



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not reportable

Case No: 022/2022

In the matter between:

M D M

APPLICANT

and

T P M

RESPONDENT

Neutral Citation: *M v M* (022/2022) [2023] ZASCA 75 (26 May 2023)

Coram: Molemela JA, Mbatha JA, Meyer JA, Matojane JA and Siwendu AJA

Heard: 14 March 2023

Delivered: 26 May 2023

Summary: Family Law – divorce – partial forfeiture of benefits – misconduct – whether s 9(1) principles properly considered by the full court – whether condonation and waiver ground raised by full court mero motu sustainable – s 9(1) of the Divorce Act 70 of 1979, as amended, principles restated.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Kganyago J, Muller J and Naude AJ sitting as court of appeal):

1 Condonation for the late filing of the application for special leave to appeal the order of the full court dated 23 March 2021 is hereby granted.

2 Special leave to appeal the judgment and order of the full court, Limpopo Division of the High Court, Polokwane, dated 23 March 2021 is granted.

3 The appeal is upheld with costs and the order of the abovementioned full court is set aside and substituted as follows:

‘4.1 The appeal is upheld with costs.’

4.2 Paragraphs (c) and (d) of the order of the High Court (MG Phatudi J) are set aside and substituted as follows:

‘(c) The defendant’s counterclaim succeeds.

(d) The patrimonial benefits of the parties’ marriage in community of property in respect of the defendant’s pension benefits and interest held in the Government Employee Pension Fund are forfeited by the plaintiff in favour of the defendant.’

JUDGMENT

Mbatha JA (Molemela, Meyer and Matojane JJA and Siwendu AJA concurring)

[1] Mr T P M (the respondent) and Mrs M D M (the applicant) were married to each other on 1 October 1985 in community of property and profit and loss. On 17 October 2016 the respondent instituted an action for divorce and ancillary relief thereto in the Limpopo Division of the High Court, Polokwane (the high court), against the applicant. On 19 November 2020, the high court, (per MG Phatudi J) dismissed the applicant’s counterclaim for a partial forfeiture order in respect of the applicant’s pension benefits and granted the following orders:

'(a) a decree of divorce; (b) the joint estate shall be divided equally between the parties as stipulated in the signed Deed of Settlement marked [Annexure "A"] which is made an order of Court; (c) the defendant's counter claim is dismissed; (d) the Government Employee Pension Fund (G.E.P.F) is ordered to pay to the plaintiff 50% of the defendant's pension fund's nett benefit/interest, out of its G.E.P.F calculations from the date of divorce and payable in terms of the provisions of s 3 of the Government Employees Pension Law Amendment Act 19 of 2011; (G.E.P.F. Law Amendment Act) and (e) that each party to pay own costs.'

[2] Aggrieved by the decision of the high court, the applicant on 27 January 2021 sought leave to appeal from this Court against the judgment and order (save for the order dissolving the marriage) and the condonation for the late filing of the application for leave to appeal. On 12 March 2021 this Court granted the applicant leave to appeal to the full court, Limpopo Division of the High Court, Polokwane (the full court). Her appeal to the full court failed.

[3] On further application, the applicant sought special leave to appeal to this Court. On 26 February 2022 this Court ordered that the application for leave to appeal be referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). The parties were directed to be prepared, if called upon to do so, to address this Court on the merits of the appeal. In order to obtain leave from this Court, the applicant needs to establish that the appeal would have a reasonable prospect of success as contemplated in s 17(1)(a)(i) of the Superior Courts Act on both appealability and on the partial forfeiture of benefits sought.¹

[4] Furthermore, the applicant applied in terms of rule 12 of the Rules of this Court for condonation for the late filing of the record and the heads of argument. The applications were not opposed by the respondent. Accordingly, the applicant's non-compliance is condoned. In addition, as is apparent from the record, the respondent abides by the decision of this Court as was the case when the appeal served before the full court.

Background

¹ *Van Wyk v The State, Galela v The State* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA).

[5] In the particulars of claim the respondent attributed the failure of the marriage to the grounds that:

'the parties are no longer compatible and no longer share common interests; the Defendant [the applicant] has through her conduct as mentioned earlier humiliated and hurt the Plaintiff [respondent]; the Plaintiff has lost his love and affection for the Defendant and is no longer interested in the continuation of the marriage relationship; the Defendant denies the Plaintiff with his conjugal rights.'

