

APPLYING PROVISIONS ON FORFEITURE OF PATRIMONIAL BENEFITS TO POLYGYNOUS CUSTOMARY MARRIAGES

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SUMMARY

The purpose of forfeiture-of-patrimonial provisions (forfeiture) is to ensure that a person does not benefit from the dissolution of a marriage that he or she has wrecked. Forfeiture provisions appear in section 9 of the Divorce Act 70 of 1979 (DA). They were initially designed only for civil marriages in a monogamous setting, and they were designed to apply to the three matrimonial property systems. Strictly speaking, customary marriages were neither in community of property nor out of community of property. Be that as it may, by reason of section 7 of the Recognition of Customary Marriages Act 120 of 1998 (RCMA), the three matrimonial property regimes apply to monogamous customary marriages. In addition, section 8 of the RCMA introduces section 9 of the DA to the dissolution of customary marriages. Monogamous customary marriages do not present a challenge to the application of section 9. It is polygynous customary marriages that present a complex situation. This article considers the application of forfeiture in polygynous customary marriages. It is concerned with a situation where a court orders forfeiture in divorce proceedings between a husband and one of his wives.

1 INTRODUCTION

The original purpose of providing for forfeiture of patrimonial benefits (forfeiture) was to ensure that a party to a marriage did not benefit from the dissolution of a marriage that he or she had actively wrecked.¹ Forfeiture may be seen as an exception to the default rules pertaining to the various matrimonial property systems in South Africa.² For instance, the general rule in a marriage in community of property is that the parties share equally in the joint estate on dissolution of the marriage.³ If a court orders forfeiture, on

¹ *Murison v Murison* 1930 AD 157.

² Sibisi "Re-Thinking Forfeiture of Patrimonial Benefits When a Marriage Dissolves Through Death" 2022 *Obiter* 260 261.

³ See ch 3 of the Matrimonial Property Act 88 of 1984.

application by a party to a marriage, the parties will not share equally in the joint estate. The spouse who is responsible for the breakdown of the marriage will be ordered by the court to forfeit any benefit accruing by virtue of the marriage, either wholly or in part. In marriages out of community of property, without the accrual system, a party forfeits whatever benefit the antenuptial contract confers.⁴ In a marriage that is subject to the accrual system, a party forfeits any accrual claim that he or she may have against the estate of the innocent party.⁵ In short, a person forfeits a patrimonial benefit. The requirements for a forfeiture order are discussed below.

Difficulties in the application of forfeiture provisions do arise in cases of polygynous marriages. The first hurdle is that in a polygynous customary marriage, a man has more than one wife.⁶ Furthermore, the matrimonial property rules in polygynous customary marriages are not as straightforward as they may seem.⁷ It is also accepted that, historically, the matrimonial property rules encapsulated in the Matrimonial Property Act⁸ do not bode well for customary marriages in general, and is yet more complicated for polygynous customary marriages. Mamashela points out that prior to the promulgation of the Recognition of Customary Marriages Act⁹ (RCMA), customary marriages were neither in nor out of community of property.¹⁰ Therefore, she argues that it is incorrect to say that prior to the promulgation of the RCMA, customary marriages were automatically out of community of property.¹¹ Although the RCMA has been promulgated, there are challenges regarding matrimonial property matters in polygynous marriages, as is shown below. Nevertheless, Pienaar suggests that the only viable matrimonial property system in a polygynous marriage is out of community of property without accrual.¹² This view is also supported by Heaton and Kruger.¹³ These authors are of the view that it is impossible to apply community of property to a polygynous marriage as this may result in one wife having an undivided and indivisible share in property acquired by another wife.¹⁴

However, Pienaar refers to findings of empirical research published in 2000. She points out that about 69 per cent of the respondents married in terms of customary law (monogamous and polygynous) preferred some form

⁴ Hahlo "When Is a Benefit Not a Benefit?" 1984 *South African Law Journal* 456 457.

⁵ See generally Sibisi 2022 *Obiter* 261–262 for a brief discussion on the application of forfeiture in the different matrimonial property systems.

⁶ Mwambene "What Is the Future of Polygyny (Polygamy) in Africa?" 2017 *Potchefstroom Electronic Law Journal* 1.

⁷ Pienaar "African Customary Wives in South Africa: Is There Spousal Equality After the Commencement of the Recognition of Customary Marriages Act?" 2003 *Stellenbosch Law Review* 256 263.

⁸ 88 of 1984.

⁹ 120 of 1998.

¹⁰ Mamashela "New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act" 2004 *South African Journal of Human Rights* 616 617–618.

¹¹ *Ibid.*

¹² Pienaar 2003 *Stell LR* 263.

¹³ Heaton and Kruger *South African Family Law* 4ed (2015) 224.

¹⁴ *Ibid.*

of property sharing.¹⁵ Clearly, this does not equate to a marriage that is out of community of property. The RCMA does not cater for a combination of community of property and the sharing of property, especially where the accrual system is excluded.¹⁶

This article attempts to clarify the application of forfeiture in polygynous customary marriages. It is concerned with a polygynous customary marriage where a court orders forfeiture in divorce proceedings between a husband and one of his wives. It should be noted that the forfeiture provisions, as they currently stand, were designed for civil marriages concluded in accordance with the Marriage Act.¹⁷ They were also designed to apply to a monogamous marital institution. Furthermore, at the time that the laws were written, customary marriages were not fully recognised. Be that as it may, when customary marriages were finally recognised by the RCMA, the legislature decided to introduce civil-law matrimonial property rules to monogamous customary marriages. Accordingly, all monogamous customary marriages are, by default, in community of property and of profit and loss.¹⁸ However, the legislature does not prescribe any matrimonial property system for polygynous customary marriages. Instead, a distinction is drawn between those polygynous customary marriages that were entered into before the RCMA and those that were entered into after the RCMA. Furthermore, by virtue of section 8(4)(a) of the RCMA, section 9 of the Divorce Act¹⁹ (DA), which provides for forfeiture, applies in divorce proceedings in customary marriages.

