

SOUTH AFRICA / JUDGMENT

# R.B.M v M.S.M (CA 29/2022) [2023] ZAECKMKHC 18 (24 February 2023)

[2023] ZAECKMKHC 18

## COURT

Eastern Cape High Court, Makhanda

## BEFORE

Bands, Hartle

## CASE / FILE NUMBER

CA 29/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case No: CA 29/2022

In the matter between:

R[...]-B[...] M[...]

Appellant

and

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

Respondent

APPEAL JUDGMENT

BANDS AJ:

[1] The parties, who had been married for some 28 years, were divorced by order of the Regional Court on 12 November

2021. This is an appeal against part of the trial court's judgment, and more particularly the court's refusal to grant an order that the respondent forfeit the patrimonial benefits of the parties' marriage, in accordance with section 9(1) of the Divorce Act 70 of 1979 ("the Divorce Act").

- [2] In order to succeed with her appeal, the appellant must establish that the Magistrate's judgment is assailable on the basis of error or misdirection. I return to this later.
- [3] The parties were married to one another, in community of property, on 23 May 1993. That the marriage relationship had broken down irretrievably was common cause. The respondent, as plaintiff in the divorce action, sought (i) a division of the joint estate; (ii) maintenance for the duration of the divorce action;<sup>[1]</sup> and (iii) payment of 50% of the appellant's pension interest as at the date of divorce. The appellant, as defendant, defended the action and, by way of a claim in reconvention, sought an order that the respondent forfeit the benefits arising from the marriage in community of property.
- [4] The appellant's pleadings were not a model of clarity, with the issue of forfeiture having been raised obliquely. Not only did the drafter conflate the factors set out in section 7(2) of the divorce Act with those contained in section 9(1) thereof; but the appellant's claim for forfeiture was misguidedly based on the principle of fairness. By way of illustration, paragraph 6 of the appellant's claim in reconvention reads as follows:

*"In the absence of an agreement, having regards for (sic) the reasons of the breakdown of the marriage, as pleaded by the Defendant, the existing and perspective (sic) means of the parties, their respective earning capacities, their financial needs and obligations, the age of the parties, the duration of the marriage and the standard of living that the parties enjoyed throughout the marriage, it is pleaded that the Plaintiff will be unfairly advantage (sic) vis-a-vis the Defendant unless he forfeit (sic) the benefits of the marriage in community of property, including the Defendant's*

pension fund interest and the Plaintiff's share in the immovable property situated at 1[...] M[...] Street L[...], Germiston, while the Defendant continues to pay the mortgage bond over such immovable property." [Own underlining].

- [5] I pause to mention that reliance on the principle of fairness echoed through the appellant's evidence in chief. In adopting

this approach, the appellant lost sight of what a marriage in community of property entails at its core. This was cautioned

against by the then Appellate Division, in *Wijker v Wijker*.<sup>[2]</sup> Simply put, section 9(1) does not provide for the application of the principle of fairness.

- [6] Returning to the appellant's pleadings, I am of the considered view that they lacked legal coherence in material respects and were undoubtably open to exception. None was taken. It is unsurprising, however, that the respondent's legal representative, at the outset of the divorce proceedings in the trial court, objected to the appellant's claim for forfeiture of benefits given the formulation of the pleadings. Notwithstanding this initial objection, and after much debate, the legal representatives on behalf of the parties agreed that the crux of the appellant's case was one of partial forfeiture of benefits, such order relating to (i) a Nissan Qashqai motor vehicle 2.0 Acenta ("the motor vehicle");<sup>[3]</sup> (ii) the parties former marital home, situated 1[...] M[...] Street, L[...], Germiston ("the immovable property"); and

(iii) the appellant's pension interest in the Government Employee's Pension Fund ("the appellant's pension interest"). Moreover, the legal representatives agreed that the issues in dispute, as appeared from the pleadings and which had further been defined by agreement, would be fully ventilated during the evidence. It is on this basis, that the trial court heard the matter.

- [7] At the hearing of the appeal, the appellant's counsel conceded that the joint estate falls to be divided equally up until June 2015, this being the month during which the parties separated. Accordingly, any order for the forfeiture of benefits would, of necessity, only be operative post June 2015.

