

SOUTH AFRICA / JUDGMENT

M.D.M v T.P.M (HCAA06/2021) [2021] ZALMPPHC 84 (23 November 2021)

[2021] ZALMPPHC 84

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago, Muller, Naude

CASE / FILE NUMBER

HCAA06/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: HCAA06/2021

In

the matter between:

M[...]

D[...] M[...]

APPELLANT

And

T[...]

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

RESPONDENT

JUDGEMENT**KGANYAGO J**

- [1] The appellant and the respondent were married to each other in community of property. The respondent had instituted divorce action against the appellant seeking an order for a decree of divorce; division of the joint estate and 50% share of the appellant's pension interest in the Government Employees Pension Fund. The appellant had defended the respondent's action and filed a counterclaim in which she is seeking an order that the respondent partially forfeit the rights to share in the benefits of their marriage in community of property specifically with regard to the appellant's pension interest in the Government Employees Pension Fund.
- [2] The appellant and the respondent were able to settle all other aspects of the patrimonial consequences of their marriage including obtaining decree of divorce, except for the pension interest. Their settlement agreement was reduced to writing and signed by both the appellant and respondent.
- [3] The matter came for trial before MG Phatudi J, and the only issue he was required to determine was whether or not the appellant was entitled to a forfeiture order as per her counterclaim. The parties agreed that the appellant had the onus to discharge. The court a quo found that there was no merit made in the counterclaim to justify an order of forfeiture of the benefits of the marriage. The court a quo granted the decree of divorce incorporating the deed of settlement; dismissed the appellant's counterclaim and ordered 50% share of the appellant's pension benefit by the respondent. At the time when the matter came before the court a quo, the appellant was already paid her pension interest hence the court a quo ordered that the respondent was entitled to 50% share of the appellant's pension benefit. The appellant is appealing against the whole judgment and order of the court a quo with the leave of the Supreme Court of Appeal.
- [4] Both the appellant and the respondent have testified under oath in the court a quo. The appellant in her evidence confirmed that she and the respondent were married to each other in community of property on 1st October 1985. She stated that on her retirement from active service on 14th June 2019 she was paid a lump sum pension benefit of R2 840 000.00. She testified that her counterclaim for forfeiture was based on the substantial misconduct on the part of the respondent, and the circumstances that gave rise to the breakdown of the marriage.
- [5] The appellant testified that the problems in their marriage with regard to the substantial misconduct by the respondent started during 2007 when the respondent started having an extra marital affair with one of their employee one M[....] E[....] L[....]. That they were sometimes fighting about the extra marital affair which the respondent had.

- [6] The appellant testified that she and the respondent were having a cash loan business called [...] ([...]). E[...] was employed at this cash loan. On 16th July 2007 the appellant was phoned by a certain lady informing her that E[...] was having a love relationship with the respondent. The appellant confronted the respondent and E[...] about their extra marital affair, and the respondent assaulted the appellant by biting her finger. They quarrelled about his extra marital affair the whole night, and in the morning the appellant told the respondent that she was going to lay a criminal charge against him. However, the respondent phoned his brother who intervened, and she did not open a criminal charge against the respondent.
- [7] The appellant alleges that since that incident things got worse as the respondent told her to never go to [...] to see or inspect its books. According to the appellant, she and the respondent were each having 50% member's interest in [...]. The appellant and the respondent consulted with a counsellor, and that during one of the counselling sessions the respondent told the counsellor that this thing of marital affair is something that is in him, and that if there is man who does not have a mistress that man is a fool. The respondent further told the counsellor that he will never stop mistresses in his life. That is when the appellant told the counsellor that she did not see the whole session going anywhere. She told the respondent that since she was adamant, they may continue to stay as husband and wife, but that they will not share conjugal rights or be intimate with each other until the respondent can explain to the appellant that he was tired of having mistresses.
- [8] On 25th March 2008 the appellant dismissed E[...] from her employment. When the appellant told the respondent that she had dismissed E[,...], the respondent told the appellant that if indeed she had dismissed her, the appellant must know that he is still in a love relationship with E[,...], and he is going to marry E[,...], and also build her a house. The respondent further told the appellant that he was going to start a business with E[,...], and also have children with her. From December 2007 the respondent stopped depositing money for the appellant like he used to do, despite the flourishing of their business [...].
- [9] The appellant testified that after she had dismissed E[,...], the respondent admitted to her that he gave E[,...] money to start [...]. Further that the respondent and E[,...] had started other business entities in the names of [...] and [...]. That in [...] E[,...] was owning 50%, respondent 20% and other people 20% and 5% respectively. That on [...] the respondent and E[,...] were both having 50% members interest each, but later the respondent resigned as a member of the closed corporation.
- [10] The appellant further testified that from there, the respondent's and E[,...]’s relationship went public. That on 22nd April 2009 the appellant saw a vehicle stopping at the garage and when she went to the car to check, she found that it was E[,...] and the respondent inside that car. The appellant further testified that the respondent also bought a stand for E[,...] where he started building a house for E[,...]. The appellant stated that during the year 2012 she and the respondent were having 73 head of cattle, and the herd boy told her that 9 head of cattle were sold. That year she also heard that the respondent was having other head of cattle in a

