

**Substantial misconduct as a factor in the
determination of forfeiture of patrimonial benefits
at divorce in South Africa**

TF Phajane

 orcid.org/0000-0002-1282-6673

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Supervisor: Prof M Carnelley

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Student nr: 26504286

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ABSTRACT

Forfeiture of patrimonial benefit in the context of South African Divorce law has undergone several legislative changes. Previously, before the enactment of the *Divorce Act*, the common law principles were used by the courts to determine whether one of the *consortiums* forfeited the benefit in the marriage. Under the contemporary constitutional dispensation, substantial misconduct is regarded as one of the factors that could be invoked to determine forfeiture of patrimonial benefit.

There are no clear guidelines for the courts on how to grant forfeiture of patrimonial benefits on the grounds of substantial misconduct as the question remains whether a fault-based criterion of forfeiture is appropriate in a no-fault divorce system in light of the identified *lacunae* in the legislation.

Key words: substantial misconduct, forfeiture of patrimonial benefit, divorce law.

TABLE OF CONTENTS

ACKNOWLEDGMENTS	i
DEDICATION	ii
ABSTRACT.....	iii
LIST OF ABBREVIATIONS.....	VII
CHAPTER 1	1
1 INTRODUCTION.....	1
1.1 Background	1
1.2 Rationale	3
1.3 Research question	7
1.4 Aims and Objectives of the study.....	7
1.5 Research method.....	8
1.5.1 The qualitative approach	8
1.6 Framework of study	8
1.7 Relevance to the research unit.....	9
CHAPTER 2	10
2 FORFEITURE OF PATRIMONIAL BENEFITS IN TERMS OF THE COMMON LAW.....	10

2.1	<i>Introduction</i>	10
2.2	<i>Common law development of forfeiture of benefits</i>	10
2.3	<i>Divorce Laws Amendment Act and the fault or guilt principle.....</i>	18
2.4	<i>Abolition of the guilt or fault principle</i>	20
2.5	<i>Conclusion</i>	22
CHAPTER 3	25
3	SOUTH AFRICA 'S CURRENT LEGAL POSITION	25
3.1	<i>Introduction</i>	25
3.2	<i>Implications of Section 9 of the Divorce Act.....</i>	26
3.3	<i>Overview of forfeiture of patrimonial benefits.....</i>	26
3.3.1	<i>Constitutionality</i>	27
3.3.2	<i>Grounds for divorce.....</i>	29
3.4	<i>Substantial misconduct</i>	31
3.5	<i>Undue benefits in relation to substantial misconduct..</i>	38
3.6	<i>Conclusion</i>	46
CHAPTER 4	48
4	CONUNDRUM AND CONCLUSION	48
4.1	<i>Introduction</i>	48
4.2	<i>Findings of the study.....</i>	49

4.2.1	<i>Common law</i>	49
4.2.2	<i>Forfeiture of patrimonial benefits under the Divorce Act</i>	51
4.2.3	<i>Comparison between statutory regulation and common law</i> ...	52
4.2.4	<i>Substantial misconduct</i>	53
4.2.5	<i>Undue benefits</i>	54
4.3	<i>Recommendations</i>	54
4.4	<i>Conclusion</i>	56
	BIBLIOGRAPHY	57

LIST OF ABBREVIATIONS

DLAC	Divorce Laws Amendment Act
SALC	South African Law Commission

CHAPTER 1

1 INTRODUCTION

1.1 Background

The principle of forfeiture of benefits is a legal process which was practised in South Africa prior to the incorporation of the *Divorce Act* of 1979 (hereinafter the *Divorce Act*).¹ Common law acknowledged that the courts had powers to grant an order of forfeiture of patrimonial benefits **on** the guilty party in situations where it could determine that the reason for the breakdown thereof was caused by such party.² This was not an uncommon practice as the common law position on divorce was premised on the fault doctrine.³ This doctrine was based on the fact that, if adultery, malicious desertion or habitual criminality were present as grounds for divorce,⁴ by implication based on fault of the other party, a divorce could be granted and a respondent could forfeit his/her benefits from the marriage.⁵ Countless factors in the common law could determine **whether or not an order of forfeiture of patrimonial benefit is a suitable order to be made in such circumstance.**⁶

In situation whether the innocent party instituted a claim founded on forfeiture of benefits under the common law, the court had to rely on the circumstances which resulted in the breakdown of the marriage.⁷ The court would refuse a forfeiture order if it was satisfied that the innocent party claiming forfeiture had committed adultery, maliciously deserted the **other party** or was imprisoned as a habitual criminal during the subsistence of the marriage.⁸

¹ *Divorce Act* 70 of 1979.

² Lee *An Introduction to Roman-Dutch Law* 87.

³ Lee *An Introduction to Roman-Dutch Law* 87.

⁴ Heaton *The Law of Divorce and Dissolution of Life Partnership in South Africa* 8. For current purposes the possibility of a divorce based on incurable insanity is ignored (*Divorce Laws Amendment Act* 32 of 1935).

⁵ *Murison v Murison* 1930 AD 159; *Munene* 2019 *De rebus* 14.

⁶ Heaton *The Law of Divorce and Dissolution of Life Partnership in South Africa* 8.

⁷ *Kruger South African Family Law* 17; *Marumoagae* 2014 *De Jure* 86.

⁸ Heaton *The Law of Divorce and Dissolution of Life Partnership in South Africa* 7; *Marumoagae* 2014 *De Jure* 86 -87.

In the case of *Celliers v Celliers*⁹ in 1904, the court acknowledged that the Roman law and Roman-Dutch law authorities lacked clarity on the issue of “forfeiture of patrimonial benefits” in South Africa.¹⁰

The court confirmed that the principle was part of the South African law and acknowledged the common law power to grant a forfeiture order founded on the principle of guilt other than only consider properties contributed by the party at fault in a marriage.¹¹

When the South African Law Commission, then known, reconsidered the South African divorce law, it recommended that new legislation, the “*Divorce Act*”, should not be premised on the fault doctrine to reflect the reality and *mores* of the community but should rather acknowledge that both parties to a divorce have contributed to the breakdown of the marriage and that it would be in the interests of the children to make the process smoother and less acrimonious.¹² However, it still elected to incorporate the opinion of forfeiture of benefits into the South Africa legislation.¹³ Section 9(1) of the *Act*¹⁴ provides as follows:

“When a decree of divorce is granted on the ground of irretrievable breakdown of a marriage, the court may make an order that 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 breakdown thereof and any substantial misconduct on the part of either parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other, be unduly benefited”.¹⁵

⁹ *Celliers v Celliers* 1904 TS 926.

¹⁰ *Celliers v Celliers* 1904 TS 926 para 18-20.

¹¹ *Celliers v Celliers* 1904 TS 926 para 18-20.

¹² *South African Law Commission Act 19 of 1974*.

¹³ *South African Law Commission Act 19 of 1974*.

¹⁴ *Section 9(1) of the Divorce Act*.

¹⁵ *Section 9(1) of the Divorce Act*.

The current study is premised on the issue of 'substantial misconduct' as a fault factor in the determination of forfeiture of benefits in a no-fault divorce system.

It has been noted that the concept of 'substantial misconduct' has not been defined in the aforementioned provision.¹⁶ This study submits that the concept 'substantial misconduct' poses a conundrum in the determination of forfeiture of benefits in South African divorce law.¹⁷

1.2 Rationale

This study investigates the issue of 'substantial misconduct' as a factor in the determination of forfeiture of patrimonial benefits at divorce and how it fits into the broader divorce process. **The Divorce Act** provides that the courts have the discretion to grant an order of forfeiture of patrimonial benefits against one party if the circumstances that led to irretrievable breakdown were caused by 'substantial misconduct' of such a party.¹⁸ It has been asserted that 'misconduct' on its own does not warrant the order of forfeiture of patrimonial benefits but rather it should be 'substantial misconduct'.¹⁹ This conception is derived from the doctrine that who he is at fault should not benefit from a marriage which he/she has wrecked.²⁰ The benefit must not be looked **at isolation but at the expense of the innocent party.**²¹

However, the *Divorce Act*²² does not concisely provide a guideline to be followed where 'substantial misconduct' as a ground of forfeiture of patrimonial benefits is a factor. This causes a legal conundrum when the courts must determine forfeiture of patrimonial benefits. For instance, the lack of procedural guidelines was addressed in *Wijker v Wijker*²³, where the court questioned the application of fairness in section 9 of the *Act* and stressed that certain steps had to be laid out in order to preserve

¹⁶ Munene 2019 De rebus 14.

¹⁷ Munene 2019 De rebus 14.

¹⁸ *Section 9(1) of the Divorce Act.*

¹⁹ Heaton *The Law of Divorce and Dissolution of Life Partnership in South Africa* 91; *See also Marumoagae* 2014 *De Jure* 93.

²⁰ Heaton *South African Family Law* 132.

²¹ Heaton *South African Family Law* 132

²² *Divorce Act* 70 of 1979.

²³ *Wijker v Wijker* 1993 4 SA 720 (A) para 1.

fairness, based on the fact that the court cannot order one party to forfeit his/her benefits in a joint estate in favour of the other party.²⁴ The court gave guidance that the accepted view of forfeiture of benefits does not entail that a party loses his/her own assets, but rather loses his/her claim to financial benefits generated by the other spouse.²⁵ The court emphasised that a forfeiture order cannot be used as a tool to deviate from the normal outcomes that can result in a matrimonial property system or to achieve a redistribution of assets mainly due to the fact that it considers this fair and just.²⁶ In *JW v SW*²⁷, it was highlighted that the court's intention when granting an order of forfeiture is to protect the vulnerable party, rather than punishing the party against which the order is sought.²⁸

In terms of section 9, the court has to take into consideration any 'substantial misconduct' on the part of either parties to the extent that, if the order of forfeiture is not made, the one party will not be 'unduly benefited' in relation to the other.²⁹ The following numerous cases deal with the substance:

In *Klerck v Klerck*³⁰ the court noted that it would not grant an order of forfeiture of benefits where the plaintiff fails to provide admissible evidence which entails that the defendant has committed 'substantial misconduct'.³¹ The question which the court failed to answer was what type of action amounts to substantial misconduct and what procedures should be followed in granting an order of forfeiture of patrimonial benefits.³² Similarly, the court in *Marumoagae*³³ noted that 'the court ought 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 passing its judgment'.³⁴ When parties allege

²⁴ *Wijker v Wijker* 1993 4 SA 720 (A) para 1.

²⁵ *Visser & Potgieter Family Law* 180.

²⁶ *Wijker v Wijker* 1993 4 SA 720 (A) para 18.

²⁷ *JW v SW* 2011(1) SA 545 (GNP).

²⁸ *JW v SW* 2011(1) SA 545 (GNP) para 2.

²⁹ Section 9(1) of the Divorce Act.

³⁰ *Klerck v Klerck* 1991 1 SA 265 (W) para 12 -15.

³¹ *Klerck v Klerck* 1991 1 SA 265 (W) para 12 -15.

³² *Klerck v Klerck* 1991 1 SA 265 (W) para 12 -15.

³³ Heaton *The Law of Divorce and Dissolution of Life Partnership in South Africa* 92-93; *Marumoagae* 2014 *De Jure* 89.

³⁴ *Marumoagae* 2014 *De Jure* 89.

circumstances which, according to them, led to the breakdown of the marriage, they may apportion blame to the other, by establishing the fault of the other party.³⁵ This will be taken into consideration by the court.³⁶ This determination will justify whether the order of forfeiture of patrimonial benefits based on substantial misconduct is justified.³⁷ The question is should “blame” be a factor considered by the courts to assess and determine whether or not ‘substantial misconduct’ exists. In contrast, in *Matyila v Matyila*³⁸ it was held that, courts ought to regard a certain level of misconduct to determine whether or not granting an order based on forfeiture is reasonable and fair.³⁹

Mayedwa questions the relevance of forfeiture of patrimonial benefits in divorce proceedings by contending that the *Act* seems to penalise those who are found to have committed ‘substantial misconduct’.⁴⁰ She is of the view that courts have abandoned ‘fault’ or conduct as the main reason of a forfeiture order.⁴¹ This demonstrates the complex aspect of ‘substantial misconduct’. In *MC v JC*⁴², a husband had obtained a partial forfeiture order based on the adultery committed by the wife which was deemed ‘substantial misconduct’ though they had been married for 26 years.⁴³ On appeal, the court held that section 9(1) of the *Divorce Act* might infringe upon the right to equality because the party who had committed ‘substantial misconduct’ is placed in a prejudicial position with regards the distribution of patrimonial benefits.⁴⁴ ‘Substantial misconduct’ cannot be considered in isolation of other factors such as duration of the marriage, circumstances leading to breakdown of marriage, and whether there could be undue benefit.⁴⁵ This creates a conundrum in the application of ‘substantial misconduct’.⁴⁶ In *Swart v Swart*⁴⁷ there was an

³⁵ *Marumoagae* 2014 *De Jure* 89.

³⁶ *Marumoagae* 2014 *De Jure* 89.

³⁷ *Marumoagae* 2014 *De Jure* 89.

³⁸ *Matyila v Matyila* 1987 3 *SA* 230 (*W*).

³⁹ *Matyila v Matyila* 1987 3 *SA* 230 (*W*) para 19.

⁴⁰ *Mayedwa* 2019 www.googleweblight.com.

⁴¹ *Mayedwa* 2019 www.googleweblight.com.

⁴² *MC v JC* 2016 (2) *SA* 227 *GP*.

⁴³ *MC v JC* 2016 (2) *SA* 227 *GP* para 2.

⁴⁴ *MC v JC* 2016 (2) *SA* 227 *GP* para 12.

⁴⁵ *MC v JC* 2016 (2) *SA* 227 *GP* para 12.