#### Legal principles

- [8] It is trite that a discretion is conferred upon the court in terms of section 9(1) of the Divorce Act whether or not to order forfeiture of the patrimonial benefits of the marriage. Such discretion may be exercised in favour of either of the parties and may relate to the whole or only a portion of the patrimonial benefits. In the exercise of this discretion, the court is enjoined by section 9(1) to have regard to various factors in determining whether one party, in relation to the other, will be unduly benefitted if an order for forfeiture is not made.
- [9] The factors to which the court must have regard, include: (i) the duration of the parties' marriage; (ii) the circumstances which gave rise to the breakdown of the marriage; and (iii) the existence of any substantial misconduct on the part of either of the parties.
- [10] Regarding the evidence, which is necessary to be led at trial, McCreath J commented as follows in *Koza v Koza*:<sup>[4]</sup>

*"In my view it is therefore necessary that there be placed before the court evidence in respect of the factors mentioned in section 9(1) and also, in order to establish properly whether there is an undue benefit warranting the making of an order, evidence of the nature and value of the benefits in respect whereof forfeiture is sought. It follows that a party making a claim of this nature should plead the necessary facts to support that claim and formulate a proper prayer in the pleadings to define the nature of the relief sought."*

- [11] Whilst it is apparent from the record of appeal that the parties had, by agreement, defined the issues in dispute prior to the commencement of the trial, it remains to be determined whether there was sufficient evidence to have enabled the trial court to exercise a discretion, or to have made an order specifying the nature and extent of the patrimonial benefits, if any, which ought to have been forfeited by the respondent in favour of the appellant.
- [12] It is accepted that the court's point of departure, in considering a prayer for forfeiture, was to have held the parties to the matrimonial property regime elected by them. In the context of the present dispute, the parties were married in community of property.

- [13] The concept of community of property is described in HR Hahlo, The South African Law of Husband and Wife in the following terms:[5]

*“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 the financial contributions, hold equal shares.”*

- [14] In the oft-quoted case of Engelbrecht v Engelbrecht[6] the court found that joint ownership of another party's property is a right, which each of the spouses acquires on conclusion of a marriage in community of property. This is the inevitable consequence of the parties' matrimonial regime. Unless the parties, either before or during the marriage, contribute in precisely equal shares, the party that contributed less, shall on dissolution of the marriage, be benefited above the other should an order for forfeiture not be granted. Section 9(1) of the divorce act does not afford the greater contributor a remedy in such circumstances, the remedy only arises in the event that the benefit is undue, having regard to the factors to which I have referred.
- [15] Accordingly, the court in Wijker in considering the proper approach in determining whether to grant an order in accordance with section 9(1), held that the court would first need to determine whether or not the party against whom the order of forfeiture is sought will in fact be benefited if the order is not made. This is a purely factual determination. Unless the nature and extent of the benefit are established, the court cannot determine whether the benefit was undue or not. Only if, and when it is determined that that party will benefit, will the court move onto the next inquiry, being whether such benefit will be an undue one.[7] The second stage of the enquiry involves a value judgment. The onus of proving the nature and extent of the alleged benefit which is to be forfeited, is on the party alleging that his or her spouse would acquire an undue benefit.
- [16] On a reading of the trial court's judgment, and whilst having referred to the two-stage enquiry as set out in Wijker, the trial court failed in its entirety to consider whether the respondent would in fact have stood to benefit if an order for forfeiture was not made. Seemingly, the trial court's

point of departure, insofar as the enquiry was concerned, was a consideration of the second stage thereof, which in itself was wholly insufficient in that proper regard was not had to the factors set out in section 9(1) of the Divorce Act. Consequently, there is no basis upon which the Magistrate could have exercised a value

**judgment.**

- [17] For the aforesaid reasons, I am satisfied that the trial court misdirected itself in the application of the legal principles relevant to claims in terms of section 9(1) of the Divorce Act. Whether or not this misdirection will of necessity lead to an interference with the findings of the trial court will be dependent upon the outcome of a proper assessment of the evidence, in accordance with the stated legal principles.

