

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

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APPELLANT

and

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RESPONDENT

Coram: Maritz JA, Mainga JA and O'Regan AJA

Heard on: 6 July 2012

Delivered on: 15 November 2012

APPEAL JUDGMENT

MAINGA JA (MARITZ JA AND O'REGAN AJA CONCURRING)

[1] This is an appeal against a judgment of the High Court ordering amongst other things, a divorce and the forfeiture of the benefits of marriage by the appellant.¹

Facts

[2] The parties were married to each other in community of property on 11 December 1994 in Windhoek. On 13 August 2010 the respondent, Mr Elias Shikongo instituted action in the High Court against his wife, the appellant, Mrs Margaret

¹ See *Elias Ndevanjema Shikongo v Margaret Shikongo (born Thompson)*, Case NoI 2802/2010 judgment of the High Court delivered on 1 April 2011.

Shikongo, claiming among other things, a decree of divorce and the forfeiture by the appellant of the benefits of the marriage in community of property, on the ground of adultery, alternatively constructive desertion. The appellant counterclaimed for, among other things, a decree of divorce based on the respondent's adultery and constructive desertion and a forfeiture by the respondent of the benefits of the marriage in community of property. After a trial that lasted four days (18 – 21 January 2011), Unengu AJ, on 1 April 2011, dismissed the appellant's counter-claim and granted an order of divorce on the ground of adultery in favour of the respondent and a forfeiture order.

[3] The order in its entirety reads as follows:

- '1. The plaintiff is granted a final order of divorce;
2. The defendant forfeits the benefits of the marriage in community of property subject to the tender made to her by plaintiff in the terms referred to hereunder if accepted:
 - (i) That the immovable property situated at Mostert Street 73, Pioneerspark, Windhoek, Republic of Namibia be transferred into the name of the defendant at her own cost and that the plaintiff signs all the necessary documents in order to effect the said transfer;
 - (ii) That the Erf situated in Cape Town be transferred into the name of the defendant and the plaintiff signs all documents necessary to effect the transfer at the defendant's own costs;
 - (iii) That the Lexus motor vehicle with registration number N98448 W be transferred and registered into the name of the defendant at own costs;
 - (iv) That the plaintiff continues to pay the balance still outstanding and due to the bank on the property situated at Mostert Street 73, Pioneerspark, Windhoek;
 - (v) That the defendant retains all the household effects and movables currently in the property to be transferred to the defendant which property is situated at Mostert Street 73, Pioneerspark, Windhoek; and

- (vi) That the plaintiff shall retain the defendant on his medical aid for a period of six (6) months after the final order of divorce or until she acquires her own medical aid, whichever occurs first.
3. The defendant shall not share in any other assets of the common estate save for the tender above;
 4. The settlement agreement between the parties regarding custody and control of the minor children is hereby made an order of court;
 5. The defendant is ordered to pay the costs of suit on the scale as between party and party, which costs shall include the costs consequent upon the employment of one instructing and one instructed counsel and such costs shall not form part of the common estate;
 6. The defendant's counter-claim is dismissed with costs, such costs to include costs occasioned by the employment of one instructing and one instructed counsel.'

[4] The appellant appealed against the judgment and order made by the High Court. The appellant noted an appeal against the judgment timeously on 19 April 2011, but did not lodge security for costs or the record of appeal timeously. The record should have been filed on 1 July 2011 but was only lodged on 20 September 2011. As a consequence, the appeal lapsed. The appellant applied for condonation of the late filing of the record, and belatedly (during the hearing) for reinstatement of the appeal. Although the notice of appeal stated that the appeal was against the whole of the judgment and order, during the hearing of the matter it became clear that the appeal, if reinstated, would be limited to the order of forfeiture of the benefits.

