

FACTORS JUSTIFYING FORFEITURE OF PATRIMONIAL BENEFITS ORDERS

Molapo v Molapo (2013) ZAFSHC 29
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1 Introduction

Marriage in community of property carries major implications for ownership of the parties' assets, liability for their debts as well as their capacity to enter into legal transactions (*Tomlin v London and Lancashire Insurance Co Ltd* 1962 (2) SA 30 (D) 33C–D; and *W v W* 2011 (1) SA 545 (GNP) par 17). To some extent, the same may be true for marriages out of community of property with the application of the accrual system, more particularly at the dissolution of such a marriage. Community of property entails the pooling of all assets and liabilities of the spouses immediately on marriage, automatically and by operation of law (Heaton *South African Family Law* 3ed (2010) 67). The same regime applies to assets and liabilities which either spouse acquires or incurs after entering into the marriage. The joint estate created by marriage in community of property is held by the spouses in co-ownership, in equal and undivided shares (Van Heerden, Cockrell, Keightley, Clark, Sinclair and Mosikatsana *Boberg's Law of Persons and the Family* 2ed (1999)185). The natural consequence of holding the parties to their marriage agreement is that on divorce the joint estate will be divided equally between them unless a forfeiture of patrimonial benefits order is made (*DT v DA* Case no (15402/2010) ZAGPJHC/2013 Unreported case par 18). Where it has been established, forfeiture of patrimonial benefits is a financial patrimonial consequence of marriages in community of property and marriages out of community of property were the accrual system is applicable.

Section 9(1) of the Divorce Act (DA) is the basis upon which the court can decide to grant forfeiture of patrimonial benefits. The principles relating to forfeiture of patrimonial benefits in respect of marriages in community of property remain probably the most misunderstood aspects of South African matrimonial law, more especially in practice (Van Niekerk *A Practical Guide to Patrimonial Litigation in Divorce Actions* Issue 8 (2006) 3–4)). This section lists three factors which courts should take into account when granting an order for forfeiture of patrimonial benefits. First, this paper seeks to discuss the case of *Molapo v Molapo*, with a view to critically analyse the approach adopted therein with regard to forfeiture of patrimonial benefits. The author shall be arguing that the court, when ordering partial forfeiture of benefits, in this case was influenced partly by what it regarded to be fair in the context of this case, notwithstanding the fact that the principle of fairness has been rejected by the Supreme Court of Appeal (*Wijker v Wijker* [1993] 4 All SA 857 (AD) as approved by *Botha v Botha* 2006 (4) SA 144 (SCA)). Secondly, the author shall also demonstrate that in *Molapo v Molapo* the court failed to

provide a basis upon which it apportioned the proceeds of the main asset in the joint estate to the parties. Finally, in order for a court to be able reach a decision regarding forfeiture of patrimonial benefits it is important for a party claiming forfeiture to adequately make out a case for forfeiture of patrimonial benefits (see *Khoza v Khoza* 1982 (3) SA 462 (T); and *Binda v Binda* 1993 (2) SA 123 (W)). The author shall argue that the party in whose favour forfeiture of patrimonial benefits was awarded in *Molapo v Molapo* failed to properly make out a case thereto in her pleadings.

2 Discussion of the law

The concept of forfeiture of patrimonial benefits is derived from the common law. The underlying principle is that no one ought to benefit financially from a marriage that he or she has wrecked (see *Murison v Murison* 1930 AD 157). In particular, this concept as far as Roman-Dutch law is concerned, is to be found in Article 18 of the Political Ordinance, 1580. This Article deals expressly only with divorce on the ground of adultery and reserved to the plaintiff his Roman-law rights conceived as a penalty for the disruption of the marriage (*Allen v Allen* [1951] 3 ALL SA 285 (A) 289). No forfeiture of patrimonial benefits could be ordered by the court at common law unless it has been claimed, hence once claimed by an “innocent” spouse, it could not be withheld by a court (see *Harris v Harris* 1949 (1) SA 254 (A)).

