RESEARCH ARTICLE

Siyabonga Sibisi

Senior Lecturer, UKZN, Durban
ORCID: https://orcid.org/0000-0002-2372-5173

DOI: https://doi.org/10.38140/jjs.v48i2.7106

ISSN 0258-252X (Print)
ISSN 2415-0517 (Online)

Journal for Juridical Science
2023:48(1):145-159

Date Published:
30 June 2023

THE IMPACT OF THE DURATION OF THE MARRIAGE IN FORFEITURE OF PATRIMONIAL BENEFITS: *PP V JP* [2020] ZAGPJHC 281 (2 NOVEMBER 2020)

SUMMARY

When deliberating whether to issue a forfeiture order for patrimonial benefits, section 9 of the *Divorce Act* 70 of 1979 mandates the court to take into account the marriage's duration, the reasons behind the marriage's breakdown, and any significant misconduct. These factors aid the court in determining if any financial benefits granted to a party are unwarranted. The presence of any of these factors might provide grounds for justifying a forfeiture order.

This analysis examines how the duration of a marriage impacts a court's decision regarding forfeiture, as well as how the duration of the marriage affects the extent of the forfeiture, as explored in the case of *PP v JP* [2020] ZAGPJHC 281 (2 November 2020). It illustrates that while forfeiture provisions retain a residual influence from the fault-based divorce system, the duration of the marriage remains distinctively impartial to fault.

1. INTRODUCTION

In reality, matrimonial property matters are not as straightforward as they may seem on paper. For instance, the general rule is that the parties will share equally in the division of the joint estate on dissolution of a marriage that is in community of property.[1] However, this equal sharing is not always guaranteed. It is possible for one party not to receive anything, especially when they have not contributed any assets into the joint estate and they

Published by the UFS
http://journals.ufs.ac.za/index.php/jjs

1 Van Heerden *et al.* 2021:170.

have committed substantial misconduct.[2] In some cases, there may be some form of property sharing, but not equal property sharing, despite the marriage being in community of property. A deviation of this kind is justified in law. There are two grounds that may justify a deviation from the general rules regarding matrimonial property on divorce. These are redistribution of assets in terms of sec. 7(3) of the *Divorce Act*[3] and forfeiture of patrimonial benefits in terms of sec. 9 of the same *Act*.

A divorce court has a discretion to order a redistribution of assets of the wealthier spouse to the spouse with less assets, if the marriage was out of community of property without the accrual system and the spouse with less assets has made a direct or indirect contribution to the growth or maintenance of the estate of the wealthier spouse.[4] On the other hand, a court may order total or partial forfeiture of patrimonial benefits against the defendant if the latter will, in relation to the applicant, be unduly benefitted, should the order not be made.[5]

This case note focuses on forfeiture of patrimonial benefits. It focuses, in particular, on the impact of the duration of the marriage relationship on a court's decision whether to order forfeiture and the impact of the duration of the marriage in determining the extent of the forfeiture. The duration of the marriage was one of the central issues in the Gauteng Local Division sitting as a court of appeal in *PP v JP*,[6] held in Johannesburg. This case note was stimulated by this decision. It opens with a general discussion on forfeiture of patrimonial benefits. The facts and decision in *PP v JP* are then discussed. Thereafter, the impact of the duration of the marriage relationship on forfeiture will be discussed. A conclusion will then be reached.

2. FORFEITURE OF PATRIMONIAL BENEFITS

2.1 Forfeiture under the common law

The common law purpose behind forfeiture of patrimonial benefits is to ensure that a person does not benefit financially from a marriage that he or she has wrecked[7] and, if the court ordered forfeiture, it could only be total forfeiture.[8] The word 'wrecked' suggests that fault on the part of the defendant was

2 Substantial misconduct includes adultery, malicious desertion, assault, failing to contribute to the joint estate, lack of care for the family, and so on. These are discussed further below.
3 *Divorce Act* 70/1979.
4 See sec 7(4). In light of the decision in *G v Minister of Home Affairs* 2022 (5) SA 478 (GP), it is no longer relevant when the parties were married. In this decision, the court held that sec. 7(3) was, among others, unconstitutional in so far as it differentiated based on the date of the marriage. However, at the time of writing this submission, this decision was yet to be confirmed by the Constitutional Court.
5 See sec. 9(1).
6 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020).
7 Hahlo 1963:418.
8 Hahlo 1984:457.

