

In the Supreme Court of Appeal of South Africa

MEDIA SUMMARY – JUDGMENT DELIVERED IN SUPREME COURT OF APPEAL

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H BOTHA v G J BOTHA

The Supreme Court of Appeal today handed down judgment in the matter of ***Botha v Botha***. The case revolved around the question of whether the appellant wife (Mrs Botha) should share in the proceeds of two insurance policies which the respondent husband (Mr Botha) had taken out on the life of his father who died in July 2001. Each of the insurers had paid out R500 120 to Mr Botha upon his father's death.

As the parties were married (in 1993) in terms of an antenuptial contract which excluded community of property and of profit and loss, but made the marriage subject to the accrual system provided for in Chapter 1 of the Matrimonial Property Act of 1984, Mrs Botha was entitled to share equally in the proceeds unless she was ordered by the court making the divorce order to forfeit the benefit of such proceeds. The Port Elizabeth High Court ordered Mrs Botha to forfeit one-half of the proceeds of the first policy and the full proceeds of the second policy, with the result that Mrs Botha would only share in the proceeds of the policies in the amount of R125 030. Mrs Botha appealed against this order.

The Supreme Court of Appeal set out the provisions of s 9(1) of the Divorce Act of 1979, in terms of which the court granting the divorce may order that the property benefits of the marriage be forfeited by one party in favour of the other, either wholly or partially, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown of the marriage and any substantial misconduct on the part of either of the parties, is satisfied that, if the forfeiture order is not made, the one party will be unduly benefited in relation to the other party. The SCA pointed out that the first step in applying s 9 is to determine whether or not the spouse against whom the forfeiture order is sought will in fact be benefited – this is purely a factual issue. Once that has been established, then the court must go on to determine, having regard to the factors

mentioned in s 9, whether or not that spouse will be unduly benefited in relation to the other spouse if the forfeiture order is not made. This second step is a value judgement, but it must be made by the court after having considered the facts falling within the ambit of the three factors mentioned in the section. As had been held in an earlier judgment of the SCA, the court cannot take into account factors falling outside the three listed factors in exercising its value judgement.

Mr Botha's father had owned two farms in the Tarkastad area. He had two sons, Mr Botha being the younger, and two daughters. He had intended to bequeath one of his farms to each of his sons, but Mr Botha did not intend to farm and his elder brother did. The Port Elizabeth High Court accepted on the evidence that the two policies had been taken out by Mr Botha, at his father's suggestion, with the purpose of compensating Mr Botha for the loss of the farm which his father had decided to bequeath to his elder brother. Mr Botha had paid all the premiums due under the policies. The father was involved in a fatal motor accident in 2001 and, in terms of his will, Mr Botha's elder brother did inherit both farms, while Mr Botha only inherited a cash amount of R300 000, as did each of his sisters.

According to the trial court, neither of the two parties had been guilty of any substantial misconduct. The SCA held that, while the strained relationship between Mrs Botha and her husband's family, in particular her mother-in-law, was taken into account by the trial judge as 'a circumstance giving rise to the breakdown of the marriage', it appeared 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 against Mrs Botha had he not had regard to the reasons which he accepted, on the evidence, to have motivated the taking out of the policies. By doing this, the trial judge had not exercised his value judgement properly as he had had regard to factors outside the ambit of the three factors mentioned in s 9 of the Divorce Act. Mrs Botha's appeal thus succeeded and the SCA replaced the order of the Port Elizabeth High Court with an order to the effect that Mr Botha pay Mrs Botha one-half of the proceeds of each of the two policies.