Even though South African courts have applied forfeiture of patrimonial benefits in some of the judgments before 1979 (see *Murison v Murison supra* 157; *Mulder v Mulder* (1885–1888) 2 SAR TS 238, *Ferguson v Ferguson* (1906) 20 EDC 221, *Dawson v Dawson* (1892) 9 SC 446 448; and *Zelie v Zelie* 1944 CPD 2) it was only after the promulgation of the DA that this concept was formally legislated. Even though the DA generally removed the notions of “guilt” and “innocence” as far as the granting of divorce generally is concerned, fault nonetheless remain part of the jurisprudence relating to forfeiture of patrimonial benefits. It has been held that the DA has “left untouched the concept of a forfeiture of benefits, when it dealt at all events with marriages in community of property, not altering what was then envisaged or encompassed by the notion in the eyes of the common law, but merely defining and adumbrating the circumstances in which the Court was empowered to order a forfeiture” (*Persad v Persad* [1989] 2 All SA 482 (D) 486).

Forfeiture of patrimonial benefits is dealt with in section 9(1) of the DA. Accordingly, when a decree of divorce is granted on the ground of the irretrievable breakdown of marriage, the court granting a divorce order may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part. The court can only make such an order if satisfied that, if the order is not made, the one party will, in relation to the other, be unduly benefited. In this regard, the former Appellate Division (now Supreme Court of Appeal) has developed a two-state test based on value judgment in the following terms:

“It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be purely a factual issue. Once that has been established the trial court must determine, having regard to the factors mentioned in the

section, whether or not that party will in relation to the other be unduly benefited if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial court after having considered the facts falling within the compass of the three factors mentioned in the section" (*Wijker v Wijker supra* par 19).

Factors listed in section 9(1) of the DA which the court should take into account when deciding whether the party against whom forfeiture is sought would be unduly benefited or not are the following: The duration of the marriage; circumstances that gave rise to the breakdown of the marriage and any substantial misconduct on the part of either of the parties. These factors should be taken into account by the court once it has evaluated the circumstances of a particular case, the nature of the evidence led and the facts proved before it.

It is important to note that no other factor may be taken into account by a court when granting a forfeiture order (*Moodley v Moodley* [2008] 48 ZAKZHC par 8). It was held in *BOO v NNO* ([2012] JOL 29395 (GNP) par 66), that "a discretion is clearly conferred upon the court in terms of section 9(1) whether or not to order forfeiture of the patrimonial benefits of the marriage. That discretion may be exercised in favour of either of the spouses and may relate to the whole or only a portion of the patrimonial benefits. Moreover, the court is enjoined to have regard to various factors specified in the said section, in the exercise of that discretion in order to determine whether one party will in relation to the other be unduly benefited if the order for forfeiture is not made".

The Supreme Court of Appeal has authoritatively held that "the trial court may therefore not have regard to any factors other than those listed in section 9(1) in determining whether or not the spouse against whom the forfeiture order is claimed will, in relation to the other spouse, be unduly benefited if such an order is not made" (*Botha v Botha supra* par 8). The court further observed that absent from section 9 of DA is a catch-all phrase, permitting the court in addition to the factors listed therein, to have regard to "any other factor" (*Botha v Botha supra* par 8). This simply entails that the factors listed in section 9(1) of the DA are a closed list and court does not have discretion to consider any other factor not mentioned therein (Marumoagae "Forfeiture of Patrimonial Benefits – It's Not About What's Fair" July 2012 *De Rebus* 22).

In *Wijker v Wijker* (*supra* par 33), the court found that the court *a quo* had introduced the concept of fairness in its analysis of section 9(1) of the DA. The court held that:

"The finding that the appellant would be unduly benefited if a forfeiture order was not made, was therefore based on a principle of fairness. It seems to me that the learned trial judge, in adopting this approach, lost sight of what a marriage in community of property really entails ... The fact that the appellant is entitled to share in the successful business established by the respondent is a consequence of their marriage in community of property. In making a value judgment this equitable principle applied by the court *a quo* is not justified. Not only is it contrary to the basic concept of community of property, but there is no provision in the section for the application of such a principle."

