

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



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: **26 October 2022**

SIGNATURE:.....

CASE NO: A160/2019

In the appeal between:

M[...],
Appellant

M[...]

N.O

And

L[...], N[...]

Respondent

Coram: Kubushi & Millar JJ

Heard on: 25 October 2022

Delivered: 26 October 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 26 October 2022.

SUMMARY: Appeal against the dismissal of a claim for forfeiture in terms of section 9(1) of the Divorce Act 70 of 1979 – parties married in community of property – 15 year marriage – onus on party claiming forfeiture to establish entitlement on a balance of probabilities – evidence led at trial did not establish pleaded grounds for forfeiture or substantial misconduct of respondent – appeal dismissed with costs.

ORDER

On Appeal from the Regional Division of Gauteng held at Pretoria, (The Learned Magistrate Bekker sitting as Court of First Instance)

It is ordered: -

1. The executor in the estate of the late M[...] M[...] is substituted as appellant.
2. The application for the reinstatement of the appeal is granted.
3. The appeal is dismissed with costs.

JUDGMENT

MILLAR J

1. This is an appeal against a decision of the Learned Magistrate Bekker in the Regional Court of Pretoria on 2 August 2019 dismissing a claim by the Late Ms. L[...] ('the deceased') for the forfeiture of the benefits of a marriage in community of property between herself and the respondent.
2. The claim arose out of the breakdown of a marriage between the deceased and the respondent. The parties, both of whom were mature¹ and had children from prior relationships, had initially entered a marriage in community of property during 2000. This marriage had failed, and they were divorced during 2003. On 30 March 2004, they had again married each other, once again in community of property. This marriage endured until during 2017 when the respondent left the common home. He instituted divorce proceedings on 3 July 2018.
3. It was not in issue between the parties that a divorce should be granted when the matter came to trial in 2019 – the crisp issue to be decided was whether the respondent should forfeit any of the benefits of the marriage.
4. Before dealing with this issue, it is apposite to mention that the prosecution of the present appeal has not been without challenge. The appeal despite being noted timeously on 4 September 2019 was thereafter not timeously prosecuted within the 60-day period prescribed by Rule 50(1)² of the Uniform Rules of Court and so it was argued, by the respondent, the appeal had lapsed. Thereafter on 14 June 2021, the deceased passed away.

¹ The respondent was born on 28 March 1949 – he was 51 at the time of the first marriage and 55 at the time of the second marriage. He was 68 at the time he instituted the divorce proceedings. The deceased was born on 14 April 1960 - she was 40 at the time of the first marriage and 44 at the time of the second marriage. She was 57 when the divorce proceedings were instituted.

² The rule provides that: "An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed."

5. The appeal was first set down for hearing on 5 October 2021 but was removed from the roll on that day with the appellant to pay the wasted costs. This had, presumably, been occasioned because of the failure to apply for condonation for the failure to timeously prosecute the appeal together with a change of attorneys on the part of the appellant. Thereafter on 23 October 2021, an application for condonation was brought, an answering affidavit filed and a replying affidavit on 16 November 2021.
6. The appeal was again enrolled for hearing on 12 April 2022 and was again removed from the roll. This is now the third time that this appeal is before the court.
7. The application for condonation does not deal in any substantive way for the delay in the timeous prosecution of the appeal. This is not surprising given that the deceased had passed away and the attorney representing her had withdrawn and been replaced by a new attorney shortly before the first hearing on 5 October 2021. The highwater mark is the assertion that the deceased's attorney had somehow failed to act on the instructions of the deceased and that a complaint had been made to the Legal Practice Council. The application also had annexed to it a copy of the engagement letter for the appellant's new and current attorney of record on 9 July 2021. The application fails to deal at all with the delay between 9 July 2021 and 23 October 2021 when the application was brought.
8. Besides the failure to prosecute the appeal, the court on 5 October 2021 questioned the *locus standi* of the appellant. Prior to this and indeed subsequently, the appellant has never formally substituted himself for the deceased in the proceedings as provided for in rule 15(3)³ of the Uniform Rules

³ The rule provides that: "Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted."

of Court. The appellant, it would appear, took the view that the uploading on the caselines filing system of a copy of the letters of executorship appointing him on 24 June 2021 is, in itself sufficient to effect his substitution for the deceased.