It must be pointed out that a monogamous customary marriage has similar characteristics to a civil marriage in that they are both monogamous; but a monogamous customary marriage is potentially polygynous, and a civil marriage is strictly monogamous. For this reason, the matrimonial property systems applicable to civil marriages can easily be applied in monogamous customary marriages.²⁰ In turn, this makes the application of the forfeiture relatively straightforward. However, the same is not the case in respect of polygynous customary marriages.

This article opens with a brief discussion in part 2 on polygynous customary marriages in South Africa and their recognition in the RCMA. Part 3 goes on to discuss matrimonial property in polygynous customary marriages. In line with the RCMA, it considers both old polygynous marriages (entered into before the RCMA came into operation) and new polygynous marriages (entered into after the RCMA). This part of the discussion also highlights the complexities involved in matrimonial property matters in polygynous customary marriages and serves as a backdrop to the discussion that follows. Part 4 discusses forfeiture in general, while part 5 is a more focused discussion on the application of forfeiture in polygynous customary marriages. Part 6 concludes by recommending how courts should apply these provisions in polygynous customary marriages.

¹⁵ Pienaar 2003 *Stell LR* 266.

¹⁶ *Ibid.*

¹⁷ 25 of 1961.

¹⁸ S 7(2) and (3) of the RCMA.

¹⁹ 70 of 1979.

²⁰ Pienaar 2003 *Stell LR* 263.

2 A BRIEF NOTE ON THE LEGAL RECOGNITION OF POLYGYNY

Despite predating colonialism, customary marriages were not afforded full legal recognition in South Africa prior to the RCMA. The reasons for non-recognition were given as the requirement of *ilobolo* and the potentially polygynous nature of a customary marriage.²¹ Dlamini is critical of polygyny being used as a reason for non-recognition.²² He argues that since a civil marriage allows for divorce and remarriage, this implies that it accommodates serial polygyny.²³ Thus, it is submitted that this reasoning was simply a poor excuse to perpetuate racial discrimination because even monogamous customary marriages were not recognised. If polygyny were really the reason for non-recognition, then monogamous customary marriages would have been afforded conditional recognition that fell away as soon as the marriage became polygynous. However, monogamous customary marriages suffered the same fate as polygynous customary marriages. The most plausible conclusion to be drawn here is that the grand scheme was for total annihilation of customary marriages in favour of Christian or civil marriages.

Arguably, the promulgation of the Constitution²⁴ paved the way to the full recognition of customary marriages in general. It is submitted that non-recognition or piecemeal recognition could not withstand constitutional scrutiny in light of constitutionally entrenched rights such as equality,²⁵ human dignity,²⁶ freedom of religion, belief and opinion²⁷ and the right to culture.²⁸ The RCMA was signed into law on 20 November 1998 and came into effect on 15 November 2000. Section 2 of this Act is relevant for present purposes. Section 2(3) and (4) provides for the recognition of polygynous customary marriages entered into both before and after the commencement of the RCMA (old and new polygynous marriages). Section 2(3) provides for the full recognition of old polygynous customary marriages provided that they were valid under customary law. Section 2(4) provides for the full recognition of new polygynous customary marriages provided that they comply with the RCMA. The legislation clearly intended to clear away any doubts about the legal recognition of all polygynous marriages and promote legal certainty.

Section 3 of the RCMA provides the requirements for a valid new customary marriage. Much has been written about these provisions, but this article only refers to relevant aspects. Parties to a polygynous marriage must

²¹ Maithufi and Bekker "The Recognition of the Customary Marriages Act of 1998 and its Impact on Family Law in South Africa" 2002 *Comparative and International Law Journal of Southern Africa* 182.

²² Dlamini "The Role of Customary Law in Meeting Social Needs" 1991 *Acta Juridica* 71.

²³ Dlamini 1991 *Acta Juridica* 76.

²⁴ Constitution of the Republic of South Africa, 1996.

²⁵ S 9 of the Constitution.

²⁶ S 10 of the Constitution.

²⁷ S 15 of the Constitution.

²⁸ S 30 of the Constitution.

both be above the age of 18;²⁹ they must consent to be married to each other under customary law³⁰ and the marriage must be negotiated and entered into or celebrated in accordance with customary law.³¹ If one party is below the age of 18, parental consent is required.³² Neither party should be a party to an existing civil marriage with another person.³³

The provisions of section 7 of the RCMA are also relevant. In general, section 7 provides for the proprietary consequences of customary marriages and the contractual capacity of spouses. Section 7(6) provides for a court-approved contract if a husband wishes to enter into a subsequent customary marriage. Such a contract would regulate the proprietary consequences of the polygynous marriage. Prior to the Constitutional Court decision in *MM v MN*,³⁴ the impact of the absence of this court-approved contract on the validity of a subsequent polygynous marriage was unclear. This would not have been the case had section 7(6) been express about the consequences of the absence of a court-approved contract.³⁵ In *MM v MN*, the court *a quo* had held that failure to comply with section 7(6) invalidated the subsequent marriage.³⁶ On appeal, the Supreme Court of Appeal disagreed with the court *a quo*. It held that failure to comply with section 7(6) did not invalidate the subsequent marriage, but the subsequent customary marriage was out of community of property.³⁷ On further appeal to the Constitutional Court, the court confirmed the decision of the SCA – that failure to comply with section 7(6) did not invalidate the subsequent marriage.³⁸ The marriage remained valid provided there was compliance with other requirements of a polygynous customary marriage, including that there must be consent of the first wife in *Tsonga* polygynous customary marriages. Therefore, though desirable, a court-approved contract as envisaged in section 7(6) is not a requirement for a valid subsequent marriage.³⁹

3 MATRIMONIAL PROPERTY IN POLYGYNOUS MARRIAGES

Section 7 of the RCMA provides for proprietary consequences of all customary marriages. While it prescribes community of property, profits and loss for monogamous customary marriages, it does not prescribe any matrimonial property regime for polygynous customary marriages.