This is a clear indication that the principle of fairness was authoritatively rejected by the then Appellate Division as far as forfeiture of patrimonial

benefits is concerned. The decision of the Appellate Division case was confirmed and endorsed by the Supreme Court of Appeal in *Botha v Botha supra*. The author is alive to the fact that there are those who might be inclined to argue that *Wijker v Wijker* is a pre-constitutional decision and its approach regarding fairness in relation to forfeiture of patrimonial benefits might need to be revisited in order to give effect to constitutional values and fundamental rights protected by the 1996 Constitution. This is because 'family law is probably the area of South African private law which has expanded and changed most rapidly since the reception of Roman-Dutch law in South Africa. Many of these changes have come about as a result of the enactment of a Bill of Rights in both the Interim Constitution and the final Constitution' (Bonthuys "South African Bill of Rights and the Development of Family Law" 2002 SALJ 748).

Further, that the concept of forfeiture of patrimonial benefits generally as a common-law remedy should be developed to the extent that it should recognize the potential vulnerability of the spouse against whom forfeiture is sought, if such an order will leave him or her destitute. Further that, if such a spouse made a certain contribution to the assets constituting the joint estate, it is only fair that he or she shares equitably in that joint estate if the parties are married in community of property. Furthermore, it can also be argued that the requirement of "unduly benefitted" in section 9(1) of the DA contains discretionary elements based on fairness. More particularly because, when a court is called upon to decide whether one spouse would be unduly benefitted if an order of forfeiture is not granted, the court has to consider whether failure to order forfeiture would be unfair.

However, the author is of the view that anyone who might be inclined to advance the above arguments would not be taking into account the fact that the Supreme Court of Appeal during the constitutional dispensation has pronounced on this matter in *Botha v Botha*, which case was decided in 2006. In that the Supreme Court of Appeal did not see fit to develop the common law with regard to forfeiture of patrimonial benefits, in actual fact the court was not even confronted with any constitutional claim regarding forfeiture of patrimonial benefits from the parties. In all the cases dealing with forfeiture of patrimonial benefits which are reported, not even one litigant has raised any constitutional concerns with regard to this concept, and the author is of the view that the issue relating to its development as a common-law creation relating to the concept of fairness is totally irrelevant.

Forfeiture of patrimonial benefits is not only a common-law remedy, but also a statutory remedy which is gender neutral in its outlook and can be used by any party who meets its requirements in accordance with section 9(1) of the DA. This remedy is a potential financial consequence of all marriages entered into in community of property or those where the accrual system is applicable. The parties can ensure that this eventuality does not become applicable when they divorce by signing an antenuptual contract at the time of their marriage wherein they can choose to marry out of community of property without the application of the accrual system. By choosing to get married in community of property or out of community of property with the application of the accrual system they automatically accept that forfeiture of patrimonial benefits would be a potential financial consequence of their marriage should they divorce.

“It has long been accepted that when parties enter into a marriage in community of property one joint estate will be formed. As such, entering into a marriage in community of property is a risk each spouse takes. The spouses will, on the date the joint estate is created, become joint owners of all the assets brought into the estate and will also share each other’s liabilities” (*BOO v NNO* [2012] JOL 29395 (GNP) par 55). Such a risk entitles the court upon request on divorce to order forfeiture of all or only some of the patrimonial benefits derived from the marriage. It has been correctly held that “courts do not have the power not to order forfeiture merely because this might seem equitable” (*BOO v NNO supra* par 58).

The author submits that it is not for the court to attempt to balance the interests of the respective parties in the joint estate and make an order which would seem fair in the eyes of the court. In other words, it cannot be said to be unfair when the financial consequences of what the parties contracted into materialize. Thus, the concept of fairness in the interpretation of forfeiture of patrimonial benefits does not have a role to play.

3 *Molapo v Molapo*

3 1 *Facts*

The only dispute before the court was whether there should be a forfeiture order under section 9(1) of the DA in favour of the plaintiff who was the wife in this case (par 1). The parties met in or around 1988, but married each other on 3 January 1992. They then bought their first house at the end of 1993 for R49 000. The defendant paid about R500 to R600 out of his pocket and the balance of the bond payment was a subsidy from his employer (par 6). This house was sold for R87 000 in or around 2002 and the defendant took the profits and used part thereof to pay off his personal debts. Defendant bought a car which at first he gave to the plaintiff but later took it back, leaving the plaintiff to use public transport (par 7).

In or around 2003 the parties bought another house for R140 000, wherein they obtained a bond with the plaintiff being responsible for the payment thereof. The value of this house at the time of divorce was said to be R500 000. The defendant never contributed towards the payment of that bond (par 9). The plaintiff also paid for the children’s school fees. The plaintiff’s monthly income in 1993 was R2 500, R8 000 in 2006 and at the time of divorce it was R10 871. On the other hand, the defendant’s monthly income was R1 000, R5 000 in 2006 and R7 215 at the time of divorce (par 10).