⁴⁶ *Mayedwa* 2019 www.googleweblight.com.

⁴⁷ *Swart v Swart* 1980 (4) *SA* 364 (*O*).

attempt to distinguish between 'substantial misconduct' and adultery leading to a divorce. This is perceived as a misguided approach since adultery itself was regarded as the highest form of guilt or fault under Roman-Dutch law.⁴⁸ In *MC v JC*⁴⁹ a ruling on the constitutionality of section 9(1) was not made for technical reasons. The question posed was whether the section be entirely removed.⁵⁰

This assertion is validated by the contradictions in and misconceptions by courts in their interpretation and application of 'substantial misconduct'. According to Bonthuys, a challenge related to misconception arose when the South African courts interpreted section 9 of the *Divorce Act* as a limitation provision, "where forfeiture had to be limited to the spouse who had contributed less to the joint estate or whose separate estate shows a smaller accrual, whereas the other spouse who has made a larger financial contribution to the marriage is protected from forfeiture."⁵¹ The question by the scholar is whether to embrace fixed matrimonial property regimes or wider judicial discretions.⁵²

In *Engelbrecht v Engelbrecht*⁵³, the court had to expand on the intention of the legislature in crafting the contentious provision. The court held that the legislature could have never directly intended to have a wife who assisted her husband for 20 years forfeit her benefits when found to have committed adultery.⁵⁴ In submission, this introduced more confusion as to what constitutes 'substantial misconduct', if not adultery.

As a result, there is uncertainty about the constitutionality of section 9(1) of the *Divorce Act*. Furthermore, there is a lack of a clear definition and guidelines to the meaning and application of 'substantial misconduct'. The point of departure in this

⁴⁸ *Marumoagae* 2014 *De Jure* 88.

⁴⁹ *MC v JC* 2016 (2) *SA* 227 *GP* para 2.

⁵⁰ *Mayedwa* 2019 www.googleweblight.com.

⁵¹ *Bonthuys* 2014 *SALJ* 439-460.

⁵² *Divorce Act* 70 of 1979.

⁵³ *Engelbrecht v Engelbrecht* 1989 (1) *SA* 597 (K).

⁵⁴ *Engelbrecht v Engelbrecht* 1989 (1) *SA* 597 (K) para 10.

review is that there is a misconception on the application of 'substantial misconduct' in determining forfeiture of patrimonial benefits.

1.3 Research question

The question in this study is whether a fault-based criterion of forfeiture is appropriate in a no-fault divorce system in light of the identified *lacunae* in the legislation.

1.4 Aims and Objectives of the study

This study aims to probe the legislative principles governing "forfeiture of patrimonial benefits" with specific reference to 'substantial misconduct' in a no-fault system in South Africa. This concept of 'substantial misconduct' has not been articulately defined in the aforementioned provision.⁵⁵ It is submitted that the concept 'substantial misconduct' poses a conundrum in the determination of forfeiture of benefits in South African divorce law.

It is also aimed at investigating the issue of 'substantial misconduct' as a factor in the determination of forfeiture of patrimonial benefits at divorce and how it fits into the broader divorce process.

The objectives of the study are designed to analyse and explore a different view point to 'substantial misconduct' as a ground of forfeiture of benefits in divorce cases. Concomitantly, the research examines historical legislative and judicial principles of forfeiture of benefits in South Africa and establishes the constitutionality of 'substantial misconduct' as a ground to forfeiture of patrimonial benefits. Moreover, this study proffers an analytical overview of the impact of common law in the current constitutional dispensation on forfeiture of patrimonial benefits in South Africa.

An assessment will be conducted to determine whether the *Divorce Act* provides the courts with clear guidelines concerning misconduct and examine whether the

⁵⁵ *Munene 2019 De rebus* 14.

law dealing with 'Substantial misconduct' in South Africa requires reassessment and amendment.

1.5 Research method

1.5.1 The qualitative approach

This mini dissertation utilises the qualitative research method. This approach is the most suitable because it adopts a descriptive style beneficial to legal practitioners in examining new knowledge that might not have been available for perusal, thereby gaining new understanding.

1.6 Framework of study

The study is divided into four chapters whose details are outlined below:

Chapter 1 is the introduction and proffers an overview of the research, the background to the study, the specific problem addressed as well as the aims and objectives of the study. Concomitant to this, this initial chapter provides and justifies the research methods utilised in data collection and establishes the appropriate techniques for analysis.

Chapter 2 examines the historical overview in relation to forfeiture of patrimonial benefits in South Africa, that is, the position, scope, and development of common law as well as its impact of forfeiture of benefits. To successfully attain this, chapter two refers to and observes the regulation of forfeiture of patrimonial benefits in a historical perspective.

Chapter 3 discusses issues regarding constitutionality, identified *lacunae* and forfeiture of benefits on substantial misconduct in South Africa currently.

Chapter 4 is the final chapter in this research study, and it specifically addresses what the study ascertained in view of the research, aims and objectives of the research.

1.7 Relevance to the research unit

The significance of this study is based in the conception that since neither the introduction nor the incorporation of “substantial misconduct as a ground of forfeiture of patrimonial benefits in divorce” by the South African law, it has since endured silence in other aspects of this subject matter and the issue thereof. The study recognises that the contemporary law does not clearly direct how the courts should address the way an order based on substantial misconduct should be granted and the constitutionality of section 9 (1) of the *Divorce Act*. Therefore, this study deals with a complex subject matter that calls for urgent reform in South African *Divorce Act*.

This study deals with a practical aspect of divorce law. It overlaps into two research sub-projects, that is, Vulnerable Societies and Justice in Practice. The reasons for its relevance under the abovementioned specific projects are that this legal topic encompasses the need for procedural reassessment in divorce law regulating ‘Substantial misconduct’ in the determination of forfeiture of benefits and further questions the constitutionality of this very section.

CHAPTER 2

2 FORFEITURE OF PATRIMONIAL BENEFITS IN TERMS OF THE COMMON LAW

2.1 Introduction

Before to the adoption of the *Divorce Act* in 1979, the South African legal system dealing with forfeiture of patrimonial benefits was premised on the principles of common law.⁵⁶ As a general rule, the precepts and norms of common law had the effect that when a divorce order was granted by the courts, the issue of whether one spouse was at fault or guilty and whether such fault was with regard to forfeiture of benefit had to be established.⁵⁷ The purpose of this chapter is to examine the history of common law as a legal approach applied to forfeiture and position of the Divorce Act relative to forfeiture of patrimonial benefits.

2.2 Common law development of forfeiture of benefits

Forfeiture of patrimonial benefits by one spouse to the other is a doctrine which stems from the belief in common law that "nobody ought to benefit from a marriage that he/she wrecked".⁵⁸ Under common law, the fault principle was derived from the grounds for divorce being adultery and malicious desertion. This same fault principle was used for forfeiture of benefits.⁵⁹ Therefore the classical approach of fault or guilt depended on the ground for divorce, e.g., adultery. Another common law principle was that the court had the discretion to grant an order that the spouse at fault forfeit all assets in the marriage.⁶⁰ The courts followed the approach that

⁵⁶ *Schafer Family Law Services, Issue 7* 15.

⁵⁷ *Barnard The South African law of Persons and Family Law* 239.

⁵⁸ *Marumoagae Factors justifying forfeiture of patrimonial benefit orders; Obiter* 36 232-242.

⁵⁹ *Marumoagae Factors justifying forfeiture of patrimonial benefit orders; Obiter* 36 232-242.

⁶⁰ *Barnard The South African Law of Persons and Family Law* 239; *Koza v Koza* 1982 (3) SA 462 (T) 465H.

the guilty spouse could forfeit the patrimonial properties of the marriage if the reason for the breakdown was caused by adultery.⁶¹

However, this approach later changed to a certain extent in the case of *Murrison v Murrison*⁶², where the court made a submission that where a marriage is dissolved on the grounds of adultery committed by one of the spouses, such spouse forfeits any benefits from the marriage and the court had no discretion to withhold an order for forfeiture of benefits if such an order is claimed by the injured spouse.⁶³

Wrongful doers or spouses that maliciously deserted the marriage or committed adultery which resulted in the ultimate breakdown of the marriage could be ordered to forfeit all of the patrimonial benefits of the marriage.⁶⁴ To all intents and purposes, the reason of the fault rule was to deprive the guilty party of the benefits of the nuptial relationship and to ensure that the innocent spouse retained the assets that were acquired during the subsistence of the marriage.⁶⁵

The underlying fact under the common law and its rule remained that marriages are a significant and powerful tool that create unity between two spouses.⁶⁶ A presumption created by this application of common law showcased that marriages were deigned to last for the lifetime of parties and divorce was regarded an abomination in the society.⁶⁷ This influence was instigated by the biblical injunction that "No person shall divorce his/her wife or husband unless the other spouse committed sexual immortality".⁶⁸

Nevertheless, the question is what the guilty spouse forfeits and whether the guilty spouse forfeits all the patrimonial benefits, including those that were acquired before the subsistence of the marriage under common law. Consideration of this

⁶¹ *Barnard The South African Law of Persons and Family Law* 239; *Koza v Koza* 1982 (3) SA 462 (T) 465H.

⁶² *Murison v Murison* 1930 AD 159.

⁶³ *Murrison v Murrison* 1930 AD 159.

⁶⁴ Lee *An Introduction to Roman-Dutch Law* 87.

⁶⁵ Lee *An Introduction to Roman-Dutch Law* 87.

⁶⁶ *Barnard The South African Law of Persons and Family Law* 240.

⁶⁷ *Murison v Murison* 1930 AD 159.

⁶⁸ *Murison v Murison* 1930 AD 159.

question has led the courts to deliver discerning judicial precedents. For instance, in *Mulder v Mulder*⁶⁹, the majority judgment delivered by Esselen and De Korte JJ presented the view that all property brought into the community marriage by the spouse who committed adultery could be forfeited in favour of the other spouse.⁷⁰

The court held that the spouse who caused the breakdown of the marriage should not be allowed to receive any benefits in the marriage for their wrongdoing.⁷¹ According to Marumoagae⁷² with reference to the minority judgment delivered by the Honourable Jorrissen J in the *Mulder* matter, there is no legal basis for the spouse to build a marriage that is in community of property only to forfeit such benefits based on marital wrongs as the guilty party.⁷³

In *Oppenman v Oppenman*⁷⁴ the court opined that although the law has been stringent on the type of property that is contributed by the spouses to the marriage, the term "assets" for the purposes of forfeiture order is not bounded to windfalls such as gifts and bequests, but it extends to acquisitions made in relation to the economy or investments as well as the industry.⁷⁵ For this reason, there is no doubt that the court accepted the view that there is a direct and indirect contribution to the patrimonial estate of the marital relationship. The direct contributions denote the financial influence made by the spouse to the marriage while indirect contributions take the form of domestic labour activities as performed by the wife in the marital household of the parties to the nuptial association.⁷⁶

In South Africa, it became a norm that when forfeiture was granted by the courts in relation to the guilt or fault principle, the contributions made by the spouses should include both the financial and the non-patrimonial assets acquired during the subsistence of the marriage. In *Gates v Gates*⁷⁷ the court established that monetary

⁶⁹ *Mulder v Mulder* (1888) 2 SAR 238.

⁷⁰ *Mulder v Mulder* (1888) 2 SAR 238.

⁷¹ *Mulder v Mulder* (1888) 2 SAR 238.

⁷² *Marumoagae* 2014 De Jure 88.

⁷³ *Marumoagae* 2014 De Jure 88.

⁷⁴ *Oppenman v Oppenman* 1962 (1) SA456 (SWA) at 457 D-F.

⁷⁵ *Oppenman v Oppenman* 1962 (1) SA456 (SWA) at 457 D-F.

⁷⁶ *Oppenman v Oppenman* 1962 (1) SA456 (SWA) at 457 D-F.

⁷⁷ *Gates v Gates* 1940 NPD 361.

property is not the only aspect that should be considered when an order is granted that the guilty spouse forfeit the benefits accrued to the parties in the marriage. The court acknowledged in certain circumstances the wife may not earn any tangible assets during the subsistence of the marriage.⁷⁸ In that regard, the court held that:

“There are vital services which are considered as contribution to the marriage and cannot be set aside or be disregarded, such as managing and maintaining the joint household, performing house duties as well as taking care of the children. These could also be regarded as contributions which pose a very real substantial value, which may well, and usually do, exceed the bare cost of her maintenance.”

From a purely legal perspective, the court illustrated that labour duties executed by the wife in the marriage accrued as intangible assets of the parties and such services should not be overlooked but rather be considered as patrimonial assets when the order is made against the spouse at fault. By reason of the fact that there was a cost saving exercise for the benefit of the earning spouse, the wife indirectly contributed to the estate accrual.⁷⁹ In a practical sense, the husband would have employed a third party in return for remuneration had the wife not discharged the essential services mentioned by the courts in *Gates v Gates*.⁸⁰ It is therefore safe to state that this decision was logically sound and fair because the employment agreement between the husband and the third party would have decreased the value of the patrimonial assets.⁸¹ What the court also meant in this case was that the contributions made by the wife may appear in the form of domestic services that is rendered to the husband in the subsistence of the marriage.⁸²

The test to determine whether a certain property should be included against the guilty spouse was objective, in that it required the judge to reasonably consider essential services in the form of non-patrimonial assets that were contributed to the

⁷⁸ *Gates v Gates* 1940 NPD 361.

⁷⁹ *Gates v Gates* 1940 NPD 361-366.

⁸⁰ *Gates v Gates* 1940 NPD 361.

⁸¹ *Gates v Gates* 1940 NPD 361.

