



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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Mashola v Mashola (022/2022) [2023] ZASCA 75 (26 May 2023)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding, with costs, an appeal against the decision of the Limpopo Division of the High Court, Polokwane (the full court).

Mr Tsietsi Philemon Mashola (the respondent) and Mrs Makwena Delina Mashola (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 high court against the applicant. On 19 November 2020, the high court, dismissed the applicant's counterclaim for a partial forfeiture order in respect of the applicant's pension benefits. Instead it ordered that the respondent was entitled to 50% of the applicant's pension fund. Aggrieved by this order, the applicant on 27 January 2021 sought leave to appeal from this Court against the judgment and order (except for the order dissolving the marriage.) 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 was also unsuccessful. Further aggrieved by the full court's decision, the applicant petitioned this Court for an appeal which was subsequently granted.

The crux of the matter before this Court was whether the respondent would unduly benefit if the order for partial forfeiture of benefits was not granted in terms of s 9(1) of the Divorce Act 70 of 1979?

To substantiate her application, the applicant testified that the reason that led to the breakdown of the marriage relationship was the prolonged extra-marital affair by the respondent with one Eva Leshiba (Eva), who was an employee of the parties' Financial Services business. The applicant described that incident as a turning point in her life, as the affair was conducted in the public domain. Furthermore the applicant found out that the respondent had six other children outside the marriage, Eva's child being one them. The applicant further testified that she tried professional counselling with the respondent immediately after learning about the affair, however, it bore no fruit. The applicant also testified that she suffered financial difficulty since the respondent had abandoned his financial obligations towards her and their children, leaving her to pick up the burden. He instead directed his attention to building an empire with Eva by establishing numerous businesses to the financial detriment of their joint estate.

The SCA held that the applicant had successfully satisfied the requirements of the forfeiture clause in s 9(1) of the Divorce Act, and found that the respondent would be unduly benefited if the order for partial forfeiture was not granted. The SCA further held that 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. Furthermore, the uncontroverted evidence of the applicant showed that the respondent's outside interests far more exceeded what he contributed to the joint estate. The Court went on further and held that the long-existing relationship with Eva conducted in a brazen and humiliating fashion towards the applicant and the duration of the marriage indicated the burden of the joint estate on the applicant. The SCA also held that 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. 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 was not sustainable. The Court also took into consideration that the respondent used the joint estate for years for the benefit of Eva, failing to adequately provide for the joint estate and the duration of the marriage. As a result the granting of an order of forfeiture of the half share of pension benefits against the respondent was justified.

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