One day during the marriage, the defendant opened the gas bottle in the house while the plaintiff and the children were inside the house. The plaintiff did not have a sense of smell, and at the time she was lying in bed and could not smell the gas. However, the children alerted her of the gas. At that time, the defendant locked both the front and back doors of the house and the plaintiff could not get out of the house (par 12.1). At the time of this incident, the defendant was heavily under the influence of liquor. As a result of the defendant’s behaviour, the wife successfully obtained a protection order against the defendant, who ultimately moved out of the house. However, the protection order which the plaintiff obtained against the

defendant was withdrawn. Immediately thereafter, the defendant came back to the house and started fighting again with the plaintiff. The police were called and the defendant was removed from the house (par 12.3). Later on, another incident took place when the defendant, who was heavily intoxicated at the time, saw the plaintiff being driven by her male friend and started insulting them. In paragraph 13 of the judgment it is stated that “there was a fight between that man and defendant. Plaintiff said she made a case against the defendant and he pleaded guilty”. However, nowhere in the judgment is it stated to what the defendant pleaded guilty.

The court also accepted that the defendant physically and verbally abused his two daughters born of the marriage. During the trial, the defendant admitted that he had not seen his children in 10 years (par 14). Over and above the relationship which the defendant had with his children (or lack thereof), the contribution of the defendant towards the new house was also in dispute. On the one hand, according to the plaintiff, the only thing that the defendant contributed was the fence which he paid for which cost him R1 500. On the other hand, the defendant alleged that he also paid for taking out wooden floors and replacing them with tiles. The court accepted the plaintiff’s version and rejected the version of the defendant (par 11).

3.2 *Discussion and analysis of the court’s approach*

The court assessed the fact of the case by applying the criteria in section 9(1) of the DA, and held that due to the fact that parties had been married for more than 20 years, the duration of the marriage was held not to be an important factor in this case (par 19). However, even though the court recognized that defendant paid the bond for 10 years on the one hand, it nonetheless accepted that he made no substantial contribution to the new house (par 24.1). The court went on to point out several incidents which according to it related to the circumstances which gave rise to the breakdown of the marriage and substantial misconduct in accordance with the criteria set in section 9(1) of the DA. The first incident was when the defendant opened the gas bottle in the house (par 12.1). The second incident related to the defendant proclaiming that “The boss is back”, when he came back into the house after the protection order was set aside and the fact that he started fighting with the plaintiff (par 12.2). The court also took into consideration the fact that it was alleged that the defendant used to abuse his children as well as allegations of the defendant’s extra-marital affairs (par 14(i) and 15). On strength of this, it was argued on behalf of the plaintiff that at least partial forfeiture should be ordered (par 16). The defendant also made his own claim that the plaintiff committed a substantial misconduct in that she belittled him in front of her friends, and told him he earned peanuts and that she had a boyfriend. However, the court found that there was no substance in any of these allegations (par 24.2). The court ultimately held that the facts of this case established that the misconduct of the defendant led to the dissolution of the marriage (par 24.3).

After making a value judgment and taking into account the three factors mentioned in section 9(1) of the DA, the court then held that:

“In my view the scale is tipped heavily, but not entirely in the plaintiff’s favour. Just as in *Singh* I believe, because of the principle of *pacta sunt servanda*, the

agreement to share equally between the parties, and that the defendant paid the bond for 10 years, the defendant is entitled to salvage something from this marriage. His substantial misconduct and the fact that he made no meaningful contribution to the new house and put no money from the old house into the new house, reduce his rights" (par 26).

This statement directly or indirectly reflects that the court intended to reach a fair outcome in this case. Because the parties agreed when they got married in community of property that they would share equally the assets of their joint estate, it would not be fair for anyone of them upon the dissolution of the marriage not to take out anything from their marriage. Further, that the fact that the defendant contributed something at least in the first 10 years of the marriage, he was then entitled to get something from the marriage. In addition to the above-quoted paragraph from *Molapo v Molapo* judgment, the court concluded that "a fair order would be that the proceeds of the sale of the new house be shared between the parties on the basis that the plaintiff gets two thirds and defendant one third" (par 27). It can thus be argued that the court was under the impression that, given past contributions of the defendant to the joint estate and the parties' agreement to share equally through their chosen marital regime, it would not seem fair for the defendant to walk out of the marriage without getting anything. It appears like the court was convinced that the defendant was entitled to some share in the marriage when the parties divorce, and failure to accord any benefit to the defendant would yield unfair outcomes.