necessary. Clearly, forfeiture was aligned to the common law divorce system which was based on fault. Under the common law, a divorce could only be obtained if fault or marital fault had been committed by the defendant.[9] In *Schwartz v Schwartz*,[10] the court held that marital fault, for the purposes of obtaining a divorce, comprised adultery and malicious desertion.[11] It is not clear whether imprisonment constituted marital fault for which a divorce could be obtained under the common law.[12] However, in 1935, the *Divorce Laws Amendment Act*[13] included, among others, the imprisonment of the defendant for a period of five years after having been declared as a habitual criminal as a ground for a divorce.[14] The spouse who had committed marital fault could not bring divorce proceedings. Only the innocent spouse could bring divorce proceedings.[15]

Under the current *Divorce Act*, marital fault is no longer necessary for a divorce decree.[16] A court may grant a divorce decree, even if both the parties are innocent of any marital fault. In this situation, divorce will simply be ordered based on the irretrievable breakdown of the marriage. As will be noted below, a forfeiture order may also be made where the parties are innocent of any marital misconduct.

2.2 Forfeiture under the *Divorce Act*

Forfeiture of patrimonial benefits has been codified by the *Divorce Act*. It is not the intention of this note to compare common law forfeiture and the *Divorce Act*; it suffices to state that the common law forfeiture was not codified as is. Accordingly, sec. 9(1) of the *Divorce Act* provides that:

> 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.

9 Quansah (2005:121) points out that forfeiture of patrimonial benefits is a product of a fault-based divorce. See also Marumoagae 2015:233.
10 *Schwartz v Schwartz* 1984 (4) SA 467 (A).
11 *Schwartz v Schwartz* 1984 (4) SA 467 (A):473A-B.
12 *Schwartz v Schwartz* 1984 (4) SA 467 (A):437C.
13 *Divorce Laws Amendment Act* 32/1935.
14 See generally *Schwartz v Schwartz* 1984 (4) SA 467 (A):437C.
15 Barratt 2016:334.
16 Quansah (2005:121) points out that the insistence on guilt and innocence tended to have a damaging impact on post-divorce relationships between the ex-spouses *inter se* and their children. The author also points out that the departure from the fault-based divorce emanated from the *English Matrimonial Causes Act*, 1973. Other jurisdictions followed from here. South Africa followed in 1979, when the *Divorce Act* was promulgated.

A reading of this provision makes it clear that, although the fault principle has been abolished as a ground for a divorce, forfeiture of patrimonial benefits is a lingering influence of the fault principle in so far as the court is enjoined to have regard to any substantial misconduct.[17] Because of this, one may instead argue that the fault principle has only been semi-abolished.

With the above said, sec. 9(1) makes it clear that the requirements for a forfeiture order are twofold, namely jurisdictional requirements and substantive requirements. In this context, a jurisdictional requirement is one that must be present before the court may hear the substantive merits of a matter. There are two jurisdictional requirements in sec. 9(1). The first jurisdictional requirement is that the proceedings must be divorce proceedings. This is interesting because divorce is not the only way in which a marriage comes to an end. There are three ways in which a marriage may come to an end, namely divorce, annulment, and death.[18] The fact that sec. 9(1) has no application when the marriage has ended through death has been criticised.[19] The circumstances of the marriage before the death could be such that, had the marriage ended in divorce, a strong case for an order of forfeiture could be mounted.[20]

The second jurisdictional ground is that the ground for the divorce should be the irretrievable breakdown of the marriage. This is also interesting because the irretrievable breakdown of a marriage is not the only ground for a divorce. A divorce may also be obtained on the grounds of mental illness[21] and continuous unconsciousness.[22] Sec. 9(2) illuminates the legal position, by making it clear that a forfeiture order may not be made against a mentally ill and continually unconscious spouse.

