



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1305/2021

In the matter between:

I M M

APPELLANT

and

A M M

RESPONDENT

Neutral citation: *M v M* (1305/2021) [2023] ZASCA 33 (31 March 2023)

Coram: DAMBUZA AP and MOCUMIE, MBATHA and MABINDLA-BOQWANA JJA and NHLANGULELA AJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 31 March 2023

Summary: Matrimonial law – sections 7 and 9 of the Divorce Act 70 of 1979 – division of joint estate – claim for forfeiture of pension interest – substantial misconduct not established – appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mazibuko AJ and Wright J, sitting as court of appeal):

- 1 The respondent's application for condonation of the late filing of heads of argument is granted.
 - 2 The appeal is upheld with each party to pay their own costs.
 - 3 The high court's order is set aside and replaced with the following:
'The appeal is dismissed with each party to pay their own costs.'
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JUDGMENT

Mabindla-Boqwana JA (Dambuza AP and Mocumie and Mbatha JJA and Nhlangulela AJA concurring):

Introduction

[1] The appellant, Mr I M, and the respondent, Mrs A M, were married in community of property on 4 December 1995. The appellant instituted divorce proceedings on 15 September 2015 in the Springs Regional Court (the regional court) against the respondent. As part of the initial relief, he sought an order of forfeiture of benefits arising from the marriage in community of property by the respondent based on an alleged extramarital affair.

[2] The respondent denied the allegation in her plea and filed a counter-claim alleging extramarital affairs between the appellant and other women, and physical

and verbal abuse by the appellant on her, among other acts of misconduct. However, the order she sought at that stage did not include forfeiture of benefits but merely division of the joint estate.

[3] During 2017, the appellant amended his particulars of claim by asserting entitlement to 50% of the respondent's pension interest in the Government Employees Pension Fund (GEPF). In her plea to the amended particulars of claim, the respondent pleaded that her interest in the GEPF should not form part of the joint estate. This was because, approximately 12 months prior to the date of institution of the divorce proceedings, the appellant had withdrawn his pension interest from the GEPF in the sum of R2 429 265. 50 and from that amount utilised R500 000 towards household debts and needs. He however refused to account for the balance approximating R2 million.

[4] The respondent pleaded further that since the withdrawal of his pension benefits from the GEPF, the appellant engaged in extramarital affairs. In addition she would only receive a projected amount of R1 154 266, on retirement, which was less than the amount for which the appellant refused to account. As a result, the appellant would unduly benefit and she would be prejudiced, should the court grant an order entitling him to the portion of her pension interest in the GEPF. For that reason, she prayed for forfeiture of the appellant's pension interest.

[5] In the alternative she pleaded that, should the court find that the appellant was entitled to the pension interest, he should only be awarded the difference between the sum he had refused to account for and the amount due to him as at the date of dissolution of marriage.

[6] Since the appellant had abandoned his forfeiture prayer, the only issue for determination in the regional court was whether the appellant would unduly benefit from the alleged failure to account and should forfeit his 50% portion of the respondent's pension interest. The regional court ruled that the respondent bore the onus on this issue and should testify first.

[7] It is common cause that the appellant was employed by the Department of Education and Training (the department) as the head of department at Hluwasi Secondary School, thereafter at Etwatwa Secondary School as the school principal. He resigned from the department, but the respondent did not know the reason as he did not discuss anything with her. He told her that he had received R2.4 million from the pension fund and would use R300 000 to pay the outstanding mortgage bond for the house. He also promised to pay their debts; buy some furniture; and invest the rest.

[8] He bought the furniture, renovated the house and paid off his vehicles, which altogether with payment of the outstanding mortgage bond, amounted to R500 000. They agreed that he would pay off her debts and in turn, she would register him in her medical aid. He however paid only between R50 000 and R55 000 of her debts and refused to sign documents for his inclusion in her medical aid.

[9] The respondent testified further that she was responsible for groceries and gardening maintenance costs. After the appellant resigned, she had to include their two major children in her medical aid. The children were studying at tertiary institutions and she had to pay their fees. The appellant only paid the fees for one child after being forced to do so by a maintenance order. She confirmed that the

appellant was responsible for paying the mortgage bond instalments of their common home. She however paid rent for the place she resided in with the children (at the time of the trial). She later heard that the appellant found employment but she did not know where that was.