²⁹ S 3(1)(a)(i) of the RCMA.

³⁰ S 3(1)(a)(ii) of the RCMA.

³¹ S 3(1)(b) of the RCMA.

³² S 3(3) of the RCMA.

³³ S 10(1) and (4) of the RCMA.

³⁴ 2013 (4) SA 415 (CC).

³⁵ Kruuse and Sloth-Nielsen "Sailing Between Scylla and Charybdis: *Mayelane v Ngwenyama*" 2014 *Potchefstroom Electronic Law Journal* 1710 1712.

³⁶ The decision of the court *a quo* is reported as *MM v MN* 2010 (4) SA 286 (GNP). See par 23.

³⁷ The decision of the SCA is reported as *Ngwenyama v Mayelane* 2012 (4) SA 527 (SCA). See par 38.

³⁸ *MM v MN* (CC) *supra* par 41.

³⁹ Van Heerden, Skelton, Du Toit, Anderssen, Baird, Boezaart, Carnelley, Feldhaus, Hansungule, Human, Weeks, Ozah, Robinson and Smith *Family Law in South Africa* 2ed (2021) 225.

Furthermore, a distinction is drawn between the proprietary consequences in old and new polygynous customary marriages.⁴⁰ The wisdom behind this distinction is debatable in light of developments pertaining to customary marriages. A similar distinction does not exist in relation to monogamous customary marriages. In terms of the amended section 7(2), a monogamous customary marriage, irrespective of when it was entered into, is a marriage in community of property unless the community of property is excluded by the parties in an antenuptial contract.

Prior to amendments in 2021,⁴¹ the proprietary consequences of old monogamous and polygynous customary marriages were governed by customary law,⁴² leading to a conclusion that these customary marriages were neither in nor out of community of property.⁴³ Although section 6 of the RCMA conferred equal status and capacity, the husband retained control of all property.⁴⁴ Parties to these marriages could apply to court for leave to amend their matrimonial property system.⁴⁵ The husband had to join all the wives to his application.⁴⁶ The proprietary consequences of new polygynous marriages were to be governed by a court-approved contract as provided for in section 7(6), briefly discussed above.

The amendments were triggered by two notable cases. These cases challenged the provision that the proprietary consequences of old customary marriages continued to be governed by customary law and were thus out of community of property. With respect to old monogamous customary marriages, the leading case is *Gumede v President of the Republic of South Africa*.⁴⁷ Since this article does not focus on monogamous marriages, these decisions will not be discussed in great detail, save to indicate that the RCMA was subsequently⁴⁸ amended, as mentioned above, to provide that all old and new monogamous customary marriages are, by default, in community of property.⁴⁹ For the sake of clarity, matrimonial property in old polygynous customary marriages is discussed separately from matrimonial property in new polygynous marriages.

3 1 The matrimonial property regime in old polygynous customary marriages

The leading case with respect to old polygynous customary marriages is the Constitutional Court decision in *Ramuhovhi v President of the Republic of South Africa*.⁵⁰ In this case, the applicants approached the courts for an

⁴⁰ See s 7 of the RCMA.

⁴¹ The Recognition of Customary Marriages Amendment Act 1 of 2021.

⁴² S 7(1) of the RCMA before the amendment.

⁴³ Rautenbach *Introduction to Legal Pluralism in South Africa* (2018) 97.

⁴⁴ Bennett *Customary Law in South Africa* (2004) 246.

⁴⁵ S 7(4)(a) of the RCMA.

⁴⁶ S 7(4)(b) of the RCMA.

⁴⁷ 2009 (3) SA 152 (CC).

⁴⁸ Notably, it took approximately a decade for the RCMA to be amended after the decision in *Gumede supra*.

⁴⁹ S 7(2) of the RCMA, as amended.

⁵⁰ 2018 (2) SA 1 (CC).

order that section 7(1) of the RCMA was unconstitutional in providing that old polygynous customary marriages continued to be governed by customary law, in terms of which only the husband controlled matrimonial property. The Constitutional Court had to consider the damaging impact that this provision had on the lives of women in old polygynous customary marriages. It found that section 7(1) perpetuated “inequality between husbands and wives” in the case of old polygynous customary marriages.⁵¹ It also found that section 7(1) discriminated on the ground of marital status in that it differentiated between parties to old polygynous customary marriages and parties to new polygynous customary marriages.⁵² Since marital status is a listed ground,⁵³ the discrimination was automatically unfair.⁵⁴ In addition, the court found that the discrimination limited the right to human dignity.⁵⁵ After finding that section 7(1) was unconstitutional, the court ordered interim relief pending legislative intervention.⁵⁶ It held that the spouses in old polygynous customary marriages must all share equally in the ownership, management and control of family property.⁵⁷ With respect to house property, the court held that the husband and wife of that house must have equal rights. It also held that a party retains exclusive ownership and control of personal property.⁵⁸

Following this decision, the RCMA was amended in 2021. These amendments included those necessitated by the decision in *Gumede*,⁵⁹ albeit that more than a decade had passed. In its amended form, section 7(1) provides for the proprietary consequences of old polygynous customary marriages. Accordingly, the spouses have joint and equal ownership, right of management and control over marital property.⁶⁰ In respect of house property, the husband and wife must jointly manage and control the house property in the best interests of the members of the house.⁶¹ In respect of family property, the husband and all the wives must jointly manage and control the family property in the best interests of the whole family constituted by all the houses.⁶² Each spouse retains exclusive ownership, management and control of personal property.⁶³ It is thus clear that old polygynous customary marriages are neither in nor out of community of property. There is also a significant shift from the legal position before *Ramuhovhi*, where the husband had control of all the property.⁶⁴

The most important question that arises is about the meaning of the concepts “house property”, “family property” and “personal property”. In

⁵¹ *Ramuhovhi supra* par 35.

⁵² *Ramuhovhi supra* par 37.

⁵³ S 9(3) of the Constitution.

⁵⁴ *Ramuhovhi supra* par 39.

⁵⁵ *Ramuhovhi supra* par 38.