⁸² *Gates v Gates* 1940 NPD 361.

estate of the spouses.⁸³ In all possibility, the husband cannot argue that the wife did not add to the accrual of the patrimonial state on the basis that all the property was contributed by him in the marriage. The mere fact that the wife performed essential duties is sufficient reason to be included in the ultimate assessment on forfeiture of patrimonial arising from the guilt principle that is made by the courts.⁸⁴

Similarly, there have been debates on whether the courts are empowered to grant a forfeiture order upon application by the innocent spouse if both parties to the nuptial relationship contributed directly or indirectly to the breakdown of the marriage. In *R v R*⁸⁵ the court accepted the approach that adultery as a common law ground for divorce should not be interrogated in isolation and labelled as the only factor that lead to the breakdown of the marriage.⁸⁶ Interestingly, the court outlined that both parties may contribute to the dissolution of the marriage through their conduct.

The strength of the minority judgment handed down by the Honourable Jorrisen J in the *Mulder* matter⁸⁷, was later re-emphasized by the court in *McGregor v McGregor*.⁸⁸ In this case, the court held that it has always been a standard practice in divorce actions that the innocent spouse, upon request, acquires all the benefits in the marriage.⁸⁹ It was found that where forfeiture is requested, the guilty spouse forfeited the patrimonial benefits; the properties which could be forfeited do not include his assets, but the benefits arising from the marriage. This approach has since been followed by the courts. Thus, Bonthuys⁹⁰ argued that the Roman law modelled the regime on patrimonial benefits to accept the custom that the party at

⁸³ *Oppenman v Oppenman* 1962 (1) SA456 (SWA) at 457 D-F; *Gates v Gates* 1940 NPD 361.

⁸⁴ *Gates v Gates* 1940 NPD 361.

⁸⁵ *R v R and another* (20741/2011) ZAGPPHC 505.

⁸⁶ *R v R and another* (20741/2011) ZAGPPHC 505.

⁸⁷ *Mulder v Mulder* (1888) 2 SAR 238.

⁸⁸ *McGregor v McGregor* (15 CTR 114).

⁸⁹ *McGregor v McGregor* (15 CTR 114).

⁹⁰ *Bonthuys The rule that a spouse cannot forfeit at divorce what he/she has Contributed to the marriage: an argument for change* Volume 131 No 2. 439-460.

fault could, upon the dissolution of the marriage, retain the assets and liabilities of the marriage acquired before and during the subsistence of the marriage.⁹¹

In *Celliers v Celliers*⁹² it was held that common law authors and judiciary needed lucidity on “forfeiture of patrimonial benefits” in South Africa.⁹³ The court indicated that there were misconceptions and inconsistencies which rendered the divorce unjust because common law afforded the courts limited power to grant a forfeiture order on the guilt principle while withholding the power of the courts to extend such an order to the assets contributed by the spouse who caused the breakdown of the marriage. What is of importance to this judgment is the idea that the property which did not form part of the joint estate has to be included when a forfeiture order is granted by the courts.⁹⁴ That is, all assets that form and do not form part of the joint estate can be forfeited in principle.

The Honourable De Kotze in *Ferguson v Ferguson*⁹⁵ rejected this approach when making the determination of whether the property contributed by the wife who committed adultery could be forfeited in favour of the husband.⁹⁶ This discernment was made on the view that the guilty spouse could forfeit any benefits that were derived from the plaintiff in the consequence of the community of property. The court held that the patrimonial benefits that were brought by the wife into the marriage should not be included in granting the forfeiture order.⁹⁷

Marumoagae⁹⁸ contends that although the Honourable De Kotze clarified that certain property and patrimonial benefits could be excluded when an order is granted against the party at fault, the missing factor was a formal assessment and a standard procedure to guide the courts in determining whether forfeiture order

⁹¹ *Bonthuys The rule that a spouse cannot forfeit at divorce what he/she has Contributed to the marriage: an argument for change Volume 131 No 2. 439-460.*

⁹² *Celliers v Celliers* 1904 TS 926.

⁹³ *Celliers v Celliers* 1904 TS 926.

⁹⁴ *Celliers v Celliers* 1904 TS 926.

⁹⁵ *Ferguson v Ferguson* 1906 ECD 218.

⁹⁶ *Ferguson v Ferguson* 1906 ECD 218.

⁹⁷ *Ferguson v Ferguson* 1906 ECD 218.

⁹⁸ Marumoagae 2014 *De Jure* 95.

was the appropriate sanction in the circumstance.⁹⁹ He also posits that the court could have laid out the objective criterion that regulates “undue benefits” because the innocent party may, in particular incidents, acquire the assets that were not due to him/her if a forfeiture order were granted against the guilty spouse.¹⁰⁰

Although some divergence from common law inaugurated positive developments into the regime on forfeiture of patrimonial benefits, innocent spouses that seek relief have had to make a special prayer to the courts for an order and have had the onus to prove by means of admissible evidence that the spouse at fault committed marital offences.¹⁰¹ The courts have had to assess whether the evidence presented by the guiltless spouse who seeks an order demonstrated adultery.

This point was evident in *Estate Heinemann & Ors v Heinemann*¹⁰² where the innocent spouse approached the court for an order that the patrimonial benefits should be forfeited by the guilty party, including the assets that had accrued to him during the subsistence of the marriage.¹⁰³ The court held that for such order to be granted, the innocent party requesting this must prove that the spouse at fault had committed the conduct of adultery or was guilty of malicious desertion.¹⁰⁴

Dealing with forfeiture of patrimonial benefits under common law was challenging as the courts did not possess an inherent power to grant an order that the property in the marriage has been forfeited by one spouse to the other.¹⁰⁵ The innocent party had to apply to the court to claim forfeiture of benefit and the claim had to be weighed against the circumstances that led to the breakdown of the marriage.¹⁰⁶ A similar approach was followed by the court in *Harris vs Harris*¹⁰⁷ which explained

⁹⁹ Marumoagae 2014 *De Jure* 95.

¹⁰⁰ Marumoagae 2014 *De Jure* 95.

¹⁰¹ Barnard *The South African Law of Persons and Family Law* 239; *Koza v Koza* 1982 (3) SA 462 (T) 465H.

¹⁰² *Estate Heinemann & Ors v Heinemann* 1919 A.D 126.

¹⁰³ *Estate Heinemann & Ors v Heinemann* 1919 A.D 126.

¹⁰⁴ *Estate Heinemann & Ors v Heinemann* 1919 A.D 126.

¹⁰⁵ Lee *An Introduction to Roman-Dutch Law* 87.

¹⁰⁶ *Peter's v Peters* (1906) TS 515.

¹⁰⁷ *Harris v Harris* 1949 1 SA 264.

that the absence of a request on a forfeiture order from the claimant does not authorise the courts to exercise its discretion.¹⁰⁸

It is safe to state that divorce was permissible if the innocent party proved that the party at fault had breached the material terms of the marriage and is in fact the guilty party.¹⁰⁹ The end of a marriage under common law existed only if one of the spouses died or where the dissolution was caused by the adulterous conduct or malicious desertion of the other party.¹¹⁰ The guilt and fault principle created the impression that in the absence of marital wrongs, the courts ought to reject an application for divorce.¹¹¹

Academics such as Cockrell *et al*¹¹² presented the opinion that the guilt or fault principle was undesirable and morally unacceptable because it did not consider the fact that both spouses could contribute to a breakdown of the marriage. Practically, this is correct since the guilt principle strove to draw a distinction between the spouses that acquires the patrimonial assets and the party at fault whom a relief of forfeiture is sought against in court.¹¹³ However, the question whether the spouse that committed marital offences was allowed to refute the evidence in contrast to forfeiture of benefits based on the guilt principle was not addressed in common law. It was up to the courts to make such inference and resolution.¹¹⁴

Several authors argued that the fault or guilt principle was characterised by a great number of uncertainties under common law. Key among these challenges was the question whether the guilty spouse could forfeit all the benefits, including those that were acquired by the party at fault during the subsistence of the marriage.¹¹⁵ Nonetheless, authorities in common law have always accepted the approach that

¹⁰⁸ *Harris v Harris* 1949 1 SA 264.

¹⁰⁹ Barnard *The South African Law of Persons and Family Law* 239.

¹¹⁰ Schäfer *Family law Services, Issue 7* 15.

¹¹¹ Schäfer *Family law Services, Issue 7* 15.

¹¹² Cockrell *et al The South African Law of Persons and Family Law* 71.

¹¹³ Cockrell *et al The South African Law of Persons and Family Law* 71.

¹¹⁴ Cockrell *et al The South African Law of Persons and Family Law* 71.

¹¹⁵ Schäfer *Family Law Service Issue 21* 1.

the courts were empowered to order forfeiture if the evidence suggested that one spouse contributed to the breakdown of the marriage.

2.3 Divorce Laws Amendment Act and the fault or guilt principle

Before the incorporation of the South African *Divorce Act* in 1979, the common law doctrine of guilt or fault effectively determined the extent to which the courts could grant an order based on forfeiture of patrimonial benefits.¹¹⁶ However, this principle in South Africa became a statutory measure when the legislature implemented the *Divorce Laws Amendment Act* (hereafter the *DLAC*)¹¹⁷ in 1935. While common law approved adultery and malicious desertion as the common grounds that justified the decree of divorce, the *DLAC* introduced two more grounds which should be considered by the courts in determining whether a divorce should be granted. These grounds are imprisonment resulting from habitual criminality and incurable insanity.¹¹⁸

For a divorce order to be granted since one of the *consortiums* in the marriage is a habitual criminal, the spouse against whom an order is sought should have been imprisoned for a period of five years.¹¹⁹ With regard to incurable insanity, the *DLAC* mandated the court to subjectively give regard to the circumstances that led to the insanity and to order such decree after a period of seven years.¹²⁰ However, the enactment of incurable insanity and declaration of a habitual criminal did not affect the regulation on forfeiture benefits because the request on the forfeiture order still required the courts to make an assessment on whether one of the spouses committed adultery or malicious desertion.¹²¹

Academics have presented ideas on the exclusion of incurable insanity and declaration that one of the spouses in the consortium is a habitual criminal as

¹¹⁶ Schafer, *Family law Services, Issue 21* 1.

¹¹⁷ *Divorce Laws Amendment Act* 32 of 1935.

¹¹⁸ Schalkwyk *General Principles of the family law* 249.

¹¹⁹ Schäfer *Family law Services, Issue 21* 1.

¹²⁰ Schäfer *Family law Services, Issue 21* 1.

¹²¹ Schafer *Family law Services, Issue 21* 1.

grounds for forfeiture of patrimonial benefits under the *DLAC*.¹²² According to Himonga¹²³ it would have been impractical to order that a person suffering from incurable insanity forfeit the assets of a marriage because such person cannot comprehend the nature of the judgment delivered by the court. She also explained that forfeiture of patrimonial estates has always been based on matrimonial offences. As a result, incurable insanity is a natural sickness and not misconduct.¹²⁴

As a means to support this, the court in *Harris v Harris*¹²⁵ formulated the approach that incurable insanity should only be seen as a ground that justifies divorce and not a forfeiture order.¹²⁶ The reasoning behind this judgment was based on the idea that incurable insanity can never be a matrimonial felony and the spouse in question does not decide to suffer from the sickness while adultery and malicious desertion are explicit choices of a normal person who understands the nature and the practical consequences of their action.¹²⁷ In reality, the property of the spouse whose insanity is declared by the courts was protected by the law, to the extent that the other spouse could not approach the courts to pray for a forfeiture order.

The question whether the spouse who is declared a habitual criminal could forfeit the patrimonial benefits remained to be seen under the *DLAC*.¹²⁸ However, it is argued that the approach to this issue depends on the type of criminal activity committed by the spouse. For instance, the implication that the husband committed a criminal offence of indecent assault outside the matrimonial home or rape could be regarded as one such marital offence that justifies both a divorce decree and forfeiture of patrimonial estates.

It is pertinent to note that the *DLAC* did not abolish the fault or the guilt principles. In all possibility, the Act introduced the approach that a divorce decree should also be considered in circumstances where one of the spouses in the marriage is declared

¹²² Himonga *Principles of South African Law* 72.

¹²³ Himonga *Principles of South African Law* 72.

¹²⁴ Himonga *Principles of South African Law* 72.

¹²⁵ *Harris v Harris* 1949 1 SA 264.

¹²⁶ *Harris v Harris* 1949 1 SA 264.

¹²⁷ Himonga *Principles of South African Law* 72.

¹²⁸ Himonga *Principles of South African Law* 72.

a habitual criminal or incurably insane, the *DLAC* also prescribed the number of years that should be taken into account by the courts on whether a divorce decree should be granted.¹²⁹ It is submitted that these grounds were crucial for the purpose of divorce and not forfeiture of patrimonial benefits.¹³⁰

2.4 Abolition of the guilt or fault principle

The discussions and measures around the abolition of the guilt principle were initiated by the government in 1974 when it instructed the South African Law Commission (hereafter the SALC) to make an inquiry into the South African legal system regulating divorce law at that period. The notion behind this mandate was to identify the common law principles that needed improvement and to adapt them to the demands of the current legal settings.¹³¹

The findings of the SALC indicated that there were defects in the South African legislative and policy framework of divorce which were not addressed by the *DLAC*.¹³² However, the report formulated by the SALC had the following statement to express regarding the guilt or fault principle:

"Most of the objections to the Divorce Law stemmed from the guilt or fault principle on which the common law grounds are based. It is contended that it is unrealistic and unfair to proceed from the assumption that the blame for the marriage breakdown lies only with one of the spouses while the other is completely innocent. With reference to several divorce cases, the majority of them, both spouses are to a greater or lesser extent to blame for their marriage breakdown".¹³³

¹²⁹ Himonga *Principles of South African Law* 72.

¹³⁰ Marumoagae 2014 *De Jure* 95.