[10] For his part, the appellant testified that when he received the pension fund money, he paid R800 000 towards the settlement of the mortgage bond owed to ABSA in respect of the house and the loan owed to Nedbank which they had used to extend the house. He had been on chronic medication and when he stopped earning a salary, he struggled financially. He had to take loans for his upkeep, including one from the respondent, to pay rates, taxes, phone costs and medication. He also helped with groceries. So when he was eventually paid the pension money in August 2014, he paid back the loan of around R25 000 to the respondent. He also had to pay an amount of approximately R45 000 for the vehicles.

[11] He testified further that for the renovations of the house, he paid the electrician R80 000 and the approximate amounts: for the roof R25 000, for guttering R12 000 and for the swimming pool R25 000. He also had ongoing legal fees involving a labour dispute he had with his previous employer, for which he had to pay not less than R40 000 for consultation. He accepted that these were incurred after he had filed for the divorce. He also had to pay tuition fees for his son's education, as per the maintenance order. Tuition fees cost about R80 000 whilst accommodation fees were around R70 000. He also had to pay for his son's flights and subsistence of R1000. He subsequently moved his son from Cape Town to Pretoria. The tuition cost increased to about R90 000 and the residence to R65 000 per annum. He did not have documents to prove these expenses. According to him, the respondent was not

interested in what was being done with the renovations, which is why he went ahead on his own without involving her.

[12] In cross-examination, he testified that he spent almost all his retirement fund money towards the joint estate. At the time of the trial, the South African Council of Educators employed him on a contract basis, which was renewable annually.

[13] In rejecting the contention of undue benefit, the regional court found that: ‘There was no evidence of the nature or the extent of the benefit that [the respondent] sought to have [the appellant] forfeit. The court is thus not in a position to make a finding as to the patrimonial benefits [themselves].

If the court is wrong in this conclusion that the nature and extent of the benefit was not proved then it must consider the next leg of the inquiry.

...

The only factor argued was that the [appellant] misconducted himself by not disclosing the details of any investment of his pension payout.

I am not convinced that this amounts to a misconduct let alone a substantial misconduct. There are avenues open in the law to obtain information of the investments, if any made by the [appellant]. There is no evidence that if an order for forfeiture of the benefit is not made [the appellant] would unduly benefit.’

[14] As a result, the regional court granted the decree of divorce, division of the joint estate, an order that 50% of the pension interest due or assigned to the respondent be paid to the appellant, up to the date of divorce and other ancillary orders. It further ordered each party to pay their own costs.

[15] Aggrieved by this order, the respondent appealed to the Gauteng Division of the High Court, Johannesburg (the high court). In the appeal, she contended that the regional court erred in holding that she bore the onus to prove and quantify the nature and extent of the benefit, while it was the appellant who wished to claim 50% of her pension fund interest. She submitted further that the regional court failed to consider that withholding financial information from a spouse amounted to substantial misconduct as defined in s 9 of the Divorce Act 70 of 1979 (the Divorce Act).

[16] The respondent further argued that the regional court should not have accepted the appellant's testimony regarding estimated payments and the allegation that all his funds were utilised for the benefit of the joint estate, which allegations were never pleaded. Not only was the respondent taken by surprise, the court accepted 'new evidence' without any corroboration or documentary proof of any alleged expenditure.

[17] Lastly, the respondent contended that the regional court misdirected itself in finding that avenues existed for the respondent to obtain information regarding any investments. According to the respondent, this could not be sustained in light of the fact that the appellant never disclosed the estimated and actual breakdown of his expenditure 'as a defence' in his pleadings. The respondent could not guess what the defence would be.

[18] The high court did not deal with the issue of undue benefit and forfeiture of pension interest. Its judgment was brief and dealt with an issue not contested by the parties. It made the following findings:

‘Due to the fact that [the respondent] gave credible, unchallenged and uncontested evidence about infidelity and domestic violence it is indisputable that [the appellant] has to forfeit benefits. Such conduct, particularly the domestic violence is wholly unacceptable and attracts forfeiture.

There was some debate during the hearing about alleged lack of pleading and insufficient discovery concerning the patrimonial benefits, particularly the pension fund. These issues pale to insignificance when compared to something as serious as domestic violence.

Adv Mokgawa presented able oral argument in this appeal. Despite two opportunities during the appeal hearing to find evidence in the transcript where [the appellant] had challenged the evidence of [the respondent] about infidelity and domestic violence was understandably unable to do so.’

