IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

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

(3) REVISED.

CASE NO: A293/18

20/9/2019

In the matter between:

M[….] G[….] C[….] Appellant

and

S[….] R[….] C[….] Respondent

JUDGMENT

TEFFO, J:

Introduction

[1] The respondent (plaintiff) instituted divorce proceedings against the appellant (defendant) in the Regional Court, Pretoria North whereby she sought a decree of divorce and an order for forfeiture of the patrimonial benefits of the parties' marriage in community of property.

[2] The appellant defended the action and filed a plea and a counterclaim

wherein he sought a division of the joint estate.

[3] It was common cause between the parties that their marriage relationship had irretrievably broken down and there were no reasonable prospects of the restoration of a normal marriage relationship.

[4] On 6 June 2018 the Regional Court, Pretoria North handed down judgment in favour of the respondent. The order reads as follows:

> *"It is ordered that the bonds* of *the marriage subsisting between the plaintiff and the defendant be and are hereby dissolved. Forfeiture of the immovable property situated at [….], Gauteng Province, in its entirety."*

[5] The appellant now appeals against the whole judgment of the Regional Court. He contends that the trial court failed to take into consideration his evidence that he brought two motor vehicles into the marriage. The motor vehicles were sold and the proceeds of their sale were used to renovate the matrimonial home of the parties. The trial court failed to give weight to the fact that the respondent was consulted and she consented to the sale of the motor vehicles. It was argued that the respondent's evidence did not suggest that the improvements effected on the matrimonial home by the appellant after the marriage, did not add value to the property and that without any evidence to the contrary, it must be found that the improvements thereof added value to the immovable property.

[6] Further contentions made were that the order of the trial court was incomplete. It only related to the immovable property and was silent on the remainder of the assets that formed part of the joint estate. The order of the court a *quo* was based on the duration of the marriage. It was submitted that the Divorce Act, 70 of 1979 *("the Act")* does not provide guidance as to how courts should go about establishing that a marriage is of long or short duration. The court a *quo* failed to explain what the legislature meant by the phrase *"unduly benefited'.* A submission was made that the trial court simply looked at the length of the marriage and found that the short duration of the marriage warranted an order for forfeiture of the patrimonial benefits, without explaining how the short duration of the marriage would result in one party being unduly benefited if forfeiture was not ordered.

[7] The appeal is not opposed.

Background

[8] The parties met each other in 2009 and got married on 6 January 2011 in community of property. At that time the respondent was the owner of the immovable property situated at [….], Gauteng Province (the matrimonial home) which she bought in 2001. She is an educator and has been paying the bond on the matrimonial property from 2001. She paid it off shortly after her marriage with the appellant in December 2011. She bought the immovable property for R111 000,00 and its value at the time of the divorce was estimated to have been R 300 000,00.

[9] There are no children born from the marriage between the parties.

[10] Both parties are government employees. The appellant has been working for the South African Police Service at the Dog Unit from 1987.

[11] The appellant moved out of the matrimonial home, where he has been residing with the respondent after the marriage, on 14 February 2017.

[12] The appellant brought two motor vehicles into the marriage which have now been sold. A portion of the proceeds of the sale of the motor vehicles has been used to renovate the matrimonial home. During the subsistence of the marriage, the respondent also bought herself a motor vehicle without the financial assistance from the appellant.

The evidence

[13] The respondent testified in support of her case and the appellant testified in defence of his case.

[14] The respondent, Ms S[….] R[….] C[….]testified that the appellant had extramarital relationships which she found irreconcilable with the marriage. From July 2016 the parties never accorded each other conjugal rights. The appellant informed her that he no longer had feelings for her. After her marriage with the appellant, the appellant only put his wedding ring on for two months. When she asked him why he was no longer wearing it, he said it was disturbing him at work. She discovered that the appellant's marital status never changed after their marriage. He regarded himself as either single or divorced as he had previously divorced. At

some point the appellant mentioned to her that he only married her because after his divorce with his previous wife, he did not have a place to stay. His house had been sold. She sought an order that the appellant should not share her house, pension and the other properties that she owned during their marriage.

[15] The appellant, Mr M[….] G[….] C[….] testified that he brought the following properties into the marriage: a television set, a stand, a base, cushions, garden chairs and a fridge. He does not remember the others. He testified that after the sale of the motor vehicles, the money was transferred into his account. He bought tiles, the frames for the bedroom and the garage doors. He changed the boards and there were other renovations. He was charged R20 000,00 for the installation of certain items in the house.