¹³¹ Bernard *The South African law of persons and Family* 239; South Africa Law Commission Report on Divorce RP 57/1978 para 6.

¹³² Marumoagae 2014 *De Jure* 95.

¹³³ *South Africa Law Commission Report on Divorce* RP 57/1978 Para 6.2.

Furthermore, the SALC correctly argued that the guilt or fault principle was baseless and unjust for two reasons.¹³⁴ The first related to the impression that the courts were not afforded the discretion to decide whether to grant a forfeiture order. This is true because once it has been established that the guilty party committed adultery or was found guilty of malicious desertion, then the courts were mandated to grant an order on forfeiture. Secondly, the SALC held that the guilt principle was biased since it disregarded the possibility that both spouses could contribute to the dissolution of their marriage.¹³⁵

Of importance, the findings of the SALC did not advocate for the abolition of the guilt or fault principle. Rather, the SALC suggested that the principle could be retained in the South African legal system, but the courts should not regard the norm as a decisive factor in forfeiture of patrimonial benefits.¹³⁶ It would, therefore, appear that the SALC did not support the guilt or fault principle because of its inherent inclination to determine forfeiture of patrimonial property and the approach that there is always guilt and innocence in the dissolution of marriages.¹³⁷

The **guilt** principle fairly favoured the innocent party and disregarded other important aspects that could lead to the breakdown of a marriage. The social issues such as happiness in the nuptial relationship and misconduct of one of the parties which did not result from the adulterous behaviour or malicious abandonment were immaterial for the purpose of decreeing forfeiture under the common law.¹³⁸

As a result, the SALC proposed a shift from the fragmented common law approach in the regulation of divorce law. One of the fundamental recommendations presented by the SALC was the abolition of the guilt principle.¹³⁹ The notion behind this proposal may well be attributed to the doctrine that the norm disregarded substantial factors, such as termination by mutual consent between the parties.

¹³⁴ *South Africa Law Commission Report on Divorce RP 57/1978 Para 6.2.*

¹³⁵ *South Africa Law Commission Report on Divorce RP 57/1978 Para 6.2.*

¹³⁶ *South Africa Law Commission Report on Divorce RP 57/1978 Para 6.2.*

¹³⁷ Marumoagae 2014 *De Jure* 95.

¹³⁸ Schafer *Family law services, Issue* 21 1.

¹³⁹ *South Africa Law Commission Report on Divorce RP 57/1978 Para 6.2.*

Whereas the *DLAC* was the primary legislation which accepted the guilt or fault principle as a ground that must be considered in forfeiture of patrimonial benefits in that period, the SALC advocated for its repeal. Several findings of the SALC led to the promulgation of the current *Divorce Act* in South Africa.¹⁴⁰

At this point, it is safe to state that the law dealing with forfeiture of patrimonial benefits is consistent since there are factors which must be considered when a divorce and forfeiture order is considered by the courts. Subsequently, judges are afforded the right to decide whether forfeiture of patrimonial benefits is the appropriate sanction in the circumstance. However, the measures suggested by the SALC have been perceived as a positive development.¹⁴¹

2.5 Conclusion

The primary purpose of this chapter was to examine the historical approach previously used by the courts in assessing whether forfeiture of patrimonial benefits should be granted. The fault or guilty principle is an established norm under common law that was founded on the notion that the guilty spouse or the spouse at fault does not have to benefit or even take advantage of his/her guilt or fault.¹⁴²

At the onset, there were uncertainties regarding the issue whether forfeiture of patrimonial benefits entails that the guilty party surrenders all the properties, including those that were acquired before and during the subsistence of the marriage. This question was addressed by the *Mulder vs Mulder*¹⁴³ where the majority agreed that indeed the assets which are forfeited by the spouse at fault include "all benefits" in the marriage relationship.¹⁴⁴

However, authorities in other cases were sceptical and objective to agree with this approach. The *Ferguson v Ferguson*¹⁴⁵ judge discerned from the precedent that

¹⁴⁰ *South Africa Law Commission Report on Divorce RP 57/1978 Para 6.2.*

¹⁴¹ Marumoagae 2014 *De Jure* 95.

¹⁴² Hahlo *The South African Law of Husband and Wife* 373.

¹⁴³ *Mulder vs Mulder* (1888) 2 SAR 238.

¹⁴⁴ *Mulder vs Mulder* (1888) 2 SAR 238.

¹⁴⁵ *Ferguson v Ferguson* 1906 ECD 218.

forfeiture of patrimonial benefits includes all properties that were acquired before and during the duration of the marriage. The court ordered that the patrimonial benefits which merited forfeiture include only the estate that was acquired by the guilty party during the subsistence of the marriage.¹⁴⁶

Even so, the uncertainties around the topic escalated because this approach was sustained and applied by other courts, even after the principle laid down by De Kotze. This is because forfeiture of patrimonial benefit was not automatically granted with a divorce decree at common law. Adultery and malicious desertion were the most common misconduct which justified a forfeiture order.¹⁴⁷

A new legislation in the form of *DLAC* retained the guilt principle and introduced two more grounds of divorce, namely, incurable insanity and a declaration that one spouse in the consortium was a habitual criminal.¹⁴⁸ The question whether these grounds modelled the regulation on forfeiture of patrimonial benefits was addressed in *Harris v Harris*.¹⁴⁹ In this case, the court indicated that incurable insanity does not merit the order based on forfeiture. However, it goes without saying that the contributions of the SALC have shaped and modelled the future of South African divorce law. The abolition of the guilt principle and the repeal of the *DLAC* led to the incorporation of the new legislation. Currently, forfeiture of patrimonial benefits is regulated under the *Divorce Act*, and it can be granted under three circumstances. That is, the duration of the marriage, substantial misconduct and other circumstances that led to the breakdown of the marriage.¹⁵⁰

Essentially, the common law approach of the guilt or fault principle is recognised in South Africa and several precedents in the country relied on this doctrine in examining whether a forfeiture order should be granted. In other words, there had

¹⁴⁶ *Ferguson v Ferguson* 1906 ECD 218.

¹⁴⁷ Contributed to the marriage: an argument for change Volume 131 No 2. 439-460. Barnard *The South African Law of Persons and Family Law* 239; *Koza v Koza* 1982 (3) SA 462 (T) 465H.

¹⁴⁸ Himonga *Principles of South African Law* 72.

¹⁴⁹ *Harris v Harris* 1949 1 SA 264.

¹⁵⁰ Section 9 (1) of the *Divorce Act*.

to be proof of adultery or malicious desertion before a conclusion could be made on forfeiture of patrimonial benefits.¹⁵¹

The diversion from the common law system was first established in 1975 and the discussions around the topic led to the implementation of statutory rules which contemporarily regulate forfeiture of patrimonial benefits in South Africa.¹⁵² It has been noted that the diversion from the principle that the guilty party forfeits all the properties in the marriage was a positive measure implemented by the courts to regulate the regime on forfeiture of benefits, the concept of substantial misconduct remained **unknown** in the common law. The South African judiciary system relied on the principles laid down by the courts in this period to grant an order for forfeiture of patrimonial benefits.¹⁵³ Nevertheless, it is pertinent to note that the fault principle has undergone several criticisms and at this point it is desirable to examine the conceptual meaning of the fault/ guilt principle as used by the courts in common law.¹⁵⁴

The next chapter focuses on the constitutionality of the principles governing forfeiture of benefit on substantial misconduct in South Africa and the principle of undue benefits as well as its relevance to substantial misconduct and other factors encompassed in section 9(1) of the South African *Divorce Act*. To achieve this, the chapter identifies the relevant legislative provisions in the *Divorce Act* and case law which address substantial misconduct as a factor justifying forfeiture of patrimonial in South Africa.

¹⁵¹ Cockrell *et al* *The South African Law of Persons and Family Law* 71.

¹⁵² Schäfer *Family law Services, Issue 7* 15.

¹⁵³ Hahlo *The South African Law of Husband and Wife* 373.

¹⁵⁴ Hahlo *The South African Law of Husband and Wife* 373.

CHAPTER 3

3 SOUTH AFRICA 'S CURRENT LEGAL POSITION

3.1 Introduction

Substantial misconduct as a ground qualifying forfeiture of patrimonial benefits in South Africa is regarded as the most influential factor that should be considered by the courts to grant a forfeiture order.¹⁵⁵ Section 9 (1) of the *Divorce Act* provides that,

“When a decree of divorce is granted on the ground of irretrievable breakdown of a marriage, the court may make an order that 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 breakdown thereof and any substantial misconduct on the part of either parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other, be unduly benefited”.¹⁵⁶

This means that the divorce law provides the courts with the discretion to grant an order of forfeiture of patrimonial benefits against one party if the circumstances that led to the irretrievable breakdown were caused by ‘substantial misconduct’ of such a party.¹⁵⁷ Misconduct on its own is insufficient as the courts must be satisfied that the refusal to grant an order would amount to undue benefits.¹⁵⁸ The incorporation of the *Divorce Act* on the 1st of July 1979 has proved that the issue of whether fault or guilt could be attributed to one spouse is immaterial and that the courts have the power to decide whether forfeiture of patrimonial benefits is the appropriate

¹⁵⁵ Himonga “*Persons and Family*” 340.

¹⁵⁶ *Section 9(1) of the Divorce Act.*

¹⁵⁷ Carnelley 2016 *Speculum Juris* 2.

¹⁵⁸ Mayedwa 2019 <https://www.probono.org.za/is-forfeiture-of-patrimonial-benefits-in-divorce-proceedings-still-relevant-in-modern-south-africa/>.

sanction that could be granted against the spouse who is guilty of substantial misconduct.¹⁵⁹

3.2 Implications of Section 9 of the Divorce Act

Generally, forfeiture of patrimonial benefits creates an impact that the courts should grant a forfeiture order in circumstances where, if the order is not granted, one party will be unduly benefitted in relation to the other party.¹⁶⁰ Section 9¹⁶¹ encompasses several factors that the courts must take into consideration when granting a forfeiture order. That is, the duration of the marriage, the circumstances which led to the marriage breakdown and any substantial misconduct on the part of either of the parties. Furthermore, the court must be satisfied that, if the order is not made, the one party will in relation to the other be unduly benefitted and the court must then grant an order.¹⁶²

3.3 Overview of forfeiture of patrimonial benefits

The doctrine of "forfeiture of patrimonial benefits" refers to an instance where the court grants an order of divorce as well as an order that one party forfeited the properties which would have been obtained by both parties as a result of the marriage in community of property or benefits accrued as a result of an ante-nuptial claim.¹⁶³ Its recognition in South Africa could be attributed to the common law during the time when the guilt or fault principle prevailed.¹⁶⁴ The incorporation of the *Divorce Act* moulded and shaped the South African legal system dealing with divorce law. As a result, forfeiture of patrimonial benefits is legislated and dealt with in accordance with the principles and guidelines encompassed in the legislation.¹⁶⁵

¹⁵⁹ Mayedwa 2019 <https://www.probono.org.za/is-forfeiture-of-patrimonial-benefits-in-divorce-proceedings-still-relevant-in-modern-south-africa/>.

¹⁶⁰ Munene 2019 *De Rebus* 14-15.

¹⁶¹ *Section 9 (1) of the Divorce Act*

¹⁶² *Section 9 (1) of the Divorce Act.*

¹⁶³ *Section 9(1) of the Divorce Act.*

¹⁶⁴ *Section 9 (1) of the Divorce Act.*

¹⁶⁵ Himonga "*Persons and Family*" 326.

3.3.1 Constitutionality

However, there has been much criticism on the provision of section 9 of the *Divorce Act*, of which some can be attributed to the constitutionality of the provision, the issue whether all the factors have to be present for an order to be granted and the question whether the spouse could forfeit the properties that he or she contributed to the marriage.

On the face of the constitutionality of section 9 of the *Divorce Act*, Heaton¹⁶⁶ argued that a forfeiture order is not an effective remedy since it does not explicitly entail that the spouse forfeits the benefits that he or she contributed to the marriage. Rather, it suggests that the spouse can only lose his/her claim to the patrimonial assets contributed by the other spouse.¹⁶⁷ Even so, forfeiture of patrimonial benefits has been criticised as a discriminatory practice because it was found to be effective only if it is ordered against the spouse who contributed less to the matrimonial assets, which in most cases was found to be the wives.¹⁶⁸

Generally, forfeiture of patrimonial benefits amounts to indirect discrimination, and it is against the achievement of substantive equality in a democratic society.¹⁶⁹ This is so because the marginalised class of women often acquire less property and contribute less to the patrimonial assets than husbands do in a marriage and a forfeiture order poses the threat of discriminating against the spouse with a smaller amount of the benefits in the ante-nuptial marriage.¹⁷⁰

The court in *De v RH*¹⁷¹ also opined that there are constitutional challenges with forfeiture of patrimonial benefits. It pointed out that a forfeiture order might infringe upon the right to equality on the basis of the socio-economic status.¹⁷² Furthermore, the court highlighted that the right to dignity as encompassed in the *Constitution*

¹⁶⁶ Heaton 2005 *SAJHR* 557.

¹⁶⁷ Heaton 2005 *SAJHR* 558.

¹⁶⁸ Heaton 2005 *SAJHR* 557-558.

¹⁶⁹ Anon 2019 www.lac.org.na.

¹⁷⁰ Anon 2019 www.lac.org.na.

¹⁷¹ *DE v RH* 2015 (5) *SA* 83 (CC).

¹⁷² *DE v RH* 2015 (5) *SA* 83 (CC) para 66.

could be infringed by forfeiture of patrimonial benefits since its application is merely focused on the poorer spouse in the marriage.¹⁷³ Nevertheless, Bonthuys¹⁷⁴ submits that although the socio economic status is not one of the listed grounds in section 9 of the *Constitution*, the onus to prove that forfeiture of patrimonial benefits amounts to unfair discrimination rests on the party that alleges discrimination.