**Benefit**

- [18] Accordingly, I turn to consider whether on the evidence before the trial court, any benefit arose. In doing so, I recount the evidence of the trial court only insofar as it is necessary for the purposes of this judgment.
- [19] The vehicle was purchased by the appellant for an amount of R168,137.50 during the subsistence of the marriage, albeit post 2015. In the absence of any evidence to the contrary, and for the purposes of this judgment, I shall assume that the value of the vehicle equates to the purchase price. The vehicle was fully financed through WesBank and accordingly, an asset with corresponding liability was brought into the joint estate by virtue of the parties' marriage in community of property. Put differently, no nett asset was brought into the joint estate. No evidence was led at trial as to the value of the vehicle at the time of divorce. The evidence led was speculative in nature, with reference to the amount owing on the car in terms of the asset and finance agreement as of 31 January 2021, in the amount of R128,090.48. This amount bears no correlation to the value of the vehicle, which value would, of necessity, be dependent on the age of the vehicle; the condition of the vehicle; and the current mileage thereof. I am satisfied that the appellant failed to prove the value of the vehicle at the time of divorce and concomitantly, she failed to establish the nature and extent of the benefit, if any, that the respondent would have derived, should the joint estate have been divided in the ordinary course.
- [20] The immovable property was purchased during the subsistence of the marriage for a purchase consideration of R587,389.00 and was fully bonded in favour of Nedbank. The parties accepted equal responsibility for the repayment thereof. Whilst the parties testified that the property was registered in their names during or about 2009, it was apparent ex facie the statement of account issued by Nedbank on 30 November 2020, which had been tendered into evidence in the court below, that the parties took transfer of the immovable property on 27 November 2008. Assuming, for the purposes of this judgment, that the value of the property at the date of purchase corresponded with the purchase price, the value of the liability cancelled out the value of the asset.

[21] On the record, it was common cause that the respondent was responsible for the payment of the bond instalments from the date on which the parties took transfer of the immovable property up until he lost his employment during the course of 2013. From 2014 to the date of trial, the appellant was responsible for the payment thereof. Accordingly, and despite it having been put to the appellant that the respondent had paid such instalments for approximately 3.5 years versus the appellant's contributions

over a period of 8 years, this was objectively, on the facts, incorrect. As at the time of divorce, the respondent and the

appellant had contributed towards the instalments for a period of 5 and 8 years respectively.

Profits in the amount of R90,000.00

from the sale of an immovable property situated in M[...], which the respondent owned prior to the parties' marriage, and which was brought into the joint estate and utilised by the parties as their first matrimonial home, were for the most part utilised for improvements to the immovable property.

[22] It was undisputed that the appellant had made a greater contribution to the property than the respondent. Having said that, a calculation as to the parties' actual respective contributions was never placed before the trial court. The evidence as to the parties' estimated contributions was no more than speculative in nature. Moreover, the only evidence at trial regarding the current value of the property was with reference to the municipal valuation included in a municipal statement of account issued to the parties by the City of Ekurhuleni on 21 June 2020, some 15 months prior to the date of divorce. The value recorded therein was in the amount of R737,000.00. Insofar as the outstanding loan agreement is concerned, the parties owed an amount of R392,011.62 as of 1 September 2021.

[23] On the aforesaid evidence, I am not satisfied that the appellant proved the extent of the respondent's benefit at all. This is further compounded by the concession made on behalf of the appellant, that the joint estate up until 2015, fell to be divided equally between the parties. On the evidence before the trial court, it is not possible to determine the value of the property in 2015 nor the extent of the property's appreciation, if any, between 2015 and the date of the parties' divorce. Accordingly, the appellant failed to establish the nature and the extent of the benefit, which may accrue to the respondent in respect of the immovable property, if any.

[24] Lastly, it is necessary to consider the appellant's pension interest. It was undisputed in the trial court that the appellant's pensionable service date with the Government Employees Pension Fund was 10 October 2005, the contributions towards which the respondent played no part. Accordingly, such asset was acquired during the subsistence of the parties' marriage, the value of which accrued to the joint estate. According to the evidence led at trial, the resignation benefit as of 8 February 2021 was in the amount of R2,165,547.00. Given the concession to which I have referred, it is necessary to consider the value of the pension interest as it was in 2015. By virtue of the lateness of the concession, no evidence was led at

trial regarding such value, and accordingly this court is unable to ascertain it. Notionally, the extent of the benefit that the respondent would acquire if the joint estate were to be divided equally for the full duration of the parties' marriage, would be the increase in the value of the pension interest from 2015 to the date of divorce in November 2021.

