

NOTES / AANTEKENINGE

DOES SECTION 9(2) OF THE DIVORCE ACT 70 OF 1979 PROVIDE ADEQUATE PROTECTION FOR AN ILL SPOUSE?

1 Introduction

In simple terms, section 9 of the Divorce Act (70 of 1979) provides for forfeiture of patrimonial benefits (forfeiture) in divorce proceedings if the ground for the divorce is the irretrievable breakdown of a marriage. It was important for the legislature to specify that forfeiture may only be made where the ground for a divorce is the irretrievable breakdown of the marriage (s 3(a) read with s 4(1)), because the latter is not the only ground for a divorce in South African law. A marriage may also be dissolved by a decree of divorce on the grounds of mental illness or continuous unconsciousness (s 3(b) read with s 5). Section 9(2) further clarifies the legal position by providing that forfeiture may not be ordered against the defendant where the grounds for a divorce are mental illness or continuous unconsciousness. Obviously, the purpose behind section 9(2) is to provide protection for the mentally ill or unconscious spouse in divorce proceedings. However, the protection provided is lacking in two respects. First, as is shown below, mental illness and continuous unconsciousness, as grounds for a divorce, do not cover all defendants who suffer from mental illness or continuous unconsciousness. Defendants who are mentally ill or unconscious, but fall outside the ambit of section 5, are not protected by section 9(2). Consequently, a forfeiture order becomes possible against them. Secondly, as is shown below through case law, it appears possible to prosecute a divorce against a mentally ill or a continually unconscious spouse under section 4(1) – that is, on the basis of an irretrievable breakdown of the marriage. In this case, a forfeiture is possible and the protection in section 9(2) is circumvented.

In light of the above, the adequacy of the protection in section 9(2) is questioned. This note discusses the adequacy of the protection in section 9(2). It also seeks to recommend ways in which the defect in this provision may be remedied. The grounds for a divorce in South Africa are discussed and mental illness and continuous unconsciousness are contextualised within the broader divorce jurisprudence. Thereafter follows a more focused discussion on mental illness and continuous unconsciousness as grounds for a divorce, as provided for in section 5. These discussions also reflect on the arguments by other academics, including arguments that section 5 should be expunged from the Divorce Act. Forfeiture is discussed

briefly. In conclusion, the question whether section 9(2) provides adequate protection is considered together with the author's recommendations.

2 Grounds for a divorce in South Africa

Section 3 of the Divorce Act provides that a marriage may be dissolved by a decree of divorce only on the grounds of the irretrievable breakdown of a marriage (s 3(a)); mental illness (s 3(b)); and continuous unconsciousness (s 3(c)). Based on these, it is clear that the common-law fault-based divorce system, where the granting of a divorce decree was dependent on the defendant's guilt in that he or she committed adultery or malicious desertion (Hahlo "A Hundred Years of Marriage Law in South Africa" 1959 *Acta Juridica* 47 55), is no longer applicable. While this move has largely been welcomed, it has also been pointed out that the introduction of the no-fault divorce system has seen a rise in divorce rates (Schafer "Amendments to the Divorce Act: A Question of Priorities" 1984 *THRHR* 299 307). It has been argued that facilitating this high divorce rate undermines the need to protect marriage as an institution.

Because this note is on mental illness and continuous unconsciousness, these are dealt with in more detail below. Only the irretrievable breakdown of a marriage is discussed in this part of the note. The Divorce Act does not define the meaning of irretrievable breakdown of a marriage. Instead, determination of whether a marriage has irretrievably broken down was left within the discretion of the courts. Nevertheless, section 4(1) provides:

"A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them."