However, the Constitutional court in the case of *Harksen v Lane*¹⁷⁵ accepted the approach that discrimination is not limited to the grounds specified in the *Constitution*.¹⁷⁶ Indirect discriminatory practices could include the attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings.¹⁷⁷ In order to ascertain whether a particular conduct or practice constitutes indirect unfair discrimination, the court should consider the position of the complainant in the society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination is on a specified ground or not and the nature of the provision or power and the purpose sought to be achieved by forfeiture.¹⁷⁸

Interestingly, it has been contended that the objective of a forfeiture order is the achievement of fairness, in that it protects the spouse who contributed more assets to the marital estate of the parties.¹⁷⁹ In other words, the financial contribution made by the wealthier spouse is protected from unduly benefitting the other spouse.

It, therefore, becomes clear that forfeiture of patrimonial benefits is justifiable and reasonable in an open and democratic society that is based on human dignity, equality, and freedom under the limitation clause in section 36 of the *Constitution*.¹⁸⁰

The claim that forfeiture of patrimonial benefits amounts to indirect discrimination based on gender could be successfully claimed by the poorer spouse in a marriage.

¹⁷³ *DE v RH* 2015 (5) SA 83 (CC) para 66.

¹⁷⁴ Bonthuys 2001 *THRHR* 204.

¹⁷⁵ *Harksen v Lane* 1998 (1) SA300 (CC).

¹⁷⁶ *Harksen v Lane* 1998 (1) SA300 (CC) para 50-53

¹⁷⁷ *Harksen v Lane* 1998 (1) SA300 (CC) para 50-53.

¹⁷⁸ Rautenbach and Malherbe *Constitutional Law* 78.

¹⁷⁹ Heaton *South African family law* 131.

¹⁸⁰ Bonthuys 2014 *SALJ* 458.

*Clark and Goldblatt*¹⁸¹ submits that men as compared to women have always been advantaged economically and educationally and their financial benefits are often improved because, in most instances, social expectations such as the primary responsibility for childcare and home-making are observed by women which affects their aptitude and capability to work and to accumulate the patrimonial benefits of the spouses in a marriage.¹⁸² The apparently simple reality is that forfeiture of patrimonial benefits is not granted against the wealthier spouse and the argument that wives are ordinarily precluded from the benefits on the basis of gender is probably accurate because they frequently contribute less to the marriage.¹⁸³

3.3.2 *Grounds for divorce*

Previously there were inconsistencies about the question whether the court should consider simultaneously the duration of the marriage, the circumstances that led to the breakdown of the marriage and the substantial misconduct of either of the parties in a marriage before granting a forfeiture order. The approach adopted by the court in *Matyila v Matyila*¹⁸⁴ suggested that all the three factors must be alleged and proven and that there is no indication that the court may consider only one factor as a decisive element that justifies forfeiture of patrimonial benefits.¹⁸⁵

Conversely, the court in *Tsebe v Tsebe*¹⁸⁶ discerned inadequacy from the view that all factors must be considered before a forfeiture order can be granted by the courts. It held that the presence of any of the factors mentioned in section 9 (1) of the *Divorce Act* is sufficient for the court to make an order that the one spouse forfeit the benefits of marriage in favour of the other.¹⁸⁷ For this reason, it is a rested principle that a forfeiture order can be granted even if substantial misconduct did not lead to the breakdown of the marriage. The court need not consider all the factors cumulatively. Therefore, it has been argued that the plaintiff who seeks a

¹⁸¹ *Clark and Goldblatt* "Gender and Family Law" 201.

¹⁸² *Clark and Goldblatt* "Gender and Family Law" 201.

¹⁸³ Bonthuys 2014 *SALJ* 458.

¹⁸⁴ *Matyila v Matyila* 1987 3 SA 230 (WLD).

¹⁸⁵ *Matyila v Matyila* 1987 3 SA 230 (WLD) para 234G.

¹⁸⁶ *Marumoagae* 2014 *De Jure* 94.

¹⁸⁷ *Tsebe v Tsebe* (31918/2014) [2016] ZAGPHC 575 (27 June 2016).

relief to the court for forfeiture of benefits should prove at least two factors to secure forfeiture of patrimonial benefits against the other spouse.¹⁸⁸

Similarly, Marumoagae¹⁸⁹ submits that although it is clear in the South African divorce law system that the court has to consider the three factors specified in the *Divorce Act* to grant an order, the legislation is silent on the type of circumstances that may be taken into account by the courts in assessing what led to the breakdown of the marriage.¹⁹⁰ In other words, the *Divorce Act* does not outline the procedure and guide the courts on how to grant a forfeiture order based on the occurrences that led to the divorce. Therefore, the courts would have to make such interpretation on a case-to-case basis in the absence of legislative guidelines.

The *Divorce Act* guides the court to consider the duration of the marriage in granting a forfeiture order.¹⁹¹ However, the statute does not specify the required standard time frame that should be considered by the courts in contemplating whether forfeiture of patrimonial benefits is the appropriate relief. This means that the court would have to make a judgment on the merits of each case.

In principle, the South African courts have always differentiated between the short and long period in assessing the duration of the marriage. For instance, in *Swanepoel v Swanepoel*¹⁹² the court explained that the marriage of spouses in community of property which was entered into on the 15 of December 1990 and where the other spouse left the common home around the 4th of June 1995 could be regarded as too short a duration.¹⁹³ Similarly, in *Malatji v Malatji*,¹⁹⁴ the court found that the marriage in community of property that was concluded in 2002 and where the defendant left the marital home in June 2003 justified a divorce and a forfeiture order.¹⁹⁵

¹⁸⁸ *Tsebe v Tsebe* (31918/2014) [2016] ZAGPHC 575 (27 June 2016).

¹⁸⁹ *Marumoagae* 2014 *De Jure* 94.

¹⁹⁰ *Marumoagae* 2014 *De Jure* 94.

¹⁹¹ Section 9 (1) of the *Divorce Act*.

¹⁹² *Swanepoel v Swanepoel* All SA 1996 (3).

¹⁹³ *Swanepoel v Swanepoel* All SA 1996 (3).

¹⁹⁴ *Malatji v Malatji* 23124/2003) [2005] ZAGPHC 142 (4 Feb 2005).

¹⁹⁵ *Malatji v Malatji* 23124/2003) [2005] ZAGPHC 142 (4 Feb 2005).

3.4 Substantial misconduct

Substantial misconduct as a ground justifying forfeiture of patrimonial benefits in South Africa is mentioned in section 9 of the *Divorce Act*. Even so, it is significant to note that the legislation does not define what substantial misconduct entails or the category of behaviours that constitutes substantial misconduct. However, in an attempt to attribute the meaning to the phrase, the South African Oxford Dictionary¹⁹⁶ defines the expression "substantial" to include something of real worth, real value and of importance, which belongs to a particular substance and which is real, existing and not imaginary or illusive.¹⁹⁷ "Misconduct, on the other hand, is defined as an improper or unfair and unlawful conduct influenced by premeditated or intentional purpose or by obstinate indifference to the consequences of one's acts".¹⁹⁸

Judging from both definitions attributed to "substantial" and "misconduct," it is safe to state that when conjoined, substantial misconduct in divorce law denotes the intentional or negligent conduct committed by one spouse in a marriage and which significantly causes the breakdown of the marriage. Nevertheless, misconduct on its own is insufficient to persuade the court to grant a forfeiture order.

The conduct of the spouse who committed substantial misconduct must be so serious that any reasonable person in the position of the presiding judge would regard such behaviour as substantial. Thus, it has been submitted that to establish the presence of substantial misconduct in a case, there is great need for one to make an assessment into the turpitude, nature, extent and gravity of the conduct which gave rise to the irretrievable breakdown of the marriage.¹⁹⁹ However, there are quite a number of judicial interpretations on substantial misconduct in South Africa.

¹⁹⁶ *South African Online Oxford Dictionary* www.sa-online-oxford-dictionary.co.za.

¹⁹⁷ *South African Online Oxford Dictionary* www.sa-online-oxford-dictionary.co.za.

¹⁹⁸ Anon 2000 <https://legal-dictionary.thefreedictionary.com/Misconduct>.

¹⁹⁹ Anon 2010

[http://butterworths.wits.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=myInb:10.1048/enu](http://butterworths.wits.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=myInb:10.1048/enu) ; Marumoagae 2014 *De Rebus* 94.

In *Singh v Singh*²⁰⁰ the court was challenged with the issue of whether the conduct of the wife who left the matrimonial home and committed adultery on several occasions for a period of two years amounted to substantial misconduct.²⁰¹ It is common cause that the wife pointedly contended that the reason for leaving the common home was due to mistreatment of her husband, but the wife admitted to adulterous conduct. The court held that the misconduct of the wife was so severe and substantial to the extent that it outweighed the fact that the marital relationship between the wife and husband had been sustained for more than twenty years. Furthermore, the court granted forfeiture order in favour of the husband on the ground that the conduct of the wife amounted to substantial misconduct.²⁰²

It is, therefore, not clear from *Singh v Singh*²⁰³ whether substantial misconduct was caused by the fact that the wife left the matrimonial home or committed adultery. However, it can be contended that the decision of the court was influenced by the conduct of the wife. Be that as it may, the absence of hard and fast principles which deal with forfeiture of patrimonial benefits based on substantial misconduct has created room for uncertainties and confusion in the South African divorce law.²⁰⁴ Key among these ambiguities is the question whether adultery and desertion of the matrimonial home should be simultaneously regarded as grounds for both divorce and forfeiture of patrimonial benefits.

Nonetheless, the court in *F v F*²⁰⁵ was afforded the opportunity to clarify the position in relation to desertion of the common home as a ground warranting forfeiture of patrimonial benefits. In this case, the wife left the matrimonial household for a period of three months.²⁰⁶ She subsequently claimed that the reason for leaving was instilled by compelling circumstances which stemmed from the extramarital affairs of the husband wherein some of this adulterous behaviour was committed with

²⁰⁰ *Singh v Singh* 1983 1 781 [TPD].

²⁰¹ *Singh v Singh* 1983 1 781 [TPD] *para* 98.

²⁰² *Singh v Singh* 1983 1 781 [TPD] *para* 98.

²⁰³ *Singh v Singh* 1983 1 781 [TPD].

²⁰⁴ Viljoen 2017 www.solidariteit.co.za.

²⁰⁵ *F v F*(30918/2016) [2018] ZAGPPHC 477 (2 March 2018).

²⁰⁶ *F v F*(30918/2016) [2018] ZAGPPHC 477 (2 March 2018).

some of her friends. The court pointed out with reference to the case of *Binda v Binda*²⁰⁷ that the intention of the wife was not to leave the matrimonial home and that in those three months there was no evidence that the wife had committed adultery.²⁰⁸ Therefore, forfeiture of patrimonial benefits based on substantial misconduct was not granted by the court on the premise that leaving the common home is not a ground that should be regarded as substantial misconduct.

While the court in *Singh v Singh*²⁰⁹ established the principle that desertion of the matrimonial home and adultery constituted substantial misconduct and justified a forfeiture order, there have been other cases with similar issues where the courts found that adultery and leaving the common home did not substantiate a forfeiture order.²¹⁰

For example, in the recent case of *BM V SM*²¹¹ the plaintiff instituted the divorce proceedings against his wife on the 27 April 2020. A counterclaim was presented by the defendant who sought an order for divorce, and subsequently a forfeiture order for the patrimonial benefits arising from the benefits in community of property. The plaintiff admitted that he had left the common home and that during the desertion he had stayed with the mistress, of which the relationship still subsisted.²¹² *Senyatsi JA* held that the misconducts of the plaintiff did not merit forfeiture of patrimonial benefits.²¹³

It is argued that this specific discernment causes misperceptions because the court did not give effect to the previous precedent that dealt with a similar incident, nor did it demonstrate how it erred in reaching its conclusion.²¹⁴

²⁰⁷ *Binda v Binda* 1993 (2) SA 123 (W).

²⁰⁸ *Binda v Binda* 1993 (2) SA 123 (W).

²⁰⁹ *Singh v Singh* 1983 1 781 [TPD].

²¹⁰ *Singh v Singh* 1983 1 781 [TPD].

²¹¹ *BM v SM* (29333/2017) [2020] ZAGPHC 94 (26 March 2020).

²¹² *BM v SM* (29333/2017) [2020] ZAGPHC 94 (26 March 2020) para 27.

²¹³ *BM v SM* (29333/2017) [2020] ZAGPHC 94 (26 March 2020) para 27.

²¹⁴ *BM v SM* (29333/2017) [2020] ZAGPHC 94 (26 March 2020) para 27.

On previous judicial precedence, the Honourable Judge in *Swart v Swart*²¹⁵ demonstrated that adultery and desertion of the matrimonial or common home might not, under particular circumstances, be the cause of the marriage break down, but serve as symptoms of a marriage that has been enduring for a long time and that **there are other forms of conduct** which are blameworthy and that could significantly lead to the breakdown of the marriage and merit forfeiture of patrimonial benefits.²¹⁶ It is worth noting that the court did not specify the other categories of conducts which qualify as substantial misconduct and the procedure that must be followed by the court to assess the extent to which certain behaviour of one of the consortium in the marriage could amount to such. Therefore, it remains unclear in the South African legal system what substantial misconduct entails and the courts have not been very helpful in providing an unblemished and unambiguous procedure and definition to that effect.²¹⁷

A further misperception around substantial misconduct with regard to forfeiture of patrimonial benefits could also be observed from *JW v SW*²¹⁸ where the presiding officer was faced with the dilemma to decide whether the conduct of the husband who was sentenced to five years in prison for assaulting the wife qualified as substantial misconduct.²¹⁹ Though assault is perceived as an offence that is serious in nature, given the current state of the country regarding Gender-Based Violence against women and children, the court found that assault does not merit substantial misconduct and that a forfeiture order was not the appropriate sanction. It also explained that:

“This was not enough to take into account when deciding on the penalty with regard to the distribution of the assets, in this case the more so as the husband had brought the fixed property into the joint estate”.²²⁰

²¹⁵ *Swart v Swart* 1980 (4) 364 (O).

