THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 393/04

In the matter between:

HEIDI BOTHA Appellant

and

GABRIËL JOHANNES BOTHA Respondent

Coram**:**	Harms, Brand, Conradie, Lewis et Van Heerden JJA
Heard:	17 February 2006
Delivered:	09 March 2006
Summary:	*Divorce – forfeiture of patrimonial benefits of the marriage – proceeds of two insurance policies taken out by the defendant (husband) on the life of his father – application of three factors referred to in s 9 of the Divorce Act 70 of 1979*

Neutral citation: This judgment may be referred to as *Botha v Botha* [2006] SCA 7 (RSA)

JUDGMENT

VAN HEERDEN JA:

[1] The only issue in this appeal is whether or not the trial court was correct in making a partial forfeiture order against the appellant in terms of s 9 of the Divorce Act 70 of 1979.

[2] The parties were married to each other on 24 April 1993, the proprietary consequences of their marriage being regulated by an antenuptial contract in terms of which community of property and community of profit and loss were excluded and the marriage was made subject to the accrual system specified in Chapter 1 of the Matrimonial Property Act 88 of 1984.

[3] In July 2003, the appellant ('plaintiff') instituted action against the respondent ('defendant') in the Port Elizabeth High Court, claiming a decree of divorce and ancillary relief. In his counterclaim, the defendant claimed partial forfeiture by the plaintiff of the patrimonial benefits of the marriage. On the evidence led at the trial, it was accepted on behalf of both parties that the plaintiff was entitled to payment of R497 300 from the defendant as being half of what was, at least, the difference between the accruals of their respective estates. This payment by the defendant to the plaintiff formed part of the order made by the trial court immediately after the conclusion of the trial. The sole remaining question (which was reserved for judgment at a later stage) was whether the plaintiff was

entitled to any further amount in this regard, this issue revolving around the proceeds of two insurance policies that the defendant had taken out on the life of his father who died on 24 July 2001. The respective insurers had paid out an amount of R500 120 to the defendant in respect of each policy.

[4] As regards this remaining question, Jennett J ultimately issued an order directing that the plaintiff forfeit one-half of the proceeds of the first policy (the Sanlam policy) and the full proceeds of the second policy (the Fedsure policy). In consequence of this order, he directed the defendant to pay to the plaintiff a further amount of R125 030 as the balance of her share of the accrual of their respective estates. The defendant was also ordered to pay the plaintiff's taxed party and party costs. The appeal, which comes before us with leave of the High Court, is directed at these orders.

[5] The counterclaim for forfeiture is governed by the provisions of s 9(1) of the Divorce Act 70 of 1979, which reads as follows:

'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.'

[6] In *Wijker v Wijker*,[1] this court considered the question whether proof of 'substantial misconduct on the part of either of the parties' was an essential requirement for a forfeiture order. It answered this question in the negative, holding[2] that the context and the subject-matter of s 9(1) made it abundantly clear that the legislature never intended the three factors mentioned in the section to be considered cumulatively. As regards the approach to be followed by a court of appeal when hearing an appeal in respect of a forfeiture order, Van Coller AJA stated the following:[3]

'It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be purely a factual issue. Once that has been established the trial Court must determine, *having regard to the factors mentioned in the section*, 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,[4] it is made by the trial Court after having considered the facts falling within the compass of the three factors mentioned in the section.'

(Emphasis added.)

---

[1] 1993 (4) SA 720 (A).
[2] At 729E-F.
[3] At 727E-F.
[4] On the nature of the discretion exercised by the court in this regard, see *Wijker* at 727F-728C. Cf *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) paras 16-18 and *Kirkland v Kirkland* [2005] 3 All SA 353 (C) paras 45-51.

[7] In relation to the trial court's finding in the *Wijker* case that it would be unfair to permit the appellant husband to share in the respondent wife's estate agency business while he had made hardly any contribution towards its management, administration and profit-making, Van Coller AJA held[5] that --

'*The finding that the appellant would* be *unduly benefited if a forfeiture order was not made, was therefore based on a principle of fairness*. It seems to me that the learned trial Judge, in adopting this approach, lost sight of what a marriage in community of property really entails. . . . The fact that the appellant is entitled to share in the successful business established by the respondent is a consequence of their marriage in community of property. *In making a value judgment this equitable principle applied by the Court* a quo *is not justified*. Not only is it contrary to the basic concept of community of property, but *there is no provision in the section for the application of such a principle. . . . . The benefit that will be received cannot be viewed in isolation, but in order to determine whether a party will be unduly benefited the Court must have regard to the factors mentioned in the section*. In my judgment the approach adopted by the Court *a quo* in concluding that the appellant would be unduly benefited should a forfeiture order not be granted was clearly wrong.'