A simple reading of this provision makes it clear that it is not enough that the marriage relationship has broken down between the parties. In addition to the breakdown, what is required is that there must be no reasonable prospect that the marriage may still be restored into a normal marriage relationship between the parties to a marriage (Barnard "An Evaluation of the Divorce Act 70 of 1979" 1983 *Acta Juridica* 39 44). A normal marriage relationship is a relative term. Should the court consider what is normal in the eyes of the society or what is normal between the parties? In some marriages, the parties may be drunkards who attack each other, both physically and verbally, when under the influence of alcohol. While this may certainly be normal between the parties, it is frowned upon by society. It is submitted that courts have not adopted societal views on what constitutes a normal marriage relationship. Neither have they settled only on what is normal between the parties. Instead, courts have treated each case based on its own facts, bearing in mind that what may be normal for one marriage, may not necessarily be normal for another marriage (Barnard 1983 *Acta Juridica* 45). However, a normal marriage relationship has been associated with *consortium omnis vitae* (Van Heerden, Skelton and Du Toit *Family Law in South Africa* 2ed (2021) 137), and it includes companionship, love, affection, comfort, mutual services and sexual intercourse (Barnard 1983

Acta Juridica 45). Barnard opined that once consortium has ceased to exist, the marriage may have irretrievably broken down (Barnard 1983 *Acta Juridica* 45). Barnard's view is supported.

In light of the above, the court in *Naidoo v Naidoo* (1985 (1) SA 366 (T)) held that the test whether a marriage has irretrievably broken down comprises both a subjective enquiry into the breakdown of the marriage; and an objective enquiry into whether the breakdown is irretrievable (*Naidoo v Naidoo supra* 367C). The subjective component enquires into the attitudes of the parties towards the marriage relationship. The fact that at least one of the parties wants a divorce satisfies the subjective enquiry. It has been pointed out that the cooperation of both parties is necessary for a marriage to succeed (Van Heerden, Skelton and Du Toit *Family Law in South Africa* 138). However, this is not enough. The court must also conduct an objective enquiry into the history of the marriage relationship between the parties to determine if the breakdown is irretrievable (*Schwartz v Schwartz* 1984 (4) SA 467 (A) par 24).

During the early stages of the Divorce Act, there was uncertainty about whether a court had a discretion as to whether to order a decree of divorce once it was shown that the marriage had irretrievably broken down. This uncertainty was instigated by the use of the word "may" in section 4(1). In *Smit v Smit* (1982 (4) SA 34 (O)), the court considered itself to possess this discretion. However, in *Schwartz v Schwartz (supra)*, the Appellate Division, as it was, put an end to this uncertainty. It held that the effect of section 4(1) was to confer upon the court powers that it did not have. It further held that once it is shown that a marriage relationship between parties has irretrievably broken down, it becomes the duty of the court to order a decree of divorce (par 18). With this said, section 4(3) of the Act is also worth mentioning. This provision confers a discretion on the court to postpone divorce proceedings, but only if it appears before it that there is a reasonable possibility that the parties may become reconciled through marriage counselling, treatment or reflection. However, should the marriage counselling fail, the court will have no discretion but to decree a divorce.

It is worth highlighting that section 4(3) does not confer upon the court a wide discretion to refuse a divorce decree; it confers the power to exercise a narrow discretion under specific circumstances. Courts cannot just exercise their discretion in terms of section 4(3) without care. This discretion must be exercised judiciously, and only when there is a reasonable possibility that the parties may become reconciled through marriage counselling, treatment or reflection. It follows that if there is no such reasonable possibility, an order in terms of section 4(3) may not be made. Perhaps one of the greatest challenges to this provision is the meaning of marriage counselling, treatment or reflection. It is trite that marriage counselling may come from different sources – for instance, from churches, families, elders and experienced people, as well as professionals. The question is whether, the legislature (in s 4(3)) intended professional counselling or the former. If the former was also intended, section 4(3) may never be invoked, given that in almost every divorce case, one form of counselling or treatment is almost always attempted before initiating divorce proceedings. Indeed, a survey of

divorce cases shows that an order in terms of section 4(3) is seldom made (see the Southern African Legal Information Institute website on saflii.org).

