

# The regime of forfeiture of patrimonial benefits in South Africa and a critical analysis of the concept of unduly benefited

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## OPSOMMING

### Die Leerstuk van die Verbeurdverklaring van Vermoënsregtelike Voordele in Suid-Afrika en 'n Kritiese Ontleding van die Konsep van Onbehoorlike Voordeel

Hierdie artikel poog om die verbeurdverklaring van vermoënsregtelike voordele van die huwelik in die Suid-Afrikaanse reg volledig te bespreek. Die Suid-Afrikaanse howe is gereeld genader om sulke bevele in egskeidings sake te maak vandat die Romeins-Hollandsereg in Suid-Afrika aangeneem is. Hierdie kwessie is eers in 1979 in die Wet op Egskeidings artikel 9(1) gereguleer. Hierdie artikel fokus spesifiek op artikel 9(1) van die Wet en bespreek die faktore wat die howe in ag mag neem as verbeurdverklaringsbevele toegestaan word. Daar word egter geargumenteer dat die howe gevaal het om artikel 9(1) behoorlik te interpreteer, aangesien hulle nie riglyne in verband met die betekenis van “onbehoorlike voordeel” (soos dit in die wetsartikel verskyn) voorsien het nie.

## 1 Introduction

The object of this paper is not simply to narrate the law relating to forfeiture of patrimonial benefits in South Africa, but to provide an in-depth examination of this area of our family law which, in my opinion, has not been adequately covered in recent literature.<sup>1</sup> This paper is necessary not only in academic circles, but also as a point of reference for family law practitioners. Since the adoption of the Roman-Dutch law in South Africa, our courts have, for decades, been called upon to decide whether or not to grant an order of forfeiture of patrimonial benefits in divorce matters.<sup>2</sup> However, the concept of forfeiture of patrimonial

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- 1 Barratt, Domingo, Mahler-Coetzee, Olivier & Denson *Law of Persons and the Family* (2012); Himonga “Persons and Family” in F du Bois (ed) *Wille's Principles of South African Law* (2007) 145-394; Schäfer *Family Law Service* (Issue 54) (October 2010) 26-27; Cockrell, Keithtley, Sinclair, Heaton, Van Heerden, Clark, Mosikatsana & Cockrell *Boberg's The Law of Persons and Family Law* (1999); Cronje, Bernard & Olivier *The South African Law of Persons and Family Law* (1990); Eekelaar & Nhlapo *The Changing Family: Family Forms and Family Law* (1998); Heaton *South African Family Law* (3 ed) (2010); Monareng *A Simple Guide to South African Family Law* (2008); Robinson, Human, Boshoff, Smith & Carnelly *Introduction to South African Family Law* (4 ed) (2009).
  - 2 Mackarness “Roman Dutch Law” 1906 (1) *Journal of the Society of Comparative Legislation* 39.

benefits was legislated in 1979 by the Divorce Act.<sup>3</sup> Section 9(1) of the Act provides factors to be taken into consideration by a court when granting a forfeiture order.<sup>4</sup> This section directs that a forfeiture order should be granted in circumstances where, if the order is not granted, the one party will be unduly benefited in relation to the other. However, the Act neither provides the definition of the phrase “unduly benefited” nor does it clarify what is meant by this phrase in the context of the Act.<sup>5</sup> It is even more concerning that our courts have generally failed, neglected or refrained from explaining or interpreting what this phrase entails, despite this phrase being at the heart of section 9(1) of the Act.

The purpose of this paper is to discuss section 9(1) of the Act as well as to explain what is meant by “unduly benefited” in the said section. I will argue that in order for our courts to adequately discharge divorce matters where forfeiture of patrimonial benefits has been claimed, there must be a clear and concise interpretation and guidance from our courts as to what is meant by “unduly benefited” in the said section. Even though I do not intend to provide a definition in this paper, I will nonetheless unpack the phrase in an attempt to understand what its possible meaning can be. In the first part of this paper, I will briefly discuss the development of the South African forfeiture of patrimonial benefits regime and demonstrate how South African courts have approached section 9(1) of the Act.

## 2 Historical Perspective

### 2.1 The Guilty Principle

At common law, marriage was “to last during the lifetime of the parties; and no divorce was allowed, but by the death of one of the parties, or on account of preceding adultery”.<sup>6</sup> As such, divorce was based on the fault principle where the court had to decide the guilt or innocence of a spouse. The common law position was that the guilty spouse should not be allowed to benefit from his or her wrong doing.<sup>7</sup> At common law, “if either of the consorts commits adultery, he or she will forfeit thereby, for

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<sup>3</sup> Act 70 of 1979 (the Act).

<sup>4</sup> “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”.

<sup>5</sup> S 1 of the Act only provides definitions for the following: “court”, “divorce action”, “rules”, “pension fund”, and “pension interest”.

