REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

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

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

(3) REVISED

CASE NO: HCA26/2020

In the matter between:

M[....] F[....] K[....] **APPELLANT**

And

S....] C[....] N[....] **RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The appellant and respondent were married to each other by customary union on 15th December 2012. This was the appellant's second marriage. At the time of the marriage of the two parties, the respondent had two children from her previous relationship. There are no children born of the marriage between the appellant and respondent.

[2] On 4th October 2017 the respondent instituted a divorce action against the appellant seeking (a) a decree of divorce; (b) division of the joint estate; (c) that 50% of the pension interest due or assigned to the appellant up to the date of divorce be paid to the respondent within 30 days after the court grants a decree of divorce; (d) that an endorsement be made on the records of the relevant pension fund by the appellant; (e) and that the Government Employees Pension Fund (GEPF) be ordered to pay an amount equal to 50% of the value as on date of divorce to the appellant within 30 days after the date on which the final decree of divorce was granted.

[3] The appellant had defended the plaintiff's action, and had also filed a counterclaim to the respondent's particulars of claim. In his counterclaim the appellant is seeking orders (a) that the decree of divorce be granted; (b) that the patrimonial benefits of the marriage in community of property be forfeited by the respondent in favour of the appellant to wit: (i) the appellant's interest in GEPF; (ii) the immovable property known as erf [….], Polokwane; and (iii) the immovable property known as [….], Polokwane.

[4] The matter came before Ngobeni JT in the regional court Polokwane who granted the following orders: (a) dissolved the bonds of marriage subsisting between the appellant and respondent; (b) equal division of the movable and immovable assets of the joint estate which includes the immovable assets

situated at [….], Polokwane and […..], Polokwane; (c) that GEPF pay 50% of the pension interest of the appellant calculated from date of marriage being the 15th December 2012 to 26th October 2020 within sixty days of the date of divorce; (d) no order as to spousal maintenance; (e) that if the parties are unable to divide their joint estate with the assistance of their legal representatives, an application for appointment of a liquidator be brought.

[5] The appellant is appealing against the judgment and orders (b), (c) and (e) granted by the regional magistrate. Order (b) provides for equal division of both immovable and movable assets; order (c) provides for partial forfeiture the pension interest by the respondent; and order (e) provides for appointment of a liquidator in case the parties are unable to agree on the division of their joint estate. The respondent had also lodged a cross appeal against the judgment and order (c).

[6] The appellant's grounds of the appeal are that the respondent will be unduly benefited if a forfeiture order is not made in his favour due to the significant larger contribution made by him, compared to the respondent, with respect to the assets brought into marriage and accumulated during its short existence. According to the appellant, the court *a quo* should have ordered a forfeiture of the two immovable properties the appellant brought into the joint estate as well as the respondent's 50% share in the appellant's pension interest. The respondent's ground for her cross appeal is that the court *a quo* erred in making a partial forfeiture of the appellant's pension interest, but should instead have made an order that she share the appellant's pension interest from date of contribution to GEPF.

[7] The facts to this case are briefly as follows. When the appellant and respondent married each other, the respondent was employed as a human resource officer at Medi Clinic Tzaneen which employment was terminated during December 2013 and the respondent was paid R168 074.00. The assets which the respondent brought into their marriage were a Nissan Livinia motor vehicle which she was still paying; her pension benefit of R168 074.00; and furniture.

[8] The appellant bought into their marriage the immovable property situated at [….], Polokwane valued at R400 000.00 as at date of divorce; the vacant stand situated at [….], Polokwane which he bought during 2007 for R285 285.00; his pension interest at GEPF with resignation value of R2 829 166.00 at the time of trial; two vehicles to wit a Toyota and Audi; furniture and his savings.

[9] During March 2013, the appellant and the respondent started building their house [….], Polokwane. According to the appellant, he was using his savings to build the house, and during December 2013 he took a second bond over the Shaluka Plains property of R344 000.00 which money he used to build the house in Serala View. Further that he paid the said bond throughout their marriage.