9. With the passing of the deceased and the termination of the mandate of the attorney appointed by her, there is no prospect of this court ever being furnished with a proper explanation as to the reasons for the failure to prosecute the appeal timeously. Notwithstanding that the award of an order for costs against the estate of the deceased and two unsuccessful attempts to have this appeal heard, the appellant persists.
10. The issue that arises in this appeal has consequences for not only the appellant and the respondent but also for the heirs of the deceased and it is for this reason that I am of the view that, notwithstanding the shortcomings in the application for condonation and disregard of the rules when it comes to the appellant's substitution, that it is in the interests of justice that the appellant be substituted for the deceased and the merits of the appeal be heard and decided.
11. Turning now to the issue on appeal – was the Learned Magistrate *a quo*, correct when after hearing the evidence of both the deceased and the respondent, he dismissed her claim that the respondent forfeits the benefits of the marriage?
12. The consequence, generally of a marriage in community of property is that:

“When couples marry in community of property, they share everything. Everything they have when they marry, and everything they acquire during the marriage, automatically falls into their joint estate.

In this context, the word “estate” means everything a person owns as well as everything he or she owes – in other words, all their assets and all their debts. An ‘asset’ is anything of monetary value: for example, money, shares in a company, accrued pension interests, and physical

things like cars, books, clothes, houses, farms, parrots, jewellery and so on" (footnotes omitted)⁴

And

*"It is important to note that all this happens automatically by operation of law the moment the couple marries. They do not need to sign any documents or re-register any of the property".*⁵

13. In the present matter, neither the breakdown nor the desire of the parties to end the marriage and be divorced was in issue. In issue was whether the court should grant an order in favour of the deceased for the respondent to forfeit the benefits of the marriage. In this regard it is the deceased who bore the onus of establishing her entitlement to a forfeiture order.
14. In terms of section 9(1)⁶ of the Divorce Act 70 of 1979 the court has a discretion whether to grant or refuse a full or partial forfeiture of patrimonial benefits. This discretion is to be exercised judicially. Three factors should be considered before a complete or partial forfeiture of benefits is to be ordered. The first is the duration of the marriage, the second the circumstances which lead to the breakdown of the marriage and thirdly whether there was any substantial misconduct by either of the spouses. These represent the sole factors that are to be considered in deciding whether there ought to be forfeiture or not⁷ - if these factors are present then the enquiry moves to whether the failure to grant a forfeiture will result in an 'undue benefit'.

⁴ Barrat, A. Domingo, W. Amien, W. Denson, R. Mahler-Coetzee, JD. Olivier, M. Osman, F. Schoeman & H. Singh, PP. *Law of Persons and the Family* 2nd ed (2019) Pearson: Cape Town, Pg 284

⁵ *Ibid* page 285

⁶ The section provides that: "*When a decree of divorce is granted on the ground of the 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, either wholly or in part, if the court, having regard to the duration 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 for forfeiture is not made, the one party will in relation to the other be unduly benefited.*"

⁷ See *Botha v Botha* 2006 (4) SA 144 (SCA) at para 8

15. The duration of the marriage between the parties was 15 years⁸. Both parties were mature when they married. In 2014 when the respondent turned 67, he retired. The relevant circumstances pleaded by the deceased in claiming forfeiture, which were said to have led to the breakdown of the marriage included that the respondent had deserted the deceased when he left the common home in 2017, that the respondent had not been intimate with her since 2006 and that as a result of emotional and financial abuse perpetrated by him, she had been plunged into both debt and a state of depression and further that he had during the marriage failed to 'meaningfully' contribute to the household expenses and debts leaving the deceased to shoulder this burden alone. Additionally, it was pleaded that when the respondent retired, he had failed to share his pension payout with the deceased.
16. The deceased testified at length during the trial about specific assets purchased by her and various financial transactions entered during the marriage. The respondent similarly for his part testified about contributions made by him to both the joint estate and to the support of the deceased.
17. Pertinently the evidence in the main centered on the deceased's acquisition before the second marriage of an immovable property which was subject to a mortgage bond, and which was thereafter re-mortgaged so that a vehicle could be purchased for the respondent to use. This had led, so the deceased testified, to increased stress upon her which had resulted in her suffering from depression. This all occurred some 10 years before the divorce proceedings were instituted. The deceased also testified about the acquisition of a second property which was also subject to a mortgage bond and to her financial stress relating to both this property as well as debts for furniture. The respondents' evidence that he had paid off the debt relating to the furniture and had also contributed to the Polokwane property from the proceeds of his pension payout was not disputed. It was also a matter of some contention that the respondent