plot in Dendron, and when she went to the plot to check, she was told that the owner of the cattle was E[....].

- [11] The appellant further testified that E[....] bought the bricks after the cattle were sold, and that her investigations revealed that a senior traditional leader Kibi is the one who sold the cattle and thereafter deposited an amount of R34 000.00 into [....] bank account. That at some stage she took the respondent to the maintenance court, where the respondent revealed to her that he was having 6 children outside their marriage whom he was taking care of, and that he will not be able to afford the amount which the appellant was requesting. The appellant further stated from 2007 up to the date when the matter was heard in the court a quo, there was no change in the respondent's behaviour in relation to his extra marital affairs. The appellant further stated that she was the one who was paying medical aid cover for the respondent and their children. The appellant further testified that she is one who had contributed 80% towards building their common home, and that the respondent contributed little towards household expenses and the maintenance of the children.
- [12] The appellant was cross examined and she stated that in 2007 she was running [....] whilst employed as an educator by the Department of Education. The appellant conceded that when she took the decision to dismiss E[....] from her employment she did not involve the respondent, as the respondent was denying her access to the business. The appellant further stated that the reason why she dismissed E[....] was that she was having a relationship with the respondent and also the manner in which E[....] was conducting herself around her (appellant).
- [13] The appellant further stated that during 2016 or 2017 she and the respondent withdrew money from their joint investment account in order to erect a wall at their house in preparation of their daughter's wedding. The appellant conceded that stand no 882 is registered in E[....]'s name, and that she and the respondent are the ones who found that stand and even paid a deposit for that stand, and that the receipt for the deposit was issued in E[....]'s name. The appellant further stated that she was in the company of E[....] when she went to pay for the deposit.
- [14] The appellant conceded that the respondent had contributed towards the educational needs of their child R[....] , and that she and the respondent had an agreement that she will pay the educational needs of the other child up to grade 12, and thereafter the respondent will takeover to pay for the tertiary education. The appellant further conceded that with regard to their daughter S[....] , she and the respondent have jointly contributed towards her educational needs from their investment account, even though it was through a court order.

- [15] The appellant stated that she was not sure as to when did E[...] start building her house at stand 882, but that during 2012 the house was been roofed. The appellant stated that she did not know whether E[...] had contributed in building her house, but what she knows was that it was the respondent who contributed through the sales of the cattle. The appellant conceded that when E[...] started building her house, E[...] was already owning a cash loan business [...] which she started during
2009. The appellant further conceded that E[...] was having more customers for her cash loans business, and that those were the customers that she took from [...], and that even though she was dismissed, she continued collecting money from their customers.
- [16] The appellant further stated that she knows [...] ([...]) which is a company registered by her sister's son and that her sister has passed away. The appellant did not dispute that she was running [...] behind the scenes, but stated that the employees of that close corporation will collect money on behalf of the close corporation and hand over that money to her. The appellant further stated that after the money for that close corporation has been handed over to her, she will give it her sister's son who was staying in Johannesburg, and some of it she will use it to maintain the children of her sister's son. The appellant did not dispute that she was sleeping partner in [...], but disputed that it was competing with [...].
- [17] The appellant stated that [...] was established by E [...], but the cash injection in establishing it was made by the respondent. The appellant further stated that she is having a lot of proof that the said business was established with cash from the respondent in that some of its customers were transferred from [...], and also that she is having information that E[...] was still collecting money from the customers of [...] even after she had established her own business.
- [18] The appellant stated that she was contributing 80% towards the maintenance of their children, whilst the respondent was contributing 20%. When it was put to the appellant that she and the respondent owned a shop and a poultry farm that were assisting in the well keeping of the family, the appellant stated that the shop did not have too much stock and that she was only taking bread from that shop.
- [19] The respondent also testified under oath. He testified that he started [...] during the year 2000 as the only member of the close corporation. During 2003 he included the appellant as a member of the close corporation. He held 50% member's interest, whilst the remaining 50% was held by the appellant. The respondent stated that he was the one who was running the business of [...], whilst the appellant was supporting him. [...] had six employees. The respondent further stated that during 2007, he and the appellant were able to invest R500 000.00 with ABSA from the proceeds of [...].
- [20] The respondent stated that E[...] was one of their employees and that he is the one who had employed her either during 2003 or 2004. That E[...] was employed as general worker until she was dismissed during 2008 by the appellant. The respondent further stated that the appellant did not consult him before she dismissed E[...]. According to the respondent, E[...]