[10] On 29th January 2014 the respondent registered her own company which won a R201 000.00 tender at Correctional Services Polokwane. From 1st November 2014 to 31st May 2017 the respondent was employed at [….] in Pretoria. During 2015 the parties moved to their house in [….]. On 31st March 2016 the parties concluded an ante-nuptial contract in terms of which the accrual system was excluded which ante-nuptial contract was registered on

22nd April 2016. However, their marital regime was never changed and it remained a marriage in community of property. On 31st May 2017 the respondent was retrenched from her employment and was paid a retrenchment package of R61 031.25. The respondent vacated their matrimonial home on 3rd September 2017, and instituted divorce proceedings on 4th October 2017.

[11] The appellant had submitted that the respondent's contribution to [….] property is next to nothing, whilst she did not contribute anything towards the [….] property. It is therefore the appellant's submission that if the court compares the assets that the appellant had brought into the marriage with the assets brought by the respondent, it is clear that the respondent will unduly benefit from the marriage in community of property if forfeiture order is not made.

[12] The respondent's version is that when she and appellant got married, she was employed at Tzaneen Medi Clinic. She was dismissed by the Medi Clinic during October 2013 wherein she referred her dismissal dispute to the CCMA. She won her dismissal dispute at the CCMA and was given an option to either return to work or to take the package. The appellant advised and encouraged the respondent to take the package of which she did. On receipt of the payment of her package, the respondent and the appellant agreed that the respondent will continue to pay the instalment of her car, buy groceries and also assist in buying building materials for the house that they have started building at [….] during March 2013. According to the respondent, the people who were building their house in [….] were paid by cash and on payment day

the appellant will call her, and she would give the appellant money for the builders, and sometimes she will deposit it into the appellant's credit card.

[13] According to the respondent her relationship with the appellant started to deteriorate 5th February 2016 after the passing of the first wife of the appellant's father. The respondent saw the appellant's ex-wife assisting with the funeral arrangements, and when she reported that to the appellant, the appellant told her that there was nothing wrong with that. That the appellant started to come home after midnight, and when he arrives, he would wake up the respondent and started insulting her. That led to the respondent leaving their common home and going back to her parental home.

[14] The respondent had submitted that no other factors, other those provided for in section 9(1) should be taken into account in determining whether forfeiture should be ordered or not. Further that the court *a quo* had used wrong facts in finding that the appellant had already shared his pension interest with his ex-wife, and that if indeed the appellant had already shared his pension interest with his ex-wife, the court *a quo* should have made an order for 50% of the pension interest minus the amount already paid to the ex-wife.

[15] The court *a quo* in ordering equal share of both movable and immovable assets, found that a marriage in community of property is a universal economic partnership of the spouses, and that 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. Even though the court *a quo* found that the marriage of the parties was for short duration, held that there was no evidence that the respondent entered into the marriage with the appellant to just benefit, or to just get a share from the property of the

appellant. Further that there is no evidence that when the respondent was away from the common home for work purposes, she committed acts of substantial misconduct which harmed their joint estate.

[16] The court *a quo* accepted that the appellant had contributed more in building the house at [….], but that did not necessarily mean that the respondent must not benefit because of that. With regard to [….] property, the court *a quo* found that after the parties have moved into the [….] property, they rented that property and the rental paid contributed towards the bond repayment of that property. The court *a quo* found that both parties were entitled to equal shares from the proceeds from the two properties, as there was no benefit above the ordinary that was shown to exist.

[17] With regard to the appellant's pension interest, the court *a quo* found that the appellant was a contributor to GEPF even during the subsistence of his marriage with his ex-wife. That the undisputed evidence is that at the time of divorce to his ex-wife, in the distribution of their joint estate, that pension interest was also considered and they reached a settlement concerning division of their joint estate. The court *a quo* found that it will be inappropriate for it to subject that portion of the pension interest of the appellant to another distribution. The court *a quo* concluded that it will be appropriate if the respondent must only share in the pension interest of the appellant from the date of their marriage to date of divorce.

[18] The appellant is seeking total forfeiture arising from the marriage in community of property by the respondent, whilst the respondent is seeking equal division of the assets of the joint estate including the appellant's pension interest held at GEPF. This court is called upon to determine whether the court *a quo* was

correct in awarding equal division of the joint estate on the parties movable and immovable assets instead of a forfeiture by the respondent; the appointment of a liquidator in case the parties were unable to divide the assets of their joint estate, and whether the court *a quo* had exercised its discretion correctly in making an order of partial forfeiture of the respondent's share in the appellant's pension interest.