Another example of the narrow discretion conferred upon the court appears in section 5A. This provision empowers the court to refuse a divorce if it appears during divorce proceedings that despite a divorce in a circular court, by reason of religious barrier or prescripts, one or both of the spouses will not be free to remarry unless the religious barrier to remarriage is removed. The court may refuse to order a civil divorce unless it is satisfied that the party whose responsibility it is to facilitate the religious divorce has taken all reasonable steps to remove the religious barriers. Alternatively, if the court does not order a decree of divorce, it may make any order that it finds just. A few things are worth highlighting with respect to section 5A. First, this provision was only added as an amendment to the Divorce Act in 1996 (Divorce Amendment Act 95 of 1996). Secondly, it applies only in cases of dual religious marriages (Abduroaf "An Analysis of s 5A of the Divorce Act 70 of 1979 and Its Application to Marriages Concluded in Terms of Islamic Law" 2023 *De Jure* 1 5). Thirdly, the powers of the court are invoked only if one or both of the parties will not be able to remarry because of a religious barrier or prescript. Finally, the court has a narrow discretion whether to refuse a divorce decree or to make any order that it finds just.

3 Mental illness and continuous unconsciousness as grounds for a divorce

Section 5 of the Divorce Act elaborates on mental illness and continuous unconsciousness as grounds for a divorce. These grounds have been labelled as the "supervening impossibility of the marriage" (Zaal "Divorcing the Afflicted: The Case Against Section 5 of the Divorce Act" 1983 *SALJ* 114 116). Mental illness is dealt with separately in section 5(1), whereas continuous unconsciousness is dealt with in section 5(2). These provisions are set out below, and are then the subject of a unified critical discussion.

3 1 *Mental illness*

Section 5(1)(a) and (b) of the Divorce Act provides that a court may grant a decree of divorce on the ground of mental illness if it is satisfied that the defendant, in terms of the Mental Health Care Act (17 of 2002): (i) has been admitted as a mentally ill patient pursuant to a reception order; (ii) is being detained as a state patient at an institution or other place, or (iii) is being detained as a mentally ill convicted prisoner at an institution, and has not been unconditionally discharged for a period of at least two years immediately prior to the institution of the divorce proceedings. There must also be evidence from at least two psychiatrists, one of whom must have been appointed by the court, that the defendant is mentally ill and that there is no reasonable prospect they will be cured of the mental illness.

Mental illness as a ground for a divorce is not novel to the Divorce Act. Prior to this Act, there were doubts whether mental illness was ever a common-law ground for a divorce. The doubts were understandable in a divorce system that was premised on fault. Owing to this uncertainty, if a

person wanted to divorce a mentally ill spouse, they had to try and find the fault in order to qualify for a divorce (Zaal “Some Medico-Legal Aspects of Divorce in South Africa” 1985 *CILSA* 237 238). The uncertainty about whether mental illness ever constituted a ground for a divorce was lifted when the Divorce Laws Amendment Act (32 of 1935) was passed. This Act added as grounds for divorce incurable mental illness of no less than seven years (s 1(1)(a)) and the imprisonment of a spouse for no less than five years after being declared a habitual criminal (s 1(1)(b)). Admitting mental illness as a ground for a divorce assumed that such illness destroys the marriage relationship between husband and wife, thereby necessitating a permanent separation (Turpin “Desertion and Insanity” 1958 *SALJ* 438). Although this assumption is questionable in a world where some marriages can withstand many challenges, admitting mental illness as a ground for a divorce was welcomed at the time because it saved spouses who wanted to divorce their mentally ill spouses from branding the mental illness as fault.

For the sake of completeness, it is important to highlight that the Divorce Act repealed the whole of the Divorce Laws Amendment Act. While mental illness was obviously retained as a ground for a divorce, the same is not the case with imprisonment. Accordingly, imprisonment is not a ground for a divorce *per se*. A party seeking a divorce on the ground that the defendant is imprisoned will have to couch the case in such a way that the irretrievable breakdown of the marriage is established, as required by section 4(1).

3.2 *Continuous unconsciousness*

Section 5(2) empowers the courts to decree a divorce if the defendant is, by reason of a physical disorder, in a state of continuous unconsciousness. The court must be satisfied of two things. First, the defendant must have been unconscious for a period of six months immediately prior to the institution of divorce proceedings. Secondly, after hearing evidence of two medical practitioners, one of whom must be a neurologist or neurosurgeon appointed by the court, the court must be satisfied that there are no reasonable prospects of the defendant gaining consciousness.