⁵⁶ *Ramuhovhi supra* par 51.

⁵⁷ *Ibid.*

⁵⁸ *Ramuhovhi supra* par 63.

⁵⁹ *Supra.*

⁶⁰ S 7(1)(a)(i) and (ii) of the RCMA, as amended.

⁶¹ S 7(1)(b)(i) of the RCMA, as amended.

⁶² S 7(1)(b)(ii) of the RCMA, as amended.

⁶³ S 7(1)(c) of the RCMA, as amended.

⁶⁴ Bennett *Customary Law Africa* 257.

Ramuhovhi, the court did not explain them. The amended RCMA also does not define them. Instead, it provides that they have the meaning ascribed to them in customary law.⁶⁵ One may conclude that this is in deference to living customary law: should there be a dispute about which property belongs to what category and the consequences thereof, the courts will first ascertain the contents of the living law of a particular group before making a decision. However, if the past is anything to go by, courts will simply apply official customary law or formal law to the dispute. It is submitted that there is nothing wrong with applying official customary law *per se*. However, from time to time, courts must verify if the formal law is still in line with lived experiences. Be that as it may, the concepts above are explained with reference to formal literature.

To understand the meaning of the concepts, it is first important to understand the system of the ranking of wives and their houses in a polygynous customary marriage. Each wife constitutes a house,⁶⁶ and all her descendants belong to that house. House property refers to property acquired by members of the house.⁶⁷ House property is also referred to as general property, although, reference to general property is problematic because it can easily be confused with family property. Property acquired by children of the house will belong to that specific house.⁶⁸ *Ilobolo* delivered for the marriage of the daughter of the house belongs to that house.⁶⁹ In addition, *ihlawulo* (damages) given for a wrong committed against a person belonging to a particular house will also form part of house property.⁷⁰ A house will continue to exist indefinitely, as long as there is a surviving member of that house.⁷¹

Family property refers to property that has been acquired by the husband, but that has not been allotted to any house.⁷² If the husband allots any property to a particular house, such property belongs to that house and no longer constitutes family property.⁷³ Once the husband has allotted property to a particular house, he cannot reverse this.⁷⁴ However, an inter-house loan is possible, in which case one house is indebted to another.⁷⁵ The decision to make an inter-house loan is taken after consultation between the husband, the wife of the lending house and other members of that house.⁷⁶ For example, if cattle delivered for a daughter belonging to the first house is

⁶⁵ S 7(1)(d) of the RCMA, as amended.

⁶⁶ Himonga, Nhlapo, Maithufi, Weeks, Mofokeng and Ndima *African Customary Law in South Africa: Post-Apartheid and Living Law Perspective* (2020) 129.

⁶⁷ *Ibid.*

⁶⁸ Heaton and Kruger *South African Family Law* 223.

⁶⁹ Himonga *et al African Customary Law* 129.

⁷⁰ Bennett *Customary Law Africa* 257.

⁷¹ Weeks "Constitutionally Transforming South Africa by Amalgamating Customary and Common Law: *Ramuhovhi*, the Proprietary Consequences of Marriage and Land as Property" 2021 *Constitutional Court Review* 174.

⁷² Himonga *et al African Customary Law* 129.

⁷³ Heaton and Kruger *South African Family Law* 223.

⁷⁴ Mwambene 2017 *PELJ* 19.

⁷⁵ Mwambene 2017 *PELJ* 20.

⁷⁶ Maithufi and Bekker 2002 *CILSA* 182 188 ; Bennett *Customary Law* 244.

used by the son of the second house to deliver *ilobolo* for his bride, the second house is indebted to the first house. The loan must be paid back.⁷⁷

Personal property includes everything that is not house property or family property. It includes clothes of a particular family member⁷⁸ and also gifts given to a member of the family.

3 2 The matrimonial property regime in new polygynous customary marriages

As seen above, matrimonial property in new polygynous customary marriages is dealt with differently from old polygynous customary marriages. Section 7(6) of the RCMA provides that a husband in a customary marriage who wishes to enter into a subsequent customary marriage with another woman must approach the court for approval of a written contract that will regulate their future matrimonial property affairs. This must be done before the subsequent marriage. It must again be stressed that section 7(6) is not a prerequisite for the validity of the subsequent customary marriage. This provision only has a bearing on the matrimonial property affairs of the customary marriage. A court hearing an application of this nature is empowered to order the termination of any applicable matrimonial property system in the existing marriage⁷⁹ and also order division of the estate accordingly.⁸⁰ The court is also bound to take into account the circumstances of the family groups that will be affected by the order.⁸¹ The existing spouse(s) and any other persons with sufficient interest in the matter, such as creditors, must be joined in the application proceedings.⁸² The court has a discretion whether to accept the written contract or refuse it. It may refuse to accept the contract if it is of the opinion that the interests of any party will not be sufficiently protected by the contract.⁸³

The written contract envisaged is flexible. It does not prescribe any prescriptive terms for the parties. It allows the parties to structure their matrimonial property affairs in a way that works for the household. The only prerequisites are that the contract should be fair to all the parties involved. In order to achieve certainty, one formality is essential. The contract must be in writing. To ensure that all the spouses are on the same page regarding the written contract, the registrar or clerk of the court is required to furnish each spouse with the order of the court and a certified copy of the written

⁷⁷ Bennett *Customary Law* 244.

⁷⁸ Horn and Janse van Rensburg "Practical Implications of the Recognition of Customary Marriages" 2002 *Journal for Juridical Science* 54 62.

⁷⁹ S 7(7)(a)(i)(aa) of the RCMA.

⁸⁰ S 7(7)(a)(i)(bb) of the RCMA. If the existing marriage was in community of property, the court must effect a division of the joint estate. In the case of a marriage that is subject to the accrual system, the court must effect a transfer of the accrual to the poorer spouse. Overall, the court must ensure an equitable distribution of the property (s 7(7)(a)(ii) of the RCMA).

⁸¹ S 7(7)(a)(iii) of the RCMA.