[19] It is trite that the granting of a forfeiture order is in the discretion of the court and the test is whether one party will be unduly benefited if such an order is not made. In terms of section 9(1) of the *Divorce Act*[1], the factors which a court must consider in exercising its discretion are (i) the duration of the marriage or civil union; (ii) the circumstances that gave rise to the break-down of the marriage or civil union; and (iii) any substantial misconduct on the part of either of the parties.

[20] In *Botha v Botha*[2] van Heerden JA said:

> "The three factors governing the value judgment to be made by the trial Court in terms of s 9(1) thus fall within a relatively narrow ambit: they are limited to (a) duration of the marriage; (b) the circumstances which gave rise to the breakdown thereof; and (c) any substantial misconduct on the part of either of the parties. Conspicuously absent from s 9 is a catch-all phrase, permitting the Court, in addition to the factors listed, to have regard to 'any other factor'. (Compare, in this regard, the wording of s 7(2) of the Divorce Act dealing with the maintenance orders upon divorce which, apart from the fact that the list of relevant factors is significantly longer, also entitles the Court to have regard to 'any other factor which in the opinion of the Court should be taken into account'. So too, in terms of s 7(5), the list of the factors which must be taken into account by a Court in the determination of which assets should be transferred by one spouse to the other upon divorce, when the circumstances set

[1] 70 of 1979
[2] 2006 (4) SA 144 (SCA) at para 8

out in ss 7(3) and (4) justify the making of which such a 'redistribution order', also expressly includes 'any other factor which should in the opinion of the Court be taken into account'.) The trial court may therefore not have regard to any other factors other than those listed in s 9(1) in determining whether or not the spouse against whom the forfeiture order is claimed will, in relation to the other spouse, be unduly benefited if such order is not made."

[21] It is trite that it is not a requirement that all the three listed factors should be cumulatively present before a forfeiture order is granted. The appellant is relying on the duration of the marriage, and has submitted that the respondent will be unduly benefited if a forfeiture order is not made in his favour due to the significant larger contribution made by him, with regard to the assets he brought into marriage and those accumulated during its short existence, compared to that of the respondent.

[22] It is not in dispute that the marriage between the appellant and respondent was for a short duration of time and that the appellant had contributed more towards their joint estate than the respondent. In *Wijker v Wijker*[3] van Coller AJA said:

"The only remaining factor which persuaded the Court a quo to grant the forfeiture order is that it was considered unfair that the appellant should share in the company and its assets while he had made hardly any contribution towards its management, administration and profit making. The finding that the appellant would be unduly benefited if a forfeiture order was not made, was therefore based on a principle of fairness. It seems to me that the learned trial Judge, in adopting this approach, lost sight of what a marriage in community of property really entails. HR Hahlo in The *South African Husband and Wife* 5th ed at 157-8 describes community of property as follows:

[3] 1993 (4) SA 720 (A) at 731C-H

'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, held equal shares.'

The fact that the appellant is entitled to share in the business established by the respondent is a consequence of their marriage in community of property. In making a value judgment this equitable principle applied by the Court *a quo* is not justified. Not only is it contrary to the basic concept of community of property, but there is no provision in the section for the application of such a principle. Even if it is assumed that the appellant made no contribution to the success of the business and that the benefit which he will receive will be a substantial one, it does not necessarily follow that he will be unduly benefited. Compare *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) at 601F-G. The benefit that will be received cannot be viewed in isolation, but in order to determine whether a party will be unduly benefited the Court must have regard to the factors mentioned in the section. In my judgment the approach adopted by the Court *a quo* in concluding that the appellant will be unduly benefited should a forfeiture order not be granted was clearly wrong."

[23] It is highly unlikely that the parties in a marriage in community of property will be able to contribute equally towards their common estate. Each party will contribute according to his/her financial means. The one who is financially well off will always contribute more. The parties' contribution towards their common estate will therefore not on its own be determining factor to grant a forfeiture order. There must be other factors associated with that that will make the other party to unduly benefit. The determining factor is whether a party will unduly benefit, and not that he/she should not benefit.