⁸ See *KT v MR* 2017 (1) SA 97 (GP) in which it was held that the duration of the marriage is a fault neutral factor which plays a role in considering proportionality – the longer the marriage the more likely the benefit is due and conversely the shorter the marriage the more likely it is not.

had purchased a motor vehicle after having left the common home without the consent of the deceased.

18. It is not necessary to traverse the evidence led by both the deceased and the respondent in any further detail. The court *a quo* dealt with this at length in its judgment and concluded in the exercise of its discretion, correctly in my view, that notwithstanding the length of the marriage, the deceased had failed on a conspectus of the evidence to discharge the onus upon her to show that the respondent had either ‘meaningfully’ failed to contribute to the household expenses or debts or that he had emotionally or financially abused her as alleged.
19. Once the deceased and the respondent were married for the second time in community of property, the entirety of their estates were pooled into a joint estate – irrespective of where or when they had acquired the specific assets. None of the assets in their respective estates was alleged to have been excluded from the joint estate.⁹ The evidence in the present matter established that both the deceased and the respondent worked and enjoyed the benefit of assets acquired by the joint estate. This included the motor vehicle purchased by the respondent before the divorce. They also shared the expenses.
20. The relationship between spouses, while having legal consequences is also profoundly personal. Spouses choose to live their lives together in a manner that best suits them – there is self-evidently no ‘one-size fits all’ way for people to order their affairs and relationship when they choose to marry.
21. It was observed in *Kritzinger v Kritzinger*¹⁰ that:

“Human experience suggests that generally speaking where there is a breakdown of a marriage the conduct of both parties most probably always contribute to it.”

⁹ For example, a testamentary disposition specifically excluded from becoming part of any joint estate or liquidated damages for personal or reputational injury which would by operation of law be excluded.

¹⁰ 1989(1) SA 67 (A) at 821-J

22. There was, besides what has been alluded to above, no other allegations or evidence relating to the circumstances which led to the breakdown of the marriage. Furthermore, there was no evidence of substantial misconduct¹¹ on the part of the respondent – the high watermark being that he had deserted the common home. The allegations relating to alleged emotional and financial abuse were simply not established on the evidence.
23. Having found that the deceased failed to meet any of the 3 requirements set out in section 9(1) of the Divorce Act, the question of whether the respondent would be unduly benefitted¹² does not arise.
24. It is perhaps apposite to mention that even if the deceased had met the 3 requirements, there was no evidence led which established any ‘undue benefit’ that would have been received by the respondent. He was entitled as a matter of law to what he had contributed to the joint estate at the very least and any order of forfeiture would only have served to affect his right to his half share of the joint estate insofar as it may have exceeded his contribution.
25. In the circumstances, I propose the following order:
- 25.1 The executor in the estate of the late M[...] M[...] is substituted as appellant.
- 25.2 The application for the reinstatement of the appeal is granted.
- 25.3 The appeal is dismissed with costs.

¹¹ *Wijker v Wijker* 1993 (4) SA 720 (A) at 730B-C; *Singh v Singh* 1983 (1) 781 (C)

¹² Such ‘undue benefit’ must be proved – see *Matyila v Matyila* 1987 (3) SA 230 (W)

A MILLAR**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA****I AGREE AND IT IS SO ORDERED**

E M KUBUSHI**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON:

25 OCTOBER 2022

JUDGMENT DELIVERED ON:

26 OCTOBER 2022

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