IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***14th October 2020*** Signature: _____

APPEAL CASE NO: A3108/2018

COURT *A QUO* CASE NO: KP/RC/286/2013

DATE: 14th OCTOBER 2020

In the matter between:

R, G Appellant

and

R, S Respondent

Coram: Adams J *et* Majavu AJ

Heard: 14 October 2020

Delivered: 14 October 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 14 October 2020

Summary: Marriage – Divorce – marriage in Community of Property – forfeiture of benefits of marriage – order to that effect only competent in terms of section 9 of the Divorce Act 70 of 1979.

ORDER

On appeal from: The Gauteng Regional Court, Kempton Park (Regional Magistrate F Hoosen sitting as Court of first instance):

(1) The appellant's application for condonation of her non-compliance with the Rules of the Magistrates Court and the Uniform Rules of this Court and for the reinstatement of her appeal is granted.

(2) There shall be no order as to costs relative to the appellant's application for condonation.

(3) The appeal is upheld with costs.

(4) The order of the Kempton Park Regional Court is set aside and in its place the following order is substituted:

'a) A decree of divorce is granted.

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

c) A receiver and liquidator of the joint estate of the plaintiff and the defendant with the powers *inter alia* to realise the whole of the joint estate assets, shall be appointed to give effect to order (b) above in the event of the parties being unable to reach agreement on the division of the joint estate.

d) It is declared that the defendant is entitled to an amount equal to fifty per cent of the plaintiff's net pension interest in the Sanlam *Glacier* Living Annuity / Pension Fund calculated as at the 7th of May 2018.

e) Sanlam is ordered to endorse the Living Annuity to the effect that the appellant is entitled to fifty per cent of the value of the annuity as and at the 7th of May 2018.

f) The plaintiff shall pay the defendant's costs of the divorce action.'

(5) The respondent shall pay the appellant's costs of this appeal.

JUDGMENT

Adams J (Majavu AJ concurring):

[1]. The central question in this appeal is under what circumstances a party to a marriage in community of property can be ordered to forfeit the benefits arising from such a marriage. That issue arises against the following backdrop.

[2]. On the 3rd of January 1985 the parties were married to each other in community of property. There were three children born of the marriage, all of whom had attained the age of majority by the time the Kempton Park Regional Court dissolved the marriage between the parties on the 7th of May 2018. The court *a quo* also ordered a division of the joint estate, 'including the pension funds, up until the 30th of June 2007, when the [appellant] left the joint estate'. Furthermore, so the court below ordered, the appellant was to forfeit all the benefits of the marriage in community of property accumulated after the 30th of June 2007, and each party was ordered to pay his / her own costs of the divorce action.

[3]. In the trial court the parties were in agreement that the marriage relationship had broken down irretrievably and that the marriage should be dissolved. In his evidence the respondent, who was the plaintiff in the court *a quo*, testified that the break down in the marriage was as a direct result of the appellant, the defendant *a quo*, leaving the matrimonial home during 2007 and not returning. Additionally, so the respondent's testimony went, the appellant abused alcohol and mismanaged the finances of the community estate. He also claimed that the appellant did not make any contribution to the joint estate for the period from 1985 to 2007, whilst he had to ensure that the bond on their house and the instalments payable in respect of the cars were paid. He also claimed that he was solely responsible for payment of most of the other household expenses. Even more so, so the respondent testified, after the appellant abandoned the matrimonial home during December 2007.

[4]. The respondent left his employment at Telkom during 2013 and cashed in his Pension Fund by receiving in cash an amount of just over R500 000, which equated to one third of the total proceeds of the pension fund. The balance of the proceeds of the pension fund was reinvested in a living annuity with Sanlam which presumably renders on a monthly or yearly basis proceeds which the respondent appropriates to himself and lives of. The respondent also bought himself two vehicles – one during 2009, a Mercedes Benz, which he financed by a credit agreement and the other one during 2013, a Toyota, which he had bought for cash from the one third proceeds of his pension fund at Telkom, which he also used to pay off the bond on the house. Incidentally, the divorce summons was issued out of the Regional Court on the 12th of February 2013.

[5]. The appellant, when giving evidence, denied the respondent's version that she did not contribute to the community estate. She readily conceded that the respondent serviced the bond on their house, which they had acquired as a couple and a family during 1997 at a purchase price of R230 000, and the other major debts. However, so she testified, she was the one who attended to the other household expenses, such as buying groceries for the family and paying the electricity and other utility accounts, and the needs of the children, including paying their school fees. The maintenance and well-being of the children were her responsibility.