[16] He was chased out of the matrimonial home after the respondent burnt his clothes and the next morning she told him to leave. He went to reside with his sister. He has lost all love and affection for the respondent. The respondent does not like his family and his children from the previous marriage.

The law

[17] Section 9(1) of the Act[1] deals with the aspect of forfeiture. It reads as follows:

> *"When* a *decree of divorce* is *granted on the grounds 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 other party will in relation to the other be unduly benefited."*

[18] The court in *Wijker v Wijker*[2] sets out the following approach to be adopted when hearing a claim for forfeiture of patrimonial benefits of the marriage:

> *"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*

[1] Act 70 of 1979
[2] 1993 (4) SA 720 (A), also reported at (1993) 4 All SA 857 (A)

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 judgement, it is made by the trial court after having considered the facts falling within the compass* of *the three factors mentioned in the section."*

[19] In *Botha v Botha*[3], Van Heerden JA held that the trial court may not have any regard to any factor other than those listed in section 9(1) in determining whether or not the spouse against whom forfeiture is claimed will, in relation to the other spouse, be unduly benefited if such order is not made.

[20] The court in *Wijker* held that section 9 does not provide for the application of the principle of fairness.

[21] The concept *"benefit* was described as follows in *Smith v Smith*[4]*:*

"What the defendant forfeits is *not his share of the common property, but only the pecuniary benefit 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 property* ..."

[22] The court in *Moodley*[5] held that it was of utmost importance that the claimant in respect of a claim for forfeiture, must prove some kind of contribution which exceeds the contribution of the other party towards the joint estate.

[23] In *Engelbrecht v Engelbrecht*[6]*,* the court held that 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.

[24] In *Tlou v Ralebipi*[7] the court found that the parties' marriage of 21 months was of a relatively short duration. It was common cause that the plaintiff wife would be

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[3] 2006 (4) SA 144 (SCA)
[4] 1937 WLD 126 at 127-8, see also *Moodley v Moodley* 2008 SAKHC
[5] *Supra*
[6] 1989 (1) SA 597(C)
[7] 2017 (1) SA 97 (GP)

"*benefited"* within the terms of the Act if the matrimonial property was equally divided. The defendant husband had made a significantly larger contribution to the joint estate compared to the plaintiff wife in respect of the assets he brought into the marriage and accumulated during its existence. The court had to determine if the benefit was *undue".* It took into account the South African Concise Oxford Dictionary's definition of *"undue"* as unwarranted or inappropriate because excessive or disproportionate and held that if one considered the duration of the marriage, reflections on what might be proportionate were valid and appropriate in deciding whether a benefit was due or not. The court further held that in circumstances where the other factors relating to substantial misconduct and the circumstances giving rise to the breakdown of the marriage were not decisive in determining whether a benefit was undue, the consideration of a fault - neutral factor such as the duration of the marriage should be based on considerations of proportionality. Generally, it followed that, in deciding whether a benefit was undue, a court was more likely to make such a determination where the marriage was of short duration, as opposed to circumstances where the marriage was of a long duration. The longer the marriage, the more likely it was that the benefit on dissolution would be due and proportionate, and, conversely, the shorter the marriage, the more likely the benefit would be undue and disproportionate.[8]

[25] In *Swanepoel v Swanepoel,*[9] the court held that a marriage in community of property which was concluded on 15 December 1990, where one of the parties left the common home on 4 June 1995, was of a short duration. Similarly, in *Malalji,*[10] where lobola was paid for the defendant during October 2001, the parties married in community of property on 14 February 2002 and the defendant left the common home during June 2003, the marriage was held to be of short duration.

Analysis

[26] The court a *quo* was not impressed with the evidence that was presented by both parties. It remarked that the evidence was lacking and it had to dig certain information from the parties as they were testifying. Save to mention that the evidence of the respondent mainly revolved around what happened during the

[8] See also *Klerck v Klerck* 1991 (1) SA 265 (W)
[9] 1996 (3) All SA 444
[10] (23124/2003) [2005] ZAGPHC 142 (4 February 2005)

subsistence of the marriage, the court a *quo* did not make credibility findings in respect of the evidence that was presented before it.

[27] It appears from the record of the proceedings in the trial court that the following evidence of the appellant was not put to the respondent when she testified: That the appellant and the respondent bought properties of the household together. In addition to the motor vehicles he brought into the marriage, he also brought some furniture. The two motor vehicles were sold for R40 000,00 and this money was utilised towards the renovation of the matrimonial home. This evidence was presented in the face of the evidence of the respondent to the effect that only a portion of the proceeds of the sale of one motor vehicle was used for the renovations of the matrimonial home.

