benefit will be undue and disproportionate*".

CONCLUSION

15. Having considered and dealt with legislative provision as well as the case law relating to the forfeiture of benefits in divorce proceedings, I now come to the conclusion hereunder in order to answer the question or issue raised in this appeal.

16. The court a quo misdirected itself with regard to its application of its discretion as set out in section 9(1) of the Divorce Act, particularly on the issue relating to the duration which resulted it to grant a partial forfeiture order.

17. In casu the parties' civil marriage endured for some 27 years. What should however also be taken into account is the fact that they entered into a customary marriage 4 years prior to the civil marriage and that their eldest child was born some 3 years prior to their civil marriage. Their de *facto* relationship therefore endured for some 17 years.

18. After the Appellant left the common home she cared for the four minor children (with their ages between 7 and 17). She was eventually compelled to obtain an order in the Maintenance Court against the Respondent to contribute towards the maintenance of the minor children.

19. While the Respondent contributed towards and built up a pension interest the Appellant contributed to the care of the Minor children.

COSTS

20. Given the discretion vested in the court with regard to costs, it would in my view be just and equitable for each party to bear their own costs. This is fortified by the length of time to have this matter brought to its finality and the financial strains it must have cost the parties to defend their respect cases. This became evident at this hearing when the Respondent sought the services of the legal representative a day before the hearing who could not properly prepare for the hearing.

ORDER

21. In the result the appeal is upheld and the order of the court a quo is replaced as followed:

(a) A decree of divorce is granted.

(b) The joint estate of the parties shall be divided in equal shares.

(c) The Respondent's counter claim for an order in terms of section 7(8) (a) of Divorce Act 70 of 1990 in respect of Respondent's pension interest is dismissed.

(d) Each party shall pay his or her own costs.

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N. NDLOKOVANE

ACTING JUDGE OF THE HIGH COURT, LIMPOPO, POLOKWANE

I AGREE

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E.M MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO, POLOKWANE

HEARD ON	**:**	**21 OCTOBER 2016**
JUDGMENT DELIVERED	**:**	**28 OCTOBER 2016**
FOR THE APPELLANT	**:**	**M.C DE KLERK**
INSTRUCTED BY	**:**	**DAVEL DE DE KLERK KGATLA INC**
FOR THE RESPONDENT	**:**	**MOSEAMEDI M.T**

INSTRUCRED BY : MALOPE ATTORNEYS