[19] That is the sum total of the high court’s reasoning, which resulted in the alteration of the order granted by the regional court. It gave the following substituted order:

- ‘1. A decree of divorce is granted with division of the joint estate subject to [the appellant] forfeiting all patrimonial benefits.
2. [The appellant] is not entitled to any interest in the pension fund of [the respondent].
3. [The appellant] is to pay the costs of the action, including those of the claim and counterclaim.’

[20] The appeal is before us with the special leave of this Court. The parties agreed that the appeal should be determined without oral argument, in terms of s 19(a) of the Superior Courts Act 10 of 2013. It is pursued on the narrow ground that the high court misdirected itself: (a) when it substituted the regional court’s decision with forfeiture of all patrimonial benefits on an issue that did not form the basis of the relief sought by the respondent; and (b) by making a costs order against the appellant. The respondent applied for condonation for the late filing of her heads of argument, which is not opposed. Having regard to the good cause shown, there is no reason not to grant condonation.

[21] Entitlement to a portion of pension interest of one party against the other is governed by sections 7(7) and 7(8) of the Divorce Act, which prescribe:

‘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*.

(b) The amount so deemed to be part of a party’s assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), *in a previous divorce* –

(i) was paid over or awarded to another party; or

(ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

...

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund –

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that –

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

(ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification.’ (My emphasis.)

[22] From the above, it is clear that in the determination of the patrimonial benefits the pension interest is deemed to form part of the joint estate. It is therefore, the party seeking forfeiture thereof that must prove that the other party is not entitled to the portion of the pension interest. In this case, therefore, the respondent did indeed bear the onus to prove that the appellant had to forfeit his entitlement to a portion of her pension interest.

[23] Section 9 of the Divorce Act, dealing with forfeiture of patrimonial benefits of marriage, provides that:

‘(1) 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 break-down 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.*’ (My emphasis.)

[24] A court must therefore consider the claim for forfeiture having regard to three factors, namely, the duration of marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties. These factors must not be considered cumulatively and the presence of any one of them would entitle a court to grant an order of forfeiture.¹

[25] The parties had been married for over 23 years prior to their divorce, which is a long period. They lived together until 2015, when the appellant instituted divorce proceedings. While the pleadings had contained allegations of extramarital affairs from both sides, not much evidence was led on this issue, apart from the sketchy details given by the respondent. Furthermore, the appellant did not persist with forfeiture on this basis. While the respondent mentioned the extramarital affairs in her pleadings, she did not rely on this ground as the basis for forfeiture. Her complaint was that the appellant was not entitled to his 50% portion of her pension interest because of the fact that he had failed to account for the balance of his pension money that he withdrew when he left employment. The high court accordingly erred

¹ *Botha v Botha* 2006 (4) SA 144 (SCA); [2006] 2 All SA 221 (SCA) para 6. See also *Wijker v Wijker* 1993 (4) SA 720 (A) at 729E-F.

in granting an order that was not sought (which is the forfeiture of all patrimonial benefits – as opposed to only 50% pension interest of the respondent’s pension fund) and basing it on evidence that was not placed as the basis for forfeiture. On this basis alone, the high court misdirected itself and its order cannot stand.

[26] The issue that remains is whether substantial misconduct was established. The bulk of the evidence was focused on what the appellant did with his pension interest of over R2 million, which he received from GEPPF 12 months prior to instituting the divorce proceedings. By law the respondent was entitled to R1.2 million thereof. From that amount would be deducted half of the common household expenses paid by the appellant from his pension payout. According to the respondent, the appellant only used R500 000 towards the household, whilst the estimated figures he gave suggested an amount of at least R1.4 million.

[27] The regional court was criticised in the high court for having allowed the appellant to tender evidence on estimated payments he allegedly made for the benefit of the joint estate, when these were not pleaded. In terms of Rule 21(2) of the Magistrates’ Court Rules:

‘(2) No replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading shall be necessary, and issue shall be deemed to be joined and pleadings closed in terms of rule 21A(b).

(3)(a) Where a replication or subsequent pleading is necessary, a party may therein join issue on the allegations in the previous pleading.’