3.3 *Protection of the interests of the mentally ill and the continually unconscious spouse in divorce proceedings*

Section 5 provides some measures to protect the interests of the defendant where mental illness and continuous unconsciousness are grounds for a divorce. The court is empowered to appoint a legal practitioner to represent the defendant and to order the plaintiff to pay for the costs of the representation (s 5(3)). The court is also empowered to make the order it deems fit regarding the provision of security in respect of any patrimonial interest that the defendant may have in the divorce (s 5(4)). As already alluded to above, section 9(2) also provides that a forfeiture order may not be ordered if the ground for divorce is mental illness or continuous unconsciousness.

3 4 Discussion of the grounds

When compared with the 1935 enactment, section 5(1), though still stringent (Zaal 1983 *SALJ* 115), has relaxed the requirements for mental illness as a ground for a divorce. The minimum waiting period is now only two years, whereas it was seven years under the 1935 enactment. Whereas the 1935 enactment required incurable insanity, the current Act simply requires that there must be no reasonable prospect that the mental illness will be cured. There are additional challenges with section 5(1). The Act does not say what will constitute reasonable prospects of the mental illness being cured. Will a divorce action fail simply because somebody with similar illness has been cured before using certain methods? In this day and age, the meaning of "cure" may be debatable. For instance, in the South African context there is medical plurality in the form of religious, traditional and Western medicines. Religion may insist that a certain mental illness is curable, whereas physicians may say otherwise. A *curator* representing a mentally ill defendant may argue that the defendant may still be cured should they undergo religious healing. Be that as it may, the wording of section 5(1) seems to tilt in favour of Western medicines. The requirement of psychiatrists supports this assertion. What about religious leaders and traditional healers?

On the other hand, continuous unconsciousness as a ground for a divorce is novel to the Divorce Act. What is required in terms of section 5(2) is that the continuous unconsciousness must be caused by a physical disorder. However, the legislature does not define the term "physical disorder". The following questions arise in this respect: Is it not possible for a mental disorder to lead to a physical disorder? Is the converse true as well? Is it possible for a physical disorder to lead to mental illness? Zaal points out that the term "physical disorder" is used to distinguish between divorces for physical and mental illnesses. This author is critical of this approach as the distinction between a physical and mental illness is not always clear-cut, and a divorce action may therefore be dismissed on a technicality if pleaded on a wrong ground (Zaal 1985 *CILSA* 239). It is also clear that both mental illness and continuous unconsciousness are premised on time periods. It has been pointed out that these time periods were established through evidence delivered before the South African Law Commission. Thus, after the passage of these time periods, there can be certainty that the mental illness or the continuous unconsciousness is incurable (Barnard 1983 *Acta Juridica* 41).

The existence of mental illness and continuous unconsciousness as separate grounds for a divorce have been questioned. It has been stated that the legislature intended to distinguish between the grant of a divorce on the grounds of irretrievable breakdown and mental illness or continuous unconsciousness (Schafer 1984 *THRHR* 301). It has also been pointed out that these grounds constituted special circumstances for which special rules were necessary (Heaton and Kruger *South African Family Law* 4ed (2015) 122). Zaal disagreed with this approach. The author stressed the need for the legislature to avoid classifications that might encourage further stigmatisation of vulnerable groups such as the mentally ill (Zaal 1983 *SALJ* 117).

There are arguments that section 5 allows the dissolution of a marriage that has not broken down irretrievably. Section 5 simply requires that when its requirements are met, the court must grant a divorce decree regardless of whether the marriage is viable or not (Zaal 1983 SALJ 117). The unqualified presumption that mental illness destroys the marriage relationship between husband and wife has been retained. This is clearly problematic because the fact that a spouse is mentally ill does not mean that the marriage has broken down irretrievably. Zaal argues that the legislative classification that encourages the placing of mentally ill spouses in special institutions may in fact contribute to the breakdown of the marriage (Zaal 1983 SALJ 117).