- [25] Primarily, I am not persuaded that the aforesaid constitutes sufficient proof of the benefit and accordingly, I cannot conclude that the respondent would have been unduly benefitted in the absence of an order for forfeiture. Having said that, and in the event that I am incorrect in this conclusion, I am further not persuaded that forfeiture ought to have been awarded on a consideration of the factors set out in section 9(1).
- [26] It is trite that the three factors governing the value judgment to be made by the court in terms of section 9(1) are not cumulative in nature. Whilst the court is required to consider all three factors, it does not follow that if one factor is absent, an order for forfeiture is incompetent. This was made clear by the court in *Wijker* and has more recently been restated by the Supreme Court of Appeal in *Botha v Botha*.<sup>[8]</sup> I accordingly proceed to consider the required factors.

#### Duration of the marriage

- [27] In dealing with the interpretation of the meaning of 'the duration of the marriage', the court, in *Matyila v Matyila*,<sup>[9]</sup> stated as follows:

*"The meaning of the words 'duration of the marriage' as appearing in s 9(1) aforesaid is clear. It means no more nor less than the period during which the marriage has, from the legal point of view, subsisted, namely from the date of marriage to the date of divorce or, at the very least, to the date of institution of divorce proceedings. This is in accordance with the primary rule of interpretation that words should be understood in their ordinary meaning."*

- [28] During the trial, it was undisputed that the duration of the parties' marriage was 28 years. The appellant at no stage contended otherwise. For the first time, the appellant took issue with the duration of the parties' marriage, in the heads of argument filed in the appeal proceedings. The contention contained therein was that the duration of the marriage ought to have been calculated from 1993 up until the parties' separation in 2015, with the resultant duration being that of 22 years and not 28. The Magistrate's finding in this regard was not raised by the appellant as a ground of appeal and accordingly, it need not be dealt with any further suffice to comment that it could never have been the intention of the legislature to allow a party to delay the institution of divorce proceedings and then rely, to their benefit, on their own failure to act.
- [29] In any event, whether this factor is considered with reference to: (i) the date on which the parties separated, being June 2015; alternatively, (ii) the date on which summons was issued, being October 2020; further alternatively, (iii) the date of divorce, being November 2021, the duration of the marriage is that of 22, 27, or 28 years respectively.

[30] On any calculation such marriage was of significant duration and militates against the granting of an order for forfeiture.

The circumstance which gave rise to the breakdown in the parties' marriage

[31] The reasons leading to the breakdown in a marriage are complex in nature. It is not often that a marriage relationship breaks down due to the conduct of only one spouse and it is seldom possible to identify a peculiar event as being decisive.

[32] The circumstance relied upon by the respondent in his particulars of claim were somewhat generic in nature. He contended that:

(i) the appellant had abused him emotionally, whilst residing in their Gauteng property; (ii) there was no meaningful communication between the parties; and (iii) that the parties had lost their love and affection for each other. In his replication, the respondent placed further reliance on the impact that his unemployment had on the marriage. In evidence, the respondent made repeated reference to the parties' financial strain over a period of many years, which was exacerbated by his intermittent employment and income. He cited Covid-19, and the impact thereof, as the breaking point in the parties' marriage.

[33] Given the construction of the appellant's pleadings, it was difficult to discern which circumstances the appellant contended gave rise to the breakdown in the parties' marriage versus those which she contended constituted substantial misconduct on behalf of the respondent.

[34] On a consideration of the appellant's pleadings, and in addition to the usual grounds which are routinely pleaded in divorce actions, it was apparent that the appellant in her claim in reconvention relied primarily on the following further grounds for the breakdown in the marriage between the parties:

"4.1 ...

4.2 ...

4.3 the [respondent] has throughout the marriage verbally, emotionally, financially and physically abused the [appellant], which resulted in a protection order being issued in favour of the [appellant] against the [respondent];

4.4 the [respondent] has failed to maintain the [appellant] and the former, home financially;

4.5 the [respondent] resigned from his employment in 2013 for no apparent reason and left the former common home approximately five years ago;

4.6 ...

4.7 the [respondent] throughout the marriage utilised his salary, while employed, and his pension fund interest, after he resigned, for his own benefit, and without any due regard for the [appellant] and as such the [respondent] failed to share the financial benefits with the [appellant];

4.8 the [respondent] sold a motor vehicle belonging to the parties and part of the joint estate and retained the cash proceeds, without accounting to the [appellant] in respect of such proceeds, or sharing such proceeds with the [appellant];

4.9 the [appellant] engaged in an extramarital affair during the marriage, which resulted in him in fathering a child by another woman;

4.10 ...