[5] In her application for condonation, the appellant stated that her failure to file the record and bond of security timeously was not due to any intentional disregard for the rules of this Court but was for the following reasons:

- (a) the appellant was without any legal representation after the appeal had been lodged until after the appeal had already lapsed, and she was not versed with the procedures relating to the prosecution of appeals;
- (b) the late transcription of the record and the time it took to have it transcribed, indexed and bound was due to no fault of appellant; and
- (c) respondent had an obvious agenda to frustrate her at every turn in prosecuting the appeal by embroiling her in various legal suits so that she would be overwhelmed by the costs of litigation and abandon the appeal.

[6] It is also appellant's case that she has reasonable prospects of success on the limited issue of forfeiture of benefits. In this regard she disputed the following finding of the Court which she alleges is the basis for the terms of the forfeiture order:

'As I have shown above, the defendant was the sole cause of the breakdown of the marriage. Besides, she contributed very little, if any, to the building up of the joint estate. On the totality of the evidence, I am satisfied that the plaintiff has established that the defendant should forfeit the benefits.'

However, it became clear during the hearing of this matter that the appellant did not actively persist in her appeal in relation to the culpable conduct which gave rise to the forfeiture order. This was not surprising given the evidence led in the Court below relating to the conduct of the appellant and her failure to lead any evidence to establish misconduct on the part of the respondent.

[7] Appellant asserts that this finding and the consequent terms of the forfeiture order were wrong in law and stand to be overruled on appeal, with costs.

The submissions

[8] Counsel for the appellant submitted that condonation for the late filing of the record and bond of security should be granted because appellant had been without legal representation from 16 June to 18 August 2011 and she was a lay person who was not conversant with the Rules of Court especially in respect of the requirements for prosecuting an appeal from the High Court to this Court. Notwithstanding the fact that appellant was a final year law student at the relevant time it could not be said that the appellant would be conversant with the intricacies of prosecuting an appeal, so argued counsel, as an incomplete academic degree in law does not equip a person to deal with complex litigation. The bottom line of the appellant's explanation is that she was unaware that the record had to be delivered by 1 July 2011. She states she only became aware that the record should have been delivered on 1 July 2011 when she consulted with counsel on 27 July 2011. Counsel further submitted that regard must be had to the fruitless litigation instituted against her by the respondent in the magistrate's court on 14 July 2011 and the eviction proceedings launched in the High Court on 30 August 2011. These proceedings, the appellant claims, was intended to pressurise her into accepting the judgment and order of the Court below and burden her with legal costs. In the circumstances, so argued counsel, it cannot be said that the appellant was wilfully, flagrantly or grossly in violation of the rules of this Court. He submitted that the appellant had provided an acceptable and reasonable explanation for both the delay in delivering the appeal record and the delay in seeking condonation.

[9] Regarding the forfeiture order, counsel argued that the allegations in the respondent's particulars of claim fell short of the requirements necessary for a Court to issue a quantified or specific forfeiture order. In support of this submission, counsel

referred to two recent High Court decisions.² These cases held that a Court must at least be appraised of both the value of the estate at the date of marriage and at the date of divorce as well as of the contributions made by the parties during the subsistence of the marriage before it can make a specific forfeiture order. On that basis, counsel argued, the Court below was at most entitled to make a general forfeiture order and that there was no basis upon which the Court below could have issued a specific forfeiture order.

[10] Counsel further relied on Articles 16³ and 22⁴ of the Constitution of Namibia. He argued that the marriage between the appellant and the respondent lasted for 17 years and that, it is uncontroverted that the appellant was gainfully employed in senior executive positions and made contributions to the joint estate during that period. He argued that Article 16(1) does not allow for a limitation on the right to property other than within the narrow confines allowed for by the Article's express language. It only limits the rights of non-Namibian citizens to acquire property and provides that the State may expropriate property. Counsel submitted that apart from these limitations, the right to property may not be limited whether by statute, common law, or

²*N S v R H* 2011 (2) NR 486 (HC) and *Carlos v Carlos; Lucian v Lucian* unreported decision of the High Court delivered on 11 June 2011.

³ Article 16 provides:

'(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.'