While the aim of section 5 is also to protect vulnerable spouses in divorce proceedings (Robinson, Human, Boshoff and Smith *Introduction to South African Family Law* 3ed (2008) 197), the anomaly is that it does not protect all spouses who are mentally ill or unconscious (Zaal 1983 SALJ 119). These include a spouse who has been mentally ill for less than two years, a spouse who has been unconscious for less than six months, a mentally ill spouse who voluntarily surrenders to treatment at an institution, and a patient in a private mental institution (Zaal 1983 SALJ 120). In addition, section 5(1) does not apply to spouses who are not undergoing compulsory incarceration in a state mental institution (Zaal 1983 SALJ 119); it does not apply if the mentally ill spouse has not been institutionalised (Midgley "The Divorce Act: Reconsideration Necessary" 1982 SALJ 22 24), and if a patient is detained outside of South Africa (Turpin 1958 SALJ 439 and Midgley 1982 SALJ 24). Zaal argues that the insistence on compulsory treatment undermines modern medicine's increasing reliance on voluntary and community-based treatment (1985 CILSA 238). If the category of patient does not fall within the ambit of section 5, the divorce will have to proceed under section 4(1) – the irretrievable breakdown of a marriage. In this situation, the mental illness and continuous unconsciousness will, instead, substantiate the irretrievable breakdown of a marriage (Midgley 1982 SALJ 22).

3 5 *Does section 4(1) permit a divorce order against a mentally ill or continually unconscious defendant on the ground of irretrievable breakdown of a marriage?*

The main question of this note is whether section 4(1) may still be invoked even where the requirements under section 5 are met. In other words, does a party to divorce proceedings in which the defendant is mentally ill or unconscious have a choice between using section 5 and section 4(1)?

In *Dickinson v Dickinson* (1981 (3) SA 856 (W)), the plaintiff brought divorce proceedings against the defendant in terms of section 4(1) on the ground that the marriage relationship between them had irretrievably broken down; alternatively, in terms of section 5(1), on the ground of the defendant's mental illness (*Dickinson v Dickinson supra* 859D–E). At the time that the divorce proceedings were instituted, the defendant had been in an institution in terms of a reception order for approximately two years. However, her mental illness had not been proved. Although the court had initially ordered

the appointment of a *curator ad litem* and psychiatrist for the benefit of the defendant, the plaintiff was subsequently unable to afford the costs of these services. As a result, proof regarding the defendant's mental illness could not be solicited (*Dickinson v Dickinson supra* 860G). It goes without saying that the plaintiff could also not afford a second psychiatrist as required by section 5(1) (*Dickinson v Dickinson supra* 860B). For this reason, section 5(1) was abandoned in favour of section 4(1).

The court had first to assess if it was possible to proceed in terms of section 4(1). Coetzee J found that section 4(1) did permit the divorce. He held that the requirement under this provision is the objective fact regarding the irretrievable breakdown of a marriage and that there was no requirement of guilt of any kind (*Dickinson v Dickinson supra* 860E). Coetzee J then accepted that the marriage relationship between the parties had irretrievably broken down (*Dickinson v Dickinson supra* 860F). However, he could not order a decree of divorce in terms of section 4(1) because the matter had proceeded in terms of section 5(1), and the summons had been served on the *curator ad litem*. Furthermore, because section 5(1) had been abandoned, the court held:

"Before the court is convinced of the mental illness of a person, it is impossible to appoint a curator with any power to act contractually on behalf of such a person ... He has no powers whatsoever to represent her on any other basis and in any case he has no powers to enter into any contracts on her behalf." (*Dickinson v Dickinson supra* 861A–C)

Accordingly, the plaintiff had to effect proper service on the defendant (*Dickinson v Dickinson supra* 861E–F).

Since *Dickinson v Dickinson*, it has been accepted that where the defendant is mentally ill or unconscious, the plaintiff has a choice between section 4(1) and section 5. Some authors have even argued that section 4(1) (the irretrievable breakdown of a marriage) should be the only ground for a divorce. In this light, what then is the purpose of section 5 in the Divorce Act? This question was considered in *Krige v Smit* (1981 (4) SA 409 (C)), where the court held that where the requirements in section 5 exist, the question of the irretrievable breakdown of the marriage relationship becomes irrelevant (*Krige v Smit supra* 415H). It is only in the absence of the requirements in section 5 that the court may proceed in terms of section 4(1). In *Krige v Smit*, the defendant had been in a semi-conscious state as a result of a brain haemorrhage (*Krige v Smit supra* 411E). However, the defendant did regain consciousness, albeit with permanent incapacity (*Krige v Smit supra* 416C). The proceedings then continued under section 4(1), and it was proved that the marriage had irretrievably broken down and the plaintiff had already entered into a relationship with another man and wanted to remarry (*Krige v Smit supra* 416E). The court granted the decree of divorce (*Krige v Smit supra* 416H).