4.11 ...”

[35] Immediately apparent from the above was the appellant’s disdainful attitude towards what she perceived to be, the respondent’s lack of financial contribution towards the joint estate.

[36] The grounds pleaded in paragraphs 4.4; 4.5; and 4.7 of the appellant’s claim in reconvention, to a large degree, overlap. With the exception of the allegation regarding the respondent having vacated the common home in 2015 (which is common cause), the remainder of the allegations are not borne out from the common cause evidence as it appears from the record. It is accordingly necessary to examine the parties’ respective contributions towards the joint estate.

[37] The respondent owned an immovable property situated in M[...] prior to the conclusion of the marriage. As stated, this property was brought into the joint estate and utilised by the parties as their first matrimonial home. Whilst employed, this property was paid for by the respondent. The property was sold during September 2010 and the profits received from the sale, in the amount of R90,000.00, were utilised for the joint benefit of the parties. More particularly, a large portion of the profits was utilised to cover the costs of renovations and improvements to the immovable property situated in Germiston.

[38] Whilst it was apparent that the respondent was unemployed for certain periods during the subsistence of the marriage, blame for such circumstances cannot be attributed to him. The undisputed evidence was that the respondent’s employ with D[...] came to an end in 1998 due to the restructuring of the organisation. This period of unemployment lasted approximately 1 and a half years whereafter the respondent studied full time for a period of 2 to 3 years. In 2002, the respondent obtained gainful employment which lasted up until 2013. At this time, the respondent was hospitalised for ongoing chronic health issues, including diabetes and high blood pressure. The respondent’s health issues resulted in his absence from work on various occasions and led to two disciplinary proceedings. Whilst in hospital, the respondent received a phone call from his team leader demanding his attendance at work the following day. This was impossible in the circumstances. He was advised by his employer that he should leave the section in which he was working as he was unable to handle the pressure. In light of the aforesaid, and given the stress experienced by the respondent at the relevant time, he resigned from his employment.

- [39] He thereafter started a transport business, which was unsuccessful. The business was in operation for approximately 1 year. During this period up until 2016, the respondent was unemployed with occasional casual employment. From 2016 up until the end of May 2018, the respondent was employed at N[...] on a fixed term contract. He thereafter took up employment at C[...] C[...] from March 2019 to November of that same year.
- [40] Apparent from the common cause evidence is that prior to 2015, both of the parties contributed their earnings towards the joint estate. During the periods of the respondent's unemployment, the appellant, who had enjoyed continuous employment, had been required to meet the parties' financial obligations in full. It is clear from the record that this had placed a great deal of strain on the marital relationship. The respondent on the other hand, (i) studied in an endeavor to upskill; (ii) sought employment, albeit that he was not always successful; (iii) started a business venture; and (iv) assisted with the lifting and carrying of children.
- [41] Whilst there existed some dispute regarding the value of the parties' respective pension interests, it was apparent that each of the parties contributed a portion thereof to the joint estate.
- [42] In light of the aforesaid, the evidence established that both of the parties consistently contributed towards the running of the joint estate. The respondent's inability to contribute financially, at times, was not due to an attitude of laxity on his behalf.
- [43] Significantly, the appellant conceded that everything done by the parties prior to 2015, was done jointly. This concession, coupled with the concession by the appellant's counsel during the appeal regarding the division of the joint estate up until 2015 is definitive of any question as to forfeiture prior to
2015. Having dealt with the facts prior to 2015, it is necessary to assess the position, which subsisted post 2015.
- [44] The respondent testified that, following the separation, he routinely returned home over weekends to visit the family, bringing home consumables such as chocolates and 2-minute noodles. In addition, he made cash contributions to the appellant, in the form of bank transfers and by utilising the Shoprite Money Market service.
- [45] The appellant denied that the respondent had contributed financially in any way towards the immovable property or towards her and the children's expenses. Specific reference was made to the respondent's apparent lack of contribution, notwithstanding his gainful employment with N[...] during 2016 and 2017.
- [46] The record shows that the appellant initially attempted to distance herself from any form of relationship with the respondent and sought to create the impression that she had no knowledge of the respondent's whereabouts, nor his employment details for a significant period during 2016 and

2021. It was put to the respondent that the appellant had only become aware of the respondent's employment with N[...] following the discovery process. Not only is this evidence at variance with that of the respondent, but it was later contradicted by the appellant herself.