⁴ Article 22 provides:

'Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;

(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.'

customary law. He argued that an order of forfeiture, arising from the common law, violated the property rights of a spouse against whom such order is granted.

[11] Counsel for the respondent argued that the appellant had failed to comply with rules 5(5)(b)⁵ and 8⁶ of the rules of this Court and that the appeal is accordingly deemed to have lapsed. She argued that the explanation given by the appellant is not sufficient to warrant condonation and reinstatement of the appeal, particularly as the record of the proceedings in the Court below was transcribed before judgment was handed down at a time when appellant was represented.

[12] On the forfeiture order, respondent's counsel argued that the Court below had granted a general forfeiture order not a specific forfeiture order. She argued that an order for the forfeiture of the benefits arising from a marriage in community of

⁵The relevant provisions of rule 5 provides:

'(5) After an appeal has been noted in a civil case the appellant shall, subject to any special directions issued by the Chief Justice –

(a) ...

(b) In all other cases within three months of the date of judgment or order appealed against or, in cases where leave to appeal is required, within three months after an order granting such leave;

(c) ...'

⁶ The relevant provisions of rule 8 provides:

'8. (1) If the judgment appealed from is carried into execution by direction of the court appealed from, the party requesting execution shall, before such execution, enter into good and sufficient security *de restituendo*.

(2) If the execution of a judgment is suspended pending appeal, the appellant shall, before lodging with the registrar copies of the record enter into good and sufficient security for the respondent's costs of appeal, unless-

(a) the respondent waives the right to security within 15 days of receipt of the appellant's notice of appeal; or

(b) the court appealed from, upon application of the appellant delivered within 15 days after delivery of the appellant's notice of appeal, or such longer period as that court on good cause shown may allow, releases the appellant wholly or partially from that obligation.

(3) If the execution of a judgment is suspended pending appeal, the appellant shall, when copies of the record are lodged with the registrar, inform the registrar in writing whether he or she –

(a) has entered into security in terms of this rule; or

(b) has been released from that obligation, either by virtue of waiver by the respondent or release by the court appealed from, as contemplated in subrule (2),

and failure to inform the registrar accordingly within the period referred to in rule 5(5) shall be deemed to be failure to comply with the provisions of that rule.

(4) The registrar of the court appealed from shall, whenever the parties are unable to agree as to the amount of any security to be entered into under this rule, determine and fix the said amount.'

property is a well recognised legal remedy and does not infringe the appellant's constitutional rights in any way; thus the forfeiture order sought by the respondent was correctly granted by the Court below.

Issues for determination

[13] The following questions arise for decision:

- (a) Should the appeal be reinstated?
- (b) Is an order of forfeiture of the benefits of a marriage in community of property in conflict with Article 16 of the Constitution?
- (c) What is the proper interpretation of the Court order, is it a general order of forfeiture or a specific order of forfeiture?
- (d) If the order properly interpreted was a specific order of forfeiture, was the High Court entitled to make such an order on the basis of the pleadings and the evidence?

Should the appeal be reinstated?

[14] Whether the appeal should be reinstated depends on whether the appellant should be granted condonation for her late filing of the appeal record and bond of security. Non-compliance with rule 5(5) has the effect that the appeal lapses and it may only be revived upon the appellant applying for and the court granting condonation for the non-compliance.⁷

⁷*Otto v Channel Life Namibia (Pty) Ltd* 2008 (2) NR 432 (SC) at 441J-445H; *Kamwi v Duvenhage* 2008 (2) NR 656 (SC) at 663 to 664 par 23; *Ondjava Construction CC and 2 Others v HAW Retailers t/a Ark Trading* 2010 (1) NR 286 (SC); *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and 5 Others* 2011 (2) NR 469 (SC).

