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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A3004/2022

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

30/12/2022

.....

.....

Date

ML TWALA

In the matter between:

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

APPELLANT

And

B[...] M[...]

RESPONDENT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 30th of December 2022

TWALA J (with OPPERMAN J Concurring)

- [1] There are two central issues in this appeal: one is whether the appellant has proved the nature and ambit of the benefit to be forfeited by the respondent and second, whether the Court a quo exercised its discretion properly and judicially when it refused to grant the appellant an order that the respondent forfeit certain patrimonial benefits arising out of a marriage in community of property. The appeal is against the judgment and order delivered on the 10th of November 2021 by the Regional Court Magistrate sitting at Vereeniging.
- [2] The facts foundational to this case are largely common cause and are briefly as follows: the parties were married to each other in community of property on [...] April 2010 and three children were legitimised by this marriage. At the time of the divorce on [...] November 2021, there was only one minor child, K[...] M[...], born [...] March 2013 who is in the care of the respondent. Both the appellant and the respondent were employed during the

course of their marriage, the appellant was employed by the Department of Education as an educator and the respondent was employed by a private company as a general worker. It is undisputed that the disparity in the salaries of the parties is huge as the appellant was earning around R34 000 per month and the respondent R2 500 bi-weekly.

- [3] It is not in dispute that the respondent had an adulterous relationship during the course of the marriage. During 2015 she erroneously sent a “WhatsApp” message to the applicant intended for her adulterous partner wherein she expressed her love for such partner. It is further not in dispute that the marriage relationship continued as normal after the “WhatsApp” message was discussed between the parties and the appellant forgave the respondent. On the 28th of March 2017 the respondent instituted these divorce proceedings due to the abusive conduct of the appellant who, amongst other things, used to come back home late at night. The respondent was suffering from depression and undergoing therapy due to the conduct of the appellant. The appellant had at least two extra marital affairs known to the respondent.
- [4] The appellant launched a counter-claim against the respondent and pleaded that he had never enjoyed a healthy marriage relationship and that there was no meaningful communication between the parties. He alleged that the respondent had extra marital affairs during the course of the marriage and that she has never made any meaningful contribution in the marriage in that all the assets were acquired as a result of the effort of the appellant. The appellant therefore sought an order that the respondent forfeit the benefits arising out of the marriage in community of property in relation to his pension fund with the [...] Fund and two immovable properties including the furniture which order was refused by the Court a quo – hence this appeal.

- [5] It has been decided in a number of cases that the Court may only order forfeiture of the benefits arising out of a marriage in community of property if it is satisfied that, after considering a conspectus of the facts of the case, the one party will in relation to the other be unduly benefited. Put in another way, the Court has a discretion, after considering all the circumstances of the case including the conduct of the parties that led to or caused the breakdown of the marriage relationship, to order forfeiture of the benefits arising out of the marriage in community of property. Furthermore, it is trite that, where a court is granted such a discretion, an appellate court may not interfere unless it is clear that the choice the court has preferred is wrong in law and fact as understood in *Trencon*.
- [6] In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] (5) SA 245 (CC) the Constitutional Court dealing with the issue of the discretion of a lower Court stated the following:

“Paragraph 88: When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised –

‘judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.’

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.”

[7] Furthermore, the onus is on the party who seeks the forfeiture order to prove the nature and the ambit of the benefit to be forfeited. It would not be sufficient to refer to fact of the procurement of the asset only without providing its value as at the time of acquisition and its value at the time of divorce and to contend that the other party will be unduly benefited if forfeiture is not granted.

[8] In *V v V (3389/2017) [2020] ZAGPPHC 154 (4 March 2020)* the Court stated the following:

“Paragraph 12: The Court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited. A party claiming forfeiture must ‘plead the necessary facts to support that claim and formulate a proper prayer in the pleadings to define the nature of the relief sought’. Thus the onus is on the applicant for a forfeiture order to prove the nature and the ambit of the benefit to be forfeited, and in so doing, the applicant must prove the extent to which it is an undue benefit. Similarly, the allegation of undue benefit must be pleaded and proven. It would not be enough simply to refer to the acquisition of an asset and then make the bald allegation that the party against whom forfeiture is claimed will be unduly enriched at the expense of the other if forfeiture is not granted.”

[9] It is apposite at this stage to restate the relevant provisions of section 9 of the Divorce Act, 70 of 1979 which provides as follows:

“9. Forfeiture of patrimonial benefits of marriage

(1) When a decree of divorce is granted on the ground of the irretrievable break-down 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 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 benefited”.