[28] In the main the evidence of the appellant and the respondent was common cause. The criticisms levelled against their evidence by the court a *quo* are valid in that the respondent could not tell the trial court the value of the furniture that was in the matrimonial home at the date of divorce together with the value of her pension. The appellant could also not give the trial court the value of the motor vehicles and the furniture he testified he had brought into the marriage. All what was before the trial court was that the two cars which were a Toyota Yaris and a Corsa were sold for R40 000,00. The evidence is not clear as to how much of the R 40 000,00 was used in the renovations save to say that R20 000,00 was paid for certain installations that were made to the matrimonial home.

[29] It is common cause between the parties that the respondent has made a significantly larger contribution to the joint estate compared to the appellant. It was not disputed that the improvements to the house enhanced its value. Although the trial court was not told about the appellant's pension, counsel for the appellant conceded that the pension of the appellant was also a patrimonial benefit of the marriage in community. Having considered the approach to be adopted when dealing with a claim for forfeiture of the patrimonial benefits of the marriage as enunciated in the *Wijker* matter,[11] and the fact that the parties did not contribute equally in the marriage, I am of the view that factually the appellant will be benefited in the event of a division.

[30] The next and most significant enquiry that should have followed is whether,

having regard to the duration of the marriage, the circumstances giving rise to its breakdown and any substantial misconduct on the part of the parties, such a benefit will be an undue one. This is a value judgement.

The duration of the marriage

[31] The parties were married to each other in January 2011. Already in July 2016 there were problems. The defendant left the matrimonial home in February 2017.

[32] The Act does not provide guidance as to how courts should go about establishing that a marriage is of either long or short duration. It is left to the courts to make their own pronouncement based on the facts of each case. Having considered the cases referred to *supra* and the facts in the present matter, I am of the view that the court a *quo* was correct in concluding that the marriage in the present matter was of a short duration.

The circumstances that gave rise to the breakdown of the marriage

[33] The court a *quo* did not find it necessary to deal with this aspect. It took into account that it was not necessary for all the three factors listed in section 9(1) of the Act to be present before a forfeiture order is granted. Without finding any fault on the decision of the court a *quo,* I am of the view that lack of trust and unhappiness led to the breakdown of the marriage and both parties are to blame.

Substantial misconduct

[34] For the same reasons, the court a *quo* did not make any findings with regard to this aspect.

Whether the appellant will be unduly benefited

[35] In determining whether a benefit will be undue, the court in *Wijker*[12] cautioned that the equitable principles of fairness cannot be used to justify an order of forfeiture as it runs counter to the basic concept of community of property. Without defining what an undue benefit would constitute, the court pointed out however that in determining whether the benefit was undue, regard must be had to the three factors

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[11] *Supra*
[12] *Supra*

set out in section 9(1).

[36] I align myself with the views of Kollapen J as articulated in the *Tlou v Ralebipi* matter.[13] Having taken into account the definition of *"undue"* and the court's decision that in circumstances where the other factors relating to substantial misconduct and circumstances that led to the breakdown of the marriage were not decisive in determining whether a benefit was undue, the consideration of a neutral fault factor such as the duration of the marriage should be based on considerations of proportionality, I conclude that the appellant will be unduly benefited if the order for forfeiture is not made. I do not agree that the court *a quo* did not take into account the contribution made by the appellant in respect of the two motor vehicles which he brought into the marriage. The contribution was in my view very minimal as compared to the contribution made by the respondent.

[37] The trial court appears to have granted an order of partial forfeiture of the benefits of the marriage *in* favour of the respondent. The order is incomplete in that it only relates to the matrimonial home and does not deal with the remainder of the assets of the *joint* estate . The appropriate order under the circumstances should have been a forfeiture of the patrimonial benefits arising out of the immovable property situated at no. [….], Gauteng Province, the plaintiff's pension and her motor vehicle. to wit, a Hyundai. The defendant should keep his pension and each party should keep movable properties in his/her possession.

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

1. The appeal is dismissed.
2. The order of the court a *quo* is confirmed and supplemented with the following order:

"2.1. It is ordered that the bonds of the marriage subsisting between the plaintiff and the defendant be and are hereby dissolved.

2.2. It is ordered that the defendant forfeits the patrimonial benefits arising out of the immovable property situated at no. [….], Gauteng Province, the plaintiff's pension and her motor vehicle, to wit, a Hyundai. The defendant should keep his pension and each party should keep movable properties in his/her possession.

2.3. There is no order for costs."

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

M TWALA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the appellant	**N Muleya**
Instructed by	**Makwarela Attorneys**
Heard on	**22 August 2019**
Handed down on	**20 September 2019**

[13] *Supra*