Application for condonation

[15] The appeal was noted timeously but appellant did not lodge security for costs and the record on appeal timeously. The appellant states that the record was not delivered on time because she was without legal representation from 16 June to 18 August 2011 and that she was not conversant with the procedures relating to the provisions of appeal; that the record was transcribed late; and that the respondent engaged the appellant in other litigation with the sole purpose of burdening her with legal costs. The appellant states that she did not tender security on time as the amount the respondent required was exorbitant and the appellant was severely constrained financially as she had paid for the divorce trial without assistance from the respondent. The respondent opposed the application for condonation on the grounds, inter alia, that the appeal was frivolous or vexatious and had no prospects of success. The respondent further asserts that he has been prejudiced by the delay particularly because notwithstanding the dissolution of the marriage, the appellant refused to vacate the property in KleineKuppe to which the respondent has no access but which he has to maintain.

[16] In deciding whether to grant condonation for the late filing of the record and bond of security, this Court will consider first the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice to the parties; and fourthly, the prospects of success.

[17] Turning to the first issue, the time between 1 July 2011 when the record should have been filed and 20 September 2011 when the record was filed is a period of two and half months. This is a relatively long delay, especially given that the record had been transcribed prior to the judgment being handed down in the High Court. We

were not referred to any judgment of this Court condoning such a long delay for the filing of the record.

[18] The explanation for the delay does not hold weight for various reasons. The appellant is a final year law student and cannot be treated as a lay litigant who is unfamiliar with legal procedures. Moreover, the appellant was informed by a letter dated 8 July 2011 from the respondent's attorneys that her appeal had lapsed as a result of her failure to lodge the record. She was informed that as a consequence of the lapsing of the appeal, the order by the High Court had come into force, so she should have realised the importance of the filing of the record. Appellant took no steps to lodge the record notwithstanding that letter. Appellant maintains that she only became aware that the record should have been lodged on 1 July 2011 when she consulted with counsel on 27 July 2011. Thereafter even when, on her own version, the record was completed on 2 September 2011, she did not expedite its lodging. Appellant contends that she was without legal representation from 16 June to 18 August 2011 but there is no explanation given as to why the record could not have been prepared before 1 July, or as to why her former legal representatives withdrew. This, despite the fact that they lodged a confirmatory affidavit.

[19] It is also appellant's case that the respondent engaged her in other litigation with the sole purpose of ruining her financially and yet that litigation, on her own version, only commenced during August, after the appeal had lapsed. As to the failure to file the bond of security on time, appellant contends that she was severely constrained financially as she had to pay the bill of her other lawyers without the assistance of the respondent. This averment jars with the facts on the record before us which shows that on 10 January 2011 the respondent's legal representatives paid

to the appellant's lawyers a sum of N\$20 000,00 for appellant's legal costs, in addition to N\$5 000,00 paid earlier on for the same purpose.

[20] There is a dispute between the parties as to prejudice. The appellant asserts there has been no prejudice; but the respondent says that he has been acutely prejudiced. He states that since the divorce the appellant has refused to vacate the property in KleineKuppe and that he has had no access to the property although he continues to maintain it and pay the instalments due under the mortgage as well as paying for all the necessities of the household. One year after the divorce the appellant refuses to contribute anything towards the household although she is gainfully employed. He further states that the appellant unlawfully removed household items from the KleineKuppe property and took them to her newly acquired properties. It is also clear that the respondent is unable to finalise the joint estate or his affairs pending the outcome of the appeal. This is prejudicial to the respondent.

[21] The fourth issue that requires consideration is the question of prospects of success; this is a matter to which this judgment now turns. A determination of the prospects of success requires a consideration of the remaining three issues in the appeal: if the appeal should be reinstated, is an order of forfeiture of the benefits in conflict with Article 16 of the Constitution of Namibia; what is the proper interpretation of the Court order: is it a general order of forfeiture or a specific order of forfeiture; and if the order properly interpreted was a specific order of forfeiture, was the High Court entitled to make such an order on the basis of the pleadings and the evidence.

If the appeal should be reinstated, is an order of forfeiture of the benefits in conflict with Article 16 of the Constitution?