<sup>6</sup> Van Leeuwen *Commentaries on the Roman-Dutch Law* (1820) 83. It is worth noting that adultery was regarded as a crime in both Roman and Roman-Dutch law. See also *Murison v Murison* 1930 AD 159.

the benefit of the injured party, whatever either of them would otherwise have been entitled to by the local law or ante-nuptial contract".<sup>8</sup> De Korte J in *Mulder v Mulder*,<sup>9</sup> was called upon to decide whether the court has the power to make any order regarding what was brought into the marriage by the guilty party. He was of the opinion that the court has the right to declare that all property brought into the marriage by the guilty party shall be forfeit in favour of the other spouse.<sup>10</sup>

Kotze JP differed from the position adopted by De Korte J in *Ferguson v Ferguson* where he held that:

It was held by Esselen and De Korte JJ, in the case of *Mulder v Mulder* ... that property brought into community by a wife guilty of adultery may be forfeited in favour of her husband. Jorissen J however, dissented from this view and thought that the guilty wife could only be declared to have forfeited any benefits which she would have derived from her husband in consequence of the community of property, but not also any property which she herself brought into the community. ... There are decisions of the Dutch courts which support the view taken by Jorissen J and which, with respect, I have always considered to be the correct opinion on the subject. ... The passage in van Leeuwen's *Commentaries*, which I have already quoted, can certainly not be said to mean that the guilty spouse forfeits everything that he or she may have brought into the community. ... That this is so is clear from what is said by him in ch. 37, sec. 8, where, treating of the rights of the injured spouse in case of adultery, van Leeuwen observes that 'the adulterer forfeits to the injured party everything which, according to the common law or by ante-nuptial contract or otherwise, would have been acquired by him out of the property of his spouse.' And he mentions a decision pronounced on the 19th February, 1609, by the Court of Holland to that effect. This decision is also alluded to in Lybrechts and Kersteman (*loc. cit.*). So in van den Berg's *Nederl. Advysboek*, cons. 118, at p. 298, there is an opinion precisely identical with what is stated by van Leeuwen.<sup>11</sup>

The *Ferguson* case referred to above, was instrumental in explaining and clarifying forfeiture jurisprudence as it is applied in South Africa today. This case in actual fact, drew a road map for practitioners and

7 Quansay "The order of forfeiture of benefits in divorce proceedings in Botswana: A relic of a bygone era or a ghost of the past?" 2005 (1) *University of Botswana LJ* 120.

8 Van Leeuwen (1820) 424.

9 *Mulder v Mulder* (1885-1888) 2 SAR TS 238.

10 *Idem* 238 (see the headnote).

11 (1906) 20 EDC 221. Kotz JP was further of the view that "the headnote of this consultation erroneously states that the guilty husband forfeits all his property in favour of his wife, for the opinion itself at p. 298 distinctly says that the guilty husband only forfeits all benefits which he would have derived from the property of his wife. Consultation 334 in vol. 1 of the *Dutch Consultations*, and van Zutphen (*Neerl. Practyck, sub voce Overspel*, n. 1, p. 591), likewise agree with van Leeuwen. Nor can van der Keessel (*Thes.* 88) be interpreted in any other way, especially as he refers to a decision of the Supreme Court of Holland of the 19th February, 1743, where a wife guilty of adultery, on a decree of divorce being granted against her, was declared to have forfeited 'all such privileges and benefits as she might otherwise have enjoyed from the said marriage' (*vide* Lybrechts, *loc cit.*)

judicial officers of how to understand the regime of forfeiture of patrimonial benefits. This case was decided on the strength of Jorrisen J's minority judgment in *Mulder v Mulder*.<sup>12</sup> The essence of Jorrisen J's minority judgment was that it does not make sense for a person to bring property or assets into the marriage only to be told that because of his or her wrongdoing which led to the breakdown of the marriage, he or she would lose such property or assets as a punishment for his or her guilt.<sup>13</sup> The effect of the *Ferguson* decision and the minority judgment in *Mulder* was that on divorce only benefits which are derived from the marriage can be forfeited.<sup>14</sup> The guilty party was allowed to keep property that he or she brought to the marriage, in that he or she only forfeited property which was acquired during the subsistence of the marriage.<sup>15</sup> Furthermore, at common law, factors which courts took into account on divorce when granting a forfeiture order were "adultery" and "malicious desertion".<sup>16</sup> Either of the said factors, if proven, would suffice for the innocent spouse to be granted forfeiture.<sup>17</sup>

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The better opinion is that laid down by van Leeuwen. The effect of the doctrine adopted in *Mulder v Mulder* would be that, if a millionaire were to marry a poor woman in community of property, he could, on a dissolution of the marriage by reason of his adultery, be declared to have forfeited the whole of his fortune. It seems to me that such a doctrine carries its own refutation with it, and I am satisfied that it is not the correct rule of law. The opinion expressed by van Leeuwen is also that adopted in this colony, as appears from the reported cases. I need but refer to *Dieperink v Dieperink* (Buch. 1877, p. 92), *Hasler v Hasler* (13 SC 377), and *McGregor v McGregor* (15 CTR 114). It is a matter of daily and uniform practice in actions for divorce, where a forfeiture is asked, to declare, on a dissolution of the marriage, that the guilty spouse has forfeited, not his or her property brought into the marriage, but the benefits arising from the marriage. The ground for divorce is in the present instance, however, not adultery, but malicious desertion on the part of the wife".