²¹⁶ *Swart v Swart* 1980 (4) 364 (O).

²¹⁷ Marumoogae 2014 *De Jure* 94.

²¹⁸ *JW v SW* 2011 (1) SA 545 (GNP).

²¹⁹ *JW v SW* 2011 (1) SA 545 (GNP).

²²⁰ *JW v SW* 2011 (1) SA 545 (GNP) para 21-28.

Munene,²²¹ with reference to an article published by Preller²²² correspondingly argued that substantial misconduct is assailed by a great number of confusions and uncertainties in South African divorce law. In fact, the argument in support of the abolition of substantial misconduct has been proposed by academics and practitioners in the legal profession. For instance, De Klerk²²³ posits that misconduct should not play a role in weighing or assessing the merit of forfeiture and that it should be removed as one of the factors that justifies forfeiture of patrimonial benefits.²²⁴ She further concludes that the courts should be afforded the right to order forfeiture of patrimonial benefits only on the grounds of the duration of the marriage and the circumstances that gave rise to the breakdown of the marriage.²²⁵

The problems associated with substantial misconduct in South Africa are largely caused by the absence of a definition and clear statutory guidelines in the *Divorce Act*.²²⁶ The fact that one of the spouses committed marital misconduct is not sufficient for a forfeiture order. In *Kritzinger v Kritzinger*²²⁷ the court found that even if the plaintiff's adultery was the instant cause of the breakdown of the marriage, the respondent was not free from blame.²²⁸ In all circumstances, misconduct in the form adultery and desertion of the matrimonial home should not be regarded as decisive factors in assessing substantial misconduct.²²⁹ The courts should also be guided by conducts such as intentional refusal to engage in a conversation and emotional, financial and physical abuse committed by either of the spouse in a marriage.

The Supreme Court of Appeal also considered whether misconduct qualifies forfeiture of patrimonial benefits in *BS v PS*.²³⁰ This case concerned an appeal from

²²¹ Munene 2019 *De Rebus* 14-15.

²²² Preller 2019 *www.divorcelaws.co.za*.

²²³ De Klerk 2014 *De Rebus* 37.

²²⁴ De Klerk 2014 *De Rebus* 37.

²²⁵ De Klerk 2014 *De Rebus* 37.

²²⁶ *Catto and Neethling* 2020 [https://uk.practicallaw.thomsonreuters.com/6-566-4825?transitionType=Default&contextDATA=\(sc.Default\) &firstPage=true](https://uk.practicallaw.thomsonreuters.com/6-566-4825?transitionType=Default&contextDATA=(sc.Default) &firstPage=true).

²²⁷ *Kritzinger v Kritzinger* 1989 (1) SA 67 (A).

²²⁸ *Kritzinger v Kritzinger* 1989 (1) SA 67 (A).

²²⁹ Viljoen 2017 www.solidariteit.co.za.

²³⁰ *BS v PS* 2018 (4) SA 400 (SCA).

the Eastern Cape High Court wherein the wife forfeited 80% of the benefits arising from the marriage due to an alleged affair on her part. The SCA rejected the High Court's approach and found that it erred in placing all the blame on the wife on the allegation that she committed adultery.²³¹

On the other hand, *Carnelley*²³² in referring to the court's decision in *MC v JC*²³³ noted that substantial misconduct could possibly contradict several provisions in the *Constitution*. She demonstrated that, firstly, the right to equal treatment is at risk because in the divorce proceedings, one of the parties, particularly the spouse who committed substantial misconduct, is placed in a weakened bargaining position during the settlement negotiations and at trial.²³⁴ What this entails is that the spouse at fault or the party that is found guilty of substantial misconduct does not have the right to negotiate over the distribution of the assets nor to equal treatment of the law as envisaged in section 9 of the *Constitution*.

Secondly, it has been contended that substantial misconduct could infringe upon the reproductive right of the wife, in that if the husband approaches the court in circumstances where the wife has secretly terminated a pregnancy, such conduct may be perceived as behaviour that is contrary to the trust relationship of the parties and qualifies for forfeiture of patrimonial benefits.²³⁵ For all intents and purposes, substantial misconduct could instil a fear in women to make rational decisions on whether to terminate the pregnancy or not in fear of the divorce and the court granting that the benefits accrued as a result of the marriage have been forfeited due to their conduct.²³⁶

Moreover, forfeiture of the benefits in the marriage relationship viewed in the context of substantial misconduct is perceived as a practice that contradicts the constitutional right to freedom and security of a person as well as the right to dignity

²³¹ *BS v PS* 2018 (4) SA 400 (SCA).

²³² Carnelley 2016 *Speculum Juris* 11.

²³³ *MC v JC* 2016 (2) SA 227 (GP).

²³⁴ *MC v JC* 2016 (2) SA 227 (GP) para 32.2.

²³⁵ *MC v JC* 2016 (2) SA 227 (GP) para 32.2.

²³⁶ Carnelley 2016 *Speculum Juris* 11

and privacy.²³⁷ The basis of this contention could be attributed to a number of factors which include forcing the parties opting to remain in an unhappy marriage as a result of distress that the benefits could be forfeited.²³⁸ In the framework of dignity, the doctrine could exert an impact on the personality of an individual as a human being in the society arising from the stigma that members of the community would assign after the verdict is delivered by the court.²³⁹ In effect, privacy is infringed because the proceedings on their own require the party claiming forfeiture of patrimonial benefits to adduce evidence of conducts such as adultery committed by the other spouse to enable the courts to make a moral judgment.²⁴⁰

The court in *MC v JC*²⁴¹ reasonably believed that a forfeiture order, in contrast to misconduct which substantially infringes several constitutional provisions and found that certain procedures were not followed by the defendant in terms of the Magistrates Rules 16A(1)(a)-(b) of the Uniform Rules of Law. The court held that, had the party followed the appropriate procedure, the matter would have been approached in the context of constitutional law and the matter was referred for corrections and possible resubmission at a later stage.²⁴²

Indeed, there are prospects that substantial misconduct is at the edge of abolition due to its infringing and discriminatory approach. Thus, the High Court in *MC v JC*²⁴³ reasoned that there was merit in the argument that a forfeiture order under section 9 (1) based on misconduct which is substantial was outdated and unconstitutional since it aims to punish the party for substantial misconduct by depriving him or her of patrimonial benefits in the marriage in the absence of proof of how such conduct may have had an impact on the estate accrued in a marriage.²⁴⁴

²³⁷ *MC v JC* 2016 (2) SA 227 (GP) para 32.2.

²³⁸ Carnelley 2016 *Speculum Juris* 12.

²³⁹ Carnelley 2016 *Speculum Juris* 12.

²⁴⁰ Heaton 2016 *Annual survey* 362.

²⁴¹ *MC v JC* 2016 (2) SA 227 (GP).

²⁴² *MC v JC* 2016 (2) SA 227 (GP) 32.3.

²⁴³ *MC v JC* 2016 (2) SA 227 (GP).

²⁴⁴ *MC v JC* 2016 (2) SA 227 (GP) para 33.

Generally, the purpose of forfeiture of patrimonial benefits is based on the punishment that the party who stimulates the breakdown of the marriage should forfeit part or the whole benefits acquired in the marriage.²⁴⁵ It is associated with blame on the part of the spouse who, for reasons related to his conduct, ought not to benefit from the assets, monetary properties, and financial acquisitions in the marriage. However, it has been accepted that a forfeiture order with regard to substantial misconduct is premised on the principle of fairness and protection of the spouse who made a large contribution to the joint estate of the parties.²⁴⁶ It does so by ensuring that one consortium does not take advantage with regards the equal distribution of the property when he or she intends to conduct him or herself in a manner that would lead to the breakdown of the marriage relationship.

In addition, it must be noted that the question whether substantial misconduct is present in a case is insufficient to justify forfeiture order. The court must always weigh the degree of substantial misconduct committed by the other party against the undue benefits that the party would otherwise acquire if the order were not granted.²⁴⁷ That is, South African courts are mandated by the rule of law to give effect to the notion of undue benefits before they can make an order that the spouse at fault or who committed misconduct that is substantial has partly or wholly forfeited the benefit of the marriage in favour of the other spouse.

3.5 Undue benefits in relation to substantial misconduct

The principles governing forfeiture of patrimonial benefits in South African divorce law is founded on the philosophy that no spouse is entitled to unduly benefit from the properties and assets accrued during the duration off the marriage.²⁴⁸ In other words, the doctrine of undue benefits is significant in ensuring that each consortium should be awarded only the benefits that the law regards as due to him or her based on the regime of the joint estate by virtue of marriages in community of property or the assets registered in the name of both spouses. For instance, there is a

²⁴⁵ Section 9 (1) of the *Divorce Act*.

²⁴⁶ Heaton *South African family law* 131.

²⁴⁷ Sinclair 1992 *U Louisville J Fam. L* 475.

²⁴⁸ Heaton *South African family law* 135.

recognition that the courts have the discretion to refuse an order that a particular spouse forfeit the benefits of the marriage in favour of the other if there is a rational and logical belief that one spouse will unduly benefit if an order is granted based on substantial misconduct, or any other factor listed in section 9 of the *Divorce Act*.²⁴⁹

The concept of undue benefits was explained in *Engelbrecht v Engelbrecht*²⁵⁰ as benefit that is undue if it can be described as disturbingly unfair. Evidently, the assertion regarding 'undue benefit' ought to be validated and that lack of formal assessment affected the decision on the forfeiture of benefits.²⁵¹ An undue benefit is relevant in South Africa's legal system where the parties conclude a marriage contract in community of property in circumstances where the marriage does not last for a long period. It is also appropriate on the premises of the circumstances that led to the breakdown of the marriage. For example, where the intention of the poorer spouse was to acquire half of the estate in relation to the wealthier spouse.

Undue benefits could also be an appropriate term to consider if one of the parties in the marriage is guilty of substantial misconduct.²⁵² The standard of guiding South Africa's courts is based on the contributions and the shared liabilities undertaken by both spouses in the subsistence of the marriage relationship.²⁵³

To assess whether undue benefit is appropriate in any given case regarding forfeiture of patrimonial benefits, the court must be guided by two principles that are applicable to divorce law. Firstly, it should have regard to the respective contributions made by the parties in their joint estate to determine if one spouse will be unduly benefitted. In all circumstances, the wealthier spouse with more contributions to the marriage would be at risk of losing half of their estates resulting

²⁴⁹ *Anon* [Date unknown] <https://regsdienste.solidariteit.co.za/en/spouse-in-divorce-penalised-for-substantial-misconduct/>.

²⁵⁰ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) 602F.

²⁵¹ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) 602F.

²⁵² Sonnekus "Matrimonial property" 788

²⁵³ Sonnekus "Matrimonial property" 788

from the marriage in community of property, should the legislature fail to incorporate this provision into the *Divorce Act*.²⁵⁴

Secondly, the court must determine whether the benefits, if the forfeiture order is not granted, would be undue to the other spouse.²⁵⁵ That is, the courts must undertake an in-depth analysis of whether the loss of the patrimonial benefits of the marriage is equitable or whether keeping them is inequitable.²⁵⁶ In essence, it would be unjustified for the court to order forfeiture against the spouse who committed substantial misconduct if there is a reasonable belief that there is no legal basis to that effect.

Therefore, in order to enable the courts to make an order which declares that the assets have been forfeited by the other party, the spouse who seeks relief must prove, by means of documentary evidence, that refusal to order forfeiture would unduly benefit the other spouse. Siebert²⁵⁷ provided critical examples that the party claiming forfeiture should prove to claim undue benefits. He contends that an undue benefit could be practical in an instance where one party continuously makes the conditions in the household unpleasant by not contributing to the household expenses.²⁵⁸ This is quite true because liabilities of the joint estate should be acquired and carried by both spouses in the marriage in community of property.²⁵⁹

In *Z v Z*²⁶⁰ the court considered the question whether one spouse married out of community of property, with the inclusion of accrual system forfeited the benefits by failing to make contributions towards the expenses of the properties purchased during the duration of the marriage.²⁶¹ It is common cause that the court was also required to determine if an order stipulating that the benefits are forfeited is not

²⁵⁴ Viljoen 2017 www.solidariteit.co.za.

²⁵⁵ Viljoen 2017 www.solidariteit.co.za.

²⁵⁶ Sonnekus "Matrimonial property" 786.

²⁵⁷ Siebert 2015 www.news24.com.

²⁵⁸ Siebert 2015 www.news24.com.

²⁵⁹ Siebert 2015 www.news24.com; *Z v Z* (43745/13) [2015] 940 (18 September 2015).

²⁶⁰ *Z v Z* (43745/13) [2015] 940 (18 September 2015).

²⁶¹ *Z v Z* (43745/13) [2015] 940 (18 September 2015).

granted, the spouse that did not engage in the household liabilities would unduly benefit from the party that assumed such expenses.