was a team leader and was doing a fine job as they were able to bank money. The respondent denied that he was in a love relationship with E[....], and also denied building a house for E[....]. When asked whether he had fathered any child with E[....], his answer was that he did not remember, but did not have one.

- [21] The respondent stated that initially the investment account was doing well, and they were able to use the proceeds from that investment to take their children to school and also cover where there were some shortages with regard to household needs. That they were able to pay the university fees M[....] , whilst the respondent was exclusively responsible for the fees of R[....] . The respondent stated that he was using money generated from the poultry shop and cell phone business to pay for R[....] 's fees. The respondent further stated that with regard to their other child Hamilton, both him and the appellant were jointly assisting each other to pay his fees.
- [22] The respondent further stated he and the appellant were the ones who started the poultry shop and cell phone business together, and further that when they started the two businesses, he was already having a spaza shop. The respondent denied that the appellant had made any cash injections in the poultry shop, cell phone shop and spaza shop. The respondent stated that he was utilizing the money generated from the spaza shop to cater for household needs, that when he was still running those businesses, there was not a time when did not buy food for his family. The respondent further stated that they were contributing to stockvels monthly, of which during December time they will buy groceries and share it amongst themselves for the benefit of their families.
- [23] The respondent further stated that from the money he was generating from the businesses, he had opened a bank account for one of their children, M[....] , so that he can be able to pay for her school fees. The respondent stated that he was contributing R400.00 to R500.00 monthly into the bank account that he had opened for M[....] . The respondent further stated that the appellant was not taking bread only from the shop, but that she also took some other stuff for households needs. Further that from the poultry business, if the appellant wanted a live chicken, she will come take it and slaughter it for the family.
- [24] The respondent stated that he was not aware of any theft that was committed by E[....] in their business. The respondent further stated that according to him, there was no bad blood between the appellant and E[....]. According to the respondent, the reason why the appellant had dismissed E[....], was a cell phone call which the respondent had received from his (respondent) brother's child talking about licence stuff, and the appellant thought that he was talking to E[....]. After talking to his brother's child, he left the cell phone on the bed and left the house. The appellant took the respondent's cell phone to check who had phoned, but the caller had phoned from a public phone. The respondent stated that he was told by E[....] that it was the reason for her dismissal.

