IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***2nd November2020*** Signature: _____

APPEAL CASE NO: A3007/20

COURT *A QUO* CASE NO: GAU/VRG/RC643/17(D)

DATE: 2ND NOVEMBER 2020

In the matter between:

P, P Appellant

and

P, J Respondent

Coram: Adams J *et* Khumalo AJ

Heard: 29 and 30 October 2020

Delivered: 2 November 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 11:00 on 2 November 2020

Summary: Marriage – divorce – marriage in community of property – forfeiture of patrimonial benefits – trial Court having ordered partial forfeiture of patrimonial benefits in terms of s 9(1) of Act 70 of 1979 – appellant contending that trial Court should have ordered total forfeiture – appeal court may interfere with the exercise of a discretionary power by a lower court only if that power had not been properly exercised – whether the period during which the parties were customarily married immediately prior to their civil marriage should be taken into account when determining duration of marriage

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ORDER

On appeal from: The Gauteng Regional Court, Vereeniging (Regional Magistrate S P Morwane sitting as Court of first instance):

(1) The appellant's appeal is dismissed with costs.

JUDGMENT

Khumalo AJ (Adams J concurring):

Background

[1]. The issue in this appeal is whether this court, sitting as a court of appeal, can interfere with the exercise of the trial Court's discretion wherein it ordered a partial forfeiture of patrimonial benefits in circumstances where the plaintiff in divorce proceedings had sought a total forfeiture of patrimonial benefits.

[2]. The appellant (plaintiff *a quo*) instituted divorce proceedings against the respondent (defendant *a quo*) in the Gauteng Regional Court, held at Vereeniging ('trial Court'). In addition to a decree of divorce, the appellant had sought an order that the respondent forfeit certain patrimonial benefits arising from the marriage in community of property.

[3]. In the original particulars of claim the appellant had sought a total forfeiture of all the patrimonial benefits but subsequently amended her

particulars of claim and sought only a total forfeiture of (i) a share in her pension interest and (ii) the respondent's share in the immovable property situated at Three Rivers, Vereeniging.

[4]. The following facts appear from the record and were common cause between the parties: The parties entered into a civil marriage on 16 July 2015. They had two children born in March 2012 and April 2015 respectively. The respondent left the matrimonial home in February 2017 and never returned. The appellant launched divorce proceedings in July 2017; and the parties agreed in their pleadings that the marriage relationship between them had broken down irretrievably and that it should be dissolved by a decree of divorce.

[5]. In the trial Court the appellant contended that she was entitled to an order that the patrimonial benefits of the marriage be forfeited by the respondent for *inter alia* the reason that the marriage was of short duration. Also, so the appellant contended, the respondent had not made any contributions (financial or otherwise) towards the immovable property in respect of which a forfeiture order was sought and the respondent's misconduct gave rise to the break-down of the marriage. Lastly, the appellant submitted that, if the order for forfeiture was not made, the respondent will in relation to the appellant be unduly benefited.

[6]. The respondent denied the alleged misconduct and pleaded that he was entitled to an equal share of the joint estate inclusive of the pension interest and the property in Three Rivers, Vereeniging, as a party to a marriage in community of property. The respondent's evidence regarding his financial contribution during the parties' marriage was less than impressive, but nothing turns on this issue.

[7]. The circumstances under which a Court can grant an order for the forfeiture of patrimonial benefits are laid down in s 9(1) of the Divorce Act 70 of 1979 ('the Act'), which provides as follows:

'When a decree of divorce is granted on the ground of the irretrievable break-down 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 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'.

[8]. The trial Court delivered its Judgment on 6 December 2019.

[9]. Having considered the evidence before it as well as the factors mentioned in s 9(1) of the Act, the trial Court concluded that the respondent would indeed be unduly benefited if a forfeiture order was not made.

[10]. The trial Court then ruled that the respondent, instead of forfeiting the whole fifty percent interest in the property in the joint estate, should forfeit only twenty percent in the immovable property and the pension interest, resulting in the respondent being awarded only thirty percent of the immovable property and appellant's pension interest. Put another way, the trial Court granted a partial forfeiture of the patrimonial benefits in respect of the property and the pension interest.

The issue in this appeal

[11]. The appellant's appeal to this Court is against the order that the respondent should forfeit only a certain percentage of the patrimonial benefits in respect of the property and the pension interest and not the entire portion.

[12]. In argument before this Court, Mr Hlatshwayo, who appeared on behalf of the appellant, made three submissions in support of the grounds of appeal. The first was that once the trial Court had concluded that the respondent would be unduly benefitted in relation to the appellant if a forfeiture order was not made, then the trial Court was obliged to grant total forfeiture. The second was that the trial Court did not take into account the short duration of the marriage between the parties – which the appellant contends includes only the period of the civil marriage – and that the trial Court should have ordered a total forfeiture in respect of both the immovable property and the pension interest. The third was that the Trial Court did not give reasons for its decision that the respondent should only forfeit what is effectively a 20% share in the immovable property and the pension interest.