In touching on the subject of undue benefits, the court held that in order to grant forfeiture of patrimonial benefits based on that allegation that the other party would inappropriately benefit from the estate, then the plaintiff must establish such undue benefits in relation to the factors listed in terms of section 9 (1) of the *Divorce Act*. It also found that since the case is concerned with substantial misconduct resulting from failure to share in the expenses acquired because of the marriage, the plaintiff failed to prove this ground and that there was no undue benefit because the plaintiff failed to prove substantial misconduct.²⁶²

It has also been established that undue benefits should be considered by the courts in situations where one spouse in the marriage sells the assets of the joint estate without the consent of the other. In some premises, the concept of “unduly benefitting” in the *Divorce Act* must be considered if the consortiums in the marriage abuse the other spouse emotionally, physically, verbally, and mentally as a reason to trigger divorce and forfeiture order.²⁶³ An undue benefit can also be established by leading evidence that the other party has been engaged in extramarital affairs under the pretext of substantial misconduct. Thus, it would be significant for the order to sensibly and realistically be the suitable punishment, evaluated in reference to the contributions made before and during the existence of the marriage.²⁶⁴

In that regard, the court in *Klerck v Klerck*²⁶⁵ emphasised that the incorporation of section 9 of the *Divorce Act* does not entail that forfeiture of patrimonial benefits should be granted in settings where it is evident from the facts that the reason for the irretrievable breakdown of the marriage stems from the factors mentioned in the legislative and policy considerations. It submitted that:

²⁶² *Z v Z* (43745/13) [2015] 940 (18 September 2015) para 28.

²⁶³ Siebert 2015 www.news24.com.

²⁶⁴ Siebert 2015 www.news24.com.

²⁶⁵ *Klerck v Klerck* 1991 1 SA 265 (W).

"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."²⁶⁶

However, the topic of what constitutes undue benefits in relation to forfeiture of benefits is one subject that has been under scrutiny and criticism in the theoretic and practical sphere. In the one instance, it was argued that the South African legal system needs to clarify on what amounts to undue benefits because the *Divorce Act* and existing case law failed to provide a conceptual meaning and clear guidelines to enable the judicial system to make an assessment on whether one of the parties will be unduly benefitted if a forfeiture order is not granted by the courts.²⁶⁷ The truth underlying this argument is that the courts shall have to make such determination on the merits of each case in the absence of legislative and policy guidelines. For this reason, South African courts have been inventive in steering around this concept without attaching any real significance to it.²⁶⁸

Similarly, it has been contended that there is a need for the courts to attach a contextual analysis and guidelines on what undue benefits entail to curb the misconceptions and misunderstandings around the concept.²⁶⁹ A critical analysis of undue benefits would be helpful to the courts in circumstances where there is need to deliver a well-reasoned, logical, and just decision. It would also encourage the

²⁶⁶ *Klerck v Klerck* 1991 1 SA 265 (W) para 268 c-g.

²⁶⁷ Siebert 2015 www.news24.com.

²⁶⁸ Marumoagae 2014 *De Jure* 98.

²⁶⁹ Marumoagae 2014 *De Jure* 98.

South African Parliament to amend the *Divorce Act* and to include the definition and procedures that must be followed which are at present absent in the Act.²⁷⁰

Therefore, although undue benefits are a critical aspect on forfeiture of benefits, its significance is overshadowed by the non-existence of relevant legislative guidelines. Academic scholars and practitioners have also provided strictly limited knowledge with focus on the significance of undue benefits, rather than its application and meaning in South African divorce law. Thus, there is a conviction that the misunderstandings of undue benefit are problematic for litigants because the absence of procedures and the definition both make it difficult to convince the court that forfeiture of patrimonial benefits is the appropriate sanction that should be levied against the guilty spouse.

However, undue benefits will remain relevant to forfeiture order because the court cannot grant forfeiture of patrimonial benefits in the absence of undue benefits resulting from substantial misconduct, circumstances that led to the irretrievable breakdown and the duration of the marriage.²⁷¹ Any factor other than those mentioned in section 9 cannot justify forfeiture order and the court must always ensure that forfeiture of patrimonial benefits is weighed against the question whether the refusal to grant forfeiture amounts to undue benefits.

*Carnelley*²⁷² points out that the principle of “undue benefits” was correctly incorporated and attached to the grounds justifying forfeiture of patrimonial benefits in the *Divorce Act* to prevent the spouse with less contributions from obtaining a share of financial benefits which he or she did not contribute.²⁷³ In other words, the court should always be guided by the principle of contribution as the sole, or the most fundamental factor demonstrating fairness in the distribution of the joint estate of spouses acquired in the duration of the marriage.

²⁷⁰ Marumoagae 2014 *De Jure* 98.

²⁷¹ *L v L* (3146/2015) [2017] ZAECPEHC 9 (2 February 2017).

²⁷² Carnelley 2016 *Speculum Juris* 8.

²⁷³ Carnelley 2016 *Speculum Juris* 8.

The other significance of undue benefits was noted by Sonnekus²⁷⁴ who conceded that forfeiture of patrimonial assets and estate is present in matrimonial property law to all types of marriages, except those that preclude all forms of financial gains, *i.e.*, ante-nuptial contract.²⁷⁵ He further alleges that there is a possibility that one spouse may, during the divorce proceedings, acquire the benefits that were contributed by the other spouse, therefore, the relevance of undue benefits is to ensure that the spouse who makes a larger contribution does not lose his or benefits unduly in relation to the other.²⁷⁶

It can therefore, be concluded that the existence of forfeiture of patrimonial benefits in terms of undue benefits allows the court to intervene in exceptional instances as a measure that enables the courts to prevent undue benefits to be allocated to the other spouse.²⁷⁷ This was evident in *V v V*²⁷⁸ where the husband's claim in a marriage of community of property for a divorce decree was counterclaimed by forfeiture of patrimonial benefits by the wife on the basis of substantial misconduct and circumstances that led to the irretrievable breakdown of the marriage.²⁷⁹ The court outlined that South African law expresses without ambiguity the consequences of concluding a marriage in community of property and of profit and loss. It *inter alia* held that:

"The allegation of undue benefits must be pleaded and proven by the plaintiff since our law provides that it would be insufficient to simply refer to the acquisition of the property and to make a bald decision that the party against whom forfeiture is claimed will be unduly enriched at the expense of the other if forfeiture is not granted."²⁸⁰

²⁷⁴ Sonnekus "*Matrimonial property*" 787.

²⁷⁵ Sonnekus "*Matrimonial property*" 787.

²⁷⁶ Sonnekus "*Matrimonial property*" 787.

²⁷⁷ Sonnekus "*Matrimonial property*" 787.

²⁷⁸ *V v V* (10/133906) [2014] ZAPGPJHC 328 (2 April 2014).

²⁷⁹ *V v V* (10/133906) [2014] ZAPGPJHC 328 (2 April 2014) *para* 11.

²⁸⁰ *V v. V* (10/133906) [2014] ZAPGPJHC 328 (2 April 2014) *para* 11.

Additionally, in *Engelbrecht v Engelbrecht*²⁸¹ the court submitted that joint ownership of the other spouse's assets is acquired at the conclusion of the marriage by the parties. Therefore, the absence of the principle on "forfeiture of patrimonial benefits" coupled with unduly benefitting in the marriage would have the impact that the spouse with less contribution benefits at the dissolution of the marriage, unless both parties' contribution to the joint estate before or during the extent of the marriage had been of equal value.²⁸²

The patrimonial repercussions of marriage in community of property emphasises that at divorce, the parties are entitled to equal distribution of the assets.²⁸³ Even so, the forfeiture order coupled with the doctrine of undue benefit has moulded and shaped our law regarding the distribution of assets upon dissolution of the marriage.

The provision of section 9 (1) of the *Divorce Act* is also an exception to the rule that the spouse who is married out of community of property, with the inclusion of accrual system is entitled to half of the property acquired in the marriage.²⁸⁴

In the concluding remarks, scholars and legal practitioners have called for clear principles and a conscientious understanding of the meaning of undue benefits with regard to forfeiture of patrimonial benefits.²⁸⁵ For instance, Marumoagae²⁸⁶ submits that the definition of undue benefits as encompassed in section 9 of the *Divorce Act* would make it easier for the court to deal with the facts precisely and to provide a comprehensive analysis of how it reached its judgment. However, in attempting to clarify an attachment to the phrase, he suggested that the concept should be understood to include a benefit that relates to the property of the joint estate or the estate acquired in the subsistence of the marriage accumulated to the spouse whose conduct does not merit such a party in receiving the benefits.²⁸⁷ In other words,

²⁸¹ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C).

²⁸² *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) *para* 60.

²⁸³ Viljoen 2017 www.solidariteit.co.za.

²⁸⁴ *Section 9 of the Divorce Act*.

²⁸⁵ *Section 9 of the Divorce Act*.

²⁸⁶ Marumoagae 2014 *De Jure* 98.

²⁸⁷ Marumoagae 2014 *De Jure* 98.

undue benefits refer to the patrimonial benefits that is unjust and possibly acquired by the innocent party without any legal basis.

Be that as it may, the court in *Tlou v Ralebipi and Others*²⁸⁸ also attempted to provide the definition of undue benefits since the intention of the legislature in incorporating the term to the Act could not be ascertained. This attempt consisted of the consideration of “undue” in the South African Oxford Dictionary which describes the word as “unwarranted or inappropriate because excessive or disproportionate”.²⁸⁹ Therefore, it concluded that if the court cannot decide whether substantial misconduct or the circumstances leading to the breakdown of the marriage would amount to undue benefits, then there is a need to consider fault and neutral factors such as the duration of the marriage on the basis of what might be proportional in the circumstance.

3.6 Conclusion

Indeed, forfeiture of patrimonial benefits on the basis of substantial misconduct in South Africa is characterised by a large number of uncertainties and confusions. Authors and practitioners have raised several concerns that the concept promotes and the complications that it exerts on the entire judicial system. At this point, South African courts and legal scholars have not provided nor suggested a clear and a concise meaning on what substantial misconduct entails and the judiciary is mandated to consider this practice in the absence of legislative guidelines and on the merits of each case. That has led to discerning judgments on whether adultery and desertion of common home constitutes substantial misconduct as envisaged in section 9 (1) of the *Divorce Act*.

Judging from the provisions of section 9 of the *Divorce Act*, it is clear that an order which declares that the assets have been forfeited by one spouse in favour of the other applies to marriages that end as a result of the irretrievable breakdown.²⁹⁰ This section recognises that the party to whom an order is granted against can

²⁸⁸ *Tlou v Ralebipi and Others* (65631/2017) ZAGHPC 649 (12 April 2018).

²⁸⁹ *Tlou v Ralebipi and Others* (65631/2017) ZAGHPC 649 (12 April 2018).

²⁹⁰ *Section 9 (1) of the Divorce Act*.

forfeit all the benefits contributed into the marriage relationship.²⁹¹ Notwithstanding the two factors such as duration of the marriage and substantial misconduct as grounds for divorce, the courts are still conflicted on the constitutionality of forfeiture of patrimonial benefits and its discriminatory practices which are only effective only if it is ordered against the spouse who contributed less to the matrimonial assets, of which in most cases it is the wives. However, Bonthuys²⁹² suggests that socio economic status is not one of the listed grounds in section 9 of the *Constitution*; the onus to prove that forfeiture of patrimonial benefits amounts to unfair discrimination rests on the party that alleges discrimination.

Similarly, the concept of undue benefits with regards to the factors listed in the *Divorce Act* which justifies forfeiture of patrimonial benefits encompasses its own practical complications. Up to date, the intention of the legislature in incorporating “undue benefits into the *Act* has not been ascertained and the courts are also obliged to resolve the issue whether the other spouse would be unduly benefitted without guidance from any legislation or previous precedent. It would be, therefore, advisable that the legislature should consider the reformation of the law in this aspect of the South African divorce regulatory framework. Therefore, the final chapter in this study addresses what the research ascertained, that is, the “missing gap”, with regard to forfeiture of benefits based on substantial misconduct.

²⁹¹ *Section 9 (1) of the Divorce Act.*

²⁹² Bonthuys 2001 *THRHR* 204.

CHAPTER 4

4 CONUNDRUM AND CONCLUSION

4.1 Introduction

Forfeiture of patrimonial benefits as a principle of South African divorce law has increased the expectation of protecting the assets and contributions of spouses upon dissolution of a marriage. It does so through standards and legislative guidelines contained in the *Divorce Act*. However, the practice of granting a forfeiture order and its components such as factors that the courts must consider in assessing its appropriateness has been problematic and misunderstood on several occasions. Some of these contentious issues were adopted from common law and numerous scholars and practitioners possess the strong impression that the doctrine should be further reformed and adapted to clear any ambiguities and misconceptions which currently exist.²⁹³

Given the significance of substantial misconduct as a ground justifying forfeiture of patrimonial benefits, it has been accepted that intervention of the legislature is required since the *Divorce Act* does not define what substantial misconduct entails and/or clarify any features that must be considered in determining whether a particular behaviour of one in the consortium of a marriage is substantial.²⁹⁴ It is for this reason that discerning judicial precedents have caused misunderstandings and uncertainties on the rule of law. However, it is a rested principle that forfeiture of patrimonial benefits based on substantial misconduct cannot be granted if the evidence does not prove that the other spouse shall be unduly benefited.

Although undue benefit is also an important part of South African divorce law, particularly regarding forfeiture of patrimonial benefits, there have been critical misinterpretations on the contextual meaning and the procedures that must be followed by the courts in assessing its relevance and practical implication in a

²⁹³ *Munene* 2019 *De Rebus* 14-15; *Marumoagae* 2014 *De Jure* 94.

²⁹⁴ *Viljoen* 2017 *www.solidariteit.co.za*.

particular set of facts.²⁹⁵ Currently, there is no standard or formal definition provided by the *Divorce Act* and the courts. Any resolution on specifying undue benefits implemented by the court ought to be made without any reference to the legislation.²⁹⁶

Therefore, this chapter is aimed analysing the findings of the study with reference to forfeiture of patrimonial benefits based on substantial misconduct. The findings also include the relevance of undue benefits in evaluating the appropriateness of forfeiture order by the courts in South Africa. Furthermore, this chapter compares the common law position on forfeiture of patrimonial benefits with the statutory approach. The purpose of this comparison is to ascertain how common law influenced the statutory regulation of forfeiture order. Subsequently, the chapter assesses the impact lack of explicit definitions on significant concepts such as “substantial misconduct” and “undue benefits” in the *Divorce Act* poses in the contemporary effort to ensure that the country’s legal system on divorce is practiced and applied without the evident ambiguities and uncertainties.

