

SOUTH AFRICA / JUDGMENT

## R.K v M.L.K (320/19) [2020] ZAECGHC 90 (18 August 2020)

[2020] ZAECGHC 90

### COURT

Eastern Cape High Court, Grahamstown

### BEFORE

P N Kroon, M J Lowe

### CASE / FILE NUMBER

320/19

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#### Policy

#### IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

No.:

320/19

Date

Heard: 14 August

2020

Date

Delivered: 18 August 2020

In

the matter between:

R[...]

K[...]

Appellant

and

M[...]

L[...] K[...]

Respondent

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**JUDGMENT**

KROON AJ:

[1] This is an opposed appeal against a portion of a judgment by Magistrate Reddy as delivered on 1 November 2019.

[2] Pursuant to a divorce action, the Magistrate made the following order:

*“[8] COURT ORDER*

Decree of divorce,

...

Division of joint estate.

An order pertaining to the defendant’s Government employee’s pension fund as follows;

That the plaintiff is entitled to 10% of the defendant’s pension interest held at the Government employees’ pension fund.”

[3] The Appellant appeals against the final part of the order which limits the Plaintiff’s entitlement to 10% of the Respondent’s pension fund interest held in the Government Employees Pension Fund.

[4] It was common cause in the trial that:

4.1 The parties were married in the community of property on the 9th of November 2013.

4.2 The parties had one minor child who was born prior to the marriage whose date of birth is 31 July 2011.

4.3 The Respondent was a member of the Government Employee Pension Fund.

[5] Insofar as the issue on appeal is concerned, the contesting positions adopted by the parties at the trial were the following:

5.1. The Appellant contended that she was entitled to 50% of the Respondent’s pension fund interest as at the date of divorce because it formed part of the joint estate.

5.2. The Respondent contended that the Appellant was only entitled to a half share of the pension fund interest as from the date of the marriage to the date of the divorce.

[6] The Magistrate determined that because the marriage had subsisted for “a short duration”, namely a 4 year period, the Respondent should effectively forfeit 40% of what would have been her share of the Government Employee Pension Fund interest. It is not readily apparent from the reasons in the judgment as to how this figure was reached.

- [7] The Respondent did not plead that the Appellant should forfeit any of the matrimonial property and furthermore did not plead any grounds to support a plea of forfeiture.
- [8] The Respondent also did not bring a counterclaim for forfeiture of patrimonial benefits derived from the marriage as envisaged by Section 9(1) of the Divorce Act<sup>70</sup> of 1979 (“the Divorce Act”) as is invariably done in matters of this nature.
- [9] Thus the first question which arises is whether it was competent for the Magistrate to entertain a request for a forfeiture order in respect of the pension fund interest when none was claimed.
- [10] During the virtual appeal hearing, wherein Mr Van Zyl appeared on behalf of the Appellant and Mr Le Roux on behalf of the Respondent, the Court enquired from Mr Le Roux whether he could refer it to any authorities in support of the proposition that, absent a claim, a forfeiture order could be made. He was unable to do so.
- [11] If I understood him correctly Mr Le Roux submitted in substance that, leaving aside the formulation of the plea, the parties understood that forfeiture was an issue.<sup>[1]</sup>
- [12] Insofar as Mr Le Roux sought to submit that the parties were in agreement that the question of forfeiture was properly raised before the Court a quo, I am not persuaded that this is correct.
- [13] The following statements made during argument at the trial are revealing:
- 13.1. In her closing address the Appellant recorded as follows:
- “... there is no counterclaim, there is no application for forfeiture”*
- 13.2. In his closing address the Respondent conceded as much recording:
- “Your Worship we are not asking for forfeiture, we are not of the opinion that this is not a case where forfeiture is relevant.”*
- [14] The Magistrate also appears to have accepted that forfeiture was not properly raised, recording in her judgment that:
- “The Defendant has not pleaded forfeiture.”*
- [15] It would seem that the Magistrate was of the view that, notwithstanding the circumstance that forfeiture had not been claimed or even raised on the pleadings, she retained the power, mero motu, in terms of section 7(8) of the Divorce Act to grant an order of forfeiture.

[16] Returning to the question whether it was competent for the Magistrate to have made a forfeiture order absent a claim therefor it may be observed, at the outset, that at common law, prior to the enactment of the Divorce Act, it was uncontroversial that a forfeiture order in respect of matrimonial benefits could only be granted if it was claimed. An order could not be granted *mero motu*.

[17] In *Swil v Swil*[2] the following was stated:

*“...Whether the marriage is in or out of community of property, a plaintiff who has not claimed an order for forfeiture at the time of the divorce cannot, in the absence of fraud, subsequently ask for it. This much is clear law...”*[3]

[18] In my view there is no provision in the Divorce Act which in any way alters the common law position set out above.

[19] The correct position is set out by McCreath J, with whom Goldstone J concurred, in *Koza v Koza*[4], a matter where, in a divorce action, a spouse, without elaboration, claimed “forfeiture of the benefits arising from the marriage”.

[20] In *Koza*, the appeal was also concerned solely with the issue of forfeiture and the Learned Judges stipulated the requirements for prosecuting a claim for forfeiture as follows:

*“.....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.”*[5]

(own underlining)

[21] In the present matter, without wishing to belabour the point, not only did the Respondent not plead forfeiture or the material facts to support a claim of forfeiture, but the Respondent did not bring a claim for forfeiture at all and did not formulate a prayer in the pleadings to define the ambit and scope of the forfeiture sought. Given that there was no claim for the forfeiture of the pension fund interest, none could be granted.