It is trite law that no one could be ordered to forfeit property which he or she brought into the marriage (*S v S* (177/2010) [2012] ZANWHC 57 (29 June 2012) par 37 and *JW v SW* 2011 (1) SA 545 (GNP)). However, the disputed house in *Molapo v Molapo* was a patrimonial benefit of the parties' marriage, and it was purchased after the parties' marriage in that none of the parties brought it into the joint estate. It has become customary in practice to use the issue of contribution as a "defence" in a claim for forfeiture-of-benefits claim. It has been argued that "to determine whether one spouse will benefit if the order is not granted the court must determine the respective contributions by the spouse to the joint estate" (*Molapo v Molapo supra* par 22.12 quoting *LAWSA v 16*, 2ed par 90). The author is of the view that the issue of the parties' contributions as well as assets brought into the marriage is far from settled in South Africa as far as forfeiture of benefits is concerned.

In *Molapo v Molapo*, if the facts showed that, should the court not grant an order for forfeiture of patrimonial benefits, one of the parties would be unduly benefitted, then such a party would be competent to forfeit his or her benefits in the said property in part or in full. The court did not explicitly state that the defendant committed "substantial misconduct", but held that "the facts establish that the misconduct of the defendant led to the dissolution of the marriage" (par 24.3). It is not entirely clear from the judgment which factor among those listed in section 9(1) of the DA did the court find to have been proved. Nonetheless, from the way in which the judgment was written one can assume that the court accepted that incidents referred to above relating to the conduct of the defendant towards the plaintiff and the children led to the breakdown of the marriage. In that the factor which the court found to have been established is the "circumstances which led to the breakdown of the marriage" (par 12.2). However, the court used the phrase "substantial

misconduct” in paragraph 26 of the judgment, but the basis upon which this phrase was used is not entirely clear from the judgment.

If the author’s assumption is correct, then the court was justified in ordering forfeiture of patrimonial benefits in this case. In ordering forfeiture of patrimonial benefits the court held that “a fair order would be that the proceeds of the sale of the new house be shared between the parties on the basis that the plaintiff gets two thirds and defendant one third” (par 27). Notwithstanding the fact that it was submitted on behalf of the plaintiff that at least a partial forfeiture should be ordered against the defendant (par 16), the author is of the view that the court, by ordering a partial forfeiture, was doing so on the basis of what it considered to be fair to the defendant, thus ensuring that he “salvaged something” from the marriage. The court, in making its decision, was concerned about the principle of fairness which does not have any role to play in the analysis of forfeiture of patrimonial benefits in South Africa, which principle has been rejected by Supreme Court of Appeal (par 10).

The author is of the view that the court in *Molapo v Molapo* erred in deciding this case through consideration of fairness. As such, the court incorrectly introduced a fourth factor into the evaluation of the issue whether forfeiture of patrimonial benefits should be ordered: that of fairness. The consideration of fairness should not be the yardstick upon which courts deal with section 9(1) of the DA. It has been argued, convincingly in my view, that:

“while the court has a wide discretion in that it may order forfeiture in relation of the whole or part only of the benefits, it is not empowered to award a ‘portion of an errant husband’s separate estate’ to his wife, for example, merely because this might seem equitable in the circumstances. Nor may a forfeiture order be granted simply to balance the fact that one of the spouses or partners has made a greater contribution than the other to the joint estate. The forfeiture order relates only to the benefits of the marriage ... The precise nature of these benefits depends on the particular matrimonial regime” (Schäfer *Family Law Service* Issue 54 October 2010 26–27).