12 (1885-1888) 2 SAR TS 238 241.

13 *Idem* 241.

14 It is worth noting that it is a moot point in divorce law today as to whether a person can forfeit property he or she brought into the marriage. See *W v W* 2011 (1) SA 545 (GNP) where it was stated that, "the central question in this divorce action is whether a party to a marriage in community of property can be ordered to forfeit an asset she/he has brought into the joint estate. The answer should, in my view be in the negative. The essence and nature of the twin concepts of marriage in community of property and forfeiture of benefits arising from such marriage is this: a party can only benefit from an asset brought into the estate by the other party, not from his own: a *fortiori* such a party cannot be ordered to forfeit her/his own asset. This is the primary basis on which I conclude in this judgment that forfeiture should not be ordered". With respect, I am of the view that this issue is far from being settled in our law, until either the Supreme Court of Appeal or the Constitutional Court pronounce on it.

15 *Mulder op cit* 238.

16 See also *Estate Heinemann & Ors v Heinemann* 1919 A.D 126 and *Allen v Allen* 1951 (3) SA 230(A) 327, the "innocent" spouse had to pray for an order that the "guilty" spouse should forfeit the benefits that have accrued to him or her during the duration of the marriage. The court would make such an order if the "innocent" spouse alleged and proved that the "guilty" spouse had committed adultery or was guilty of malicious desertion.

The doctrine of forfeiture of patrimonial benefits was governed at common law by the wide legal principle of general operation that a man cannot take advantage of his own fault.<sup>18</sup> However, at common law, forfeiture does not follow divorce automatically; a decree of forfeiture would not be granted unless there was a special prayer for it.<sup>19</sup> A forfeiture order would be refused at common law if the court was satisfied that the party claiming forfeiture has, during the marriage, been accessory to or connived in the adultery complained of or has condoned the adultery complained of or that he or she has been guilty of adultery during the marriage.<sup>20</sup> It is evident that at common law there was no formal assessment of whether any party would be benefited or even unduly benefited if the order of forfeiture was not made. There was no objective criterion to follow to establish whether a forfeiture order was competent to be made, hence the courts embarked upon an enquiry to establish the fault of one party as opposed to the other.

## 2 2 Abolition of the Guilty Principle and the Investigation by the South African Law Reform Commission<sup>21</sup>

South African courts derived their powers to grant forfeiture orders on divorce directly from the common law.<sup>22</sup> As such, courts granted forfeiture of patrimonial benefits on the same grounds as they granted

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17 *Ibid.* See also Quansay (2005) 1 *University of Botswana LJ* 120, who argued that “the genesis of the order for the forfeiture of benefits in Roman-Dutch Law is said to be found in Article 18 of the Political Ordinance, 1980 of Holland. This article dealt expressly only with divorce on the ground of adultery and reserved to the plaintiff his Roman law rights conceived as a penalty for the disruption of the marriage. When malicious desertion was eventually accepted as a ground for divorce in Holland, forfeiture of benefits was extended to cover this ground as well by drawing analogy from Article 18 of the Political Ordinance. Thus, forfeiture of benefits was as readily decreed on the ground of malicious desertion as on the ground of adultery”.

18 *Murison op cit* 159, “*Digest* 50 17 134 and *Digest* (24 3 10 1) cited in footnote to that maxim. Matthaeus *De Criminibus* on *Digest* (48.3) Note 11 says that a man who has married a woman knowing that she was immodest and hoping that she would commit adultery so that he may get her dowry cannot recover. The same principle applies in the case of a man who puts his wife on the road to ruin after marriage”.

19 See *Potter v Potter* (8 EDC 103) & *Peter’s v Peters* (1906) TS 515.

20 Lee *An Introduction to Roman-Dutch Law* (4 ed) (1946) 87.

21 This commission used to be known as the “South African Law Commission” but is now referred to as the South African Law Reform Commission (hereinafter referred to as the SALC).

22 See Hahlo *Law of Husband and Wife* (4 ed) (1975) 430 and Himonga in F du Bois 339.

divorce orders, adultery and malicious desertion.<sup>23</sup> In the late 1910s, courts started moving away from treating adultery as a crime when granting divorce orders and started recognising that divorce ought to be granted when the marital contract between spouses has broken.<sup>24</sup> Courts were also not willing to order forfeiture of patrimonial benefits against the “guilty” party who contributed to the acquisition of the property within the marriage.<sup>25</sup> However, our courts continued to treat divorce cases on the “guilt” (or fault) principle, namely on the unrealistic assumption that, in every divorce action, only one of the spouses is “to blame” for the breakdown of the marriage, the other spouse being completely “innocent”.<sup>26</sup> As such, the guilt principle was regarded as determinative with regard to the forfeiture of patrimonial benefits of the marriage.<sup>27</sup> This was clearly undesirable as it did not properly cater for both litigants before the court, because it is possible that blame can be apportioned between the spouses. Furthermore, by relying on the guilt principle, courts prevented themselves from properly evaluating the nature of the relationship between the spouses in order to properly assess whether or not forfeiture of patrimonial benefits was an appropriate remedy.