The respondent's core claim with regard to the division of the joint estate was a specific claim for a half share in the applicant's pension interest held by GEPF. This claim was based on the provisions of s 7(7) of the Divorce Act 70 of 1979 (Divorce Act), as amended, which deems the pension benefits or interest of a spouse to form part of the joint estate.

[6] In her plea and counterclaim, the applicant did not resist the claim for a decree of divorce. She admitted that the marriage relationship had irretrievably broken down, although she disputed that she was the cause of the breakdown as set out in the respondent's particulars of claim. In her counterclaim, she claimed that the reasons for the breakdown of the marriage were that:

'the Plaintiff (the respondent) formed an adulterous relationship which relationship he refused to end notwithstanding numerous requests by the defendant; the Plaintiff has a five-year-old child with his mistress; the Plaintiff failed to contribute pro-rata according to his means toward the running of the household and the maintenance of the parties' children; the Plaintiff was financially irresponsible in that he would among other things spend his money on his mistress; the Plaintiff has ruined the Defendant financially in the amount of approximately R1 500 000.00; the Plaintiff has humiliated and degraded the Defendant throughout the marriage relationship; there is a total lack of communication between the parties [and] the parties are living separate lives and are no longer interested in the continuation of a marriage relationship.'

Consequently, the applicant sought an order that the respondent partially forfeits the right to share in her pension interest in GEPF with membership number 97917510, as he would be unduly benefitted. This issue was central during the hearing of the divorce action.

The appellant's evidence presented during the trial

[7] The applicant's testimony of what led to the breakdown of the marriage relationship was the prolonged extramarital affair by the respondent with one Mapula

Eva Leshiba (Eva), an erstwhile employee of their Financial Services business. The applicant became aware of the respondent's extramarital affair with Eva through an anonymous call in July 2007. She confronted Eva, who admitted in a derogatory manner that she was involved in a love relationship with the respondent. The respondent, however, denied the existence of the affair. The applicant described this incident as a turning point in her life, as the affair was conducted in the public domain. Furthermore Eva bore the respondent a child, who was five years old at the time of the divorce. These incidents brought her pain and humiliation.

[8] The applicant testified that she tried professional counselling with her husband immediately after learning about the respondent's extramarital affair with Eva, which bore no fruit. During the second session of counselling with one Dr Mabeba, the respondent informed Dr Mabeba that 'this thing of marital affair, [was] something that [was] in him. A man who did not have an extramarital affair was a fool'. Consequently, nothing would stop him from having mistresses in his life. The applicant testified that she realised that her efforts at reconciliation with the respondent were futile. She expressed her disillusionment in this manner: '. . . from there I could see that we were heading nowhere with this session. That is when I told my husband that because I can see that you are still adamant that there is no way that things can change then I think that even though we may stay as a man and a wife then it will be better for us to stay that way but . . . we will not have sexual intercourse up until he stops having this extramarital affairs. . . .' When the applicant was asked to clarify to the court what she meant by that, her response was 'because I was afraid that I may be infected with HIV Aids . . .'. Be that as it may, she still left the door open for him as she informed him that only when he was tired of having mistresses, they could discuss the way forward. Her evidence was that: 'we will talk about the conjugal rights. Maybe go and do some check-ups if there are some illnesses'. And explained further: 'So that he also can be satisfied that I do not have a love affair'.

[9] The applicant testified that on 25 March 2008, she took the bull by its horns and dismissed Eva from their employment, which did not settle well with the respondent. In retaliation, the respondent informed her that he was in love with Eva, will marry her, build her a house and start a business with her. This was the beginning of her financial woes as the respondent stopped depositing money into her

account, as he had previously done. This occurred at a time when their cash loan business was flourishing. At this stage, the family business was making between R20 000 and R40 000 per month. By 2007 the parties had already invested over R500 000 with Absa Bank. The applicant was told in no uncertain terms by the respondent to stop interfering in the family business.