If the author’s analysis of this case is incorrect, the author nonetheless is of the view that court could have removed any doubt as to whether fairness was applied by adequately explaining how it reached its decision to grant partial forfeiture. The court should have dealt explicitly and in detail as to how the apportionment of assets was reached in this case. In this case the court was of view that “a fair order would be that the proceeds of the sale of the new house be shared between the parties on the basis that the plaintiff gets two thirds and defendant one third’ (par 27). The court did not provide any basis for the two-thirds and one-third apportionment of the house between the parties. I submit that perhaps the court should have justified its apportionment by thoroughly weighing up the factors mentioned in section 9(1) of the DA, and properly analysing those factors with a view to indicate which one amongst of those factors was established in this case to justify partial forfeiture of patrimonial benefits. Furthermore, the court did not adequately address the issue of why partial and not full forfeiture was competent in this case. It must be noted, however, that section 9(1) of the DA, even though it allows the court to order partial or full forfeiture, nonetheless it does not provide guidelines which can assist the court when deciding whether to order partial and full partial. In *Singh v Singh* (1983) (1)

SA 781 791) the court ordered partial forfeiture of patrimonial benefits on the basis of 20 per cent and 80 per cent apportionment, and duly weighed up factors in listed in section 9 (1) of the divorce act when making such decision.

Furthermore, the author is of the view that if the court did not consider the issue of fairness or rather the court's conception of what was fair in the circumstance of this case, the court would have ordered full forfeiture of patrimonial benefits against the defendant. This is because the facts reveal in certain terms that the conduct of the defendant throughout the marriage led to the breakdown of the marriage, hence there was enough to satisfy the requirements of section 9(1) of the DA. Furthermore, the author is of the view that the approach adopted in *Molapo v Molapo* with regard to fairness does not help clarify the jurisprudence of forfeiture of patrimonial benefits in South Africa.

The author therefore submit in line with the principle laid in *Wijker v Wijker* that fairness does not have a role to play when the court has been requested to order forfeiture of patrimonial benefits. Furthermore, the author is of the view that the consideration of fairness would dilute the concept of community of property, thus rendering its financial consequences with regard to section 9(1) of the DA meaningless. The danger of the approach adopted in *Molapo v Molapo* is that legal practitioners could start arguing against forfeiture of patrimonial benefits on the basis that it would not be fair for their clients not to take away anything from the marriage, were any or all of the factors in section 9(1) of the DA would have successfully been established against their clients. This has the impact of practitioners using the principle of fairness as an indirect defence against total forfeiture of patrimonial benefits even in circumstances were it is competent.

4 Pleading forfeiture of patrimonial benefits

Furthermore, in awarding partial forfeiture of patrimonial benefits, the court in *Molapo v Molapo* was convinced that the plaintiff made out a proper case for forfeiture in her particulars of claim (par 18). It is trite that onus is on the party requesting the court to grant order of forfeiture of patrimonial benefits to prove the nature and the ambit of the benefit to be forfeited, and in so doing, he or she must prove the extent to which it is an undue benefit (*Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C); and *JW v SW supra*). In this case, the court was convinced that the plaintiff set out the grounds for her claim of forfeiture in paragraph 7 and paragraph 8 of her particulars of claim, and further that she expanded on those while adducing evidence in court (par 18). Paragraph 1 of the particulars of claim stated that

- "7: 7.1 During the course of the marriage the Defendant in no way whatsoever contributed towards the bond instalment of the property situated at 46 Diederick Street, Ehrlich Park, Bloemfontein;
- 7.2 From the purchasing of the property to date it has been the Plaintiff who has attended to the monthly instalment on said property and so too also rates and taxes, water as well as electricity costs".

Paragraph 1 further states that

“8: Having regard to the reasons which gave rise to the irretrievable breakdown of the marriage and more specifically the fact that the Defendant did not attend his obligations pertaining to the financial upkeep of the household or otherwise as well as towards the monthly bond instalment on the property as aforementioned, Defendant would be unduly benefitted if an Order for forfeiture was not granted by the above Honourable Court in relation to the fact that the marriage is one in community of property and furthermore if he were to share in the value of the aforementioned property.”