(Emphasis added.)

[8] The three factors governing the value judgment to be made by the trial court in term of s 9(1) thus fall within a relatively narrow ambit: they

---

[5] At 731C-H.

are limited to (a) the duration of the marriage; (b) the circumstances which gave rise to the breakdown thereof; and (c) any substantial misconduct on the part of either of the parties. Conspicuously absent from s 9 is a catch-all phrase, permitting the court, in addition to the factors listed, to have regard to 'any other factor'. (Compare in this regard the wording of s 7(2) of the Divorce Act dealing with maintenance orders upon divorce which, apart from the fact that the list of relevant factors is significantly longer, also entitles the court to have regard to 'any other factor which in the opinion of the court should be taken into account'. So too, in terms of s 7(5), the list of factors which must be taken into account by a court in the determination of which assets should be transferred by one spouse to the other upon divorce, when the circumstances set out in ss 7(3) and (4) justify the making of such a 'redistribution order', also expressly includes 'any other factor which should in the opinion of the court be taken into account.') The trial court may therefore not have regard to any factors other than those listed in s 9(1) in determining whether or not the spouse against whom the forfeiture order is claimed will, in relation to the other spouse, be unduly benefited if such an order is *not* made.

[9] The circumstances under which the two insurance policies were taken out by the defendant were canvassed in some detail during the trial

and in the judgment of the High Court. The defendant's father ('Mr Botha') owned two farms in the Tarkastad area. He had two sons, the defendant and his elder brother, Matthias Gysbert Botha ('Gys Botha'), and two daughters. He intended to bequeath one of his farms to each of his sons, with the elder son having the choice of which farm he wanted. However, as the defendant had no intention of farming, it was envisaged that Gys Botha, who was also farming in the Tarkastad area, might buy the defendant out if and when the sons inherited their father's farms. It was apparently suggested that Gys Botha might take out an insurance policy on his father's life in order to provide him with the finances necessary to fund such a buy-out, but he was not willing to do so. Mr Botha then suggested that an insurance policy be taken out on his life with the proceeds thereof to be used to 'compensate' the defendant for the loss of the farm which Mr Botha now intended to bequeath to Gys Botha. After discussing various options in this regard, it was decided that the defendant would take out the policy on his father's life and, in April 1997, the Sanlam policy (for R500 000) was taken out in the defendant's name. The defendant paid all the premiums due under the policy.

[10] Because of the increasing price of land, the defendant and Mr Botha subsequently decided, in late 2000, that a second insurance policy for the same amount should be taken out by the defendant on Mr Botha's

life. The Fedsure policy thus came into being, the defendant once again paying all the premiums due thereunder.

[11] Mr Botha died in July 2001 as a result of injuries sustained during a motor accident. In terms of his will, Gys Botha inherited (inter alia) both Mr Botha's farms, while the defendant inherited only a cash amount of R300 000, as did each of his sisters. The defendant initially contended that the proceeds of the policies accrued to him as either an inheritance or a donation from his late father and that, in terms of s 5(1) of Act 88 of 1984, these proceeds had to be excluded from the accrual of the defendant's estate. This contention was, however, abandoned at the end of the trial.

[12] Having dealt with the factual background, as summarised above, as well as the relevant statutory provisions and the judgment of this court in the *Wijker* case, Jennett J came to the following conclusion with regard to the factual portion of the s 9(1) enquiry:

'There is no doubt, in my view, that, if an order for forfeiture is not made in respect of the proceeds of the insurance policies, either wholly or in part, plaintiff will indeed be benefited in that defendant will have to make some payment to her in respect thereof. Before a forfeiture order can be made, however, I have to be satisfied that plaintiff will not simply be benefited but that she will be unduly benefited in relation to defendant if a forfeiture order is not made, and this is to be determined "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.'' '

[13] According to the trial judge, neither party had been guilty of any substantial misconduct. He also appeared to have regarded the duration of the parties' marriage (ten years) as a more or less 'neutral' factor, stating that –

'The parties were in their early twenties when they married. . . . If their marriage had endured, the prospects are that they would have remained married for a long time and in relation thereto a marriage of 10 years might be regarded as having been of fairly short duration. Nevertheless a marriage of 10 years duration cannot be regarded as being of very short duration.'

