

SOUTH AFRICA / JUDGMENT

M.C.M v M.S.M (Appeal) (HCA16/2024)

[2025] ZALMPPHC 153 (11 August 2025)

[2025] ZALMPPHC 153**COURT**

Limpopo High Court, Polokwane

BEFORE

Naude-Odendaal, J.D. Stroh

CASE / FILE NUMBER

HCA16/2024

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(LIMPOPO****DIVISION, POLOKWANE)****CASE****NO: HCA16/2024****(1) REPORTABLE: YES/NO****(2)****OF INTEREST TO THE JUDGES: YES/NO****(3)****REVISED: YES/NO****SIGNATURE:**

Naude-Odendaal J

DATE:

11/08/2025

In

the matter between: -

M[...]

C[...] M[...] APPELLANT

And

M[...]

S[...] M[...] RESPONDENT

JUDGMENT

NAUDE-ODENDAAL J:

[1] This is an appeal against part of the Judgment and Order on 16 May 2024, by Magistrate Motubatse MJ of the Regional Magistrate's Court of Mahwelereng in which the Magistrate granted forfeiture of the Respondent's pension interest in the Government Employees Pension Fund (GEPF) in a divorce action.

[2] The court a quo made the following order:-

"1. That the bonds of marriage subsisting between the Plaintiff and the Defendant be and are hereby dissolved.

2. Division of the joint estate.

3. Total Forfeiture of the Plaintiff's Pension Benefits by Defendant.

4. That the matter of maintenance for the minor children is referred to the Maintenance Court.

5. Each party to pay his/her own costs."

[3] The Respondent did not oppose the Appeal and Mr. G. Segwane appearing on behalf of the Respondent informed the court that the Respondent will abide by the appeal court's decision.

[4] The Appellant submitted that the court a quo misdirected itself in law, in respect of making a finding that the infidelity is a ground for forfeiture, regard being had to the plethora of trite authorities to the effect that the granting of an order of forfeiture is commenced by the financial enquiry that has been pleaded and proved by the Respondent, to demonstrate the financial misconduct committed by the Appellant to sustain forfeiture. It was submitted that in the present case, there is no financial misconduct that was committed by the Appellant for the court to grant forfeiture. Further, there is no evidence that the Appellant ever squandered assets of the joint estate. It was further submitted that the Magistrate misdirected himself in law in that how the Appellant will use her assets post-divorce is not a consideration for purposes of granting an order for forfeiture.

[5] The Appellant further submitted that the Magistrate erred in finding that the Appellant will squander 50% of the pension interest with her alleged boyfriend, regard being had to the following:-

5.1 There was no evidence that the Appellant is still in a romantic relationship with the alleged boyfriend to such an extent that the court would make a finding that the Appellant will spend part of the pension, with a person that the court is not sure exists, at the time the finding was made;

5.2 There was no evidence placed before the court a quo that the Appellant will squander the 50% pension with the alleged boyfriend post the decree of divorce.

5.3 Notwithstanding that it is in dispute that the Appellant spend money on the alleged boyfriend, there was no evidence that the Appellant spent the Respondent's money on the alleged boyfriend to sustain the finding by the court a quo that the Appellant will spend money on the alleged boyfriend.

5.4 The Magistrate failed to account how the Appellant will be unduly benefitted if forfeiture is not granted in favour of the Respondent.

[6] The Appellant further submitted that the Magistrate erred in failing to give due regard to all the evidence that was placed before the court, regard being had to the following:-

6.1 The Appellant contributed to the joint-estate of the Appellant and Respondent;

6.2 The Appellant was at all relevant times staying at her parental home, pursuant to leaving her marital home;

6.3 The Respondent was abusing the Appellant, instructively the Magistrate should have equipoised the abuse suffered by the Appellant versus the Appellant's misconduct of giving birth out of wedlock.

[7] The Appellant submitted further, that the Magistrate erred in finding that giving birth out of wedlock by the Appellant was a substantial misconduct which necessitated the grant of forfeiture of the Respondent's pension interest held by the Government Employees Pension Fund (GEPF) by the Appellant, regard having had to the fact that it is trite that infidelity is not a ground for forfeiture, instructively, bearing children out of wedlock is a by-product of infidelity, and hence on its own it cannot be a ground for forfeiture.

[8] From the Appellant's submissions and grounds of appeal, it is clear that the appeal is in fact only against the order for total forfeiture of the Respondent's pension benefits by the Appellant.

[9] Section 9(1) of the Divorce Act, 70 of 1979 provides:

"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 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 benefitted." (Own emphasis added)

[10] In *T.S v M.L.S* (5483/2022) [2024] ZAGPPHC 289 (19 March 2024) at paras 10 to 13, the following was stated:-

"[10] The dissolution of marriage by divorce is governed by the Divorce Act. The general rule is that when a marriage in community of property dissolves by divorce, the parties in that marriage share equally in the joint estate. The Divorce Act, however, provides for forfeiture of patrimonial benefits. It means that in certain circumstances a court may make an order that makes one of the parties not to share equally in the joint estate. The purpose of forfeiture is said to be to ensure that a person does not benefit from a marriage, which they have intentionally broken down. The court may order that a blameworthy party forfeit the patrimonial benefit to which he or she may be entitled by virtue of the chosen matrimonial property system. Hence, parties who are married in community of property may not necessarily share equally in the joint estate.

