C of A (Civ) 18 of 19[illegible]

IN THE LESOTHO COURT OF APPEAL

In the matter between:

SEKHEFU MONAPHATHI — Appellant

and

'MAMATHEALIRA MONAPHATHI — Respondent

Held at Maseru

Coram:

Schutz P.
Aaron J.A.
Plewman J.A.

JUDGMENT

Schutz, P.

The issue that was argued in this appeal was whether the manner in which Kheola J gave effect to an order for forfeiture of benefits, which order he had given consequent upon divorcing the parties who had been married in community of property, was correct. The order was made against the appellant (the husband).

What Kheola J did is reflected in the following passage in his judgment:

/"In the ...

" In the present case the joint estate consists of a five-roomed house with furniture and three motor vehicles. I have not determined the value of the joint estate so as to define the portion which defendant will forfeit. However, the property has been described in such detail that I am of the opinion that I can define what portion the defendant shall forfeit. I think the defendant must forfeit the house, all furniture and the motor vehicle which the plaintiff bought with her own money."

The learned judge a quo does not appear to have made any express findings on credibility although there were disputes as to who paid for what, and as to the manner in which the funds of the parties were or were not commingled.

I would point out that it can be misleading to speak of "his" or "her" money in a marriage in community, where by operation of law a universal partnership is constituted. However that may be, the notion of "his" or "her"money can be important in determining what each party contributed to the partnership, a matter that is relevant to the implementation of a forfeiture order.

In Gates v Gates 1940 NPD 361 at 364-5 Selke J. said:

/"In order ...

" In order to decide, therefore, in any given case whether the decree of forfeiture operates and, if so, how, it is necessary to know in the first place the value of the joint estate as it exists at the date of the order for divorce. It is then necessary to ascertain the existing value to the joint estate of the contributions respectively made by, or on behalf of each of the spouses

.....

If, after such proof has been given, it appears that the existing value of the defendant's contributions is equal, or greater than, that of the plaintiff's then there is no forfeiture in fact, and the existing estate is divided between them in equal shares, exactly as if no forfeiture had been decreed. If, on the other hand, the value of the contributions proved to have been made by, or on behalf of the plaintiff, exceeds that proved to have been made by, or on behalf of the defendant, then the forfeiture consists of half of difference between the values thus established."

/Selke J. ...

Selke J. proceeded (at 365) to deal with the case before him, where at the time of the divorce the value of the joint estate was worth less than the sum of the value of the contributions. Such a situation can arise because of the depreciation of assets, or because of the expenses incurred by the spouses. In such a case, Selke J held, the existing estate was to be divided in the manner stated above, according to contributions. He then raised the question what would happen, if, because of appreciation of assets, the value of the estate was worth more than the sum of the values of the contributions. He suggested that the value of the appreciation should be divided equally. I can see no logic in this view and adopt the view of Hahlo The SA Law of Husband and Wife. 4 ed 436-7 that in such a case also the whole estate remaining should be divided in accordance with the respective contributions of the parties, provided that the innocent party's contribution was greater.

Applying the principles set out in Gates and Hahlo, it is clear that only in the simplest of cases could the approach leave out the three valuations envisaged in Gates' case, and, apparently assuming that the respondent's (the wife's) contribution was greater, allows her the assets bought with "her" money.

The very simple example is this: the parties marry on day one. The wife (the innocent party to be)

/contributes ...

contributes a new Rolls Royce. The husband contributes an old Beetle. That is all. On day two they are divorced and a forfeiture order is decreed. So bad has been the one day of marriage that the spouses have incurred no expenses. Nor have the two cars had a chance to appreciate or depreciate. In such a case one can see at once that the wife contributed a greater share, and it is clear that the forfeiture rule will be served by awarding her the Rolls and him the Beetle.

But the moment the example is complicated, as must occur after the passage of some years, such a simple solution is not possible. Some assets will have depreciated, some may have appreciated, expenses will have been incurred, and so on. The ups and downs of the joint estate and the reasons therefor are usually irrelevant. What matters is the value of what is left at the time of the divorce. Any attempt to trace "his" or "her" assets as emanating from "his" or "her" contirubions runs counter to the notion of community. For example, if the wife receives a salary she receives it on behalf of the joint estate, and it falls into that estate at once by virture of operation of law. It does not matter what bank account she pays it into, or whether she pays it into a bank account at all. The same goes for the husband.

It follows that order (a) made by the trial court must be set aside.

/It would ...

It would be helpful and would reduce costs if the parties obtained or established the three valuations already referred to, and, if possible, agreed on some or all of them, before coming before the trial Court again, to which Court this matter will have to be remitted.

At the end of the hearing of the appeal Mr. Pheko, for the successful appellant, fairly conceded that each party should pay his or her own costs of appeal.

In the result the appeal succeeds and order (a) made by the trial court is set aside. Each party is to pay his or her own costs of appeal.

The matter is remitted back to the trial court where the learned judge is to:

(a) Determine the values of:

(i) The joint estate at the date of the divorce;

(ii) The plaintiff's contributions to the joint estate stante matrimonio;

(iii) The defendant's contributions to the joint estate stante matrimonio;

(b) In the event of the plaintiff's contribution to the joint estate amounting to less than half of the same, to award half of the same to her;

(c) In the event of the plaintiff's contribution to the joint estate amounting to more

/than ...

than half of the same, to distribute the same in proportion to the contributions of the parties.

(d) In giving effect to (b) and (c) above the learned judge is to utilize such procedures and methods of distribution as may be fitting and such as the law allows.

(Signed) _____
W. P. Schutz
President

I agree

(Signed) _____
S. Aaron
Judge of Appeal

I agree

(Signed) _____
C. Pleman
Judge of Appeal

Delivered at Maseru this 26th day of January 1990.

For the Appellant: Mr. M. Matsau

For the Respondent:Mr. S. Mafisa