4 Forfeiture of patrimonial benefits – section 9 of Divorce Act

Section 9 of the Divorce Act is a relic of the fault principle (Hahlo "When Is a Benefit Not a Benefit" 1984 SALJ 456 457). The original aim of forfeiture of

patrimonial benefits was to punish the guilty spouse by making sure that they did not derive any patrimonial benefit from a marriage that they had wrecked (Hahlo *The South African Law of Husband and Wife* 2ed (1963) 418). This aim is partially retained by section 9. While fault is no longer considered in the grounds of a divorce, it plays a major role in determining the economic consequences of a divorce. It may be argued that forfeiture had a gendered application insofar as it prescribed economic sanctions against the guilty spouse. In the past, women were unable to secure employment and build an estate. Since it is women who benefitted from marriages the most, the corollary is that they felt the impact of forfeiture the most. This was compounded by the common-law rule that a person could not forfeit what they brought into the marriage (Evans *Law of Divorce in South Africa* (1920) 125). Most women did not benefit from this rule in any way because they seldom generated wealth that they could bring into the marriage. It comes as no surprise that the rule that a spouse cannot forfeit what they brought into the marriage has been criticised (Heaton "Striving for Substantive Gender Equality in Family Law: Selected Issues" 2005 *SAJHR* 547 557).

Section 9(1) reads:

"When a decree of divorce is granted on the ground of the 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 breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, one party will in relation to the other be unduly benefitted."

Forfeiture has been discussed in significant details by other academics (Hahlo *The South African Law of Husband and Wife* 5ed (1985) 372–382 and 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). Against this background, this note does not delve into repetitive discussions, save where necessary.

The abstract above sets out a few rules regarding forfeiture. The first is that a forfeiture order may be made when a decree of divorce is granted on grounds of the irretrievable breakdown of a marriage. Secondly, a benefit may only be forfeited if it is a patrimonial benefit. It is submitted that a patrimonial benefit is one that a person derives by virtue of the marriage. This excludes those assets that a party brought into the marriage. The third rule is that a court has a narrow discretion on whether to order whole or partial forfeiture. It has been observed that courts are reluctant to order whole forfeiture in the absence of wrongdoing. Complete forfeiture is a likely order if the defendant is the wrongful party and has made a meagre contribution (see *Singh v Singh* 1983 (1) 781 (C) 784).

The fourth rule is that a forfeiture order may only be made if the defendant will be unduly benefitted. The legislature does not define "unduly benefitted". A study of court judgments also shows that courts have not divulged much about this concept. It is submitted that an undue benefit is one that a person derives in the absence of any legal or moral entitlement. In *Wijker v Wijker*

([1993] 4 All SA 857 (AD)), the court held that what must first be determined is whether a party will in fact benefit (*Wijker v Wijker supra* par 19). Once it is established that a party will benefit, the second and final step is to determine whether the benefit is undue (*Wijker v Wijker supra* par 19). The latter step necessitates a value judgment considering the duration of the marriage, the circumstances that gave rise to the breakdown of the marriage and any substantial misconduct on the part of either of the parties.