[22] Counsel for the appellant argued that Article 16 of the Constitution permits no limitation to the right to property and that therefore the right to property may not be limited whether by statute, common law or customary law. An order of forfeiture based on the common law violates the property rights of a spouse against whom such order is granted.

[23] The High Court made the forfeiture order in accordance with the common law. Where a marriage in community of property is dissolved by the Court, dissolution of the community of property takes place as a matter of course, irrespective of whether or not it is expressly mentioned in the Court's order.⁸ It is a long established practice to ask, as part of the relief claimed in an action for divorce where the marriage is in community of property, for a dissolution of the community and for a forfeiture of the benefits of the marriage.⁹ It is now settled law that where the Court grants a divorce on the ground of adultery, and the marriage is in community of property, if the successful plaintiff claims an order that the defendant forfeit the benefits derived from the marriage in community, the Court has no discretion to refuse to grant such an order.¹⁰

[24] In this jurisdiction the principle above was reaffirmed in *Opperman v Opperman*.¹¹ It was recently reiterated in the High Court of Namibia when Heathcote AJ stated:

'Clearly, therefore, in the absence of the applicability of the Divorce Act, 70 of 1979 in Namibia, the common law and its principles in as far as forfeiture orders are

⁸*Gates v Gates* 1940 NPD 361 at 363.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ 1962 (1) SWA 456 at 457H.

concerned, still apply and should find application in respect of each and every divorce case, even if unopposed.¹²

[25] In *Persad v Persad and Another*,¹³ Didcott J referring to the South African Divorce Act 70 of 1979 stated:

‘For, as I understand the statute, it left untouched the concept of a forfeiture of benefits, ... not altering what was then envisaged or encompassed by the notion in the eyes of the common law, but merely defining and adumbrating the circumstances in which the Court was empowered to order a forfeiture.’

The genesis of the Court’s power lies in the system of divorce based on matrimonial misconduct.¹⁴ An order for forfeiture of benefits is designed to protect the rights of the plaintiff to his or her separate contribution to the property of the marriage, and these include not only windfalls such as bequests and gifts, but also acquisitions made as a result of industry, economy or investment.¹⁵

[26] The constitutional challenge to the common law rule was not raised in the High Court. It is an undesirable practice to challenge the constitutionality of a law for the first time in this Court, amongst other reasons, because it results in this Court not obtaining the benefit of the views of the High Court on the issue. Nevertheless, because the issue in this instance is purely legal, it is appropriate to deal with this argument in order to give guidance on this important constitutional matter.

[27] The appellant’s property is not being expropriated. The question is whether the order interferes with the right in Article 16 to acquire, own and dispose of all forms of

¹²*Moresia Carlos (born Engelbrecht) and Antonio Manuel Carlos; Alfonsine Lucian (born Tjongarero) and Aloys Berthold Lucian*, unreported High Court judgment delivered on 11 June 2011, cited above in note 2.

¹³1989 (4) SA 685 (DCLD) at 689E.

¹⁴Belinda van Heerden et al, *Boberg’s Law of Persons and Family*, 2nd ed. (1999) at 205 (note 170), see also Hahlo H R, *The South African Law of Husband and Wife*, 4th ed. (1975) at 362.

¹⁵*Ex parte de Beer* 1952 (3) SA 288 (T) at 289H – 290A.

immovable property. The order of forfeiture is an order following upon a determination of the rights of the parties inter se at the termination of their marriage. Just like any other court order determining the rights of property between two individual parties, whether it be a claim for contractual damages, a *reivindicatio*, or for unjust enrichment, an order that follows such an investigation determines the legal relationships between the parties and flows from that determination. The constitutional protection of the right to acquire, own and dispose of property cannot be interpreted to mean that the determination of legal rights as between married persons according to the common law has infringed constitutional rights simply because it affects the property holdings of the spouses. Parties to a marriage in community of property who do not enter into an antenuptial contract freely accept that both at the commencement and termination of their marriage, their property rights will be affected and regulated in accordance with the law. At commencement, by the establishment of a universal partnership and the creation of a single joint estate as part thereof, and at termination, by the untangling of the partnership and division of that estate in accordance with the law. The effect on property rights is a necessary and ineluctable consequence of a marriage in community of property and the Court's determination of the parties' respective rights thereto within the applicable principles of the law cannot be construed as a constitutionally impermissible interference with property rights. This argument therefore bears no prospects of success.