[22] It follows that the insurmountable hurdle facing the Respondent is that there was no *lis* in respect of forfeiture before the trial Court.

[23] The reliance by the Magistrate on *JW v JW*[6] was misplaced. That matter is distinguishable because forfeiture was properly raised therein.

[24] Thus the correct order for the Magistrate to have made would have been to have declared that the Appellant was entitled to one half of the Respondent’s pension fund interest.

[25] This is because, as was stated by Makgoba JP[7], absent a forfeiture order the default position is that:

*“[10] ..... if that person is married in community of property the pension fund interest is an asset in the joint estate of which that person and the non-member spouse each has an undivided half share.”*

- [26] Even if I am wrong in concluding that it was not permissible for the Magistrate to have entertained the request for forfeiture, I am of the view that, in any event, this is not a case where it can be said that, notwithstanding the admitted failure by the Respondent to plead forfeiture and the material facts underpinning such a claim, there was a full and proper ventilation of the issues relevant to forfeiture.
- [27] As in *Koza*, the issues have not been fully canvassed. In *Koza*, the Court commented as follows:
- “In my view it is therefore necessary that there be placed before the court evidence in respect of the factors mentioned in s 9(1) and also, in order to establish properly whether there is undue benefit warranting the making of an order, evidence of the nature and value of the benefits in respect whereof a forfeiture is sought.”*
- [28] As in the *Koza* case, the evidence placed before the trial Court was insufficient to have enabled it to exercise its discretion in accordance with the principles stated in section 9(1) of the Divorce Act.
- [29] The only evidence which was properly before the trial Court and which was relevant to the question of forfeiture, was the circumstance that the marriage had endured for a three year period which fact was, in any event, apparent from the pleadings.
- [30] The Respondent, on whom the onus rested to prove that a forfeiture order should be granted, led no evidence about the extent of his pension fund contributions or the monetary benefits which would flow therefrom. Even if he had, further evidence would have been required to determine if forfeiture should have been granted and in particular as to whether the Appellant would have been duly benefited if it was not granted. It is not sufficient simply to refer to the acquisition of an asset and then make the bald allegation that the party against who forfeiture is claimed will be unduly enriched at the expense of the other if forfeiture is not granted.[8] Furthermore, no evidence was led as to the circumstances giving rise to the breakdown of the marriage and whether there was any substantial misconduct on the part of either of the parties.
- [31] I would add that, had a claim for forfeiture been properly brought and had the Appellant thus been aware of the case which she had to meet on this issue, the Appellant in all likelihood would have conducted the trial differently by, for example, giving evidence in chief relevant to the question of forfeiture. It would be unfair and prejudicial to the Appellant to allow the Respondent to contend, for the first time on appeal, that the Appellant had a case to answer in respect of forfeiture when she was not apprised of the ambit and scope of that case in the Court a quo.
- [32] For these reasons this Court cannot confidently conclude, as it was urged to do by Mr Le Roux, that the question of forfeiture was a “real issue” which emerged during the trial[9] or that there is no reasonable ground for thinking that further examination of the facts relevant to forfeiture might lead to a

different conclusion[10].

[33] Condonation was also sought for the late prosecution of the appeal and the late lodging of the appeal record. The condonation application was not opposed and given that it enjoyed prospects of success for the reasons set out above, it is granted.

## ORDER

[34] An order is accordingly issued in the following terms:

1. Condonation is granted in respect of the delayed prosecution of the appeal and the late lodging of the appeal record.
2. The appeal is upheld with costs.
3. The order of the Court a quo is amended to the extent that:

3.1 The following paragraphs are deleted:

*“An order pertaining to the defendant’s Government employee’s pension fund as follows;*

3.2 The above paragraphs are substituted with the following:

*“The Plaintiff is entitled to one half in the Defendant’s Government Employees Pension Fund interest, calculated as at date of divorce;*

The Government Employees Pension Fund is authorized to endorse its records as contemplated by Section 7(8)(ii) of the Divorce Act 70 of 1979;

The Government Employees Pension Fund is authorized to pay to the Plaintiff her half share of the pension fund interest in terms of the provisions of Government Employees Pension Law of 1996 and its rules.”

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P N KROON AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

I agree,  
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M J LOWE J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

Appearances:

For Appellant: Adv Van Zyl instructed by Stuart Laubscher Inc.

For Respondent: Adv Le Roux instructed by Dorfling Attorneys

- [1] See also paragraphs 19 and 22 of the Respondent's heads of argument.
- [2] 1987
- (1) SA 790 (W).
- [3] Page 793C-D. See also Wille's Principles of South African Law 9th Edition at 339 and the authorities cited therein.
- [4] 1982
- (3) SA 462 (TPD) as followed in the recent decision of AJV v MV, a decision of the North Gauteng High Court, Pretoria, as handed down on 4 March 2020 under case number: 3389/2017
- [5] At 465H-I
- [6] 2000 (1) SA 545 (GNP)
- [7] M v M (HCA18/2015)
- [2016] ZALMPPHC 2 (17 June 2016). See also Ndaba v Ndaba [2017] 1 All SA 33 (SCA)
- [8] V v V (3389/2017)
- [2020] ZAGPPHC 154 (4 March 2020)
- [9] Collen v Rietfontein Engineering Works 1948
- (1) SA 413 (A) at 433
- [10] Middleton v Carr 1949
- (2) SA 374 (A) at 385

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