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the law.

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A3017/2021

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

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Date

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NEMAVHIDI AJ

In the matter between:

M, T

Appellant

and

M, M

Respondent

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 December 2021.

JUDGMENT

NEMAVHIDI AJ (MONAMA J concurring):

- [1] This is an appeal against the judgement of the *court a quo* which was held in Vereeniging.
- [2] After the divorce matter concluded the Regional Magistrate ordered that the appellant shall forfeit his share of the immovable property which the respondent acquired prior to the matrimony.
- [3] Aggrieved by this decision, the appellant approached this court for relief.

BACKGROUND OF THIS MATTER

- [4] Appellant who was married at the time he met the respondent cohabitated with the respondent at her residence since 2010.
- [5] He divorced his first wife in December 2012 or January 2013.
- [6] After finalising the divorce appellant and the respondent then entered into a customary marriage on the 21 of December 2013 which was registered in terms of the **Recognition of Customary Marriages Act 120 of 1998** on 02 December 2015.
- [7] Appellant vacated the matrimonial home on 11 October 2018.
- [8] Respondent issued a Divorce summons on the 22nd July 2019. The divorce proceedings were finalised in the Regional court, Vereeniging on 19 October 2019.

- [9] At the time of the conclusion of the marriage the Respondent had two children from a previous relationship.
- [10] No children were born out of the marriage between the appellant and the respondent.
- [11] Respondent was the owner of three (03) immovable properties worth R2 900 000.00 at the time of the conclusion of the marriage. She purchased and improved all these properties utilising her own money as she operates a business which brings her about R80 000.00 per month.
- [12] During the marriage the Appellant and Respondent signed a joint will wherein it was stated that the immovable properties would not be regarded as assets of the joint estate and that those assets would be inherited by the respondent's children.
- [13] During the subsistence of the marriage, appellant and respondent purchased a site at D. Street. They built a house on that site.
- [14] Appellant states that he contributed towards building this house, as he purchased bricks, cement, handrails, tiles and paints.
- [15] The court *a quo* granted equal division of this joint estate in respect of this house.

LEGAL PRINCIPLES

- [16] Appellant was still married to his wife between 2010 and 2013 January. This period cannot be regarded as constituting the period of the marriage, as appellant and respondent could not officially marry at the time.
- [17] The customary marriage started operating from 21 December 2013 after appellant's divorce was finalized.
- [18] He moved out of the common home on 11 October 2018, and the divorce matter was concluded on the 19th of October 2019.
- [19] The duration of the marriage was a period of six (06) years. The real period of the marriage is five (05) years as he separated from his wife from the 19th October 2018 until their divorce was finalized on the 19 October 2019. This is a very short period. In **Matjila v Matjila 1982 (3) SA 320 (W)**, the marriage was ended on the day of the parties separation.
- [20] Respondent transferred the three houses to her two children and to her business partner after separating with the appellant. She did not receive any money when the transfer was effected.
- [21] In **Legato Mckenna v Shea and Another 2010 (1) SA 35 (SCA)**, the Court held that in order for the ownership of the immovable property in the form of the abstract theory of the transfer, two requirements had to be met, namely, delivery which is effected by registration of transfer in the Deeds Office coupled with the so-called real agreement.
- [22] The essential elements of the real agreement are the intention of the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property.

[23] In the present case, both the transferor (Respondent) and the transferees (her children and business partner) did not have any intention to transfer and to receive ownership.

[24] The estate was not diminished as it did not suffer a loss. Those three homes remained in the assets of the joint estate.

[25] Section 9(1) of **the Divorce Act 70 of 1979** reads as follows:

“When a decree of divorce is granted on the ground of irretrievable breakdown of a marriage, the Court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, having regard to the declaration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order of forfeiture is not made, the one party will, in relation to the order, be unduly benefitted.”

[26] The Court *a quo*, having considered that the declaration of the marriage was five years and the fact that the three immovables were financed by the Respondent before she entered into matrimony with the appellant. The provisions of section 9(1) of the Divorce Act are applicable to this. If the order of forfeiture of the three properties is not made, the appellant will, in relation of the order, be unduly benefitted.

[27] In **Wilker v Wilker 1993 (4) SA 720 (A)**, the Court held that it is not necessary for all three grounds to be present. One of the factors, like short duration, is enough to warrant the forfeiture order.

[28] It is trite that the shorter the duration of the marriage the more likely a Court will grant the forfeiture order. See **KT v LT JDR 0787 (FB)** at paragraph 49.

[29] In **Ferris and Another v First Rand Bank Ltd 2014 (3) SA 39 CC** at paragraph 28, the Constitutional Court held:

“An appeal court may interfere with the exercise of a discretionary power by a lower court if only that power had not been properly exercised. This would be so if the court has exercised the discretionary power capriciously, was moved by a wrong principle of law or an incorrect appreciation of facts, had not brought its unbiased judgment to bear on the issue, or, had not acted for substantial reasons.”

[30] It is the finding of this court that the court *a quo* did not exercise its discretion capriciously or overemphasized certain facts to the exclusion of others.

[31] In the result:

1. The appeal is dismissed with costs;
2. The forfeiture order granted by the court *a quo* stands.

NEMAVHIDI AJ
Acting Judge of the High Court of South Africa
Gauteng Local Division

I agree.

MONAMA J
Judge of the High Court of South Africa

Gauteng Local Division

Date of Hearing: 17 August 2021
Date of Judgment: December 2021
For the Appellant: T. Kiylops
Instructed by: R Steven Attorneys
For Respondent: M.D. Hlatshwayo
Instructed by: Hlatsshwayo-Mhayise Inc Attorneys