What is the proper interpretation of the Court order, is it a general order of forfeiture or a specific order of forfeiture?

[28] The appellant asserts that the order made by the High Court, properly interpreted, was a specific order of forfeiture. Counsel continued that on the record before it, the High Court was at most entitled to make a general forfeiture order. The

respondent on the other hand, asserts that the order made by the Court below was a general forfeiture order and that what the Court further did was permissible.

[29] In his amended particulars of claim, respondent inter alia prayed for the forfeiture by the defendant of the benefits of the marriage in community of property, in the alternative, in the event the Court below not so ordering, a forfeiture order, save for the tender made to the appellant, which was subject to the suspensive condition that appellant accepted the tender. The prayer raises the question whether the order made was a general forfeiture order.

[30] A specific forfeiture order is an order where a particular res is forfeited to the plaintiff.¹⁶ When a specific forfeiture order is sought, a court requires a litigant to set out all the relevant information.¹⁷ A general forfeiture order on the other hand has been described as follows:

‘Whereas an order of division (or no specific order) means equal division, irrespective of the amounts contributed to the joint estate by husband and wife, an order for forfeiture of benefits may mean equal or unequal division, depending on whether the defendant or the plaintiff has contributed more to the common fund, for an order for forfeiture, even if this is not expressly stated, amounts to an order for division of the joint estate, coupled with an order for forfeiture of the benefits which the guilty spouse has derived from the marriage. Since the order does not affect benefits which the innocent spouse has derived from the marriage, the estate will be divided in equal shares if the guilty spouse has contributed more to the joint estate than the innocent one, there being nothing on which the order for forfeiture could operate, but if the contributions of the innocent spouse exceeded those of the guilty one, the guilty spouse will be deprived of the benefits which he has derived from the marriage.’¹⁸

¹⁶Hahlo H R, note 14, *supra*, at 435. See also *Steenberg v Steenberg* 1963 (4) SA 870 (C); *Ex parte de Beer* 1952 (3) SA 288 (T).

¹⁷*Ex parte Deputy Sheriff, Salisbury: In re: Doyle v Salgo* 1957 (3) SA 740 (SR) at 742D; *NS v R* H cited above in note 2.

¹⁸Hahlo H R, note 14 above, at 435.

[31] In *Smith v Smith*,¹⁹ Schreiner J had put it as follows:

‘what the defendant forfeits is not his share of the common property, but only the pecuniary benefit that he would otherwise have derived from the marriage . . . it [the order for forfeiture] is really an order for division plus an order that the defendant is not to share in any excess that the plaintiff may have contributed over the contributions of the defendant.’

Where a general forfeiture order is claimed no specific allegations are necessary in the particulars of claim.²⁰

[32] Where a general forfeiture order is made, a division of the estate may be done by the parties on agreement, or by a liquidator appointed by the court, where the parties’ fails to agree, or by the court itself.²¹ Where no specific order as to the distribution of the estate has been made the first step in giving effect to an order for forfeiture of benefits is to ascertain how much of the joint estate has been contributed by the plaintiff and how much by the defendant.²²

[33] In this case, the Court below stated that ‘no evidence has been placed before Court upon which it could determine the value of the joint estate in order to define the portion the guilty spouse will have to forfeit.’ It then proceeded to say:

‘This, however, is still in the discretion of the Court. The defendant failed to persuade the court to exercise its discretion not to exclude her from the benefits arising from their marriage. As I have shown above, the defendant was the sole cause of the breakdown of the marriage. Besides, she contributed very little, if any, to the building up of the joint estate. On the totality of the evidence, I am satisfied that the plaintiff has established that the defendant should forfeit the benefits.’