[10] In support of her claim for a partial forfeiture of benefits, the applicant testified of a grand scale fleecing of the joint estate. The respondent gave money to Eva to start a cash loan business called Mokgatlou Cash Loans (Mokgatlou), which business was operating in direct competition with the family business. The respondent financially and physically assisted Eva in her cash business to the detriment of the family business and the joint estate. The Mokgatlou cash loan business was followed by Malele Funeral City Parlour (Malele) established by the respondent with Eva, in which Eva acquired a 50% interest, the respondent holding a 20% interest and 30% was warehoused for other partners. Unabatedly, the respondent and Eva established other businesses including El-Eshe Trading CC and El-Eshe Funeral Undertakers CC where each of them held a 50% interest respectively.

[11] The applicant testified that Eva, whilst in their employment, had purchased a stand close to their matrimonial home. The respondent built a double-storey house for Eva on that stand, partially completed around November 2012. During this period, the respondent sold nine head of cattle out of their 73 head of cattle kept in Dendron to a local chief. The proceeds of the sale of cattle totalling R34 000, were deposited into the El-Eshe banking account. Coincidentally, the sale of livestock happened at the time when the roof of Eva's house was constructed. Eva was given access to their motor vehicles at that stage, without the applicant's consent. The relationship between the respondent and Eva was at all times conducted in the public domain.

[12] The applicant testified that the respondent was building a business empire with Eva, whilst she was struggling to make ends meet. Finally, the applicant took the gauntlet and approached the Maintenance Court in respect of their minor daughter's educational needs. During the hearing of the maintenance case, the respondent informed the court that he had six other children born out of wedlock

whom he was maintaining at R300.00 per month per child. He proposed to pay the same amount for his daughter. The court, however, awarded the applicant a maintenance order of R750 per month in respect of their daughter with effect from 30 April 2013. That was not the end of the matter. In 2015 the respondent was again ordered by the Maintenance Court to pay for their daughter's university fees from the funds invested with Absa Bank, which he prior to that had refused to do. The applicant testified that she was solely responsible for their children's education from primary school up to grade 12 and that when it was the respondent's turn to take over in respect of their tertiary education, he failed to do so.

[13] It was also the applicant's testimony that she contributed 80% towards the building of the matrimonial home and made provision for her family members, including the respondent, to be a member of her medical aid scheme. The respondent did not contribute proportionately towards the running of the household and the maintenance of the children. During the time when the respondent was involved in Eva's business interests, the applicant had no access to their cash loan business and unbeknown to her, their cash loan business had been deregistered on 23 November 2015 at the instance of the respondent.

[14] The applicant was cross-examined about Mogasehla, a business allegedly run by her in competition to the family business. She testified that the alleged competing business was registered in the name of her nephew in 2006, long before she and the respondent had marital problems. A fact which was known to the respondent. She testified that she was not involved in that business, save that its employees, after they had collected money from her nephew's clients, handed the money over to her at the request of her nephew who lived in Johannesburg. The money was used for the welfare of her nephew's children who lived with her, and the balance was given to him. She vehemently denied that she was a sleeping partner in that business.

[15] Under cross-examination, it was suggested to the applicant that the respondent paid for the university fees of their oldest son. The applicant's response was that the respondent paid only for the first two years of his tertiary education, from 2009 to 2010. And that when their son insisted on following his chosen career path in Information Technology rather than medical studies as proposed by the

respondent, he stopped paying for his university fees. Consequently, the applicant had to take over the payment of his university fees and all related expenses from the end of the first semester in 2011.

[16] When the applicant was asked about the financial status of their family business when both parties were still involved in its operation, she testified that their business was thriving and they had no losses. The surplus profits from the business enabled them to invest funds with ABSA bank and buy Christmas gifts for employees, customers and relatives. And since the dismissal of Eva, she was disconcerted to learn that Eva, who was running her cash loan business alongside theirs, was also entrusted by the respondent with the collection of cash from their clients. She confirmed the allegation in her pleadings that the respondent had ruined her to the tune of R1.5 million, which represented the money collected by the respondent from the family business from 2008 to the date of divorce that was not accounted to her. When it was suggested that she had free access to groceries in their shop, she stated that, that was the case before Eva joined the respondent in that business.