5 Does section 9(2) of the Divorce Act provide adequate protection?

The impact of section 9(2) is that forfeiture, as discussed above, cannot be ordered if the ground for the divorce is anything other than the irretrievable breakdown of the marriage. Essentially, section 9(2) shields the mentally ill or unconscious spouse (who falls within the ambit of section 5(1) and (2)) from the impact of a forfeiture order only if the mental illness or continuous unconsciousness is a ground for the divorce. Since forfeiture is a relic of the fault principle, the obvious assumption in section 9(2) is that spouses who are mentally ill or unconscious cannot be punished for what is beyond their control. This legislative measure is well in place but for the deficiencies with the interpretation and application of section 5(1) and (2), which have been discussed above. The deficiencies are further compounded by the fact that even if the requirements in section 5 exist, the plaintiff has a choice whether to prosecute a divorce under section 4(1) or section 5 as enunciated in *Dickinson (supra)* and *Krige (supra)*, and can thereby circumvent the impact of the protective provision in section 9(2) (Schafer 1984 *THRHR* 302).

If a plaintiff decides to prosecute a divorce under section 5, the protection in section 9(2) is full scale and straightforward. However, if they decide to prosecute the divorce under section 4(1), nothing in section 9(2) prevents the court from ordering forfeiture. This conclusion is based on a literal interpretation of this provision. Various suggestions have been made. Zaal called for the complete removal of section 5 as it fails to cater for certain categories of person, as pointed out above (in which case section 9(2) will become redundant). The author calls for a better replacement for this provision, one that will consider the real family circumstances in each divorce case; if it emerges that any party to a divorce is seriously ill or mentally challenged, a curator should be appointed (Zaal 1983 *SALJ* 125). Midgley also calls for the same removal on the ground that section 5 is ineffective as it may be circumvented (Midgley 1982 *SALJ* 25). Hahlo labels section 9(2) as a "dead letter". However, he is of the view that courts are unlikely to order forfeiture against a mentally ill or unconscious defendant (Hahlo *Law of Husband and Wife* 5ed (1985) 373 n 111).

Since it is clear that section 9(2) does not provide adequate protection, what steps may be taken to ensure that qualifying defendants are protected in divorce proceedings? It is submitted that the immediate solution is the one suggested by Hahlo (Hahlo *Law of Husband and Wife* 373 n 111): that courts should not order forfeiture if the defendant is either mentally ill or unconscious as envisaged in section 5(1) and (2) respectively. However, the problem with this approach is that section 5(1) and (2) is already defective

insofar as it does not cover all defendants. In addition, nothing in section 9 supports it. In this light, some courts may ignore Hahlo's suggestion and proceed to order forfeiture where section 4(1) has been relied on.

Perhaps the best solution is an overhaul of section 5 that covers even those defendants currently excluded from the ambit of section 5. Insistence on the time periods should be dropped. There should be emphasis on the defendant's current state – that is, the fact that they are currently mentally ill or unconscious. Any speculation regarding the prospects of recovery should play little to no role. The duration of the mental illness and unconsciousness should also play little to no role. The overhaul of section 5 must also draw a distinction between those cases where the events substantiating forfeiture and the irretrievable breakdown of the marriage occurred prior to the mental illness or unconsciousness, and those where the mental illness or unconsciousness is relied upon for a divorce. It should not be enough for courts to refuse forfeiture solely because the defendant happens to fall within the ambit of section 5. The overhaul should allow forfeiture, especially in cases where mental illness or unconsciousness is self-inflicted just to frustrate the defendant.

6 Conclusion

This note has shown that section 9(2) of the Divorce Act, as it currently stands, does not afford adequate protection to mentally ill or unconscious defendants against a forfeiture of patrimonial benefits order. It has shown that the plaintiff may circumvent the impact of this protective provision by prosecuting the divorce under the provisions of section 4(1), in which case a forfeiture order becomes competent. This note has discussed the ground in section 4(1) – the irretrievable breakdown of a marriage. Mental illness and continuous unconsciousness, as grounds for a divorce as envisaged in section 5, have also been discussed in great detail. The defects in section 5 have also been highlighted.

This note proposes an overhaul of section 5, and by extension, section 9(2). This overhaul should accommodate all cases of mental illness and continuous unconsciousness with little to no regard to the duration of the condition and any speculation regarding the prospects of recovery. Furthermore, the overhaul should allow forfeiture in cases where the events justifying forfeiture and the irretrievable breakdown of the marriage occurred before the mental illness or unconsciousness. Forfeiture should also be allowed in cases where the mental illness and unconsciousness is self-inflicted in order to frustrate the plaintiff's case.

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