⁸² S 7(8) of the RCMA.

⁸³ S 7(7)(b)(iii) of the RCMA.

contract.⁸⁴ The written contract must also be sent to each registrar of deeds in the area in which the court is situated.⁸⁵

The most important question is how the matrimonial property issue is resolved in cases where subsequent customary marriages are concluded without a written contract as envisaged. On the face of it, one might apply the precedent set in *MM v MN*⁸⁶ (also confirmed by *Ramuhovhi*),⁸⁷ – that is, the subsequent marriage will be out of community of property. It is submitted that this is not ideal precedent. The question before the Constitutional Court in *MM v MN* did not concern the applicable matrimonial property system where the husband failed to comply with section 7(6). The issue concerned the requirements for a valid subsequent customary marriage. Since the Constitutional Court found that the subsequent customary marriage was null and void because it did not comply with the requirements for a valid polygynous customary marriage, the question of matrimonial property did not arise in this case. Had this question been before the Constitutional Court as the main question, the court may have come to a different conclusion when considering the impact that the exclusion of community of property can have on women. A woman can easily be deprived of her house property or personal property if it is registered in the name of her husband.⁸⁸ To guard against similar occurrences, section 8(4)(b) of the RCMA empowers a court to order a redistribution in divorce proceedings.

Recently in *Sithole v Sithole*,⁸⁹ the Constitutional Court held that section 21(2)(a) of the Matrimonial Property Act, as amended by the Marriage and Matrimonial Property Law Amendment Act,⁹⁰ was unconstitutional in that it prescribed that all civil marriages between African people entered into before 2 December 1988 were automatically out of community of property.⁹¹ The parties argued that this differentiation discriminated unfairly against African people whose civil marriages were entered into under the Black Administration Act.⁹² The court agreed with this argument. It held that the basis of the differentiation was racial discrimination and segregation based on the notion that African and White people were not worthy of the same treatment and governmental protection.⁹³ The State had failed to show any

⁸⁴ S 7(9) of the RCMA.

⁸⁵ *Ibid.*

⁸⁶ *Supra.*

⁸⁷ *Supra.*

⁸⁸ Pienaar 2003 *Stell LR* 263.

⁸⁹ 2021 (5) SA 34 (CC).

⁹⁰ 3 of 1988. On 2 December 1988, the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 was passed. It provides that all civil marriages entered into by African persons on or after 2 December 1988 are in community of property. However, African parties to civil marriages entered into before 2 December 1988, which were automatically out of community, had two years from 2 December 1988 to amend the applicable matrimonial property system to include community of property. The applicant in *Sithole v Sithole* fell within the category of persons who were married prior to 2 December 1988 and had failed to change the matrimonial property system before the deadline on 1 December 1990. Therefore, her marriage remained out of community of property, in terms of section 22(6) of the Black Administration Act 38 of 1927.

⁹¹ *Sithole supra* par 1.

⁹² 38 of 1927. Also see *Sithole supra* par 11.

⁹³ *Sithole supra* par 44.

legitimate basis for the continued retention of section 21(2)(a), and therefore, the Constitutional Court confirmed that it was unconstitutional.⁹⁴ Following this decision, the legal position is that all civil marriages entered into before 2 December 1988 are now automatically in community of property, save where the parties have specifically excluded community of property.⁹⁵ This decision points yet again to the devastating impact of the exclusion of community of property on women. This case supports the argument above that *MM v MN* is not ideal precedent insofar as it held that the subsequent customary marriage will be out of community of property if section 7(6) was not complied with.

It is submitted that the legal position now applicable to old polygynous customary marriages as a result of the amendment in 2021, as discussed above, is best suited in cases where the husband failed to comply with section 7(6) of the RCMA. In this situation, the wife will share equally with her husband in house property, regardless of who has it registered in their name. Any children born of the marriage will benefit from the house property. The interests of the other wives will be equally protected in that they will each share equally with their husband in their house property. With respect to family property, all the parties to the polygynous marriage will share equally. This is certainly better than complete exclusion of community of property, as held in *MM v MN*.

4 FORFEITURE OF PATRIMONIAL BENEFITS

4.1 Forfeiture under the common law

Forfeiture is not unique to the Divorce Act⁹⁶ (DA). It originates in Roman law.⁹⁷ The general purpose of forfeiture was to ensure that a guilty party to a marriage does not benefit from the dissolution of a marriage that he or she has wrecked.⁹⁸ In the past, marriage was a sacrosanct union between a husband and a wife.⁹⁹ Divorce was very rare¹⁰⁰ and was dependent on the commission of marital fault. In every divorce case, courts had to identify the guilty spouse and the innocent spouse. Only the innocent spouse could initiate divorce proceedings. In other words, a guilty party could not institute divorce proceedings.¹⁰¹ In *Schwartz v Schwartz*,¹⁰² the husband was the guilty spouse in that he was living in adultery with his mistress, Miss Lintvelt, a teacher at his daughter's school.¹⁰³ The husband had tried to institute divorce proceedings in 1978, prior to the DA, but had to withdraw as he was

⁹⁴ *Sithole supra* par 47.

⁹⁵ *Sithole supra* par 59.1.

⁹⁶ 70 of 1979.

⁹⁷ *Swil v Swil* 1978 (1) SA 790 (W) 792H.

⁹⁸ *Murison v Murison supra*.

⁹⁹ Barratt, Domingo, Amien, Denson, Mahler-Coetzee, Olivier, Osman, Schoeman and Singh *Law of Persons and the Family* 2ed (2017) 236.

¹⁰⁰ This is in contrast to the present where the divorce rate is very high. See Heaton and Kruger *South African Family Law* 13.

¹⁰¹ Barratt *et al Law of Persons and the Family* 334.

¹⁰² *Schwartz v Schwartz* 1984 (4) SA 467 (A).