The respondent's evidence

[17] The respondent denied having an extramarital affair with Eva. He averred that they were only friends. He visited her, assisted her in collecting money from clients and assisted her in her other business interests. He denied having business interests with Eva at all and alluded only to being involved in the family business. It was only under cross-examination when he was confronted with documentary evidence that he conceded to have established businesses with Eva. The concession was also contrary to his plea to the counterclaim where he averred as follows: 'I am not the owner of El-Eshe Funeral Undertakers, it belongs to one Eva Lesheba (sic), and I am the employee thereof'. He struggled to explain the discrepancy in his plea to the counterclaim and in his evidence in chief regarding the ownership of business interests with Eva.

[18] The respondent who had testified to the existence of the family business was confronted under cross-examination with proof of the deregistration of the family business at his instance. He misled the high court when he claimed to be working at the family business, when he had knowledge that it had been deregistered. He

admitted that he was working at Eva's businesses, whilst in the same breath he claimed to have deregistered the family business due to it causing him stress. The documentary evidence that was used to confront the respondent also showed that he left El-Eshe Funeral Undertakers in 2013. He confirmed this fact but stated that he was not compensated for his member's interest in that business. Instead, Eva gave him a credit card to use whenever he needed to purchase anything. The respondent did not disclose the credit limit on the credit card. The respondent, surprisingly, claimed to be working for free for Eva, as he testified that he was not paid a salary but claimed to draw a salary of between R3 000 and R4 000 from the family business. Later, he claimed to have received a basic salary of between R2 000 and R3 000 from Eva.

[19] The respondent gave a glowing testimony of Eva's business acumen, leadership qualities and competency in business. He attributed the demise of the family business to her expulsion by the applicant. He confirmed that Mokgatlou, owned by Eva, operated where the family business operated and that he was assisting Eva in that business. He testified that he would collect money from Eva's business clients on her behalf. At the same time, he alluded to the competition at the instance of the applicant posed by Mogasehla, which stopped him from doing business at pension points due to Mogasehla undercutting interest rates in competition with the family business.

[20] The respondent confirmed that they had a profitable business in 2007, which had yielded an investment of over R500 000. He also confirmed that the family had various business interests, including a cell phone depot, a poultry business and a spaza shop. The respondent claimed to have provided for his children's education from the proceeds of various business interests. He denied building Eva a house or of using the proceeds of the sale of cattle for the benefit of Eva. Upon being questioned whether he had children with Eva he gave an evasive answer. He did not deny the existence of the maintenance orders sought by the applicant for the educational needs of their children.

The judgment of the full court

[21] The full court, per Kganyago, Muller JJ and Naude AJ, dismissed the appeal by the applicant for an order for partial forfeiture of benefits. In dismissing the appeal,

it found that the applicant, of her own accord, had given the respondent permission to continue having extramarital affairs until he got tired of them. In that regard, so it was held, she condoned the alleged extramarital affair with Eva for the past nine years. The full court held that as a consequence of such a condonation, she waived her right to rely on the long enduring extramarital affair of the respondent with Eva as a ground for the irretrievable breakdown of the marriage since she was content with it. The full court concluded that the applicant's reliance on the long enduring extramarital affair did not suffice to support her claim for an order for forfeiture of benefits.

[22] Additionally, the full court held that the applicant was conducting Mogasehla in competition with the family business, Mokgatshehla, hence the wanting financial state of Mokgatshehla. As a result the conduct of the applicant in contributing to the demise of Mokgatshehla amounted to substantial misconduct on her part.

[23] The full court also accepted the respondent's evidence though it was not substantiated. In conclusion, it held that taking into consideration the duration of the marriage of the parties, the circumstances that led to the breakdown of their marriage and that both parties have committed substantial misconduct, an undue benefit will not accrue to one party in relation to the other if an order for forfeiture was not granted.

The issues before this Court

[24] The legal questions before this Court are as follows: (a) whether the applicant was entitled to a partial forfeiture order in respect of her pension interest/benefit held in GEPF; (b) whether the respondent's long enduring extramarital affair with Eva, the abuse and misappropriation of the funds from the various family business interests for the benefit of Eva and the failure to contribute meaningfully to the joint estate by the respondent translated into substantial misconduct on the part of the respondent; (c) in that regard, whether the respondent would be unduly benefitted if the order for partial forfeiture of benefits was not granted; (d) whether the full court was correct in finding that the appellant condoned the extramarital affair of the respondent with Eva and waived her right to rely on that ground of misconduct in pursuit of her claim for a partial forfeiture of benefits; (e) lastly, whether the full court was entitled to mero motu raise the issues of condonation and waiver.