Moreover, this chapter re-considers the constitutional approach on forfeiture of patrimonial benefits and identifies several human rights which are at risk of infringement in the application of divorce law as specified in the study. To achieve this, the chapter seeks aid from decided cases and the interpretations of scholars in the field of law. This is preceded by the recommendations which are directed towards the question whether the law dealing with forfeiture of patrimonial benefits in South Africa ought to be reconsidered and reformed.

4.2 Findings of the study

4.2.1 Common law

It is generally accepted that forfeiture of patrimonial benefits originates from the common law principle that the spouse who caused the breakdown of the marriage

²⁹⁵ Marumoagae 2014 *De Jure* 98.

²⁹⁶ Marumoagae 2014 *De Jure* 98.

is not entitled to a share in the distribution of the properties upon divorce.²⁹⁷ The procedure that was used by the courts to determine the suitability of the order was based on guilt or fault. In other words, the plaintiff seeking relief for an order had to prove that the defendant committed marital offences in the form of adultery and/or malicious desertion of the matrimonial home. Successively, the courts under common law were not afforded the discretion to refuse forfeiture of patrimonial benefits upon request by the plaintiff. The presence of adultery or malicious desertion of the common home mandated the courts to grant a forfeiture order.²⁹⁸

However, there was no clarity on whether the spouse at fault forfeits all the benefits, including those that were acquired before the marriage in the Roman-Dutch law. This confusion was dealt with by the court in *Mulder v Mulder*²⁹⁹ where a two-thirds majority of the judges set a principle that the spouse forfeits all the assets of the joint estate of the parties. The court in *Sententien van de Hooge Raad*³⁰⁰ also confirmed that forfeiture of patrimonial benefits in the Roman-Dutch law did not exclude the assets that were acquired by the guilty spouse before the conclusion of the marriage.

The approach that the guilty spouse could retain the benefits accrued prior the marriage became a norm in **the Roman Dutch law**. Be that as it may, what remained from the Roman-Dutch law was the court's discretion to refuse an order and the fault or guilt principle that was assessed on the elements of adultery and malicious desertion of the common home. In South Africa, the first reported case that dealt with forfeiture of patrimonial benefits is *Dieperink v Dieperink*³⁰¹ which introduced the principle that "the defendant [was] not entitled to her share in the community, except so far as she may have contributed any property towards the community".³⁰²

²⁹⁷ Munene 2019 *De Rebus* 14-15.

²⁹⁸ Lee *An Introduction to Roman-Dutch Law* 87.

²⁹⁹ *Mulder v Mulder* (1888) 2 SAR 238

³⁰⁰ *Sententien van de Hooge Raad* cas 8 (1515)

³⁰¹ *Dieperink v Dieperink* (1877) 7 Buch.

³⁰² Bonthuys 2014 *SALJ* 445.

4.2.2 Forfeiture of patrimonial benefits under the Divorce Act

Before the incorporation of the *Divorce Act*, the South African law recognised three grounds of divorce which were incorporated in the *DLAC*. These grounds were guilt or fault principle, incurable insanity, and declaration by the court that one of the spouses in the marriage is a habitual criminal. Nevertheless, authorities in this respect submitted that the fault or guilt principle was the sole factor justifying forfeiture of patrimonial benefits.³⁰³ Under the contemporary framework regulating divorce laws which was influenced by the SALC survey, a decree of divorce can be granted on the ground of irretrievable breakdown of the marriage, continuous unconsciousness for a period of at least six months and incurable mental illness for a continuous period of two years.³⁰⁴ However, section 9 of the *Divorce Act* clearly precluded mental illness and unconsciousness as grounds that justify forfeiture of patrimonial benefits.³⁰⁵ The only element that merits a forfeiture order is irretrievable breakdown of the marriage.

The *Divorce Act* has also introduced three factors that must be taken into consideration in weighing the relevance of forfeiture order.³⁰⁶ The court must ascertain whether the reason that led to the breakdown of the marriage relates to substantial misconduct, the circumstances that have caused the breakdown and the duration of the marriage.³⁰⁷ Any other factor will not justify forfeiture order forfeited.³⁰⁸ Even so, the courts must also make an assessment into the attributes of undue benefit in each specific case.

However, forfeiture of patrimonial benefits has been perceived as a practice that infringes upon certain human rights contained in the *Constitution*.³⁰⁹ In fact, debates around the constitutionality of forfeiture order have been constructed by academics

³⁰³ Hahlo *The South African Law of Husband and Wife* 373.

³⁰⁴ Section 4 of the *Divorce Act*.

³⁰⁵ Section 9(1) of the *Divorce Act*.

³⁰⁶ Section 9(1) of the *Divorce Act*.

³⁰⁷ Section 9(1) of the *Divorce Act*.

³⁰⁸ Section 9(1) of the *Divorce Act*.

³⁰⁹ Bonthuys 2014 *SALJ* 457.

in this part of the law. For instance, Munene³¹⁰ submits that given the state of the South African Bill of Rights that has been embedded in the *Constitution*, it is rational to assume that the fault principle in the divorce law would be archived. That is, forfeiture of patrimonial benefits is against the right to equality because it differentiates between spouses in the division of the benefits accrued in a marriage.³¹¹ Ostensibly, it has been disputed that a forfeiture order infringes upon the right to freedom and security of a person, dignity and privacy.³¹² Thus, the court in *MC v JC*³¹³ found that there is a possibility that certain rights in the *Constitution* could be infringed by forfeiture of patrimonial benefits that is still based on the fault principle that prevailed in the common law.

4.2.3 Comparison between statutory regulation and common law

Forfeiture of patrimonial benefits under common law and the contemporary statutory framework share some similarities and differences. In classifying these contrasts, in Roman-Dutch law and the Roman law, fault was regarded as a ground for both divorce and forfeiture of benefits in a marriage.³¹⁴ However, although it is no longer a ground for divorce in the current legislative and policy considerations, it has remained a substantial factor to consider when the courts assess the appropriateness of a forfeiture order.³¹⁵ In other words, there must be a reasonable belief that one of the parties committed fault in the form of the short duration of the marriage, the circumstances that led to the breakdown and substantial misconduct.

On the other hand, under common law, the court did not have discretion to refuse forfeiture of patrimonial benefits. The presence of adultery and malicious desertion of the marital home mandated the courts to grant an order, while under the *Divorce Act* this discretion is recognised.³¹⁶ Nevertheless, the position under common law

³¹⁰ Munene 2019 *De Rebus* 14-15.

³¹¹ Carnelley 2016 *Speculum Juris* 5.

³¹² Carnelley 2016 *Speculum Juris* 5.

³¹³ *MC v JC* 2016 (2) SA 227 GP.

³¹⁴ Hahlo *The South African Law of Husband and Wife* 373

³¹⁵ Marumoagae 2014 *De Rebus* 98.

³¹⁶ Hahlo *The South African Law of Husband and Wife* 373.

regarding a forfeiture order was clear on the grounds of forfeiture of patrimonial benefits. In the present legal regime, there are considerations around the duration of the marriage. The *Divorce Act* does not specify the length in the form of duration of the marriage to guide the courts adequately in its evaluation to grant the order.

The *Divorce Act* has also apparently failed to determine the types of circumstances that led to the breakdown of the marriage which should be considered by the courts in granting the order. Similarly, the legislation does not provide a contextual meaning of substantial misconduct and undue benefits. This essentially means that each case should be assessed on its own merits, in the absence of legislative and policy guidelines.

4.2.4 *Substantial misconduct*

Substantial misconduct is indeed a challenging principle in the South African framework of divorce law. Although the courts have been able to deal with this principle, there is no immediately accepted definition of what the concept entails. On the other hand, the law is currently not clear on the types of behaviour that constitutes substantial misconduct. The case of *Singh v Singh*³¹⁷ suggested that in the event where the court is satisfied that the spouse at fault committed both adultery and desertion of the common home, such conducts should be regarded as substantial misconduct. Fundamentally, in *Wijker v Wijker*³¹⁸ it was held that the court should have regard to what exactly a marriage in community entails in determining substantial misconduct.

However, the absence of hard and fast principles has also caused misconceptions and misunderstandings on the ground of substantial misconduct. This, in effect, has justified the discernments and different judicial precedents made by judges in several submissions on case law in the country. However, substantial misconduct is not considered in assessing the suitability of forfeiture order since the courts must

³¹⁷ *Singh v Singh* 1983 1 781 [TPD]

³¹⁸ *Wijker v Wijker* 1993 4 SA 720 (A)

also be satisfied that failure to grant the order would unduly benefit the other party in a marriage.

4.2.5 Undue benefits

The principle of “unduly benefitting” is the most influential factor in rationalising forfeiture of patrimonial benefits in South Africa. While a watertight differentiation cannot be made between the factors listed in section 9 of the *Divorce act* and undue benefits, there is no standard nor formal procedure which guides the courts in evaluating the question whether the other spouse would be benefited unduly if the order is not granted.³¹⁹

Essentially, “unduly benefitting” is not only challenging for judges to apply as practitioners also struggle to convince the courts that one of the consortiums in the marriage would acquire the benefits that were not due to them.³²⁰ It is also complex for scholars because there is no widely and commonly acknowledged definition attached to the doctrine which enables scholars to critically assess and analyse the problems associated with undue benefits.

4.3 Recommendations

There is no doubt that forfeiture of patrimonial benefits should be reconsidered in order to clarify certain concepts that cause misconceptions in South African divorce laws. For instance, there has been a successful debate on the constitutionality of forfeiture order and claims that it infringes upon] the human rights to equality, freedom and security of a person and the right to dignity. The court in *MC v JC*³²¹ agreed that there is a reasonable belief that certain rights in the Bill of Rights could be infringed by forfeiture of patrimonial benefits. For this reason, it is recommended that the South African law Commission should be directed to investigate the constitutionality of section 9(1) of the *Divorce Act*.

³¹⁹ Marumoagae 2014 *De Rebus* 98.

³²⁰ Marumoagae 2014 *De Rebus* 94.

³²¹ *MC v JC* 2016 (2) SA 227 GP.

The amended legislation should shed some light and clarity on factors justifying forfeiture of patrimonial benefits. To achieve this measure, the new or amended legislation could prescribe the minimum time frame with regard to the duration of the marriage as a ground of forfeiture of order. For example, wording such as “in matters concerning the duration of the marriage, a period of less than five years shall be regarded as short term and the court must grant an order if it is satisfied that refusal would unduly benefit the other spouse” may as well be added to section 9 (1) to clarify the issue of the duration of the marriage.

Furthermore, there is a need for the legislature to describe the circumstances that led to the breakdown of the marriage which merits forfeiture of patrimonial benefits.³²² Although South African courts have not been fortunate to decide the weight of forfeiture order against these circumstances, it is recommended that clarity from the legislature ought to be sought. Essentially, there has to be a list which clearly outlines instances that must be regarded to clear the current and prevailing misunderstandings.

The Parliament could consider the prospects of enlisting physical, emotional and financial abuse, instances of theft of the benefits of the patrimonial assets and selling of the property of the joint estate without the consent of the other party as circumstances that potentially lead to the breakdown of the marriage and justify a forfeiture order. However, the list is endless. In other words, the court should be afforded the discretion to consider other circumstances that are related or resemble the grounds that must be enlisted in the legislation.

Concomitantly, it is significantly recommended that section 9 (1) of the *Divorce Act* has to be reformed to simplify the ongoing misapprehensions experienced in the interpretation of substantial misconduct as a factor rationalising forfeiture of patrimonial benefits. In order to achieve this, Parliament could start off by attaching a contextual meaning in the definitions of the legislation since the description from the dictionary further complicates what the legislature intended by incorporating

³²² Marumoagae 2014 *De Jure* 94.

substantial misconduct into the *Divorce Act*. Moreover, the Act should encompass a category of behaviours that amount to substantial misconduct. Generally, the Act must guide the courts on whether adultery and desertion of the matrimonial home should be considered in isolation or sequentially and whether there are other substantial misconducts that justify forfeiture of patrimonial benefits.

Lastly, it would be advisable for section 9(1) of the *Divorce Act* to be amended, particularly in the regulation of undue benefitting by the other spouse. Currently, there is no measure or standard procedure which enables the courts to approach the question whether refusal constitutes undue benefits. That is why legal practitioners are at risk of failing their clients in convincing the courts on the issue of unduly benefitting.

4.4 Conclusion

Indeed, forfeiture of patrimonial benefits is a challenging principle that must be addressed in the South African legal system. The doctrine has been characterised by a great number of misinterpretations and confusions, of which some can be attributed to the constitutionality of the norm, lack of clear definitions in the factors that justify an order and the absence of hard and fast principles. However, there have also been positive measures such as the diversion from the common law approach of fault or guilt which deprived the courts the discretion to refuse an order and the system of attaching blame on the guilty spouse to justify an order.

The primary objective of this study was to ascertain the position of forfeiture of patrimonial benefits in South Africa regarding substantial misconduct and to identify whether there is a need for reformation in this area of the divorce law. It remains clear, from the above analysis and discussions, that the legal framework dealing with forfeiture of patrimonial benefits is not consistent and much still needs to be done before our legal system could be effective and steady in principles of forfeiture order, substantial misconduct ad undue benefits. It is therefore, hoped that the study has satisfied the objectives it set out to achieve.

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