However, from my reading of both paragraphs 7 and 8 which were quoted on the judgment, the author is of the view that the plaintiff did not adequately plead for forfeiture of patrimonial benefits in her particulars of claim. It is common knowledge that the factors upon which a party claiming an order for forfeiture of patrimonial benefits rely should be properly pleaded and proved (see *Khoza v Khoza supra*; and *Binda v Binda supra*). The author is of the view that these paragraphs did make out a claim for forfeiture of patrimonial benefits. Paragraph 7 merely dealt with the contribution or lack thereof on the part of the defendant in the purchase of the second property. Nowhere in the judgment is it indicated that lack of contribution by the defendant in the purchase of the property led to the breakdown of the marriage. In actual fact the facts of the case are crafted in such a manner so as to suggest that the plaintiff coped very well with the bond instalments on the said property. Paragraph 8 also dealt neither with the violent nor adulterous behaviour of the defendant, which aspects were crucial in the court deciding to order partial forfeiture of patrimonial benefits (par 12.1). In actual fact, paragraph 8 merely reiterates the financial non-contribution of the defendant. Even though failure to contribute financially could be one of the realities which lead to the breakdown of the marriage, there is nowhere in this judgment where it is indicated that the defendant's failure to contribute led to the breakdown of the parties' marriage.

The particulars of claim in this case were poorly drafted and failed to establish a claim for forfeiture adequately. It is important that “the plaintiff ... state(s) in concise terms what facts he intends to rely on and prove and the defendant shall do the same so that on the day of trial neither party shall be taken by surprise ...” (*Benson and Simpson v Robinson* 1917 WLD 126). However, it appears from the judgment in its entirety that it was only when oral evidence was adduced that the wife managed to make out a case for forfeiture when she testified on the behaviour of defendant during the course of their marriage. In order to make out a proper case for forfeiture of patrimonial benefits, it is necessary to allege and prove any one or more of the following: circumstances leading to the breakdown of the marriage, any substantial misconduct and/or the duration of time. The court should also be satisfied about the nature and extent of the benefits in order to assess whether any party will be unduly benefited in the circumstances of the case. The party who seeks an order for forfeiture of patrimonial benefits must provide full details of the reasons/facts/circumstances he or she relies on for the court to take into consideration when making its order. The onus is therefore on the party seeking forfeiture of patrimonial benefits to establish that forfeiture of patrimonial benefits is warranted and to indicate the nature and the quantum of the benefits to be forfeited. Finally, I submit that a case for forfeiture of patrimonial benefits can be properly made out as follows in the particulars of claim or counterclaim.

Owing to:

- (a) The short duration of the marriage between the parties, which marriage lasted for only 6 years.
- (b) The defendant's substantial misconduct regarding her adulterous behaviour; and
- (c) the circumstances which led to the breakdown of the marriage between the parties, which the plaintiff finds irreconcilable to live with, such as:
 - the defendant's neglect of the children;
 - the defendant's continuous abuse of alcohol;
 - the defendant's tendency of coming home late or not coming home at all;
 - the defendant's failure to perform her motherly and wifely duties; and
 - the defendant's violent behavior towards the plaintiff.

the defendant will be unduly benefitted if he is not ordered to forfeit his share of the immovable property which constitutes the parties joint estate.

5 Conclusion

It has long been accepted that when parties enter into a marriage in community of property one joint-estate will be formed. As such, entering into a marriage in community of property is a risk each spouse takes. The spouses will, on the date the joint-estate is created, become joint-owners of all the assets brought into the estate and will also share each other's liabilities *BOO v NNO* ([2012] JOL 29395 (GNP) par 57). "Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of the financial contributions, hold equal shares." (Hahlo *The South African Law of Husband and Wife* 5ed (1985) 157–158). In this paper I have shown that one of the possible financial consequences of marriages in community of property when the parties divorce is forfeiture of patrimonial benefits as laid out in section 9(1) of the DA. I have critically discussed the case of *Molapo v Molapo* with a view to show that the court erred in approaching forfeiture of patrimonial benefits by introducing the principle of fairness thereto. I have argued that fairness has no role to play in the jurisprudence of forfeiture of patrimonial benefits in South Africa. Most importantly, I have demonstrated that the Supreme Court of Appeal in *Wijker v Wijker* clearly rejected the concept of fairness. In this regard, when the court provided analysis of the current law regarding forfeiture of patrimonial benefits it deliberately omitted to mention aspects of *Wijker v Wijker* which dealt with the issue of fairness, thus failing to follow the precedent set by the Supreme Court of Appeal (par 22). Furthermore, this paper also recommended how forfeiture of patrimonial benefits can be properly pleaded.

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