In 1935, South Africa saw the promulgation of the now repealed Divorce Laws Amendment Act,<sup>28</sup> which introduced two further grounds for divorce; incurable insanity for not less than seven years and, the imprisonment of one spouse for at least five years after such spouse has been declared to be an habitual criminal.<sup>29</sup> However, this innovation did not have any impact on the regime of forfeiture of patrimonial benefits.<sup>30</sup> Himonga correctly argues that “in accordance with the function of a

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23 *Murison* “where a marriage is dissolved on the ground of adultery committed by one of the spouses, such spouse forfeits any benefits derived from the marriage, and the Court has no discretion to withhold an order for forfeiture of benefits if such an order be claimed by the injured spouse”. See also, *Bodley v Bodley* 1911 TPD 756 at 756, where the court stated that “the practice in South Africa is that forfeiture may also be granted in cases of malicious desertion”.

24 *Estate Heinemann & Ors v Heinemann* 126, the court held that “forfeiture of the benefits of the marriage by the guilty party stands on a different footing. Forfeiture is decreed not on the ground that adultery is a crime and as a punishment to the guilty party, but on the ground that the contract between the parties has been broken. It is as readily decreed on the ground of malicious desertion as on the ground of adultery”.

25 *Celliers v Celliers* 1904 TS 926 where it was held that “in an action for divorce on the ground of adultery the plaintiff is entitled to claim a division of the joint estate and a forfeiture of any benefits which the guilty party may have derived from the marriage; but the Court will not deprive the guilty party of the share of the joint estate which he or she may have contributed”.

26 *Cockrell* 597. See also *Strauss v Strauss* 1971 1 SA 585 (O).

27 *Strauss* *ibid*.

28 32 of 1935.

29 S1(1)(a) & (b). See also Himonga 320 as well as authorities cited in n 844 thereto.

30 This Act did not have a specific section dealing for forfeiture of patrimonial benefits.

forfeiture order as a punishment of the guilty 'spouse' for his or her misconduct, forfeiture could not be ordered against the defendant in a divorce action based on his or her incurable insanity for the guilty principle did not apply in such a case".<sup>31</sup> Incurable insanity was the only ground for divorce which was not based on the matrimonial misconduct of the spouse whose insanity was declared incurable, but on the objective fact that in reality no marriage existed and thus it was justified that the marriage should be dissolved.<sup>32</sup>

The shortcomings of the South African divorce law and the regime of forfeiture of patrimonial benefits until 1978 attracted severe criticism from academics and legal practitioners.<sup>33</sup> In 1974 the state instructed the South African Law Commission (SALC), as it then was, to inquire into the South African divorce law, which the SALC interpreted to mandate an investigation into "improving this branch of law and adapting it to the requirements of the present-day conditions".<sup>34</sup> At the beginning of 1975 the SALC embarked upon an enquiry into the defects in the existing divorce laws and possible reform measures.<sup>35</sup> The initiative of the SALC led to the publication of a SALC Report on the Law of Divorce and Matters Incidental Thereto.<sup>36</sup> This report among others recognised that:

Most of the objections to our law of divorce can be traced back to the guilty principle on which the common law grounds are based. It is contended that it is unrealistic to proceed from the assumption that the blame for the breakdown of the marriage lies only with one of the spouses while the other is completely innocent. In by far the majority of cases both parties are to a greater or lesser extent to blame for their marriage breakdown.<sup>37</sup>

Due to the fact that the South African divorce law in 1978 provided that the court had no discretion to deny a forfeiture order if an innocent party claimed for it, the SALC was of the view that this rule was too rigid and failed to take into account the fact that both spouses might be to blame for the breakdown of the marriage.<sup>38</sup> The SALC refused to recommend scrapping the forfeiture concept altogether, but recommended that fault be only one of several factors taken into account

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31 *Ibid* 339. See also Divorce Laws Amendment Act 32 of 1935 s2(b). It is not clear however, whether courts were prepared to grant forfeiture orders against spouses who were declared habitual criminals and imprisoned for more than 5 years. It would appear however, that courts would have granted forfeiture orders in such circumstances, especially if they would be imprisoned for lengthy periods and the other spouse was not prepared to wait for such a spouse to serve his or her sentence.

32 *Harris v Harris* 1949 1 SA 264. See also Barnard *The New Law* (1979) 1.

33 See Barnard *ibid* & *South African Law Commission Report on the Law of Divorce and Matters incidental Thereto* (RP 57/1778).

34 Burman & Huvers 'Church versus State? Divorce Legislation and Divided South Africa' 1985 (12) *Journal of Southern African Studies* 121.

35 Barnard 9.

36 (RP 57/1978).