[47] More particularly, the appellant testified that the respondent would return home occasionally for the night, albeit that the parties would sleep in separate bedrooms. The appellant, presumably in an attempt to bolster her evidence that she

was unaware of the respondent's whereabouts, testified that she had contacted N[...] telephonically in 2019, to speak to the respondent. In doing so, the appellant inadvertently admitted to having been aware of the respondent's employment with N[...]. Moreover, the appellant was constrained to concede, during cross examination, that the respondent had on at least two occasions during this period, transferred money to the appellant in the amounts of R4,000.00 and R2,500.00 on 25 May 2017 and 24 June 2017 respectively. The appellant further made mention of an intended family meeting in 2019, the purpose of which was to resolve the parties' marital issues. In light of such concessions, I have no reason to doubt the veracity of the respondent's evidence as to events post 2015, which evidence accorded with the probabilities.

[48] Leaving aside the allegations as to physical abuse, to which I shall return, I am satisfied that the appellant failed to prove any instances of abuse as contended for in paragraph 4.3 of the appellant's claim in reconvention. Insofar as physical abuse is concerned, and on a close analysis of the evidence on behalf of both parties, it is common cause that a physical altercation took place on 13 June 2015, after which the appellant obtained a domestic violence interdict against the respondent.

[49] The extent of the altercation remained in dispute between the parties at trial, with the respondent being vague regarding the details thereof. The appellant testified that she was sitting on the couch when the respondent, unprovoked, started assaulting her. During cross examination, the appellant conceded that the altercation was preceded by a disagreement between the parties. According to the evidence, the respondent threw the appellant into the corner of the couch and pulled her hair. The appellant grabbed hold of the respondent's arm and bit him. He loosened his hold of the appellant, affording her an opportunity to move away from the corner of the couch. The respondent thereafter pushed the appellant against the wall. At that stage, the appellant's nephew, X[...], arrived home and the altercation ceased. X[...] contacted the parties'

children as well as the police. Upon arrival, the police requested the respondent to accompany them to the police station.

The respondent was uninclined to do so and requested that he be permitted to stay at the immovable property until the end of the

week. It is this altercation which precipitated the parties' separation. No evidence was led as to any other incidents of violence between the parties and accordingly, it must be accepted for the purposes of this judgment, that it was a once off incident.

- [50] In respect of the ground pleaded in paragraph 4.9 of the appellant's claim in reconvention, it is common cause on the record that the respondent, during the early 2000's engaged in an extramarital affair with one N[...] Z[...], with whom he fathered a son in 2001. Consequently, the appellant left the common home. After a period of separation, the parties reconciled and continued to live together as husband and wife until their separation in 2015.
- [51] Implicit in the appellant's conduct is that after returning home, she forgave the respondent for his infidelity and laid the issue to rest. At no stage did the respondent take steps to seek the dissolution of the marriage. Markedly, it was the respondent who vacated the common home in 2015, whereafter he issued summons in late 2020.
- [52] On the evidence, it is not possible to make any conclusive findings regarding the respondent's alleged affair in 2015, nor in respect of the appellant's alleged affair in 2000 and accordingly, it cannot be said that parties' marriage was characterised by infidelity beyond the respondent's one indiscretion.
- [53] Lastly, it was conceded during argument in the trial court that the respondent had sold a motor vehicle belonging to the joint estate and retained the cash proceeds thereof in the sum of R20,000.00.
- [54] Having regard to the aforesaid, and on the parties' own versions, I am of the view that the reasons for the breakdown in the marriage related mainly to the financial strain on the parties, resulting in high levels of discontent. This was exacerbated by the periods of unemployment experienced by the respondent and the added demands placed on the appellant. Over time, this eroded the marital relationship and led to ever increasing unhappiness.