[6]. The appellant therefore paid on a monthly basis during the twenty two year period between 1985 and 2007, when the parties were living together as husband and wife, the electricity charges levied by the Local Authority for their matrimonial house, in addition to the other utilities bills, which she regarded as her responsibility. In any event, the appellant's direct financial contributions were relative and proportionate to her income. Her evidence was also that during the marriage the respondent was abusive towards her and had engaged in extra-marital affairs, which caused her to leave the matrimonial home during 2007. Shortly thereafter, so the evidence of the appellant went, the respondent in fact continued with a relationship with one of these women and entertained her in the common home in the absence of the appellant. This fact appears to

be conceded by the respondent, but more telling is his admission that during the subsistence of the marriage he had what he referred to as his 'girlfriend' with whom the appellant had an altercation, which landed the appellant in trouble and with a criminal charge against her for assault. The respondent in fact funded the appellant's legal representation in resisting the criminal charges.

[7]. It is common cause that during 1997, some twelve years after they got married, the parties bought a house in Polokwane for R230 000. This house was their matrimonial home and is presently valued at about R1 500 000. The vehicle which the respondent bought during 2009 was a Mercedes Benz, which he bought for R365 000 – the purchase price was financed by a credit agreement. During 2013 the respondent bought a Toyota Corolla for about R215 000 for cash, which came from the proceeds of the pension fund, a portion of which was also used by the respondent to settle the outstanding balance on the bond registered over their house.

[8]. Only the parties testified and, in my judgment, not much turns on the evidence. Resolution of the dispute between the parties depends mainly on the facts which are common cause and the applicable law. It is not necessary to evaluate the evidence in detail. Suffice to state that, in my judgment, the probabilities indicate that the respondent is the one who misconducted himself in that he engaged in extra-marital affairs during the subsistence of their marriage, which in the end probably caused the disintegration of the marriage.

[9]. The respondent's evidence relating to the cause of the breakdown of the marriage relationship went as follows:

'I would say breakdown in communication, disrespect, ill-discipline and financial activities that I did not approve.'

[10]. When asked to elaborate, the respondent gave the following explanation:

'Ja, I could determine that there were finances coming to my house which I did not know. Knowing the budget that we had within the family, but there were some finances that were coming inside my house that I did not know.'

[11]. And then later on in his evidence in chief on a question from his attorney as to the reasons why he was seeking a forfeiture order against the appellant, the respondent gave the following very telling answer:

'Well one of the reasons that I seek that is for the fact that there was no contribution from my partner with regard to the house, you know, and everything else – totally no contribution.'

[12]. I do not accept the respondent's convoluted explanation that the marriage broke down as a result of 'ill-discipline' and financial mismanagement on the part of the appellant. The real reason why the marriage relationship fell apart was due to the respondent's misconduct – he undermined the appellant by engaging in extra-marital affairs. This in turn caused the appellant to leave the matrimonial home; whereafter the respondent openly had an affair whilst the marriage was still in existence.

[13]. The respondent also made much of the fact that the appellant, after she left the matrimonial home during December 2007, made no further contributions – none whatsoever – to the joint estate. She, for example, stopped buying groceries for the common household and she obviously did not continue paying the electricity and other utilities bills. This is understandable, bearing in mind that outside of the warmth and comfort of the matrimonial home, she then had to fend for herself. She had no choice and, as I indicated, it is understandable that her contributions to the household expenses had ceased.

[14]. In that regard, it was the respondent's contention that, after the appellant left the common home during December 2007, whatever property he acquired was procured and paid for by him with the appellant making no contributions to these acquisitions. So, for instance, the respondent bought the Mercedes Benz during 2009 and the Toyota Corolla during 2013, and he also paid off the bond on their house – all of this supposedly with no assistance or contributions from the appellant. This contention persuaded the learned Magistrate, hence her order. I'm not convinced. The court *a quo* misdirected itself. It was not the respondent who acquired these assets, but the joint estate of the parties, which was able to make these acquisitions from and on the strength of what had been

accumulated by the parties as a couple over the extended period of twenty two years between 1985 and 2007.

[15]. Thus far the thumbnail facts and the issues to be decided by us in the appeal.