[24] The appellant was employed in a position that made him to earn more that the respondent. When the appellant and the respondent got married to each other, the respondent was employed at Tzaneen Medi Clinic which was a position not equivalent to that of the appellant. There is no evidence that when

the parties married each other, they were married for positions which they held at their workplace or in society. It therefore follows that since the appellant was the one with a better financial muscle and have also acquired more before their marriage will contribute more. There is no evidence that the respondent when she entered into the marriage with the appellant, her intention was to benefit from the appellant. The intention of both parties was to see their marriage work and growing old together.

[25] After the respondent was dismissed from her employment at Tzaneen Medi Clinic, she won her unfair dismissal case at the CCMA and was given the option for reinstatement or taking a package and leave her employment. The appellant is the one who encouraged the respondent to take a package and leave her employment at Tzaneen Medi Clinic. When the appellant encouraged the respondent to that, he was quite aware that the respondent had no other alternative employment and was to stay at home and he will be the one who will be taking care of her and all the household necessities. By leaving her employment, the respondent was paid her pension benefit. The appellant was still employed growing his pension interest whilst the respondent could no longer grow her pension interest as a result of the appellant's encouragement. By encouraging the respondent to take a package and leave her employment, the appellant acknowledged that despite been unemployed, the respondent will in kind also contribute towards their common estate.

[26] The merge pension benefit which Medi Clinic had paid the respondent was a contribution which the respondent had brought into the common estate which was commensurate with the respondent's financial muscle. That was merged

with what the appellant had brought into the marriage to form a universal economic partnership of the parties. Minimal as the respondent's pension interest was, part of it was used to build the house in Serala View. Since the respondent was by then out of employment, it would not have been easy for her to obtain a loan to contribute in building the Serala View house at a reputable institution, and what she had contributed from her pension benefit was what she could afford. Her contribution had also enhanced the parties' common estate.

[27] After the parties' have moved into the Serala View property, they let out the Shaluka Plains property and the rental money was used to service its bond. The parties were now jointly entitled to the proceeds from renting out the property, and by using that rental money to pay the bond, they were jointly enhancing their common estate. That is another form of contribution by the respondent towards their common estate.

[28] It is not in dispute that before the appellant was married to the respondent, had divorced. His pension interest had also formed part of the joint estate with his ex-wife. The court *a quo* took into consideration that the appellant's pension interest had already being subjected to division with his ex-wife. Basically what this entails is that the respondent had taken over from where the ex-wife had left. I don't find any reason to fault that approach, since by paying his ex-wife, a debt against the appellant's pension interest was created, and will only be seen at the time when the appellant is paid his pension interest.

[29] Even though the marriage of the parties was for short duration, the court *a quo* had considered what both parties have brought into their marriage and what

they contributed during the subsistence of their marriage and decided to make an order for equal division of all the movable and immovable assets of the parties' joint estate. With to the appellant's pension interest, the court *a quo* took into consideration that it had already been subjected to division with the appellant's ex-wife, and that it had left a hole in the appellant's pension interest which the appellant will feel when the pension interest was paid. In my view, there is nothing to fault the court *a quo's* approach in making an order of equal division of the parties' movables and immovable assets. The court *a quo* had also properly exercised its discretion in making a partial forfeiture order in relation to the respondent's share of the appellant's pension interest.

[30] Turning to the appointment of a liquidator, it is always in the interest of the parties that if they are unable to share the joint estate on their own, or through the assistance of their legal representative, a liquidator be appointed. I don't find anything wrong with the court *a quo* making this order. It follows that the appellant's appeal and respondent's cross appeal stands to fail. Neither party was successful in their appeal and it will be appropriate if each party pays his/her own costs

[31] In the result I make the following order:

31.1 Both appeal and cross appeal are dismissed.

31.2 Each party to pay his/her own costs

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

KGOMO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the appellant	**: MC DE Klerk**
Instructed by	**: DDKK Attorneys Inc**
Counsel for the respondent	**: NHK Mabapa**
Instructed by	**: Keneilwe Mabapa Inc**
Date heard	**: 28th August 2021**
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