The legal principles applicable

[25] Section 9(1) of the Divorce Act provides that:

'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 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 benefitted.'

[26] The entitlement to a half share in the pension interest of the other spouse is governed by ss 7(7) and 7(8) of the Divorce Act; which provide as follows:

'7(a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled; the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.

[27] The Divorce Act did away with the fault element as a ground for divorce. However, a consideration of whether there was substantial misconduct on the part of one of the parties, is one of the factors that may be taken into account. It is not a stand-alone factor but has to be considered with the other factors mentioned in s 9(1).

[28] There are several seminal judgments which have clarified the legal principles in relation to the application of s 9(1). The principles stated by the Appellate Division in *Wijker v Wijker*² (*Wijker*) are as follows:

(a) The party seeking an order for forfeiture of benefits does not have to prove the existence of all three factors in s 9(1) cumulatively.³ The court needs to ask itself whether one party will be unduly benefitted if an order of forfeiture was not made, and in order to answer that question, regard should be had to the factors mentioned in s 9(1).

(b) *Wijker* advocates that when dealing with s 9(1) the following approach should be adopted: 'the first step is purely a factual issue. Once that has been established the trial court must determine, having regard to the factors mentioned in the section,

² *Wijker v Wijker* 1993 (4) SA 720 (A).

³ *Ibid* at 721F.

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.⁴ It further advocated the approach adopted in an unfair labour practice dispute, where the word discretion is used in a wider sense. A court will not be exercising a discretion in the narrower sense. Therefore there will be no choice between permissible alternatives involved.

(c) The court emphasised that when making a value judgment, applying the principles of fairness is not justified, as s 9(1) contains no provision for the application of such principle. Not only is it contrary to the basic concept of community of property but there is no provision in s 9 for the application of such a principle. It held further that in considering the appeal the court is therefore not limited by the principles set out in *Ex parte Neethling and Others* 1951 (4) SA 331 (A) and it may differ from the court a quo on the merits. It is only after the court has concluded that a party would be unduly benefited that it is empowered to order a forfeiture of benefits, and in making this decision it exercises a discretion in the narrower sense.

(d) Furthermore, the *Wijker* judgment states that notwithstanding the introduction of the no fault principle in divorce, a party's misconduct may be taken into account in considering, in terms of s 9(1), the circumstances which gave rise to the breakdown of the marriage. Additionally, 'substantial misconduct may include conduct which has nothing to do with the breakdown of the marriage and may for that and other reasons have been included as a separate factor. Too much importance should, however, not be attached to misconduct which is not of a serious nature.'⁵ It must be found that it is so obvious and gross that it would be repugnant to justice to let the 'guilty' spouse get away with the spoils of the marriage.

(e) In *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) the court held that it could never have been the intention of the legislature that a wife, who had for 20 years assisted her husband faithfully should, because of her adultery, forfeit the benefits of the marriage in community of property. This confirmed the principle that the finding of substantial misconduct does not on its own justify a forfeiture order.

[29] The principles in *Wijker* were endorsed by this Court in *Botha v Botha* 2006 (4) SA 144 (SCA) where it confirmed that only the factors in s 9(1) should be

⁴ Ibid at 727D-F.

⁵ Ibid at 721G-H.

accorded consideration. This Court in *Botha* pointed out that the catch-all phrase, permitting the court, in addition to the factors listed, to have regard to 'any other factor' was conspicuously absent from s 9. It further held that s 9(1) should be construed within the context of the evidence tendered by the parties in court.

[30] In *Badenhorst v Badenhorst* [2005] ZASCA 116; 2006 (2) SA 255 (SCA), though dealing with the provisions of s 7(3) of the Divorce Act, this Court also endorsed the principle that the factual consideration of issues raised in s 7(3) cannot be a matter of a discretion. It restated the principle that one party to the marriage cannot control and abuse the assets of a joint estate as if he has marital power in the case where assets were beyond the reach of the other party. This principle should equally apply to the consideration of the forfeiture order sought by spouses married in community of property and profit and loss as they hold undivided shares in the joint estate. The Matrimonial Amendment Act has long abolished marital power in South Africa.