[16]. There is a preliminary issue which requires our attention and that relates to non-compliance by the appellant with certain time limits applicable to the prosecution of a civil appeal from the Magistrates Court to the High Court. I now turn to that issue

The Appellant's Application for Condonation

[17]. The appellant applies for condonation for her failure to have complied with the time periods laid down by the Magistrates Court Rules and by Uniform Rule of Court 50 resulting in the appeal lapsing, for reinstatement of the appeal, and for costs in the event of it being opposed.

[18]. Magistrates Court Rule 51(3) provides that an appeal may be noted within twenty days after the date the clerk of the court has supplied a copy of the judgment in writing to the party applying therefor. *In casu*, the copy of the judgment was evidently supplied by the Registrar of the Kempton Park Regional Court on the 16th of May 2018, which means that the appellant was required to deliver her notice of appeal by about the 13th of June 2018. Factually, the appellant delivered her notice of appeal on the 4th of June 2018, therefore well within the time limit imposed by the Rule.

[19]. However, Rule 51(4) provides that the appeal shall be noted by the delivery of notice, and by giving security for the respondent's costs of appeal to the amount of R1000: This latter step of paying security for the costs of the appeal the appellant only complied with over one year late on the 6th of August 2019, and only after the Registrar of the High Court pointed out to the appellant's attorneys that a date would not be allocated for the hearing of the appeal unless and until the security had been posted. The sum total of the appellant's explanation for this non-compliance is simply that it was an oversight on the part of her attorney.

[20]. As far as the prosecution of the appeal is concerned, Uniform Rule of Court 50(1) requires the appeal to be 'prosecuted' within sixty days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed. This means that the appellant *in casu* should have prosecuted the appeal on or before the 27th of August 2018. The appellant only 'prosecuted' her appeal, by applying for a date for the hearing of the appeal and simultaneously lodging with the registrar copies of the appeal record, or about the 18th of September 2019 – therefore again over one year late.

[21]. It is in respect of these procedural non-compliances which the applicant is applying, rather belatedly I might add, for condonation. The respondent gave notice on the 12th of October 2020 that he opposes this application. In the founding affidavit in support of the condonation application, deposed to by her attorney, the appellant explained the steps that he had taken to obtain a proper appeal record. Initially there were 'financial constraints' and subsequently there were miscommunications between the attorney and the transcribers, which resulted in the transcript only being received by the attorneys during August 2019. It is so that the application is somewhat scant on the details relating to the delay in obtaining the transcript of the Magistrates Court proceedings. There is very little explanation as to what transpired during the period from August 2018 to August 2019. On its own the explanation for the non-compliance may very well have been wholly inadequate and would probably have been of little assistance to the appellant in getting condonation.

[22]. The respondent filed an affidavit opposing the condonation application. The affidavit fundamentally makes two points. The first is that in a letter from the respondent's attorneys to the appellant's attorneys dated the 19th of September 2019 the respondent's attorneys pointed out that the appeal had lapsed. In a subsequent communiqué the appellant's attorneys disputed this and advised that an application for a date for the hearing of the appeal had been filed with the registrar of this Court on the 20th of September 2018 and that the allocation of a date was being awaited. Secondly, the respondent's answering affidavit makes the point that the appellant's prospects of success on appeal were,

according to the respondent, not good and therefore the application for condonation should be refused.

[23]. Applications for condonation for appeals lapsing are not uncommon and the principles relating to them well established. The factors usually weighed by a court of appeal in considering these include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, a respondent's interest in the finality of the judgment of the court below, the convenience of the court of appeal, and the avoidance of unnecessary delay in the administration of justice.

[24]. Often the delay is caused by missing files, or incomplete records, or missing recordings, and such-like singularly irritating gremlins on the way to preparing a good appeal record, so indispensable for the proper hearing of an appeal. But ultimately, condonation applications fail when the appeal should not succeed on the merits. Conversely, if the appeal is good, and if the appellant intended throughout to prosecute the appeal, condonation is usually granted. So too here. The appellant's affidavit explained the frustrations experienced in securing a proper transcript and preparation of a record. One cannot infer from that explanation anything of relevance other than a serious intent to prosecute the appeal.