[11] The relevant legal principles for a claim of forfeiture are found in section 9 of the Divorce Act. Section 9(1) of the Divorce Act, is an exception to the general rule. The section provides that when a decree of divorce is granted on the ground of 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 of 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.

[12] The question of whether a person has unduly benefited must be determined having regard to the three factors set out in section 9 of the Divorce Act, namely: the duration of the marriage, the circumstances that give rise to the breakdown, and any substantial misconduct on the part of either of the parties. In the Appellate Division in *Wijker v Wijker* 1993 (4) SA 720 (AD) 729E - F it was held that these three factors need not be considered cumulatively, and that none of these factors should be considered as

ranking above others. The decision was confirmed in the Supreme Court of Appeal in *Botha v Botha* [2006] ZASCA 6; 2006 (4) SA 144 (SCA); *Mashola v Mashola* (022/2022) [2023] ZASCA 75 para 29, wherein that court remarked that the-catch- all phrase, permitting the court, in addition to the factors listed, to have regard to 'any other factor' was conspicuously absent from section 9 of the Divorce Act. That court, further held that section 9(1) of the Divorce Act should be construed within the context of the evidence tendered by the parties in court.

[13] The onus is firmly on the Plaintiff who is the party claiming forfeiture to establish the nature and extent of the benefit to be forfeited. In this instance, it is common cause that the nature of the undue benefit is the Plaintiff's pension interest, which in terms of the provisions of section 7(7) of the Divorce Act, is deemed to form part of the joint estate. The extent of the pension interest is the amount that is to be paid out when the pension benefit becomes due."

[11] The evidence before the court a qua in essence is as follows:-

11.1 The parties got married to each other in community of property on 19 November 2015. At the time of their marriage relationship the Appellant was about 30 years old and the Respondent was about 57 years old.

11.2 One child was born from their marriage relationship on 18 March 2016.

11.3 The Appellant left the common household on the 20th of September 2019. She returned to the household during the year 2020, but received a divorce summons during June 2021.

11.4 The Appellant then left the common household during October 2021 after the Respondent threatened to shoot her.

11.5 The Appellant built a three bedroom house and furnished it with the money received from the Respondent.

11.6 Further, the Appellant had extra marital affairs and two children were born out of wedlock. The first was born on 3 February 2019 and the second child was born on 3 June 2022. The Appellant therefore at least already had extra marital affairs during the year 2018.

11.7 The Appellant claimed maintenance from the Respondent for the two children born out of wedlock, insisting that the children were his. Only after the Respondent insisted that DNA tests be done, was it confirmed that the two children born out of wedlock was not his. The Appellant testified that the Respondent assaulted her by inserting his fingers into her vagina to check if she had slept with other men and further threatened to shoot her. However, it must be borne in mind that all this happened after the Appellant had adulterous relationships and even birthed children out of wedlock.

11.8 The Appellant even lied under oath when she went to apply for maintenance for the two children born out of wedlock at the Maintenance Court and portrayed that they were the Respondent's children whilst they were not.

11.9 The Appellant has never been employed since she married the Respondent and whatever contributions were made to the common household was with the Respondent's money. The improvements to the household and furniture and household items bought, as well as the day to day living costs were all paid for by the Respondent.

[12] If the law is to be applied to the facts in the present matter, the duration of the marriage of the parties on paper was 8 years but in reality only about 2 years on and off, it is further clear the evidence before the court a quo that the Appellant's adultery gave rise to the breakdown of the marriage and her adultery in all probability was the only reason the Appellant allegedly started to check her vagina with his fingers whether she had intercourse with another man and lastly, it is clear that the Appellant's conduct of disappearing with the Respondent's bank card whilst with other men and using his money to her advantage, as well as her extra marital affairs and the children born out of wedlock which she falsely made the Respondent believe are his children until a DNA test was done, amounts to substantial misconduct on the part of the Appellant.

[13] The court a quo therefore did not misdirect itself or err when it found that the Respondent managed to prove that the Appellant will be unduly benefitted if an order for forfeiture was not granted. The appeal therefore stands to fail.

[14] In the result, the following order is made:-

1. The appeal is dismissed with costs.

M. NAUDE-ODENDAAL

JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION,

POLOKWANE

I AGREE:

J.D. STROH

ACTING JUDGE OF THE HIGH COURT,

APPEARANCES:

HEARD ON

: 9 MAY 2025

JUDGMENT

DELIVERED ON : 11 AUGUST 2025.

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 11 AUGUST 2025 at 10h00

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