



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

Date: 31 March 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

M v M (1305/2021) [2023] ZASCA 33 (31 March 2023)

Today, the Supreme Court of Appeal (SCA) handed down judgment upholding an appeal against a decision of the Gauteng Division of the High Court, Johannesburg (the high court).

The issue before the SCA was whether 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 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. 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.

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was because, approximately 12 months prior to the date of institution of the divorce proceedings, the appellant had withdrawn his pension interest from the GEPF in the sum of R2 429 265. 50 and from that amount utilised R500 000 towards the joint household's debts and needs and told her that he would invest the rest. He however refused to account for the balance approximating R2 million.

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 GEPPF. For that reason, she prayed for forfeiture of the appellant's pension interest.

The SCA held that the high court erred 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. Therefore, the high court misdirected itself and its order could not stand. Furthermore, the SCA found that the amount the appellant used for the benefit of the joint estate, on the respondent's version alone, was more than R500 000 and was ongoing. In this respect it held that 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. On the issue of costs, the SCA held that, having considered the facts of this case, it was appropriate to maintain the order granted by the regional court that each party pays their own costs.

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