[13]. There was no appeal or cross-appeal noted by the respondent against the order that he should forfeit a portion of his share of the immovable property and the appellant's pension interest. In argument before this Court, Ms Mzizi, who appeared for the respondent, attempted to persuade us from the bar to set aside the trial Court's finding that the respondent would be unduly benefitted if a forfeiture order were not granted, and asked us to set aside the forfeiture order and to substitute it for an order that there should be no forfeiture at all.

[14]. This Court declines to entertain the request from respondent's counsel for the simple reason that no cross-appeal had been noted as contemplated in rule 51(6) and (7) of the Rules Regulating the Conduct of Proceedings of Magistrates Court of South Africa. There was therefore no competent cross-appeal before us and there was no application for condonation of failure to comply with rule 51. The appellant was entitled to assume that there was no such cross-appeal and her counsel was clearly not prepared to argue such cross-appeal. The appellant would clearly be prejudiced if we entertained the request from respondent's counsel.

Interpretation and application of s 9(1) of the Act

[15]. In *Wijker v Wijker* 1993 (4) SA 720 (A) at 727D – G, the Appellate Division said the following regarding the interpretation and application of s9(1) of the Act:

'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'.

[16]. At page 278 paras A-B, the AD pointed out that when determining whether one party would be unduly benefited, a trial Court does not exercise a discretion since that is a factual issue. It went on to say that in considering an

appeal on that factual issue, it (and by extension any appeal court) may differ from a trial Court on the merits.

[17]. In the present appeal before this Court, the appellant does not take issue with the trial Court's factual finding that the respondent would indeed be unduly benefitted at the expense of the appellant if a forfeiture order was not granted.

[18]. This Court is therefore not called upon to interfere with that factual finding. The appellant takes issue only with the trial Court having granted a partial forfeiture of patrimonial benefits instead of a complete forfeiture.

[19]. The appellant is therefore asking this Court, sitting as a court of appeal, to interfere with the trial Court's exercise of its discretion in terms of s9(1) of the Act.

[20]. In *Wijker* (supra*)* at 728B-C, the AD pointed out that when a trial Court makes an order for a forfeiture of benefits following upon a factual finding that a party would be unduly benefited, the trial Court exercises a discretion in the narrower sense. That would by extension be the case when the court declines to grant a forfeiture order.

[21]. The exercise of a narrow discretion necessarily involves a *'choice between permissible alternatives'*, and, accordingly, *'different judicial officers, acting reasonably, could legitimately come to different conclusions on identical facts'* (see *Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA)* at para 21.

Whether this Court can interfere with the trial Court's discretion

[22]. The test for interference with the narrow exercise of judicial discretion by a lower court is that formulated in *Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335C – F.

[23]. Circumstances under which a court of appeal may interfere with a lower court's exercise of a narrow discretion were restated as follows in *Ferris and another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC*)* at para [28]:

'28 An appeal court may interfere with the exercise of a discretionary power by a lower court only if that power had not been properly exercised. This would be so if the

court has exercised the discretionary power capriciously, was moved by a wrong principle of law or an incorrect appreciation of the facts, had not brought its unbiased judgment to bear on the issue, or had not acted for substantial reasons.'

[24]. In instances where a lower court exercises a narrow discretion, the ordinary approach on appeal is that the 'the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially . . .' *(*see *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* 2015 (5) SA 245 (CC) at para 85*)*.

[25]. It would therefore not be competent for this Court to interfere with and set aside the exercise of the trial Court's discretion merely because this Court would have preferred the trial Court to have followed a different course among those available to it. It would equally not be competent for this Court to alter the percentage of the benefits that should be forfeited by the respondent merely because this Court believes that its preferred percentage is the appropriate percentage.

[26]. The appellant must therefore satisfy this Court that the trial Court has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question that was before it or has not acted for substantial reasons.

[27]. That is the hurdle which the appellant must overcome.

Consideration of the Appellant's three submissions

[28]. The first submission on behalf of the appellant that the finding that the respondent would indeed be unduly benefitted should have been followed by an order of total forfeiture is not supported by the interpretation of s 9(1) of the Divorce Act. As I have pointed out above, following a finding that one party would be unduly benefitted if a forfeiture order was not made, the trial Court has a choice between two alternatives, being a partial forfeiture and a total forfeiture. In this case, the trial Court opted for the former and not the latter. It

was competent for the trial Court to do so. There is therefore no merit in the first submission.

[29]. In terms of the second submission, it was contended that the parties were only married for less than three years which 'by legal prescription is a short marriage' and that the trial Court 'erred in considering the number of years the parties stayed together'.