Once the jurisdictional grounds have been satisfied, the court may entertain the merits of the matter. It will only order forfeiture if the substantive requirements are satisfied. There are two substantive requirements. The first is that the benefit to the defendant must be a patrimonial benefit and secondly, the defendant must, in relation to the applicant, be unduly benefitted, should forfeiture not be ordered. It is, therefore, essential to define what will constitute a patrimonial benefit and the meaning of unduly benefitted. A patrimonial benefit has been defined as one which a spouse acquires only by reason

17 See Carnelley (2016:11) who points out that adultery, which is a cornerstone of the fault principle, is still a factor when deciding on post-divorce spousal maintenance, forfeiture of patrimonial benefits, and a redistribution order.

18 Heaton & Kruger 2015:113.

19 Sibisi 2022:1.

20 In *Monyepao v Ledwaba* [2020] ZASCA 54 (27 May 2020), the court *a quo* did order forfeiture where the marriage had already ended in death. However, this decision was overturned by the full bench in *Ledwaba v Monyepao* [2018] ZALMPPHC 61 (25 April 2018). The SCA upheld the decision of the full bench on the ground that a forfeiture order is only permissible in divorce proceedings. In *Ex Parte Meyer, NO: In re Meyer v Meyer* 1962 (2) SA 688 (N):689F-H, the court held that, once the marriage had ended in death, the action for forfeiture of patrimonial benefits cannot be transmitted to the heirs of a deceased person.

21 Sec. 5(1) of the *Divorce Act.*

22 Sec. 5(2) of the *Divorce Act.*

of a marriage.[23] More specifically, these are benefits that arise because the parties married each other in terms of a particular marital property regime. It excludes what a spouse contributes to the marriage and includes all that the other spouse brings into the marriage.[24] Barratt *et al.* explain a patrimonial benefit as "the money or property that you become entitled to because of the marriage, or 'the financial benefit that you marry'".[25] Sec. 9 of the *Matrimonial Property Act*[26] provides that an accrual claim is a patrimonial benefit that may be forfeited either wholly or in part. It is the duty of the applicant to adduce evidence proving the nature and the extent of the benefit that the defendant stands to acquire.[27]

Because only a patrimonial benefit may be forfeited, a spouse cannot forfeit what she or he contributed into the marriage.[28] Consequently, a person who contributed the most in a marriage in community of property does not forfeit anything, even if, for the sake of argument, the court were to blindly order total forfeiture.[29] The court is bound to order equal sharing of the joint estate.[30] The same is the case if the marriage is subject to the accrual system. The person whose estate has accrued the most cannot forfeit anything beyond meeting the accrual claim of the other spouse.[31] For this reason, Heaton labels a forfeiture order as an empty remedy, as it is only effective when ordered against a poorer spouse.[32] She further argues that limiting the scope of forfeiture to a patrimonial benefit amounts to indirect discrimination on the ground of gender, as it is usually wives who acquire less assets and contribute lesser finances into the marriage and stand to lose more if a forfeiture order is made against them.[33]

As noted earlier, the second substantive requirement is that the defendant spouse must, in relation to the applicant spouse, be unduly benefitted, if forfeiture is not ordered. Therefore, a benefit may only be forfeited if it is undue. The *Divorce Act* does not define undue benefit. Marumoagae calls for courts to provide some guidelines on what constitutes an undue benefit. He opines that an undue benefit is property "accruing to a person whose conduct does not justify such a person receiving such a benefit".[34] Nonetheless, in deciding whether the benefit is undue, the court must first conduct a factual enquiry as to whether the defendant spouse will, in fact, benefit.[35] This stage of the enquiry is tied to the first substantive requirement, namely that

23 Van Heerden *et al.* 2021:178.
24 Smith 2017:4.
25 Barratt 2016:346.
26 *Matrimonial Property Act* 88/1984.
27 *W v W* 2011 (1) SA 545 (GNP):par. 20.
28 Evans 1920:125; *C v C* 2016 (2) SA 227 (GP):par. 24; Van Heerden *et al.* 2021:178.
29 Sinclair 1983:791; Heaton 2005:557.
30 Heaton 2005:557.
31 Heaton 2005:557.
32 Heaton 2005:557.
33 Heaton 2005:558.
34 Marumoagae 2014:98.
35 *Wijker v Wijker* [1993] 4 All SA 857 (AD):par. 19.