- [25] The respondent stated that according to him E[...] is the owner of stand 882. The respondent further stated that when E[...] was searching for the stand, she was in the company of the appellant, and that the appellant was assisting E[...] to stay next to the workplace. The respondent stated that he did not know how much had E[...] paid for the stand. Where she got the money to pay for the stand, the respondent stated that E[...] was employed, and further that she had children who were receiving social grant.
- [26] The respondent testified that he knows [...] which is a close corporation, and that he was told by the appellant that it was registered in names of K[...] who is the son of the late sister of the appellant. The respondent stated that [...] was started by the appellant and managed by her in the initial stages, but that the appellant later employed other people to manage it. The respondent stated that the appellant started this business when he and the appellant were doing business at a SASA pay point at Gamashashane. At that pay point, the appellant was lloing prospective customers to come and take a loans from [...] as it was offering 25% interest, whilst others were offering 30% interest. The respondent stated that he was operating the cash loan business at SASA pay points. The respondent further stated that their son R[...] was employed at [...] . The respondent stated that he saw R[...] operating at the same pay points with him for about seven months, and that resulted in the respondent stopping to operate at the pay points.
- [27] With regard to [...], the respondent testified that he was told by the appellant that it was registered in E[...]’s names, and that the appellant was also having a certificate for that. With regard to the cattle the respondent disputed that they had 73 head of cattle, but that they were either 54 or 55. The respondent stated that some of the cattle have died, some were stolen, and that he sold 10 of them in order to enable him to buy cattle feed, and some of the money he used it for travelling as he was travelling a lot. The respondent stated that in order not to hurt each other, the appellant’s pension benefit should be divided equally amongst themselves.
- [28] The respondent was cross examined and he disputed that he had denied the appellant access to the records of the business, and that the appellant was the one who was collecting those books after he had finished working with them. The respondent stated that after he learned about E[...]’s dismissal, he did not confront the appellant. The respondent stated that at the time of E[...]’s dismissal, the relationship between him and the appellant was bad, as the appellant was always shouting at him. The respondent stated that he could not discuss the dismissal of E[...] with the appellant as he was afraid of the appellant, and he decided to leave things as they are, as he did not want to engage in an argument.
- [29] The respondent stated that even after the dismissal of E[...], he did not have a problem with E[...], did not want to distance himself from E[...], and further that he would ask E[...] about the customers who have run away and where to find them, as she was the one who knew them. The respondent further stated that sometimes, he would phone or visit E[...] to ask her about these customers, and that even as at date of hearing of their matter in the court a quo, he was still phoning E[...] as there were some customers who were still owing him

money. He denied that he was having a special/love relationship with E[....]. The respondent stated the only relationship he was having with E[....] was that sometimes E[....] would ask him for some business advice and he will advise her accordingly, that sometimes E[....] will send him to collect money from customers and he will do that. The respondent denied that he had started three businesses with E[....], but that it was only one business that they have started, and that they were partners in that business. The respondent stated that the business in which he was a partner with E[....] was [....].

- [30] The respondent stated that he and E[....] registered this business either during 2009 or 2010, and that they both each held 50% member's interest. The respondent conceded that he, E[....] and other members have registered [....] on 26th November 2008. The respondent stated that he was not aware that [....] which he and the appellant held 50% member's interest each was deregistered on 23rd November 2015. According to the respondent, the appellant is still involved in the running of that business, and that he had make an application to remove himself as a member of that business as it was giving him too much stress, and he did not want any stress anymore. The respondent stated that after, he removed himself as the member of the close corporation, he did not know what happened thereafter.
- [31] The respondent conceded that in his pleadings he had stated that he was still working for [....] company and that sometimes he would go and work with E[....] at [....] and [....]. However, the respondent stated that he had ceased to be a member of [....] during 2013 as he could not continue working due to stress. The respondent stated that even though he was assisting E[....] in her businesses despite no longer been a member, he did not have a basic salary as sometimes he will be paid R2000.00 or R3000.00 per month. The respondent conceded that she did not obtain consent from the appellant before she started business with E[....], and did not know that he needed consent, further that the appellant was always grumpy and it was not easy to talk to the appellant. The respondent stated that the reason why the appellant obtained a maintenance order against him to pay R750.00 per month, was that according to respondent, things were not good between him and the appellant, but he was taking care of the child.
- [32] The basis of the appellant's appeal is that the respondent would be unduly benefited if a partial forfeiture order in respect of her pension benefit is not made against the respondent share regard being had to the respondent's alleged prolonged extra marital relationship with a certain E[....] L[....], and the respondent's alleged mismanagement of the parties once thriving cash loan business, to wit [....] which led to its deregistration in 2015.
- [33] Section 9(1) of the Divorce Act[1] (Act) provides that:

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

- [34] Section 9 of the Act gives the court discretion when granting a divorce on the ground of the irretrievable breakdown of the marriage to make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other party. In *Wijker v Wijker*[2] the court held that 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 section 9 of the Act. Those factors are the duration of the marriage, the circumstances which gave rise to the breakdown and any substantial misconduct on the part of either of the parties.
- [35] The appellant in her counterclaim had stated that what led to the irretrievable breakdown of the marriage between her and the respondent were (i) the respondent’s adulterous relationship which he refused to end notwithstanding numerous request by the appellant; (ii) that the respondent was having a 5 year old child with his mistress; (iv) that the respondent had failed to contribute pro-rata according to his means towards the running of the household and the maintenance of the parties’ children; (v) that the respondent has ruined the appellant ly in the amount of approximately R1 500 000.00; (vi) that the appellant was ly irresponsible in that he would inter alia spend his money on his mistress; (vii) that the respondent has humiliated and degraded the appellant throughout their marriage relationship; (viii) that there is lack of communication between the parties; (ix) and that the parties were living separate lives and are no longer interested in the continuation of the marriage relationship.
- [36] The respondent in his particulars of claim has stated that what led to the marriage between him and the appellant to irretrievably breaking down was (i) that the parties were no longer compatible and no longer share common interest; (ii) the appellant had through her aforesaid conduct humiliated and hurt the respondent; (iii) the respondent had lost his love and affection for the appellant and is no longer interested in the continuation of the marriage relationship; (iv) and that the appellant denies the respondent with his conjugal rights.
- [37] What this court must determine is whether the court a quo exercised its discretion properly in dismissing the appellant’s claim for forfeiture. As pointed out in paragraph 31 above, the appellant’s appeal is based on two grounds. Regarding the alleged extra marital affair between the respondent and E[...],

this is an issue that was known to the appellant since 2007. At no stage did the appellant try to institute divorce proceedings because of the respondent's adamant attitude of being involved in an adulterous relationship. The appellant seems to have condoned the alleged extra marital affair between the respondent and E[...], as during trial the appellant in her evidence in chief, told the court that after the respondent told her and the counsellor during the counselling session that he would not stop with behaviour of been involved in extra marital affairs, she told the respondent that they can stay together as husband and wife, but they will not have sexual intercourse until the respondent stops having his extra marital affairs. When the appellant was asked to explain as what she meant when she said that until the respondent stops his marital affairs, the appellant stated that up until the appellant can explain to her or tell her that he was tired of having mistresses, they will start talking as to what will happen next.

[38] The appellant on her own accord had given the respondent permission to continue having extra marital affairs until he got tired of that. When he is tired of been involved in extra marital affairs, the respondent is permitted to go back to the appellant and they will together talk a way forward. The respondent had instituted his divorce action on 17th October 2016. The appellant had condoned the respondent's alleged extra marital affair with E[...] for nine years. In my view, the appellant had waived her right to raise the respondent's alleged involvement in extra marital affairs as a reason for the irretrievable breakdown of the marriage since she was content with it. The appellant had given the respondent permission to be involved in the extra marital affairs, and when he was tired of that, he must report to the appellant and they will talk. The appellant was still waiting for the respondent to get tired of been involved in extra marital affairs, but the respondent surprised the appellant by serving her with divorce summons. Now that the respondent had served the appellant with divorce summons, the appellant wants to rely on an act which she had condoned as one of the ground for the irretrievable breakdown of their marriage. In my view, by condoning the respondent's actions for nine years, she had waived her right to rely on it.

[39] In Premier Attraction 300 CC t/a Premier Security v City of Cape Town[3] Pillay AJA said:

"An intention to waiver must be inferred reasonably, no one can be presumed to have waived rights without clear proof. The test for such intention is objective. Some outward manifestation in the form of words or conduct is required; silence and inaction will do when a positive duty to act or speak arises. Mental reservations not communicated have no legal effect."

[40] The appellant was unequivocal when she told the respondent to continue with his extra marital affairs until he got tired of them, and when he was tired, he must report to the appellant and they will talk. That in my view, was a clear intention from the appellant that she was waiving her right to in future rely on the respondent's alleged extra marital affairs as a ground for the irretrievable breakdown of their marriage. The court is mindful of the fact that there are many reasons why a wife can choose to stay in a marriage where her husband is involved in extra marital affairs and not divorce him. In the case at hand, the appellant is not stating that she chose to stay married to the respondent despite his extra marital affairs because of their children or stability, or for any other reason. The appellant

just gave the respondent permission to do whatever he was doing until he got tired. In my view, since the respondent did not come back to report to her that he was tired of been involved in extra marital affairs, the appellant cannot be permitted to use that as a ground to claim forfeiture.