37 Par 6.2 of the Report (RP 57/1978).

38 *Proposals for Law Reform in Namibia* (2000) 117 available at <http://www.lac.org.na/projects/grap/Pdf/divlawref.pdf> (accessed 2012-10-12).

in forfeiture decisions and not the sole factor.<sup>39</sup> The SALC made it clear that it was ideologically unsupportable to base the law of divorce on the guilty principle and that it was equally unrealistic to assume that fault for the marital breakdown lay with only one party to the marriage. The SALC stated further that:

In truth, the essence of divorce is the candid acceptance on the part of both parties that the marriage has failed. The Commission recognised further that the disintegration of marriages resulted from a variety of contributory factors and social problems, and was not always, or exclusively, due to marital misconduct. Accordingly, the primary aim of a sound law of divorce is to take account of the social reality of marital break-down, while at the same time providing for the protection of the interests of society in general and of its weaker members in particular. For this reason the Commission proposed that where the marital relationship had in fact broken down irretrievably a decree of divorce should be granted.<sup>40</sup>

The investigation by and the recommendations of the SALC, led to the promulgation of the Act.<sup>41</sup> This was a remarkable development in the South African law of divorce which effectively resulted in the “guilt” and “fault” principles being done away with as grounds for divorce.<sup>42</sup> It has been argued that “the reform of the law of divorce had as its primary objective the formulation of realistic rules for the dissolution of marriages: rules which make it possible to dissolve failed marriages in a way that results in the possible least disruption for the spouses and their dependants, and that best safeguards the interest of minor children”.<sup>43</sup> The Act shaped the forfeiture jurisprudence in South Africa, which was somewhat uncertain before its enactment.

### **3 Forfeiture of Patrimonial Benefits under the Divorce Act 70, 1979**

#### **3 1 Section 9(1)**

The Act came into operation on 1 July 1979 and totally reformed the South African divorce law.<sup>44</sup> Forfeiture of patrimonial benefits is dealt with in section 9 of the Act which provides that:

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39 Proposals for Law Reform in Namibia’ (2000) 117.

40 [http://butterworths.wits.ac.za/innopac.wits.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://butterworths.wits.ac.za/innopac.wits.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) (accessed 2012-10-12).

41 70 of 1979.

42 In terms of the Divorce Act s4(1), a court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them. The court may also grant a decree of divorce in terms of s5 of the Act on the ground of mental illness.

43 Himonga 321.

44 *Idem* 320–326.

- (1) 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.
- (2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.

For the purposes of this paper, emphasis is placed on section 9(1) of the Act, as it is the subsection which courts have often been requested to interpret.<sup>45</sup> This subsection mandates courts to consider three factors before granting a forfeiture order: 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. It is not clear as to what is regarded as a long or short marriage duration. However, what is clear from the courts is that when the marriage is regarded by a court as of short duration, the court will order forfeiture if it is established that if the order is not made one party will be unduly benefited.<sup>46</sup> In *Swanepoel v Swanepoel*,<sup>47</sup> the court held that a marriage in community of property which was concluded on 15 December 1990, where one of the parties left the common home on 4 June 1995, was of a short duration.<sup>48</sup> Similarly, in *Malatji v Malatji*,<sup>49</sup> where *lobola* was paid for the defendant during October 2001, the parties married in community of property on 14 February 2002 and the defendant left the common home during June 2003, the marriage was held to be of short duration.<sup>50</sup> The Act does not provide guidance as to how the courts should go about establishing that a marriage is of either long or short duration. It seems it is left to the courts to make their own pronouncement based on the facts of each case without any legislative guidance.

The Act does not determine what circumstances may be considered by the courts in assessing what led to the breakdown of the marriage. Cases are also not explicit on this point. It seems however, that such an analysis will be made on a case-to-case basis and there is no closed list of factors which may be taken into consideration.<sup>51</sup> Misconduct itself is not a factor which can bring about a forfeiture order, such misconduct must be substantial.<sup>52</sup> It is worth noting that the concept of substantial misconduct is not really defined in the Act, and it is unclear what exactly

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45 See generally, *Botha v Botha* 2006 4 SA 144 (SCA), *JW v SW* 2011 1 SA 545 (GNP) & *Wijker v Wijker* 1993 4 SA 720 (A).

46 See generally *Swanepoel v Swanepoel* All SA 1996 (3) 444.

47 All SA 1996 3 444.

48 *Ibid.*

49 (23124/2003) [2005] ZAGPHC 142 (4 Feb 2005).

50 *Idem.*

51 *Molapo v Molapo* (4411/10) [2013] ZAFSHC 29 (14 Mar 2013) par 24.3.

it entails. Our courts have also not been helpful in this regard. However, in order to establish substantial misconduct in any given case, there is a need to assess the extent, nature and gravity of the conduct which gave rise to the breakdown of the marriage.<sup>55</sup>

Even though fault is no longer a ground for divorce, it nonetheless remains an important consideration when a court is called upon to make an order of forfeiture of patrimonial benefits.<sup>54</sup> At least two factors listed in section 9(1) of the Act contain elements of fault. The court is empowered to look at the circumstances which led to the breakdown of the marriage, and to ensure whether or not there was any substantial misconduct on the part of either of the parties before the court. When parties allege circumstances which, according to them, led to the breakdown of the marriage, they may apportion blame to the other, thereby establishing the fault of the other party. This will be taken into consideration by the court.