[10] Counsel for the appellant contended that the Court a quo misdirected itself when it made a finding that both the parties are equally to blame for the breakdown in their marriage relationship instead of finding that the respondent’s infidelity was the substantial misconduct that led to the breakdown in the marriage relationship. I cannot agree with this contention. The WhatsApp message became an issue but was discussed and resolved in 2016 and the parties continued with their marriage as normal thereafter. This means, in my view, that the appellant forgave the respondent for the infidelity at the time and continued with the marriage relationship. He only raised this issue in his counter-claim when he was served with the divorce summons by the respondent.

[11] The appellant did not initiate the divorce proceedings based on the WhatsApp message and even in his counter-claim he only vaguely pleaded that the respondent has marital-affairs and failed to return home for several nights. He however, confirmed during his evidence in the Court a quo that the respondent only informed him and only confirmed her infidelity that morning at Court. He further testified in Court that he only left the matrimonial home in 2020 – thus the ineluctable conclusion to draw is that he condoned the conduct of the respondent insofar as the WhatsApp message

was concerned. Moreover, substantial or gross misconduct that leads to the breakdown of the marriage is not the only determining factor in ordering forfeiture of the benefits of arising out of a marriage in community of property.

[12] The uncontested evidence of the respondent is that the breakdown of the marriage has been caused by the conduct of the appellant who had been coming home late at night and sleeping out on some weekends. I am therefore of the view that the Court a quo has not misdirected itself in finding that in the circumstances of this case both parties were to blame for the breakdown in the marriage relationship.

[13] In *Wijker v Wijker* (325/92) [1993] ZASCA 101; [1993] 4 ALL SA 857 (AD) (26 August 1991) the Supreme Court of Appeal stated the following:

“Paragraph 19: It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be purely a factual issue. Once that has been established the trial court must determine, having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefited if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial court after having considered the facts falling within the compass of the three factors mentioned in the section”.

[14] The Court continued in paragraph 34 to state the following:

“Paragraph 34: H R Hahlo in The South African Law of Husband and Wife, 5th Edition, at pages 157 and 158 describes community of property as follows:

‘Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares’.

The fact that the appellant is entitled to share in the successful business established by the respondent is a consequence of their marriage in community of property. In making a value judgment this equitable principle applied by the court a quo is not justified. Not only is it contrary to the basic concept of community of property, but there is no provision in the section for the application of such a principle. Even if it is assumed that the appellant made no contribution to the success of the business and that the benefit which he will receive will be a substantial one, it does not necessarily follow that he will be unduly benefited.”

- [15] It should be recalled that a marriage relationship is not like a business relationship where the sharing of profit and loss is determined only by the contribution being made by the partners or directors whether financial or otherwise. The proprietary rights of a marriage are dependent on the type of marriage the parties chose to conclude. Where the marriage concluded is one in community of property a joint estate is created and at the time of divorce the sharing of the assets of the joint estate shall be equal between the parties unless the one party will be unduly benefited if an order of forfeiture of the benefits arising out of the marriage is not granted. However, the onus is on the party seeking the order of forfeiture to prove that there is a benefit which will be unduly benefited by the other party if forfeiture is not granted.

- [16] There is no merit in the argument that the respondent should forfeit the benefit arising out of the marriage in community of property in respect of the property described as situate at [...] S[...] for the alleged reason that it was procured by the appellant long before the marriage. The appellant has failed to furnish proof of the value of this property at the time when the marriage was concluded and at the time of divorce. Similarly, regarding the appellant's pension fund, he only gave estimated figures as to the value of his pension with the [...] Fund which he could not support with any documentary proof nor could he demonstrate when he obtained those figures and whether it was a death or retirement benefit.
- [17] The Court in determining issues between the parties relies on the evidence placed before it. In this case, the evidentiary burden was on the appellant to prove the nature and ambit of the benefit to be forfeited but has dismally failed to do so. It is of no consequence that the property described as situate at [...] S[...] was procured by the appellant alone before the marriage since. When the parties were married to each other in community of property all their assets and liabilities merged into a joint estate. Once a joint estate is established as a result of the marriage in community of property, the respondent is entitled to share in the property as a consequence of the marriage in community of property.
- [18] It is my considered view therefore that the Court a quo correctly found that the appellant failed to establish the nature and ambit of the benefit for which he sought an order for forfeiture. The inescapable conclusion is therefore that there is no merit in this appeal and it falls to be dismissed.

[19] In the circumstances, the following order is made:

The appeal is dismissed with costs.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 15th of November 2022

Date of Judgment: 30th of December 2022

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