[28] Whether or not replication was necessary in this case is not an issue that we need to determine because on a proper reading of the regional court’s judgment, it decided the case on the basis that no evidence was led as to the nature or the extent

of the benefit that the respondent sought to have the appellant forfeit. In other words, she did not discharge the onus to prove that the appellant would unduly benefit if an order of forfeiture of the pension interest were not made.

[29] If one has regard to the respondent's evidence, her cross-examination revealed that the amount used by the appellant for the benefit of the joint estate was over and above the R500 000 she had pleaded. She testified that the appellant paid an amount of approximately up to R55 000 for 'her debts'. She could not dispute that he paid R2000 a month for chronic medication since he was no longer on medical aid. She also did not dispute that he had taken a personal loan of approximately R25 000 from her during the time he was not working while waiting for his payout. Even this alleged loan was taken for the benefit of the joint estate. It became common cause that the appellant became responsible for the tertiary fees of their son, in terms of the maintenance order. The respondent did not state how much this was, something that could have been established from the relevant tertiary institution, if the appellant was not forthcoming with the information. She conceded that this payment of fees was continuous:

'Who is paying for your son's education? --- He is. He does. He is paying for our son's tuition. And it is just tuition.--- Yes.

[Indistinct] he live[s] at home?---Pardon?

Does your son live at home with you?--- No, at a res. *He is also paying* for that, yes.' (My emphasis.)

[30] She further testified that the appellant was responsible for the upkeep and maintenance of the marital home. All this she did not plead or state in her evidence in chief. It does appear, therefore, that the amount the appellant used towards the joint household, on her version alone, was more than R500 000 and was ongoing.

More concerning, the amounts that the respondent volunteered in her evidence kept changing. Some of the figures, which she said she was uncertain about, were not necessarily only in the appellant's peculiar knowledge. They could have been verified from the banks, which she would have been entitled to as the co-owner of the joint household. The difficulty that the trial court had in coming to a conclusion on the actual patrimonial benefits to be forfeited was understandable.

[31] Additionally, apart from the son's tertiary fees, which were ongoing and had to be paid on an annual basis, it is common cause that the appellant was not employed for a substantial number of months whilst he had to pay for the maintenance and upkeep of the household and for his medication on an ongoing basis. While the evidence appears to be imprecise as to the balance after the renovations, payment of the bond, the loan and vehicles, it could not be concluded that there was total lack of accounting to the level of substantial misconduct. As observed by the regional court, it appears that 'a not insignificant portion of the pension payout the [appellant] received was put into the house' in which the respondent will benefit as part of the division of the joint estate. Therefore, even without taking into account the appellant's evidence, the respondent failed to meet the threshold, disentitling the appellant to 50% of her pension interest.

[32] The assessment of the facts by the regional court could not be faulted. The basis upon which an appeal court may interfere with the factual findings of the trial court are confined. This principle is well established. Aside from the fact that the regional court committed no misdirection in its assessment of the facts, its judgment was rooted in the exercise of discretion. That would apply to whether any adjustment

had to be made to the patrimonial benefits. There is no basis to interfere with its discretion in this regard too.

[33] Something must be said about the manner in which this case was conducted on behalf of both parties. Attorneys and advocates have the responsibility to do their best in preparing the pleadings and presenting the necessary evidence before court. They do so to render the best legal service to their clients and to assist the courts to reach the best decision in resolving the disputes that serve before them. More could have been done in this case to present comprehensive evidence of the income and expenditure by the parties. By all accounts, theirs is not a complex joint estate. A more detailed and complete account of expenditure by the parties' could have been pleaded and proper evidence tendered in court.

[34] It remains to determine the issue of costs. Section 10 of the Divorce Act provides that '... the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties'. In my view, having considered the facts of this case, it is appropriate to maintain the order granted by the regional court that each party pays their own costs.

[35] Accordingly, the following order is made:

- 1 The respondent's application for condonation of the late filing of heads of argument is granted.
- 2 The appeal is upheld with each party to pay their own costs.
- 3 The high court's order is set aside and replaced with the following:

‘The appeal is dismissed with each party to pay their own costs.’

N P MABINDLA-BOQWANA

JUDGE OF APPEAL

Written Submissions

For the appellant:	M Manala and M Rasekgala
Instructed by:	Moumakoe Attorneys, Pretoria Matsepes Attorneys, Bloemfontein
For the respondent:	S Pooe
Instructed by:	C Kgope Attorneys, Benoni Duba Attorneys, Bloemfontein.