Initially, there was uncertainty whether courts granting a forfeiture order were obliged to have regard to all the factors listed in section 9(1) of the Act. It was not clear whether all these factors must be present and proven to justify a basis for a forfeiture order. In other words, should one factor be absent, then the court should deny a forfeiture order. In *Matyila v Matyila*,<sup>55</sup> the court held that all three factors in section 9(1) had to be alleged and proven and that there is no indication that the court may have reference to only one such factor.<sup>56</sup> There were however, other courts which were of the view that substantial misconduct was the most important factor that must be proven before a court can grant a forfeiture order.<sup>57</sup> In other words there must be proof of substantial misconduct leading to the irretrievable breakdown of the marriage. This position became evident in the case of *Singh v Singh*,<sup>58</sup> where a husband of 22

52 The Act s 9(1) lists substantial misconduct as one of the factors to be considered by the court making a forfeiture order.

53 See 'Forfeiture of Benefits' available at [http://butterworths.wits.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://butterworths.wits.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) (accessed 2012-10-24).

54 See *Wijker v Wijker* 1993 4 SA 720 at 729 I-J, where van Coller AJA held that "I have little doubt that notwithstanding the introduction into our law of the 'no fault' principle to divorce, a party's misconduct may be taken into account in considering the circumstances which gave rise to the breakdown of the marriage".

55 1987 3 SA 230 (WLD).

56 *Matyila v Matyila* 1987 3 SA 230 (WLD) 234G, Van Zyl J was of the view that "on a proper interpretation of this section it would appear that all three factors should in fact be both alleged and proved. There is no indication that the Court may have reference to only the one or the other. Had the section read differently insofar as there was a reference to 'any other factor which may be relevant' or had the word 'or' or some similar word indicating alternative possibilities been used, then Wepener's argument may hold water". In *Matyila*, Wepener argued that all these factors did not have to be pleaded or proved when an order was sought. His submission was that it would be sufficient to prove only one or two.

57 *Singh v Singh* 1983 1 781 [TPD].

58 *Ibid.*

years, accused his wife of, *inter alia*, leaving the common home, committing adultery during the last two years of the marriage and neglecting her marital duties. The wife contended that she left the matrimonial home due to her husband's mistreatment of her but admitted her adultery. The court found the wife's misconduct to be "substantial" and held that such misconduct outweighed the fact that the marriage had lasted for more than twenty years. The court accordingly ordered forfeiture against the wife on the strength of her misconduct.<sup>59</sup>

The effect of the *Singh* case is that, in the absence of substantial misconduct, the court will not order forfeiture of benefits.<sup>60</sup> This, despite the fact that there is evidence before the court relating to other section 9(1) factors warranting forfeiture of benefits. For instance, if the marriage is of relatively short duration and there is evidence that one spouse entered into the marriage for the sole purpose of benefiting materially.<sup>61</sup> The question of one party being unduly benefited if the forfeiture order was not granted was not entertained in the two cases referred to above. These two cases seem to suggest that such an assessment was not important. The decision in *Matyila* was held to be clearly wrong in *Binda v Binda*.<sup>62</sup>

In *Klerck v Klerck*, it was held that:

... it was not the intention of the Legislature that substantial misconduct or any of the other factors mentioned in section 9(1) had to be present before the Court could grant an order of forfeiture: what the Court had to do was to ask itself whether one party would be unduly benefited if an order of forfeiture was not made and in order to answer that question regard should be had to the duration of the marriage, the circumstances in which it broke up and, if present, substantial misconduct on the part of one or both parties. Further, that in the circumstances of the present case where there was no evidence of substantial misconduct on the part of the plaintiff or the defendant, because of the short duration of the marriage the plaintiff would be unduly benefited if an order of forfeiture was not made.<sup>63</sup>

59 *Singh v Singh* 1983 1 781 [TPD] 791 C-D. See also Schäfer *Family Law Service Issue* (54, Oct 2010) 28.

60 Himonga 340.

61 See *Swanepoel v Swanepoel* All SA LR 1996 3 444.

62 1993 (2) SA 123 (W) at 127 I, Leveson J held that "in my opinion the considerations I have mentioned and the anomalies I have conjured up show clearly that the Legislature required each of the three factors to be given due and proper weight in assessing whether a party had been benefited unduly. But I am unable to hold that the factors are cumulative and that all must be present before a claimant is entitled to relief by way of a forfeiture order. I therefore consider that the opposite view is clearly wrong and that this Court is not obliged to follow the decision in *Matyila v Matyila*".

63 1991 1 SA 265 (W). See the English headnote. This case was followed with approval in *Binda op cit* 127, where Leveson J held that "Kriegler J, in my opinion, makes the same point in *Klerck v Klerck* at 268C-G, and in that regard I respectfully agree with him".