- [41] The facts of this case shows that the relationship which the respondent was having with E[...] was not that of an innocent friendship where the respondent was only giving E[...] business advice, or that of a business partner. Their relationship was more than that, and the facts shows that they were involved in an extra marital relationship. However, their involvement is not a ground that led to the irretrievable breakdown of the marriage relationship between the appellant and the respondent. Their involvement has been going on for years with the knowledge and permission from the appellant.
- [42] Even though that amount to a substantial misconduct by the respondent, taking into consideration the prolonged relationship between the respondent and E[...] has been ongoing with the knowledge and permission from the appellant, this was not an ordinary adulterous relationship. Not every substantial misconduct is a ground to grant a forfeiture of benefits. The appellant for years was at peace with the adulterous relationship which the respondent had with E[...], she cannot now use that as a ground to claim forfeiture whilst for years he had condoned that. Therefore, the appeal on the ground of substantial misconduct stand to fail.
- [43] Turning to the ground whether the respondent had mismanaged the parties once thriving cash loan business, [...] which led to its final deregistration in 2015. It seems counsel for the appellant wanted to have a one-sided approach on this issue, as if the appellant did not play any role in the final demise of [...]. The appellant under cross examination did not dispute that she was a sleeping partner in the close corporation that was registered under the names of the son of her late sister. The employees of the close corporation of the son of the appellant's late sister were collecting money from the customers of the close corporation and handing it over to the appellant. That shows that the appellant was actively involved in the running of that close corporation as testified by the respondent. That close corporation was also in the business of cash loans.
- [44] The respondent had testified that the appellant at one of the SASA pay points was advertising the close corporation of the son of her late sister as offering less interest than other cash loans institutions. It follows that the prospective customers will go to the cash loans that offers less interest and that will be that of the son of the appellant's late sister. The appellant was therefore conducting business in competition with the family business. It should not have come as a surprise when [...] was no longer thriving. She out of her own actions contributed to that. The names [...] and [...] Services is so closely related to one another to extend that it can confuse their prospective customers. In my view, that was done deliberately in order to deceive and confuse the customers of [...] and that was done with full knowledge of the appellant as she was actively involved in running the affairs of [...]. The conduct of the appellant in contributing in the demise of [...] in my view, also amount to

substantial misconduct on her part towards the demise of the family business.

- [45] Even though the appellant is claiming that the respondent was not ly contributing towards the educational fees of his children, the evidence presented shows that the respondent was contributing. The appellant had testified that she had an agreement with the respondent that she will pay for the school fees of their child R[...] up to grade 12, the respondent will be responsible for his tertiary education. The appellant further testified that she could not get the result of R[...] at University of Johannesburg because the respondent told her that it was as a result that she was not responsible for R[...] 's fees, and that at that stage things were bitter. That shows that even though the appellant and the respondent had some differences, the respondent continued to honour his agreement of paying for educational fees of his children. For their daughter S[...] , both the appellant and the respondent were jointly paying for her educational fees from their investment account. This investment account was from the proceeds of [...].
- [46] As at the date of the divorce, the appellant and the respondent were married to each other for 35 years, which is a long period of time. All the children born of the marriage between the appellant and respondent are majors. As at 2017 the appellant and the respondent were still able to jointly withdraw the money from their joint investment account and erected a wall for their house in enhancing their joint estate. The respondent had contributed to the educational needs of their children despite the challenges he and the appellant were encountering in their marriage. The appellant was gainfully employed as an educator, and her retirement pension interest had been secured from the moment she started working, whilst the respondent has been self-employed. The parties were able to build their joint estate with the income that was generated from the businesses that were started by the respondent, whilst the appellant's pension interest was secured in the Government Employees Pension Fund. The appellant had contributed to the demise of the close corporation which was the respondent's source of income.
- [47] In my view, taking into consideration the duration of the marriage of the appellant and respondent, the circumstances that led to the breakdown of their marriage and that both parties have committed substantial misconduct, an undue benefit will not accrue to one party in relation to the other if an order for forfeiture is not granted. As such the court a quo had properly exercised its discretion and correctly granted the orders, even though the judgment of the court a quo does not engage with the issues dealt above. In the result, the appellant's appeal stands to fail. With regard to costs, the respondent did not oppose the appeal, and an appropriate order will be no order as to costs.

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

48.1 The appeal is dismissed and there is no order as to costs.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

MULLER J

NAUDE AJ

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

Counsel for the appellant

: MC De Klerk

Instructed by

: DDK Attorneys Inc

For the respondent

: in default

Date heard

: 12th November 2021

Judgment

electronically circulated : 23rd November 2021

[1] 70 of 1979

[2] 1993

(4) SA 720 (A) at 731G

[3] [2018] ZASCA 69 (29 May 2018) at para 14

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