[25]. That brings one to the prospects of success on appeal in this matter. This is not a case of flagrant breaches of the rules of this court without any acceptable explanation therefor where condonation may be refused irrespective of the prospects of success on appeal. We conclude below that the appeal should succeed on the merits. It follows that the condonation should be granted, and the appeal, insofar as it has lapsed if regard is had to the provision of Uniform Rule of Court 50(1) supra, ought to be reinstated.

[26]. In view of the lightness of the explanation by the appellant for the non-compliance with the rules, we believe it is appropriate that no costs order should be granted in relation to the said application.

The Merits of the Appeal and the Applicable Law

[27]. The question to be answered is this: should an order of forfeiture have been granted in favour of the respondent against the appellant? In that regard, section 9 of the Divorce Act 70 of 1979 ('the Act') provides as follows:

'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, 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 will in relation to the other be unduly benefited.'

[28]. Community of property is described in *The South African Law of Husband and Wife* by HR Hahlo, 5th edition, 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 the financial contributions, hold equal shares.'

[29]. As was said in *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C), joint ownership of another's property is a right which each of the spouses acquires on concluding a marriage in community of property. Unless the parties (either before or during the marriage) make precisely equal contributions the one that contributed less shall on dissolution of the marriage be benefited above the other if forfeiture is not ordered. This is the inevitable consequence of the parties' matrimonial regime. The Legislature (in section 9 of the Divorce Act 70 of 1979) does not give the greater contributor the opportunity to complain about this. He can only complain if the benefit is undue.

[30]. In *Wijker v Wijker* 1993 (4) SA 720 (A) it was held that the court should first determine whether or not the party against whom the order of forfeiture is sought will in fact be benefited if the order is not made. Once it is determined that that party will benefit, the next enquiry is whether such benefit will be an undue one.

[31]. In *Engelbrecht* (supra) the Full Court emphasised that a party who seeks a forfeiture order must first establish what the nature and extent of the benefit

was. Unless that is proved the court cannot decide if the benefit was undue or not. Only if the nature and ambit of the benefit is proved is it necessary to look to the three factors which may be brought into consideration in deciding on the inequity thereof.

[32]. The trial court in *Engelbrecht* was satisfied that, if forfeiture order was not made, the defendant would be unduly benefited in comparison to the plaintiff. The plaintiff and the defendant were married in community of property in 1980. The plaintiff brought into the joint estate an erf which he bought for R3000 in 1975. He used the proceeds of a life policy on the life of his first wife to pay for it. He took a bond of R14000 and built a house on the erf. The parties thereafter married. There was no proof of what the house was worth when summons was issued. On appeal the Full Court found that the plainitff had not proved the nature and extent of the defendant's benefit at the dissolution of the marriage: *A fortiori* he had not proved that such benefit was undue.

[33]. In the present case the appellant and the respondent started off with nothing – both of them owned no property of significant value and together they built up for themselves and their children an asset base, consisting in the main of the matrimonial home and the respondent's interest in his provident fund. The value of their property at the date of the dissolution of their marriage was approximately R1.5 million. It cannot be said that this amount or any portion thereof proves the extent of the appellant's benefit on the dissolution of the marriage. The point is that the property was acquired and owned by the parties as a married couple. It cannot possibly be said that this was a benefit, let alone an undue one. The same applied to the interest of the respondent in his pension fund.

[34]. I am therefore of the view that respondent had failed to prove that any benefit receivable by the appellant would have been undue – it arose from her marriage in community of property to the respondent. Accordingly, I cannot conclude that the appellant would have been unduly benefitted if forfeiture was not ordered. Therefore, the respondent's claim for forfeiture should not have been granted.

[35]. Even if this conclusion is wrong, I am in any event not persuaded that forfeiture should have been ordered if the factors mentioned in section 9(1) of the Act are taken into account.

[36]. As regards the duration of the marriage, which, in my view, should in the circumstances of this matter, be the most important consideration, was of a very long duration, lasting for approximately twenty two years until they stopped living together as husband and wife. Until the date on which the divorce summons was issued on the 12th of February 2013 the marriage had endured for twenty eight years and to the date of the dissolution of the marriage that period was thirty three years. Howsoever one views this consideration, there can be no doubt that it favours the appellant and militates against a forfeiture order. If regard is had to the very long duration of the marriage, it seems innately unjust that a forfeiture order had been granted against the appellant.