[31] In *BS v PS* [2018] ZASCA 37; 2018 (4) SA 400 (SCA) para 10-11 (*BS v PS*), this Court in considering an appeal from the Eastern Cape Division of the High Court, Grahamstown, found that the court below should not have focussed on an isolated incident of adultery by one of the spouses instead of considering the duration of the marriage and circumstances which gave rise to the breakdown of the marriage.

Analysis and Evaluation

[32] The applicant submits that the findings of the full court were out of kilter with the oral evidence and legal submissions made before the high court. One such finding is that the applicant condoned the adulterous relationship between Eva and the respondent and thereby waived her rights to rely on that ground in her quest for an order for a partial forfeiture of benefits. It is common cause that condonation had not been raised in the pleadings nor ventilated during the trial before the high court. The full court raised it *mero motu*. The full court impermissibly canvassed a different case than that which was before the high court. It acted outside the context of the appeal. It was impermissible as it had an adverse effect on the rights of the applicant and the case made out before the High Court.

[33] It is trite that a court should not pronounce upon a claim or defence not raised in the pleadings. In *Member of the Executive Council, Department of Education, Eastern Cape v Komani School and Office Suppliers CC t/a Komani Stationers* [2022] ZASCA 13; 2022 (3) SA 361 (SCA) para 53, the court emphasised, with reference to *Fischer*, that:

‘One of the enduring tenets of judicial adjudication is that courts are enjoined to decide only the issues placed before them by the litigants. And that it is not open to court to change the factual issues presented by the parties or introduce new issues.’

This was a misdirection on the part of the court. It failed to appreciate the trite principles laid out in *Wijker*, which advocate a two-step process.

[34] It misunderstood the concept of a value judgment. First, it found that the applicant’s conduct in running a cash loan business known as Mogasehla led to the demise of the family business, Mokgatshehla, and that that amounted to substantial misconduct on the part of the applicant. Second, it found that the respondent contributed to the educational needs of the children. Finally, in concluding that by ‘taking into consideration the duration of the marriage of the appellant and the respondent, the circumstances that led to the breakdown of their marriage and that both parties have committed substantial misconduct, an undue benefit will not accrue to one party in relation to the other if an order for forfeiture is not granted’, the full court misdirected itself. These were factually incorrect conclusions as the full court failed to apply the two pronged approach advocated in the *Wijker* judgment.

[35] The full court failed to take cognisance of the evidence of the applicant in that she could not accord the respondent conjugal rights due to fear of contracting the HIV/Aids virus, with its deadly consequences. When considering her testimony in its context, it is clear that the applicant never gave the respondent permission to continue with extramarital affairs. In fact, the applicant’s evidence was that when she took the respondent for counselling on 29 November 2007, he told the psychotherapist that he would never stop having extramarital relationships. Furthermore, it was not the respondent’s case that the applicant condoned his extramarital relationships. The applicant became aware of the respondent’s relationship with Eva only in July 2007. To show disdain for the relationship, she had

dismissed Eva from their employment. On every possible interpretation or evaluation, I cannot subscribe to the conclusion that the applicant condoned the respondent's extramarital relationship with Eva.

[36] The trite principle is as follows 'an appellate court can only interfere in the exercise of such discretion in limited circumstances; for example, if it is shown that the court a quo has misdirected itself by taking irrelevant considerations into account; that it has exercised its discretion for no substantial reason; that the discretion was not exercised judicially or was exercised based on a wrong appreciation of the facts or wrong principles of law'. (See *Gaffoor NO and Another v Vangates Investments (Pty) Ltd and Others* [2012] ZASCA 52; 2012 (4) SA 281 (SCA) para 38).