[30]. Having considered the record in the proceedings before the trial Court as well as the trial Court's written judgment, I am not persuaded that the trial Court did not properly consider (or did not give due weight to the) duration of the marriage between the parties.

[31]. That the trial Court considered the duration of the marriage is evident from its judgment. It said the following at paragraph 22 of its Judgment:

'22. The parties were married in 2015, and by calculation they have been married for four years. They both confirmed that they were customarily married in 2009. They both confirmed that they parted ways and only reconciled in 2011. It appears that they do not regard the period that they were customarily married as the duration of their marriage, added to their civil marriage. It can be argued either way but clearly the parties were not married for a short time. Their evidence did not assist the court to assess the type of marriage they were in'.

[32]. It is clear from its judgment that the trial Court did not only take into account the period from 16 July 2015 during which the parties were in a civil marriage, but also considered that prior to the civil marriage the parties were married in terms of customary law. It then concluded that the entire period (during the subsistence of the customary marriage and the civil marriage) did not constitute a short marriage justifying a total forfeiture of patrimonial benefits.

[33]. I mention in passing that the said customary marriage, having been concluded after the commencement of the Recognition of Customary Marriages Act, Act 120 of 1998 (commencement date is 15 November 2000) would have been a marriage in community of property in terms of s 8 of that statute.

[34]. The appellant in her own evidence in chief testified that the respondent twice paid *lobola* for her, first in 2007 and again in 2011. She also testified that

the parties had a traditional wedding ceremony in 2014 and that between 2014 and 2015 – which is the period immediately preceding the civil wedding – they lived together as husband and wife.

[35]. The respondent's evidence, which was not challenged or disputed during cross-examination, was that the parties moved in together and lived together during 2011 after he had paid *lobola*.

[36]. The parties were clearly married in terms of customary law well before the civil marriage in July 2015.

[37]. I can think of no reason why the period during which the parties were married in terms of customary law should not be taken into account for the purposes of applying the provisions of s 9(1) of the Act. The parties were after all married to each other during that period and such a marriage could only be dissolved by a decree of divorce granted by a Court.

[38]. Their conversion of that customary marriage regime into a civil marriage – something which s 10(1) of the Recognition of Customary Marriages Act contemplates – did not alter the legal position that they were already married to each other prior to their entering into a civil marriage. That being the case, the duration of the parties' marriage was at least six years at the commencement of the divorce proceedings, and not less than three years, as suggested by the appellant in the notice of appeal and heads of argument filed on her behalf. As and at the date of divorce, the parties had been married for at least eight years.

[39]. That is by no means a very short marriage.

[40]. In oral argument before this Court, Mr Hlatshwayo for the appellant conceded that the parties were customarily married in 2007 but attempted to persuade us to disregard that fact by arguing that the said customary marriage was dissolved by the parties' parents. I find that there is no merit in this argument because a customary marriage can only be dissolved by a Court in terms of s 8 of the Recognition of Customary Marriages Act.

[41]. I therefore find that the trial Court did consider and properly apply its mind to the duration of the parties' marriage.

[42]. The third submission made on behalf of the appellant was that the trial Court did not explain why it ordered that the respondent should only forfeit 20% of his share of the immovable property and pension interest. I find that this submission, although compelling at first blush, amounts to no more than nit-picking. It is clear from the judgment of the trial Court that it favoured a partial forfeiture instead of a total forfeiture. Having done so, it then fell to the trial Court to determine what it considered to be an appropriate portion of the benefit to be forfeited. It determined that the appropriate portion was 20%. It could have made a different determination, such as 25%, 30% up to 49%. Any of them would have been appropriate. It was not necessary for the trial Court to have to explain why it chose 20% and not 25, 30, or 35%. The phrase, 'how long is a piece of string?' comes to mind.

[43]. There is accordingly no merit in the criticism of the approach of the trial Court.

[44]. It is clear from the record and the judgment of the trial Court that it exercised its discretion in this regard judicially and not capriciously, or upon any wrong principle, but for substantial reasons. There is accordingly no basis for interfering with the trial Court's judgment.

[45]. The appeal accordingly falls to be dismissed.

Order

In the result, I make the following order.

(1) The appellant's appeal is dismissed with costs.

S KHUMALO AJ

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

I agree

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	29th and 30th October 2020 – on the Microsoft digital platform
JUDGMENT DATE:	2nd November 2020 – judgment handed down electronically
FOR THE APPELLANT:	Adv MD Hlatshwayo
INSTRUCTED BY:	Hlatshwayo-Mhayise Inc, Vereeniging
FOR THE RESPONDENT:	Adv T Mzizi
INSTRUCTED BY::	Malefo Attorneys, Pretoria