¹⁰³ *Schwartz v Schwartz supra* 470C.

the guilty spouse.¹⁰⁴ He was advised that “the chances were not so good in getting a divorce”.¹⁰⁵

A forfeiture order could only be made adjunct to a divorce or a separation order.¹⁰⁶ A party to a marriage could not simply approach the courts for this order without simultaneously seeking to have the marriage dissolved.¹⁰⁷ In Roman law, the grounds upon which the order could be made were malicious desertion, adultery, incurable mental illness and imprisonment of at least five years.¹⁰⁸ Under Roman-Dutch law, forfeiture was developed further. The grounds upon which an order of forfeiture could be made were adultery and malicious desertion. An interesting feature about malicious desertion as a ground for a divorce or forfeiture is worth mentioning. If a party relied on malicious desertion as a ground, he or she was required to approach the court first for an order calling on the deserting spouse to restore conjugal rights. A divorce or forfeiture order was only competent if, on the return day, the deserting spouse had failed to restore conjugal rights.¹⁰⁹ It is no longer competent for courts to issue orders for restitution of conjugal rights.¹¹⁰

4 2 Forfeiture under the Divorce Act

Section 9(1) of the DA provides for forfeiture. It supersedes the common law. It reads:

“When a decree of divorce is granted on the ground of irretrievable breakdown of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.”

Based on section 9(1), the requirements of a forfeiture order may be summarised as follows. Forfeiture may only be ordered in divorce proceedings, and the ground for the divorce must be the irretrievable breakdown of the marriage. Only a patrimonial benefit may be forfeited. The patrimonial benefit to the other party must be undue. The court must employ three factors to determine whether the benefit is undue. These factors are the duration of the marriage, the circumstances which gave rise to the breakdown of the marriage and any substantial misconduct on the part of either spouse. Finally, the court has a narrow discretion to order total or partial forfeiture.

¹⁰⁴ *Schwartz v Schwartz supra* 470F–G.

¹⁰⁵ *Schwartz v Schwartz supra* 470H.

¹⁰⁶ *Sibisi 2022 Obiter* 264.

¹⁰⁷ *Ibid.* In the case of *Vergottini v Vergottini* 1951 (2) SA 848 (W), the court refused to grant an order for forfeiture of patrimonial benefits because there were no divorce or separation proceedings.

¹⁰⁸ *Sibisi 2022 Obiter* 264.

¹⁰⁹ *Ex parte Boshoff NO: In re Boshoff v Boshoff* 1953 (3) SA 237 (W) 238B.

¹¹⁰ S 14 of the DA.

The requirements above raise various questions of interest. The requirement that the proceedings should be divorce proceedings is interesting because divorce is not the only way of dissolving a marriage. Although a marriage may be dissolved through death, divorce and annulment,¹¹¹ a forfeiture order may not be made when a marriage is dissolved through death and annulment. In *Monyepao v Ledwaba*,¹¹² the Supreme Court of Appeal held that a forfeiture order could not be granted when the marriage was dissolved through death.¹¹³ Notwithstanding that the litigants were two wives of the deceased, the court also held that a forfeiture order could only be granted to a party to a marriage against the other spouse.¹¹⁴ This reasoning is problematic because by its nature, a customary marriage has more than two spouses. The two wives of the deceased were parties to the marriage. This decision may also be criticised for adopting a literal interpretation. Had the court considered the rationale behind forfeiture, which is to ensure that a person does not unduly benefit from a marriage that he or she has wrecked,¹¹⁵ it may have arrived at a different decision. Furthermore, the facts of the case were such that, had the marriage ended in divorce, forfeiture may have been ordered. Briefly, one of the litigant wives, the respondent, had entered into a civil marriage during the subsistence of the customary marriage with the deceased.¹¹⁶

Another interesting requirement is that a forfeiture order may only be made if the ground for the divorce is the irretrievable breakdown of a marriage. This is interesting because the irretrievable breakdown of a marriage is not the only ground for a divorce. In terms of section 3(b) read with section 5 of the DA, a person may also obtain a divorce decree on the ground of mental illness and continuous unconsciousness. However, section 9(2) specifically states that forfeiture may not be ordered where the ground for a divorce is mental illness and continuous unconsciousness. It was important for the legislature to clarify the law in cases of ill health because originally, under Roman law, an order for forfeiture of patrimonial benefits could be made against persons who suffered from incurable mental illness.¹¹⁷ The legislature confirmed that this position was not received in South African law. On the face of it, this protection of the ill is a welcome feature as such persons are not in control of their circumstances, and nor can they defend themselves in divorce proceedings involving forfeiture. It is submitted that the seeming protection is quickly removed when one considers that the irretrievable breakdown of a marriage may be used to obtain a divorce decree even when one spouse is mentally ill or unconscious – in which case, forfeiture becomes possible.

Section 9(1) is clear regarding what may be forfeited – a patrimonial benefit. This patrimonial benefit may be forfeited in whole or in part. There is often confusion among students of law and some practitioners regarding the

¹¹¹ Heaton and Kruger *South African Family Law* 113.

¹¹² [2020] ZASCA 54.

¹¹³ *Monyepao v Ledwaba supra* par 21.

¹¹⁴ *Ibid.*

¹¹⁵ Hahlo 1984 SALJ 457.

¹¹⁶ *Monyepao v Ledwaba supra* par 19.

¹¹⁷ Marumoagae "The Regime of Forfeiture of Patrimonial Benefits in South Africa and a Critical Analysis of the Concept of Unduly Benefitted" 2014 *De Jure* 85 91.

meaning of forfeiture of patrimonial benefits as a whole – also known as complete forfeiture. Some assume that this means that a person forfeits everything, including what they brought into the marriage. This is not the case. In South African law, a party to a marriage cannot forfeit what they brought into the marriage.¹¹⁸ For this reason, forfeiture as a whole does not mean that a party to a marriage forfeits what they brought into the marriage. They only forfeit what they stand to benefit by virtue of the marriage. This may be illustrated as follows. Bonny and Bonela are married in community of property. The joint estate is worth R1.5 million. Bonny contributed R600 000 and Bonela contributed R900 000. On dissolution of their marriage, they are each entitled to R750 000. Bonny will get R150 000 more than what she contributed. This R150 000 is a patrimonial benefit, which may be forfeited. Whole forfeiture means that the whole R150 000 is forfeited. Partial forfeiture means a portion of the R150 000 is forfeited. The extent of partial forfeiture is usually denoted in percentage form.¹¹⁹ However, Bonny cannot forfeit the R600 000 because she brought it into the marriage. Heaton criticises the rule that a person cannot forfeit what they brought into the marriage. She points out that forfeiture is only effective when ordered against the poorer spouse.¹²⁰ The example given above supports this argument. Bonny is the poorer spouse; forfeiture will only be effective when ordered against her. If it were ordered against Bonela, it would not be effective because he contributed the most into the joint estate.