[37] Furthermore, the judgment in *Wijker* empowers the appeal court to reconsider the facts where the trial court failed to do so. I now consider the evidence which was presented before the high court in making a finding whether the respondent will be unduly benefitted as the applicant contends. The respondent's prolonged extramarital affair with Eva was not an isolated incident, but a prolonged relationship which existed up to the time when the respondent filed for divorce. It was gross, repugnant and humiliating as it was unashamedly flaunted in the public domain to the prejudice of the applicant. At the time of the dissolution of the marriage it had run for over nine years. The respondent only filed for divorce once nothing was left in the joint estate, save for the applicant's pension interest and a few assets. The respondent bankrolled Eva at the expense of his family, in that he set up various business interests with Eva. The applicant had to approach the maintenance court for the education of her children, where she also learned for the first time about the existence of other children of the respondent born out of wedlock. The respondent made very minimal contributions for the benefit of the joint estate, though he had established several businesses with Eva. The applicant solely depended on her salary as an educator.

[38] On the other hand, the respondent made no allegation of extramarital relationships against the applicant. He divorced her on the grounds of her failure to accord him conjugal rights, which cannot be regarded as a misconduct given the

reasons she advanced for her refusal. The respondent's evidence, which the court below failed to appreciate, was riddled with contradictions and inconsistencies. He pleaded that he did not own any business interests with Eva, only to be confronted with documentary evidence to the contrary. This was incontrovertible evidence which had led to the demise of the family business interests.

[39] The fact that he channelled assets of the joint estate to set up business enterprises with Eva undoubtedly constitutes misconduct. Furthermore, he withdrew from one of the close corporations but failed to take the value of his member's interest, thereby depriving the joint estate of an asset. Notably, there is no evidence of him having made any contribution towards the applicant's pension. Eva was an employee at the family business, but was able to open a string of business shortly after being dismissed from her employment. I am satisfied that the evidence presented before the trial court showed substantial misconduct on the part of the respondent.

[40] In sum, there can be no question that the applicant satisfied the requirements of s 9(1), particularly that the respondent would be unduly benefited if the order for partial forfeiture is not granted. The applicant made direct financial contributions to the joint estate, as opposed to the respondent who used almost all his financial resources for the benefit of Eva. The uncontroverted evidence of the applicant, in fact, shows that the respondent's outside interests far more exceeded what he contributed to the joint estate, the long-existing relationship with Eva conducted in a brazen and humiliating fashion to the applicant and the duration of the marriage. The duration of the marriage indicates the burden of the joint estate on the applicant. The respondent considerably eroded the value of the joint estate, and used the assets of the joint estate as if he had the marital power to do so, contrary to the proprietary regime of the marriage in community of property.

[41] The applicant led sufficient and corroborated evidence in support of her claim for an order for partial forfeiture of benefits. The respondent's evidence fell short in various ways, including that it was inconsistent, contradictory and did not support his claim for a half share in the applicant's pension interest. The claim by the respondent of 50% of the pension benefits which has accrued to the applicant is not sustainable. I have also taken into consideration that he abused the joint estate resources for

years for the benefit of Eva, he failed to adequately provide for the joint estate and the duration of the marriage.

[42] The authorities cited above justify the granting of an order of forfeiture of the half share of pension benefits against the respondent. Accordingly, I make the following order:

1 Condonation for the late filing of the application for special leave to appeal the order of the full court dated 23 March 2021 is hereby granted.

2 Special leave to appeal the judgment and order of the full court, Limpopo Division of the High Court, Polokwane, dated 23 March 2021 is granted.

3 The appeal is upheld with costs and the order of the abovementioned full court is set aside and substituted as follows:

'4.1 The appeal is upheld with costs.'

4.2 Paragraphs (c) and (d) of the order of the High Court (MG Phatudi J) are set aside and substituted as follows:

'(c) The defendant's counterclaim succeeds.

(d) The patrimonial benefits of the parties' marriage in community of property in respect of the defendant's pension benefits and interest held in the Government Employee Pension Fund are forfeited by the plaintiff in favour of the defendant.'

Y T MBATHA
JUDGE OF APPEAL

APPEARANCES

For First to Fifth Appellant: M G Haskins (with him I Ossin)
Instructed by: DDKK Attorneys Inc., Polokwane
Phatshoane Henney Attorneys, Bloemfontein

For Respondents: No Appearance
Instructed by: Mulisa Mahafha Attorneys, Polokwane