#### Substantial misconduct

- [55] As stated, it was unclear on the pleadings on which grounds the appellant placed specific reliance for substantial misconduct. This too was not clear from the record. Apparent from the trial court's judgment is that no consideration was given to this factor whatsoever.
- [56] The appellant, in the heads of argument filed in the appeal, in support of a finding of substantial misconduct, contended as follows:

*"... The respondent had the affairs, he had a child out of wedlock, he resigned from gainful employment, he remained unemployed for substantial periods, he assaulted the appellant, he left the matrimonial home and did not return after June 2015."*

- [57] I have dealt with these aspects in detail. The circumstances surrounding the respondent's resignation and the periods of his unemployment, whilst admittedly, having caused strain on the parties' marriage, do not constitute misconduct, let alone misconduct of a substantial nature as envisaged by the legislature. During his periods of employment, which were not unsubstantial, the respondent diligently discharged his financial obligations.

- [58] Whilst the respondent vacated the matrimonial home in June 2015, it is factually incorrect that he did not return thereafter. On no version can this factor be characterised as constituting substantial misconduct.
- [59] To the extent that the respondent engaged in an extramarital affair in 2000, and that a physical altercation took place between the parties on 13 June 2015, both relate to single incidents, neither of which were features of the marital relationship. Whilst such conduct is not to be condoned, nor is it to be considered acceptable, on the facts of the present dispute, such conduct falls short of constituting substantial misconduct. Moreover, I am of the view the parties conduct, following the respective incidents, as appears from the record, militates against such a finding. Not only did the respondent, following the altercation, continue to spend nights at the former common home, with the knowledge and consent of the appellant, but he also continued to make financial contributions as and when circumstances permitted. The fact that the appellant took no steps to seek the dissolution of the parties' marriage, is of significance. This is more so in the context of the respondent's affair, given the duration of the parties' marriage following their reconciliation.
- [60] For the aforesaid reasons, I am not satisfied that the appellant succeeded in proving substantial misconduct on the part of the respondent.

## Conclusion

- [61] It is apposite to repeat my earlier finding that the appellant had failed to prove the nature and extent of the respondent's benefit on dissolution of the parties' marriage and accordingly, the appellant's claim on this basis alone ought to have been dismissed.

- [62] In the event that I am incorrect in this finding and given the appellant's concession in respect of the division of the joint

estate prior to 2015, all that remains to be determined, to the extent necessary, is whether the respondent would be unduly benefitted if the joint estate, for the full duration of the marriage, was divided equally. An undue benefit as been held to be one that is disturbingly unfair.[10]

- [63] In answering the aforesaid question, a consideration of the factors set out in section 9(1) of the Divorce Act is required, whilst being mindful of the authorities to which I have referred. On a conspectus of the evidence, and in the exercise of a value judgment, I am of the view that appellant would not be unduly benefitted if the joint estate, for the full duration of

the marriage, was divided equally.

- [64] Having come to this conclusion, and notwithstanding the misdirection of the trial court, it is not necessary to interfere with the order granted.

- [65] In the result, the appellant's appeal must fail. I see no reason why costs should not follow the result.

[66] In the premises, the following order is issued:

1. The appeal is dismissed.
2. The appellant is ordered to pay the respondent's costs.

I BANDS

ACTING JUDGE OF THE HIGH COURT

I agree.

B HARTLE

JUDGE OF THE HIGH COURT

Heard:

25 November 2022

### **Judgment**

granted: 24 February 2023

For the appellant: Adv Sephton

Instructed by:

Neville Borman & Botha

For the respondent: Adv Ndamase (together with Adv Masiza)

Instructed by:

Mente Faltein Attorneys Inc.

[1] Notwithstanding the inclusion of such prayer, it does not appear that proceedings for the payment of maintenance pendente lite were ever pursued by the respondent.

[2] 1993 (4) SA 720 (A) at para 33.

[3] Which was not previously sought on the pleadings.

[4] 1982 (3) 462 (TPD) at 465H.

[5] 5th Edition at pp 157 and 158.

[6] 1989 (1) SA 597 (C).

[7] See also: Engelbrecht (*supra*) at 601F-H.

[8] Wijker (*supra*) at 729. See also: Botha v Botha 2006 (4) SA 144 (SCA).

[8] Wijker (*supra*) at 729.

See also: Botha v Botha 2006 (4) SA 144 (SCA).

[9] 1987 (3) SA 230 (WLD) at 236B-C.

[10] Engelbrecht v Engelbrecht (supra) at 602F.

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