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**IN THE HIGH COURT OF SOUTH AFRICA**

**[EASTERN CAPE DIVISION – MTHATHA]**

**Case No.: CA30/2023**

**In the matter between:**

V[...] L[...] G[...]

Appellant

and

T[...] P[...] M[...]

Respondent

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**APPEAL JUDGMENT**

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**HINANA AJ:**

**Introduction**

[1] This is an appeal involving parties who were married to each other in community of property on 17 January 1991 at Bizana. On 07 January 2022, the appellant served divorce papers on the respondent. The parties divorced and the decree of divorce was granted by the Regional Court Magistrate on 01 February 2023.

[2] In his order, the Regional Magistrate held that:

*“[24] In the result, I make the following order:*

- 1. The degree of divorce is granted.*
- 2. Division of joint estate.*

3. *Each party to retain insurance policies, investments and debts in his or her name.*
4. *The common home situated at Mt Zion is awarded to the defendant.*
5. *Each party to retain his / her pension interest.*
6. *Each party to pay his / her own costs”.*

[3] The appellant was not satisfied with the judgment of the Regional Magistrate and as a result, filed a notice of appeal. The grounds of appeal are very long and were not argued before this Court except one ground which dealt with the forfeiture of benefits. Consequently, I shall not deal with the lengthy grounds of appeal except the one argued before this Court.

#### Argument before court

[4] Only the appellant’s counsel presented argument in this court. There was no appearance on behalf of the respondent. Mr Nonkelela’s submissions only related to the misdirection of the magistrate in relation to the forfeiture of benefits arising out of the marriage. He submitted:

*“(7) The learned magistrate misdirected himself when granting an order for forfeiture because the respondent prayed for it on the bases that she was aware that during the subsistence of the marriage, they, appellant and respondent have been enjoying the pensions/provident funds of the appellant as he would usually lose jobs -now and again.”*

[5] The evidence placed before the court *a quo* and the pleadings are very important for the determination of the issues. In brief, the evidence shows that:

*“5.1 The respondent was not opposed to the divorce action instituted by the appellant. The respondent testified that she was opposed to the 50% pension interest. She further stated that appellant did not participate in the building of the joint estate. The parties separated because the appellant married another woman with the consent of the respondent. According to the respondent, the appellant did not contribute anything and also that the appellant failed to take care of the children.*

*5.2 The appellant disputed some of the allegations from the respondent and the former testified. The appellant testified that she one hired a TLB to level the site where they intended to build a house. The house was built and they fenced the premises. The children were residing with the respondent’s mother at Mbaleni. In an effort to be responsible, the appellant was employed by a company called Aries This was after he had been with Tony Trucking. When the appellant lost his job, he got some monies to buy the material and he further was driving a truck owned by his cousin. His cousin would pay him and this payment assisted in the building of the house.”*

## Analysis

[6] In order for a court to grant an order for forfeiture of marital benefits, there must be cogent evidence placed before court in order for the court to conclude that there was substantial misconduct.

[7] In *Engelbrecht v Engelbrecht*<sup>1</sup> it was held that:

*“Joint ownership of another party'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 property 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 was undue. Unless it is proved (and the burden of proof rests on the party who seeks the forfeiture order) what the nature and extent of the benefit was, 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 factors which may be brought into consideration in deciding on the inequity thereof. In this connection, it should be borne in mind that misconduct and gross unreasonableness do not always go hand in hand. Although it appears as if the Legislature wanted to limit the Court's discretion as to the granting of a forfeiture order, and did not intend to authorise the Court to take cognisance of the same wide-ranging considerations as those which section 7(3);(4);(5) and (6) (where parties are married out of community of property), with reference to the transfer of assets from one party to the other, permits, the Legislature did not intend to elevate fault, in the granting of a forfeiture order, so prominently above other considerations. It could lead to the advantages of a no-fault divorce system being eroded by disputes over fault on the division of the estate.”* (My emphasis.)

[8] When dealing with proof of substantial misconduct in *Wijker v Wijker*<sup>2</sup> the court held that:

*“To determine whether a party would be unduly benefited, a trial court would certainly not be exercising a discretion in the narrower sense. Here too no choice between permissible alternatives is involved. In considering the appeal this Court is therefore not limited by the principles set out in Ex parte Neethling (supra) and it may differ from the court a quo on the merits. It is only after the court has concluded that a party would be unduly benefited that it is empowered to order a forfeiture of benefits, and in making this decision it exercises a discretion in the narrower sense. It is difficult to visualize circumstances where a court would then decide not to grant a forfeiture order.”*

The facts in *Wijker*'s case cannot and must not be read in isolation but must be cumulatively considered.

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<sup>1</sup> 1989 (1) SA 597 (C) at pp 598-9: The judgment is in Afrikaans and I could not access an English translation and therefore reliance is placed on the headnote.

<sup>2</sup> 1993 (4) SA 720 (A) at pp 727-8.

[9] When the court is considering whether any party to a marriage would be unduly benefited, the factors enlisted in the Divorce Act<sup>3</sup>, should be taken into account. These are:

- (a) The duration of the marriage;
- (b) The circumstances that gave rise to the breakdown of the marriage.
- (c) Any substantial misconduct on the part of either of the parties and that undue benefit may accrue to the one party in relation to the other, if an order of forfeiture is not granted.