the benefit must be a patrimonial benefit. This stage of the enquiry will be satisfied if there is a patrimonial benefit. The second stage of the inquiry is deciding whether the benefit is undue. To this end, the court must exercise a value judgment considering the reason for the irretrievable breakdown of the marriage, the duration of the marriage, and any substantial misconduct as stated in sec. 9(1).[36]

A benefit will not be viewed as undue only because the beneficiary has made hardly any to no contribution towards the acquisition of the assets in question. Courts cannot simply award forfeiture simply to achieve fairness.[37] For instance, a marriage in community property entails equal sharing of profits and loss at the end of the marriage regardless of who contributed less into the joint estate.[38] A court cannot simply deviate from this as an effort to achieve fairness between the parties.[39] In *Engelbrecht v Engelbrecht*,[40] the respondent had acquired a house prior to his marriage in community of property with the appellant. In divorce proceedings, he sought to have the appellant's equal share in the house forfeited on the ground that he had acquired the house before the marriage to the appellant.[41] The court *a quo* had decided that the benefit to the appellant was undue on this ground. On appeal, the decision of the court *a quo* was overturned. The appeal court held that a decision relating to forfeiture must be made with strict adherence to sec. 9 of the *Divorce Act*[42] and only if the court finds that a patrimonial benefit is undue. The court must then exercise its narrow discretion and decide whether the patrimonial benefit will be forfeited either in part or wholly. In *Rousalis v Rousalis*,[43] the court observed that sec. 9 does not provide the court with much discretion as provided by other provisions of the same *Act* such as sec. 7(2), dealing with spousal maintenance.[44]

As indicated earlier, courts do not enjoy an unfettered discretion beyond the three factors in sec. 9(1).[45] What do these factors entail? At the outset, the duration of the marriage is the central theme of this note. It will receive more attention below. With this said, what about the other two factors, namely the reason for the breakdown of the marriage and substantial misconduct. It is important to add that these two factors contain an element of fault.[46] There are many reasons that some marriages end in divorce. Courts have repeatedly stated that marriages seldom break down as a result of only one spouse.[47] Because of this, sec. 9(1) of the *Divorce Act* enjoins the court to consider the reasons for the breakdown of the marriage. The purpose behind establishing

36 *Wijker v Wijker* [1993] 4 All SA 857 (AD):par. 19.
37 *Botha v Botha* 2006 (4) SA 144 (SCA):par. 7; Heaton 2005:557.
38 Heaton & Kruger 2015:62.
39 Smith 2017:5.
40 *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C).
41 *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C):599C.
42 *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C):599E.
43 *Rousalis v Rousalis* 1980 (3) SA 446 (C).
44 *Rousalis v Rousalis* 1980 (3) SA 446 (C):450E.
45 *Botha v Botha* 2006 (4) SA 144 (SCA):par. 8; Carnelley & Bhamjee 2012:488.
46 Marumoagae 2014:94.
47 *W v W* 2011 (1) SA 545 (GNP):par 26.

the reason for the breakdown of the marriage is to identify the guilty party, if there is any, as the fault principle is still part of forfeiture.[48] There may be marital fault involved, or both the parties may be innocent of any marital fault. This is a factor that the court must also consider.