A patrimonial benefit has been clearly illustrated, but how can it be defined? The DA does not define it. Sibisi submits that a patrimonial benefit is one that accrues to a party to a marriage by virtue of the marriage.¹²¹ A party does not contribute towards the acquisition of the benefit in question. They acquire this benefit by being married. This is the principal reason that a person cannot forfeit what they brought into the marriage because it is not a patrimonial benefit. A patrimonial benefit includes an accrual claim and a benefit in terms of an antenuptial contract.¹²² Section 9(1) makes it clear that a patrimonial benefit may be forfeited if the other party will, in relation to the other, be unduly benefitted. This brings into purview the meaning of undue benefit. Marumoagae submits that an undue benefit is one that accrues to a person whose conduct does not justify such a person receiving it.¹²³ In *Molapo v Molapo*,¹²⁴ an undue benefit was described as one that is disturbingly unfair. Sibisi submits that an undue benefit refers to something that a guilty party to a marriage acquires in the absence of any moral or legal

¹¹⁸ See generally *M v M LP* (unreported) 2017-06-19 case no 1070/2014. Bonthuys (“The Rule That a Spouse Cannot Forfeit at Divorce What He or She Has Contributed to the Marriage: An Argument for Change” 2014 *SALJ* 439 445) argues that a person should forfeit everything, including what they brought into the marriage. She observes, with authority, that the rule that a person could forfeit everything has never been expressly overturned by our courts.

¹¹⁹ Sibisi 2022 *Obiter* 267.

¹²⁰ Heaton “Striving for Substantive Gender Equality in Family Law: Selected Issues” 2005 *South African Journal of Human Rights* 547 557.

¹²¹ Sibisi 2022 *Obiter* 266.

¹²² Hahlo 1984 *SALJ* 457.

¹²³ Marumoagae 2014 *De Jure* 98.

¹²⁴ FSB (unreported) 2013-03-2014 case no 4411/10 par 22.13.

entitlement.¹²⁵ He also adds that a spouse who does not contribute to the growth of the marital estate, in circumstances where they are able to do so, should also forfeit a patrimonial benefit. Should such a spouse benefit, the benefit will also be undue.¹²⁶

In *Wijker v Wijker*,¹²⁷ the then-Appellate Division held that in deciding whether a benefit is undue, a court must make a value judgment, taking into account the three factors that appear in section 9(1) of the DA.¹²⁸ These factors are: the duration of the marriage; the reason for the irretrievable breakdown of the marriage; and any substantial misconduct. While a court is enjoined to consider all these factors, it is not essential for a party to plead and prove all three factors for a court to award an order of forfeiture of patrimonial benefits.¹²⁹ The existence of at least one of the factors is sufficient for a forfeiture order. It is clear from studying these factors that the fault principles have not been completely left out of divorce jurisprudence.¹³⁰ Reference to substantial misconduct bears testimony to this. Nevertheless, a forfeiture order may be made in the absence of marital fault. It may be made solely on the basis that the marriage was of a short duration.¹³¹ What constitutes a short duration is unclear. However, in *Botha v Botha*,¹³² the Supreme Court of Appeal suggested that a short duration was a marriage of less than 10 years.

As noted above, courts should also consider the reason for the irretrievable breakdown and any substantial misconduct. It is submitted that substantial misconduct and marital fault have the same meaning. These refer to conduct that is considered serious enough to break the bond of marriage.¹³³ These include adultery, malicious desertion, imprisonment and abuse.¹³⁴ However, it is not required that the substantial misconduct must have led to the breakdown of the marriage. It is well known that many marriages can withstand marital misconduct, and it would be undesirable if only substantial misconduct that led to the irretrievable breakdown of the marriage was considered for the purposes of a forfeiture order. The factors make it clear that the court must consider substantial misconduct, alongside the reason for the breakdown of the marriage.

The factors may be criticised for taking into account only the duration of the *marriage* relationship between the parties. These days, it is not uncommon for marriages to be preceded by an extended period of cohabitation or universal partnership, and also to build an estate together during this informal period. In addition, it is not uncommon for the parties to get married only at a later stage. However, should the marriage terminate,

¹²⁵ Sibisi 2022 *Obiter* 268.

¹²⁶ *Ibid.*

¹²⁷ [1993] 4 All SA 857 (AD).

¹²⁸ *Wijker v Wijker supra* par 19.

¹²⁹ *Matyila v Matyila* 1987 (3) SA 230 (W) 234G.

¹³⁰ Van Heerden *et al Family Law in South Africa* 178.

¹³¹ *T v R* 2017 (1) SA 97 (GP) par 20.18.

¹³² 2006 (4) SA 144 (SCA) par 13.

¹³³ Phajane *Substantial Misconduct as a Factor in the Determination of Forfeiture of Patrimonial Benefits at Divorce in South Africa* (LLM dissertation, North-West University) 2022 31.

¹³⁴ Bonthuys 2014 *SALJ* 451 and Phajane *Substantial Misconduct* 18–19.

courts are only enjoined to consider the duration of the marriage relationship and nothing beyond that. It is a decided point in our law that courts do not have unfettered discretion to award forfeiture. They are confined to the three factors above.¹³⁵ Thus, the courts do not enjoy a discretion to consider the duration of the parties' entire relationship. It is relevant to the present discussion that a customary marriage is not an event but a culmination of a series of events,¹³⁶ during which parties may live together and pool their resources towards a common home. Courts should consider this period as well. However, each case must be decided on its own facts.