It has been argued that “the court is empowered to grant forfeiture of patrimonial benefits even in the absence of substantial misconduct, as the legislature had clearly eschewed the principle of fault by enacting the Act and that fault should not be permitted to creep in through forfeiture of benefits”.<sup>64</sup> It was further stated in *Englebrecht v Engelbrecht*,<sup>65</sup> that, in the granting of the forfeiture order, the legislature did not elevate fault (substantial misconduct) prominently above all other factors listed in section 9(1) of the Act.<sup>66</sup> It is now evident that courts were beginning to realise that there was no hierarchy as far as factors mentioned in section 9(1) are concerned, and that all the factors listed were equally important hence no one factor amongst them was individually decisive. This essentially meant that each factor on its own, or with another, was capable of convincing the court to grant a forfeiture order.

Even though the court made an assessment as to whether one party would be unduly benefited if an order of forfeiture was made in *Klerck*, it nevertheless failed to explain what the legislature meant by the phrase “unduly benefited”. The court simply looked at the length of the marriage and found that the short duration of the marriage warranted an order of forfeiture being made, without explaining how the short duration of the marriage would result in one party being unduly benefited if forfeiture was not ordered. I am alive to the fact that there are instances where it might be said that it is clear that one party will be unduly benefited, especially if the marriage was of relatively short duration and it appears a party wanted to cash in on the marriage, and end it quickly. Here he or she should not benefit. However, things are seldom that simple, hence clear guidance as to what amounts to “unduly benefited” is needed, especially from our courts.

In 1993, the Appellate Division<sup>67</sup> was presented with an opportunity to clarify the South African forfeiture of benefits jurisprudence in the case of *Wijker v Wijker*.<sup>68</sup> Even though this case is celebrated as having clarified the law, especially with regard to the approach our courts should adopt when dealing with the factors in section 9(1), I am of the view that it missed a golden opportunity to provide clarity on what is meant by “unduly benefited”. In this case, the court held that “the context and the subject matter make it abundantly clear that the legislature could never have intended that the factors mentioned in the section should be considered cumulatively”.<sup>69</sup> This means that the party seeking a forfeiture order need not allege and prove all the factors listed in section 9(1) to be successful. A party seeking an order of forfeiture of benefits will be successful if he or she can prove that as a result of one or more of the

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64 Sinclair “South Africa: Protecting children - poverty, abuse, divorce and political turmoil” 1992 – 1993 (31) *U Louisville J Fam. L* 475. See also *Klerck v Klerck op cit.*

65 1989 1 SA 597.

66 *Idem* 602-3.

67 As it then was. Now the Supreme Court of Appeal.

68 1993 4 SA 720.

69 *Idem* at 729 E.

factors listed in section 9(1), the other spouse would be unduly benefited if forfeiture of benefits is not ordered.<sup>70</sup>

The approach in *Wijker* was followed and confirmed in *Botha v Botha*,<sup>71</sup> where the court further clarified that “the trial court may therefore not have regard to any factors other than those listed in section 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”.<sup>72</sup> This simply means that the factors listed in section 9(1) are a closed list, hence the court will not entertain any other factor. Unfortunately, the court in *Botha* also failed to analyse what the legislature meant in section 9(1) by “unduly benefited”. I respectfully submit that the court should have done so irrespective of whether or not it was called upon to do so by the parties. Furthermore, the court should, at the very least, have made *obiter* remarks regarding the phrase “unduly benefited”.

Section 9(1) further grants courts the discretion, after granting a decree of divorce, to decide whether or not to grant a forfeiture of patrimonial benefits order having regard to the circumstances of the particular case, the nature of the evidence led and the facts proven before the court. When exercising their discretion, courts should be careful not to refuse such an order when it is competent to do so in the circumstances of the particular matter. Courts should also be careful to apply their minds thoroughly to the facts before the court when granting forfeiture of patrimonial benefits orders, especially in undefended divorces. The decision whether or not to grant forfeiture orders, lies with the court. It has been held however, that the court’s discretion is restricted to a consideration of the three factors mentioned in section 9(1) of the Act, thus no other factor may be taken into account by a court when granting a forfeiture order.<sup>73</sup>

#### 4 Unduly Benefited

It is worth noting that although *Wijker* has given some clarity, this area of South African family law still needs to be further clarified, more

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70 See Marumoagae “Forfeiture of patrimonial benefits – it’s not about what is fair” *De Rebus* (July 2012) 21-22 22. See also *Wijker op cit* 729 E.

71 2006 4 SA 144 (SCA).

72 2006 4 SA 144 (SCA) par 8.

