Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 09183/2017

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

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DATE

In the matter between:

E S M Applicant

And

A T M Respondent

JUDGMENT

MAKUME, J:

[1] On the 18th April 2023 I granted the following order:

1.1 A decree of divorce is granted.

1.2 The Plaintiff's right to share in the Defendant's Pension fund, the matrimonial home situated at […] T[…] Street, T[…], Brakpan, including the furniture therein is forfeited.

1.3 The Defendant shall pay to the Plaintiff the sum of R20 000.00 being the deposit the Plaintiff paid towards the purchase of the matrimonial home.

1.4 The Plaintiff is ordered to pay the taxed party and party cost of the Defendant.

[2] The Applicant who was the Plaintiff in the action now seeks leave to appeal against that order and/or judgement on the grounds set out in the notice of application.

[3] It is argued that leave to appeal should be granted because:

3.1 This Court erred in favour of the Respondent in respect of the prayer for forfeiture of the benefits.

3.2 That this Court erred in finding that the Respondent had contributed an amount of R14 000.00 towards the purchasing of the matrimonial home situated at […] T[…] Township.

3.3 The Court erred in ruling that the Applicant was only entitled to an amount or R20 000.00 which is the amount he contributed towards the purchasing of the matrimonial home.

[4] In paragraph 11 of the notice of application for leave to appeal the Applicant states that “he is of the view that another Court could come to a different conclusion than the one arrived at by the Court.”

[5] I accept that in his heads of argument the Applicant has correctly set out the test to be applied in considering an application for leave to appeal even though he made reference to an incorrect section of the Superior Court Act. It should be Section 17(1) (a) and not Section 1.

[6] It is trite law that application for leave to appeal should be considered within the perimeter of what is set out in Section 17(1) (a) of the Superior Court Act 10 of 2013 which reads as follows:

> “Leave to appeal may only be considered where the judge or judges concerned are of the opinion that –
>
> (a) (i) The appeal would have a reasonable prospect of success or
>
> (ii) There is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration.

[7] The only issue in this matter was the interpretation of Section 9(1) of the Divorce Act and how this Court applied that law to the facts presented before me.

[8] I do not deem it necessary to restate the provision of Section 9(1) of the Divorce Act save to say that it gives a Court a discretion which should be applied judicially and after taking into consideration the jurisdictional facts set out therein which is the duration of the marriage, the circumstances which gave rise to the breakdown of the marriage as well as any substantial misconduct on the part of either of the parties.

[9] The Applicant has referred this Court to the decision of this division in the matter of **JW v SW 2011 (1) SA (GNP)** a judgement by Makgoka J as he then was and also a decision of the Appellate Division in **Wijker v Wijker 1993 (4) SA 720 (A)**. In Wijker (supra) the Court held that the proper approach in determining whether an order of forfeiture should be made is to first 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 and that once it is determined whether such benefit will be an undue one.

[10] The facts in JW v SW (supra) are closely similar to the facts in this matter. The learned Makgoka J in deciding that matter starts off in paragraph 1 with the following:

> "The central question in this divorce action is whether a party to a marriage in community of property can be ordered to forfeit an asset she/he has brought into the joint estate. The answer should in my view be in the negative. The essence and twin concepts of marriage in community of property and forfeiture of benefits arising from such marriage are that a party can only benefit from assets brought into the estate by the other party not from his own, a fortiori such a party cannot be ordered to forfeit his own asset."

[11] After analysing the facts and in considering the pension benefits built up by the Plaintiff Makgotla J concluded as follows at paragraph 37 and 38:

> "I take into account that the Plaintiff has been in continuous employment for the past 25 years during which time she probably built up a fairly modest pension interest. On the other hand, the Defendant due to his erratic employment history has built no such interest
>
> In considering what is fair and just in the circumstances of the case I conclude that no order should be made in terms of Section 8 (a) of the Act. In other words, the Defendant is not entitled to any part of the Plaintiff's pension."

[12] The only contribution that the Applicant brought into the estate is the admitted amounts of R20 000.00 (Twenty-Two Thousand Rand) nothing more.

[13] I am under the circumstances of the view that the Applicant has failed to persuade me that he has a reasonable prospect that the appeal would succeed in the result I make the following order.

1. The Application for Leave to Appeal is dismissed.

2. The Applicant is ordered to pay the Respondent's taxed party and party costs.

Dated at Johannesburg on this 26th day of June 2023

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M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	14 JUNE 2023
DATE OF JUDGMENT	:	26 JUNE 2023
FOR APPLICANT	:	ADV MAKUA
WITH		ADV NGWANA
INSTRUCTED BY	:	MESSRS DENGA INCORPORTED
FOR RESPONDENT	:	ADV MAGAGULA
INSTRUCTED BY	:	MATEME INCORPORATED