[37]. As for factors that led to the break-down of the marriage, a marriage relationship seldom breaks down as a result of the conduct of only one spouse. The marriage of the appellant and the respondent is no different. As indicated above, I accept the appellant's version that during the subsistence of the marriage the respondent engaged in extra-marital affairs, which probably resulted in the respondent becoming confrontational and possibly abusive towards the appellant. I also have difficulty in accepting that the appellant, as alleged by the respondent, abused alcohol. If that was so, how is it possible that the marriage endured for twenty two years – the parties' marriage appears to have been a normal one with its own challenges. The appellant was also able to rear three children seemingly without any difficulty.

[38]. I am of the view that there is no evidence that the marriage broke down as a result of any misconduct on the part of the appellant. On the contrary, I think that from the evidence the breakdown of the marriage resulted from the respondent's misconduct. The aforegoing also relates to the last consideration of substantial misconduct on the part of either party. If anything, substantial misconduct on the part of the respondent counts against a forfeiture order.

[39]. It must be remembered that both the parties entered into the marriage empty handed. Twenty two years later, when they separated, they, as a couple, owned assets worth millions of rands. During that period the respondent was the main breadwinner with the appellant, whilst also earning an income and seeing to the payment of some of the household expenditures, had the duty to look after the smooth running of the household and the rearing of the children.

[40]. The further point is that the increase in the value of assets in the joint estate over the duration of the marriage was a consequence of the parties' marriage in community of property. The fact that the appellant did not contribute financially towards the increased value of the assets does not necessarily follow that the appellant would have been unduly benefited.

[41]. Furthermore, whatever benefit that might have accrued to the appellant, must be considered having regard to the factors mentioned in section 9. I have already alluded to the very long duration of the marriage. Also, as pointed out in *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA), the traditional role of housewife, mother and homemaker should not be undervalued because it is not measurable in terms of money. The respondent's misconduct can certainly not be ignored, but it must be assessed with all the other circumstances. I therefore come to the conclusion that an order for forfeiture was not appropriate in the circumstances.

[42]. In sum, the evidence in this matter and the objective facts as applied to the applicable legal principles do not support the learned Magistrate's conclusion that the appellant should forfeit the benefits of the parties' marriage in community of property accumulated after December 2007. There is no legal basis for such conclusion. In any event, on the evidence before the court *a quo* there is no proof in support of a finding that the benefits accrued in the form of an increase in the net value of the joint estate between 2007 and 2018, when the decree of divorce was granted. The learned Magistrate misdirected herself in that regard – as I have already indicated, most of the acquisitions post 2007 were in the place or on the strength of existing assets belonging to the joint estate, such as the proceeds from the respondent's Pension Fund. The value of

these assets were then reduced and the consequent reduced value in the joint estate was then replaced by the value of the newly acquired asset, such as the Toyota Corolla and the equity in the house, which was no longer bonded.

[43]. In the circumstances, I am of the view that the appeal against the order of the Magistrates Court should be upheld.

Order

In the result, the following order is made:-

(1) The appellant's application for condonation of her non-compliance with the Rules of the Magistrates Court and the Uniform Rules of this Court and for the reinstatement of her appeal is granted.

(2) There shall be no order as to costs relative to the appellant's application for condonation.

(3) The appeal is upheld with costs.

(4) The order of the Kempton Park Regional Court is set aside and in its place the following order is substituted:

'a) A decree of divorce is granted.

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

c) A receiver and liquidator of the joint estate of the plaintiff and the defendant with the powers *inter alia* to realise the whole of the joint estate assets, shall be appointed to give effect to order (b) above in the event of the parties being unable to reach agreement on the division of the joint estate.

d) It is declared that the defendant is entitled to an amount equal to fifty per cent of the plaintiff's net pension interest in the Sanlam *Glacier* Living Annuity / Pension Fund calculated as at the 7th of May 2018.

e) Sanlam is ordered to endorse the Living Annuity to the effect that the appellant is entitled to fifty per cent of the value of the annuity as and at the 7th of May 2018.

f) The plaintiff shall pay the defendant's costs of the divorce action.'

(5) The respondent shall pay the appellant's costs of this appeal.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

I agree

Z M P MAJAVU

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	14th October 2020
JUDGMENT DATE:	14th October 2020
FOR THE APPELLANT:	Adv R Letsipa
INSTRUCTED BY:	Ledwaba Attorneys, Kempton Park
FOR THE RESPONDENT:	Mr Johan Moolman
INSTRUCTED BY:	Pratt Luyt & De Lange Attorneys, Polokwane