73 *Moodley v Moodley* [2008] 48 ZAKZHC par 8. See also an unreported case of *O v O* [2011] ZAGPPHC 182; 35432/2008, 42644/2010, 40419/201 (2 Sept 2011) par 66, where it was held that “a discretion is clearly conferred upon the court in terms of section 9(1) whether or not to order forfeiture of the patrimonial benefits of the marriage. That discretion may be exercised in favour of either of the spouses and may relate to the whole or only a portion of the patrimonial benefits. Moreover, the court is enjoined to have regard to various factors specified in the said section, in the exercise of that discretion in order to determine whether one party will in relation to the other be unduly benefited if the order for forfeiture is not made”.

especially with regard to what section 9(1) means by “unduly benefited”. This phrase has never been under judicial scrutiny despite being at the heart of section 9(1). Our courts have been really creative in manoeuvring around this phrase without attaching any real significance to it. I therefore submit that a proper contextual analysis by our courts is needed in order to provide guidance on what is meant by “unduly benefited”, in section 9(1). I am of the view that such an analysis will go a long way in assisting our courts to reach well-reasoned and just decisions. Such a positive step by our courts may inspire the legislature to amend the Act and provide relevant definitions which are currently absent from the Act.

I am not proposing that courts should provide a concise and precise definition of “unduly benefited”, rather, they should provide guidelines on how this phrase should be understood, as this will assist litigants in convincing the court to either grant or refuse a forfeiture of patrimonial benefits order. Interpreting and contextualising this phrase would breathe life into section 9(1) and would lead to it being understood within a social context. I submit that this approach would make it even easier for the court to marry the facts before it with the law and thus properly articulate how it has arrived at its decision. This will also go a long way in assisting parties before the court in understanding the reasoning behind the order. It is important that courts start deciding cases relating to section 9(1) of the Act by interpreting and providing clarity as to what is meant by the phrase “unduly benefited” in the context of that section. Surely it cannot be regarded as being sufficient to merely assess the facts and reason in such a manner as to force them to align with one or more of the factors listed in section 9(1), and thereby conclude that one party will be unduly benefited should the order of forfeiture of patrimonial benefits not be made, without a proper interpretation and guidance regarding the meaning of “unduly benefited”.

It is not my purpose to provide a definition of what “unduly benefited” means but I will make some suggestions in order to spark academic and judicial debate which may lead to a working definition. I submit that this phrase can be understood as a benefit (being property subject to the joint estate) accruing to a person whose conduct does not justify such a person receiving such a benefit. In other words, the person to whom the benefit is due has, through his or her conduct, shown him- or herself not to be entitled, worthy, warranted or deserving to receive such a benefit.

An example of such conduct would be if A marries B in community of property knowing B to be wealthy and under a mistaken impression that B suffers from a particular disease and would die soon. Shortly after the marriage A discovers that B is actually healthy and proceeds to file for divorce. Under these circumstances, should A be allowed to receive half of the joint estate which, by virtue of the marriage in community of property, he or she is entitled to? A would, in my opinion, be unduly benefited thereby. Such a benefit is undue because, at the time of entering the marriage, A was motivated by his or her expectation of

being rewarded from the proceeds of B's estate. This was effectively a marriage of convenience. A is not deserving of the benefit which would ordinarily accrue to him or her. These facts will be used in assessing the "duration of the marriage" factor listed in section 9(1) and this will be a basis to award forfeiture of benefits. It is thus evident from the example I provided that should A nonetheless receive a benefit despite his or her conduct, he or she will be unduly benefited in the circumstances.

## 5 Conclusion

It is trite that divorce dissolves a marriage from the moment that the court grants the divorce decree and makes its pronouncement. The joint estate in a marriage in community of property usually comprises both the movable and immovable assets acquired before and during the subsistence of the marriage. A spouse to such a marriage cannot argue that he or she acquired an asset before the marriage and therefore such asset does not form part of the joint estate. In the event of a marriage in community of property being terminated by a decree of divorce and the spouses failing to agree on the division of assets, the court may appoint curators or liquidators to divide the property.<sup>74</sup> Absent a forfeiture order, the assets of the joint estate will be equally divided between the spouses.

This paper first discussed the common law position and then looked at how South African courts treated cases relating to forfeiture of patrimonial benefits before the promulgation of the Act in 1979. It was shown that the courts relied on the guilt principle in order to reach their decisions. Since the coming into effect of the Act, South Africa's courts have been called upon to pronounce on section 9(1), however, they have been inconsistent regarding the weight to be attached to each of the factors listed in section 9(1) when granting an order of forfeiture of patrimonial benefits. It was only in 1992 that the Appellate Division in *Wijker* "clarified" the position and stated that all three factors do not have to be present and they need not be considered cumulatively. I submit that South African courts generally, have failed to properly interpret section 9(1) of the Act as they have neglected to provide guidance on

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74 *Salaman v Salaman and Another* [2008] ZAKZHC 61 par 16. In *Gillingham v Gillingham* 1904 TS 609 Innes CJ stated that: "When two persons are married in community of property a universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both parties continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the court to divide the estate, and the court has power to appoint some person to effect the division on its behalf. Under the general powers which the court has to appoint curators it may nominate and empower someone (whether he is called liquidator, receiver, or curator ... perhaps curator is the better word) to collect, realise, and divide the estate. And that that has been the practice in South African courts is clear".

what the phrase “unduly benefited” means within the context of the Act. I have argued that should the court give due weight to the said phrase, this will go a long way in assisting them to reach just decisions.