



FORFEITURE OF PATRIMONIAL BENEFITS IN SOUTH AFRICA

Forfeiture of patrimonial benefits entails a court granting an order of divorce and including an order that one party forfeits the assets which would have been acquired by them as a result of the marriage in community of property or benefits accrued as a result of an ante-nuptial claim. The concept of forfeiture of patrimonial benefits is legislated by Section 9(1) of the Divorce Act 70 of 1979 (*"The Act"*). In terms of the Act the courts should grant a forfeiture order in circumstances where, if the order is not granted, one party will be "unduly benefited" in relation to the other party. The Act further contains certain factors which the courts must take into consideration when granting such an order.

In the past, a marriage relationship could only be terminated by the death of one of the parties or due to adultery. In the latter case, the courts could order forfeiture of patrimonial benefits in favour of the innocent spouse, however the court had to determine the 'fault' of the guilty spouse which would determine the extent to which the guilty party would forfeit the benefits which were derived during the subsistence of the marriage. The courts would refuse a forfeiture order if the innocent spouse was accessory to, connived or condoned the adultery complained of or that the innocent spouse too committed adultery during the subsistence of the marriage.

The Act developed this archaic fault element and took into account that in divorce actions, not only one party is necessarily always to blame for the breakdown of the marriage and that the marriage relationship can deteriorate due to many contributory factors and social problems. The courts will therefore grant a decree of divorce if the marital relationship has irretrievably broken down. This, in turn, has done away with the 'fault' element as a ground for divorce.

The 'fault' element, however, still remains as one of several factors to be taken into account in determining whether a forfeiture order can be granted. In terms of Section

9(1) of the Act, the court may grant a forfeiture order having taken into account three factors, namely the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of one of the spouses. Furthermore the courts will make the order if one party will be “unduly benefited” in relation to the other party if the order is not granted.

There was a large amount of uncertainty regarding the weight the courts should put on these factors and whether one factor, in absence of another, could be a decisive factor in granting a forfeiture order. In the Appellate Division case, *Wijker v Wijker* 1993 4 SA 720, the court stated that the factors should not be considered cumulatively and therefore a party seeking a forfeiture order does not have to prove the existence of all three factors and therefore if they can prove that due to the existence of one or more of the factors, the other spouse would be unduly benefited if a forfeiture order is not granted. The court in *Botha v Botha* 2006 4 SA 144 (SCA) confirmed the above decision, however both judgements failed to provide clarity on the meaning of “unduly benefited”, which meaning still remains to be clarified by our courts. The courts will however consider each individual case separately and take into account the circumstances therein and thereafter apply their discretion in making a forfeiture order or not.

Article by **Myrna Heunis**, candidate attorney at Malan Lourens Viljoen Inc.