[10] In *Botha v Botha*,<sup>4</sup> the court held that a trial court may not have regard to other factors other than those listed in the Divorce Act.

[11] The *onus* is on the person or party seeking forfeiture to demonstrate that the other party will unduly benefit if forfeiture is not ordered.

#### Evaluation of Evidence

[12] It is important to mention that the appellant contributed to the joint estate and to the welfare of their children. This is so even though the respondent disputed that the appellant contributed. After the respondent had left the marital home, the appellant's family visited the respondent's family in order to ask for the reasons why the respondent had left. That meeting did not yield any positive results.

[13] The respondent contended that she could not stay in a polygamous marriage. According to the respondent, the appellant married another wife without the respondent's permission.

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<sup>3</sup> 70 of 1979 section 9(1).

<sup>4</sup> 2006 (4) SA 144 (SCA); [2006] 2 All SA 221 (SCA).

[14] In *Engelbrecht* case,<sup>5</sup> the court further held that:

*“In order to succeed a party who seeks a forfeiture order must first establish what the nature and extent of the benefits were:- unless this is done, the court cannot decide if the benefit was undue or not. Hence, only when the nature and extent of the benefit have been proved is it necessary to analyze the three factors which may be considered in deciding whether it will be equitable to order a forfeiture of benefits.”* (Omitted footnotes.)

[15] I am not satisfied that the appellant committed substantial misconduct as stated earlier, he materially contributed to the education of his children, took steps to save his marriage by making means to “bring back his wife to their marital home.”

[16] The Regional Magistrate found that the respondent had made out a case for forfeiture of benefits arising out of marriage. He also found out that if the plaintiff were to get 50% from the defendant’s pensions he would be unduly benefited.

[17] The Regional Magistrate identified, *inter alia*, the fact that the appellant had children out of wedlock and the effect that his actions had on the respondent’s health, as factors that put a strain on the marriage. Those are the factors that led to the breakdown of the marriage but they do not, according to evidence, constitute sufficient basis to warrant forfeiture of benefits flowing from their marriage regime. It is common cause between the parties that when they were planning to build the marital home they apportioned financial responsibilities in that the appellant bought bricks and the respondent bought iron sheets. That is just one of the contributions that the appellant made towards the joint estate. The finding that if the forfeiture was not ordered he would unduly benefit is not consistent with those common cause facts. It follows therefore that in this regard the Regional Magistrate misdirected himself and this court is, accordingly, at large to interfere with the decision of the Regional Magistrate.

[18] In *Z v Z*<sup>6</sup>, Legodi J dealt with the phrase “undue benefit” in terms of section 9 (1) of the Divorce Act and said:

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<sup>5</sup> *Engelbrecht* (note 4 above).

*“Cumulative consideration of all relevant factors seem to be at play in terms of subsection (1), and the court will make an order only when is satisfied that, if an order for forfeiture is not made, the one party ('guilty party') will unduly be benefited in relation to the other party ('the innocent party'). It is an exercise of a discretion guided by consideration of the duration of marriage, the circumstances which gave rise to the breakdown and any substantial misconduct on the part of either of the parties.*

*It is clear from the wording of the subsection that to qualify for forfeiture, based on misconduct, such misconduct must be "substantial". I understand this to mean that, it must not only be a misconduct which does not accord with the marriage relationship, but also that the misconduct must be serious. Undue benefit in my view, is also a relative term. Benefiting from one spouse's sweat, in my view, would not necessarily amount to undue benefit. To come to the conclusion of undue benefit, one would be guided by a number of factors for example, refusal to work when it is possible to do so, squandering of money and other assets of one's estate and other factors on the handling of the estate which is prejudicial to the other spouse. It is not in my view, any circumstance which can give rise to the breakdown which will result in a substantial misconduct to justify forfeiture. A particular circumstance may be enough for irretrievable breakdown of marriage relationship, but not necessarily sufficient to be categorized as a substantial misconduct to justify a forfeiture.”*

[19] In *Tsebe v Tsebe*<sup>7</sup>, the court found that Mr Tsebe had committed substantial misconduct in that he used the pension payment solely for himself only to the exclusion of the joint estate and his wife. This seems not to be the case in *casu*.

### Conclusion

[20] In my view, the circumstances of this case do not justify forfeiture by the appellant and therefore, the appeal must succeed.

[21] **In the result, the following order is made:**

- 1. The appeal is upheld.**
- 2. The decision of the Regional Court Magistrate ordering forfeiture of benefits by the appellant is set aside and substituted with the following:  
There shall be a division of the joint estate.**
- 3. Each party shall pay its own costs.**

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**M.N HINANA**

**ACTING JUDGE OF THE HIGH COURT**

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<sup>6</sup> (43745/13) [2015] ZAGPPHC 940 (18 September 2015) at paras 6-7.

<sup>7</sup> (39138/2014) [2016] ZAGPPHC 575 (24 June 2016).

**I agree.**

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**T.V NORMAN**

**JUDGE OF THE HIGH COURT**

**APPEARANCES**

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**NO APPEARANCE FOR THE RESPONDENT**

**Date heard 17 May 2024**

**Date delivered 30 May 2024**