5 FORFEITURE OF PATRIMONIAL BENEFITS IN POLYGYNOUS CUSTOMARY MARRIAGES

Before embarking on this part of the article, it is important briefly to restate the matrimonial property rules in polygynous customary marriages. With respect to old polygynous customary marriages, property is divided into three categories – family property, house property and personal property. With respect to new polygynous customary marriages, matrimonial property is regulated by a court-approved contract, as envisaged in section 7(6) of the RCMA. However, if there is no court-approved contract, the decision in *MM v MN*¹³⁷ applies. The polygynous customary marriage will be out of community of property. It should be recalled that *MM v MN* is criticised above on the ground that the issue before the court did not concern the patrimonial consequences of the marriage.

That said, how should forfeiture provisions be applied in the context of polygynous customary marriages? This article is concerned with a situation where a court orders forfeiture in divorce proceedings between a husband and one of his wives. As pointed out above, by virtue of section 8(4)(a) of the RCMA, section 9 of the DA is applicable to the dissolution of customary marriages, and a patrimonial benefit may accordingly be forfeited. Thus, if any property can be defined as a patrimonial benefit, it stands to be forfeited if the court orders forfeiture. Property that would otherwise be regarded as personal property may qualify as a patrimonial benefit if acquired by virtue of the marriage.

In cases where section 7(6) of the RCMA was complied with, the terms of the court-approved contract will determine what property qualifies as a patrimonial benefit for the purposes of section 9 of the DA. However, where there was non-compliance with section 7(6), any subsequent customary marriages will be out of community of property in light of *MM v MN*.¹³⁸ If the marriage is out of community of property, there will be no patrimonial benefit for the less affluent spouse and there will be nothing to forfeit. The only remedy for this spouse is a redistribution of assets in terms of section 7(3) of

¹³⁵ *Wijker v Wijker* 1993 (4) SA 720 (A) 727. See also Marumoagae "Factors Justifying Forfeiture of Patrimonial Benefits Orders: *Molapo v Molapo* (2013) ZAFSHC 29 14 Mar 2013" 2015 *Obiter* 232.

¹³⁶ *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) par 21.

¹³⁷ *Supra*.

¹³⁸ Notably, this part of the decision in *MM v MN* was followed in the recent decision, *Monyepao v Ledwaba* (SCA) unreported case 1368/18 of 27 May 2020.

the DA. Section 8(4)(a) and (b) of the RCMA introduces redistribution of assets as a remedy in divorce proceedings in all customary marriages, regardless of when the marriage was concluded. However, section 7(5)(c) of the DA provides that a court must take into account any forfeiture order in terms of section 9 of the DA. This means that a forfeiture order does have an influence on any possible redistribution-of-assets order.

On the argument that *MM v MN* is not ideal precedent, the same position applicable to old polygynous marriages should apply where a court-approved contract was not complied with. In which case, matrimonial property will be divided into house property, family property and personal property. In this situation, it is recommended that when a forfeiture-of-patrimonial-benefits order is made in divorce proceedings between a husband and one of his wives, it should apply with respect to the property of the house of the wife concerned as well as the wife's share in the family property to the extent that these may be defined as a patrimonial benefit. It should be noted that since it is only the husband who contributes to the family property, he cannot forfeit anything in the latter category of property. A person cannot forfeit what they brought into the marriage.

Although personal property may easily be classified as a patrimonial benefit, as pointed out above, it is recommended that forfeiture of patrimonial benefits should not apply to personal property. Perhaps an exception may be made with respect to luxurious items that are a patrimonial benefit. These items usually come at a price and should be forfeited in favour of the innocent spouse.

The factors named in section 9(1) of the DA – the duration of the marriage, reasons for the irretrievable breakdown of the marriage, and any substantial misconduct – do not present a problem. They can be applied as they are, the only exception being that what may qualify as substantial misconduct at common law, or in a monogamous marriage, may not be seen in the same light in polygynous marriages. For instance, adultery may be seen differently in polygynous marriages. Malicious desertion may also be seen differently in polygynous marriages. Since there is more than one wife, the fact that the husband distributes his time among all his wives should not be seen as desertion by any of the other wives.

6 CONCLUSION

This article has discussed matrimonial property in polygynous customary marriages. It has shown that matrimonial property in polygynous marriages differs from matrimonial property in monogamous customary marriages. It has also discussed the distinction between matrimonial property in old polygynous customary marriages and that in new polygynous marriages. In addition, it has highlighted the complexities involved. It has recommended that, by default, property should be divided into house property, family property and personal property in both old and new polygynous customary marriages, where section 7(6) of the RCMA has not been complied with. This article criticised *MM v MN* insofar as the court held that, in cases where section 7(6) is not complied with, the marriage will be out of community of property. It argued that *MM v MN* is not good precedent on the question of

matrimonial property in polygynous customary marriages where section 7(6) has not been complied with, because this question was not the main issue before the court. The issue before court in that case concerned the requirements for a valid subsequent customary marriage. As the court pointed out, section 7(6) is not a requirement for validity.

This article therefore recommends that since matrimonial property in polygynous customary marriages is distinctive, the same should be the case with the application of forfeiture of patrimonial provisions as set out in section 9(1) of the DA. When a court orders forfeiture of patrimonial benefits in divorce proceedings between a husband and one of his wives, the order should apply in relation to house property of the wife concerned and a share in family property insofar as these may be defined as patrimonial benefits. The rule that a person cannot forfeit what he or she brought into the marriage should apply. However, an exception should be made with regard to personal property. Although personal property may be a patrimonial benefit, courts should not order forfeiture in relation to these. The case should be different if the patrimonial benefit is a luxury item, in which cases it should be forfeited. If the parties did conclude a section 7(6) contract, which is less likely to be the case, patrimonial benefits will be determined with reference to the terms of the contract.