[14] With regard to the circumstances which gave rise to the breakdown of the marriage, Jennett J referred to the differences in the personalities of the parties, concluding that this factor, as a circumstance giving rise to the breakdown of their marriage, was 'of no relevance to the issue that I have to decide.'

[15] A factor that was, however, held clearly to have been a circumstance giving rise to the breakdown of the marriage, was the plaintiff's relationship with her mother-in-law. The plaintiff appeared to feel that her mother-in-law was overly possessive of her son and that she

interfered unduly in their married life. According to the plaintiff, the defendant's family members frequently visited and stayed at the parties' home with little notice and did not leave the parties to lead their own lives. Indeed, in early 2000, matters had reached such a stage for the plaintiff that she instituted divorce proceedings against the defendant. Although the parties reconciled shortly thereafter, one of the conditions set by the plaintiff for her withdrawing the divorce summons was an embargo on her mother-in-law – according to the defendant, also on his father and siblings – visiting the parties' home. This was the situation which prevailed at the time the Fedsure policy was taken out.

[16] Jennett J concluded as follows:

'Under the above circumstances it seems to me that plaintiff would indeed be unduly benefited if a forfeiture order is not made in respect of the proceeds of the second insurance policy taken on defendant's father's life [the Fedsure policy]. I have already mentioned the motivation behind the taking out of the policy, which was to benefit defendant, and clearly not plaintiff and defendant as a unit, and to order defendant to pay plaintiff half of the proceeds of the policy taken out at the time in circumstances when plaintiff was estranged from defendant's family would in my view result in plaintiff being unduly benefited in relation to defendant. I will therefore order that plaintiff forfeit any patrimonial benefit resulting from the payment of the proceeds of the second insurance policy to defendant.

> For much the same reasons I am also of the view that, if plaintiff were to share in the full proceeds of the first insurance policy taken out on the life of defendant's late father [the Sanlam policy], she will be unduly benefited in relation to the defendant. This insurance policy taken out during 1997 was, however, taken out at a stage when relations between plaintiff and defendant's family had not deteriorated to the extent they subsequently did. I am mindful of the fact that in terms of their marriage contract plaintiff is entitled to share in the full accrual of defendant's estate unless a forfeiture order is made against her, and in exercising what may be described as a value judgment I conclude that plaintiff should forfeit [such] patrimonial benefit of the marriage as would result from the payment of one half of the proceeds of the first insurance policy to defendant.'

[17] In my view, it is quite clear that, while referring to the approach laid down by this court in the *Wijker* case, the trial judge misdirected himself in that he did *not*, in the exercise of his value judgement, confine himself to the factors mentioned in s 9(1). On the contrary, it would appear that, at the very least, *one* of the main reasons for his making the forfeiture order against the plaintiff was what he accepted to be 'the motivation behind the taking out' of the policies. While the strained relationship between the plaintiff and the defendant's family, in particular his mother, was taken into account by Jennett J as 'a circumstance giving rise to the breakdown of the marriage', it appears from his judgment that neither this strain, nor the duration of the marriage, nor a combination of both, would have led him to make the forfeiture order in question had he not had regard

to what he accepted, on the evidence, to be the reasons motivating the taking out of the policies. The trial judge thus cannot be said to have exercised his value judgement 'having regard to the factors mentioned' in s 9, as required by the judgment of this court in the *Wijker* case. It follows that the appeal must succeed.

Order

[18] In the circumstances, the following order is made:

1. The appeal is upheld with costs, including the costs of the application for leave to appeal.

2. Paragraphs (a) and (b) of the order made by the Port Elizabeth High Court on 10 June 2004 are set aside and substituted with the following:

(a) The defendant's counterclaim is dismissed.

(b) The defendant is ordered to pay to the plaintiff an amount of R500 120, in addition to the amount of R497 300 payable by the defendant to the plaintiff in terms of the order made on 14 May 2004 by the Port Elizabeth High Court, such amounts together

representing the plaintiff's share of the accrual of the parties' respective estates.

B J VAN HEERDEN
JUDGE OF APPEAL

CONCUR:

Harms JA

Brand JA

Conradie JA

Lewis JA