¹⁹1937 WLD 126 at 127-128, *Gates v Gates*, cited above in note 8 at 363-364.

²⁰See cited above note 8 at 364 ; *N S v R H*, *Carlos v Carlos*; *Lucian v Lucia* cited above in note 2 and *Swil v Swil* 1978 (1) SA WLD 790 at 793D-G.

²¹ See note 14 supra, at 432 and 435. See also *Gates v Gates* cited above, note 8 at 369-70; *Wertheim v Wertheim* 1976 (4) SA 633 WLD at 636-7.

²² See note 14, supra, at 434.

[34] The forfeiture order granted states:

'The defendant forfeits the benefits of the marriage in community of property subject to the tender made to her by the plaintiff in the terms referred to hereunder if accepted.'²³

This formulation is somewhat unclear. The order could mean that the appellant forfeits the benefits of the marriage and accordingly is only entitled to the assets specified in subparagraphs (i) to (v). If the order is interpreted in this way, it is a specific forfeiture order. Alternatively the order could be interpreted to mean that if the appellant does not accept the tender made by the respondent as to the division of the joint estate within a reasonable time, she will forfeit the benefits of the marriage. This would be a general forfeiture order subject to a suspensive condition. In my view the latter interpretation of the order is the better one. It gives meaning to the words 'if accepted' in the order and is consistent with the reasoning of the Court cited at paragraph [33] above. That being the case, on a proper interpretation of the order, it is not a specific forfeiture order but a general forfeiture order which will come into effect if the appellant does not accept the division of the estate as set out in the tender.

[35] Accordingly, if the appellant accepts the tender made by the respondent, she will receive the listed assets as her share of the joint estate. If she does not accept the tender within a reasonable time, the general forfeiture order made by the Court must be given effect.

Was the High Court entitled to make the forfeiture order on the basis of the pleadings and the evidence?

²³The full order is set out in paragraph [3].

[36] Given my conclusion that, properly construed the order is a general forfeiture order, there can be no doubt that the Court below was competent to make it on the record before it²⁴and this issue accordingly requires no further consideration.

Conclusion

[37] Given the conclusion that I have reached that the order made by the High Court was a general forfeiture order, subject to a suspensive condition, the appellant's argument that the order was impermissible on the record before the court cannot succeed. Accordingly I conclude that there are no prospects of success in this appeal.

[38] I now return to the preliminary question whether condonation for the late filing of the record be granted and therefore the reinstatement of the appeal. Given the fact that the delay of 2½ months is long and no reasonable explanation was offered for the delay, and importantly there are no prospects of success, it would not be appropriate to grant the application for condonation.

[39] In the circumstances, the appropriate order is that the application for condonation of the late filing of the appeal record is refused and the matter is struck from the roll.

Costs

[40] The costs should follow the cause. The appellant should be ordered to pay the costs of the respondent, such costs to include the costs of one instructing and one instructed counsel.

²⁴See *Carlos v Carlos* and *N S v R H* cited above in note 2.

[41] The effect of this Court's decision is that the High Court order stands as explained at paragraph [34] above. That order is a general forfeiture order which will come into effect if the appellant does not elect to accept the tender made by the respondent, as reflected in the order of the Court below, within a reasonable time. This Court is of a view that given the delays occasioned by this appeal, it would be fair to give the appellant 30 days from the date of this order to accept the tender.

Order

[42] The following orders are made:

1. The application for condonation of the late filing of the appeal record is refused.
2. The appeal is struck from the roll.
3. The appellant is ordered to pay the costs of the respondent, such costs to include the costs of one instructing and one instructed counsel.

MAINGA JA

MARITZ JA

O'REGAN AJA

APPEARANCES

APPELLANT: Mr A H G Denk
Instructed by Swarts& Bock Legal Practitioners

RESPONDENT: Ms C E van der Westhuizen
Instructed by Kruger, van Vuuren& Co