Seeing that marriages do end in divorce for reasons that do not involve marital fault, it is not difficult to see the reason that the legislature included substantial misconduct as another factor to be considered. As pointed out earlier, under the common law, marital fault, for the purposes of a divorce, included only adultery and malicious desertion.[49] However, a proper reading of the *Divorce Act* and recent cases[50] suggests that substantial misconduct extends beyond adultery and malicious desertion.[51] It is submitted that the use of the word 'any' in sec. 9(1) suggests that the legislature was intent on punishing substantial misconduct financially wherever it reared its ugly head in a marriage. This raises a question: How far back in time would a court be prepared to go? Some substantial marital fault may have occurred years before the marriage finally broke down irretrievably. Would the court consider marital fault from which the parties had recovered and managed to restore a normal marriage relationship? If the parties had agreed to bury the hatchet and restore the marriage, would a court allow the parties to dig up the misconduct and rely on it for a forfeiture order? These are relevant questions more so because it is not required that the substantial misconduct should be the cause of the irretrievable breakdown of the marriage.[52]

3. FACTS AND DECISION IN *PP V JP*

3.1 Facts

The appellant and the respondent entered into a civil marriage on 16 July 2015.[53] The marriage was in community of property.[54] The parties had two children with each other who were born before they got married.[55] In February 2017, the respondent left the matrimonial home.[56] On what would have been the second anniversary of their civil marriage, the appellant instituted proceedings

48 Van Heerden *et al*. 2021:178.
49 Bonthuys 2014:451.
50 In *Molapo v Molapo* (4411/10) [2013] ZAFSHC 29 (14 March 2013):par. 24.2, the court considered the defendant's attempt to blow up the family house and the family with gas, lack of care for his family, and assault on the plaintiff were regarded as substantial misconduct. In *Ramoroka v Ramoroka* (19051/12) [2015] ZAGPPHC 700 (14 August 2015):par. 19, both physical and emotional abuse were regarded as substantial misconduct. More recently, in *GJV v MV* (48308/2011) [2023] ZAGPPHC 78 (14 February 2023):par. 41, the court considered financial selfishness, among others.
51 Bonthuys 2014:488.
52 *M v M* (A3004/2022) [2022] ZAGPJHC 1024 (30 December 2022):par. 11.
53 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 4.
54 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 6.
55 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 4.
56 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 4.

for a divorce in July 2017.[57] In her pleadings, the appellant prayed for, among others, a divorce decree and an order of total forfeiture of patrimonial benefits. Particularly, the appellant sought an order that the respondent forfeits his share in the appellant's pension interest and the immovable property. She relied on the short duration of the marriage and the respondent's misconduct that led to the irretrievable breakdown of the marriage.[58] She also alleged that the respondent had not contributed towards the acquisition of the immovable property. Because of the aforesaid, the marital benefit to the respondent would, in relation to her, be undue if an order of total forfeiture was not made.[59] The respondent denied the above. He argued that he was entitled to share equally in the joint estate.[60]

The trial court considered sec. 9(1) and decided that the respondent would benefit unduly if a forfeiture order were not made. It ordered that he should forfeit 20 per cent of his share in the immovable property and the pension interest. It then ordered complete forfeiture with respect to the rest of the joint estate.[61] The appellant was aggrieved by the decision of the court to order partial forfeiture with respect to the immovable property and the pension interest; she took this part of the decision on appeal before the Gauteng Local Division.[62] As noted earlier, this case note focuses on the decision of the appeal court in so far as it dealt with forfeiture and the duration of the marriage.

It was argued on behalf of the appellant before the appeal court that, once the court has concluded that a person would unduly benefit, the court was then bound to make an order for total forfeiture.[63] It was also argued that the court should have considered the short duration of the marriage and then made an order for total forfeiture.[64]

3.2 Decision of the appeal court

In deciding the matter, the court referred to the wording of sec. 9(1). Accordingly, the court held that this provision enjoined the trial court to make a factual finding on whether the respondent had benefitted, which it did in the affirmative.[65] In addition, the appeal court held that this provision also enjoined the trial court to exercise its discretion in deciding whether the benefit in question would be undue.[66] However, the discretion in question is not a general discretion, but discretion in the narrow sense in that the court has a

57 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 4.
58 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 5.
59 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 5.
60 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 6.
61 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 10.
62 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 11.
63 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 12.
64 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 12.
65 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 16.
66 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 19.

choice whether or not to make a forfeiture order.[67] Even if it does make the order, it has a choice between partial and total forfeiture. Beyond these, the court does not enjoy any discretion.

Seeing that the trial court had made a discretionary decision, the appeal court held that it could only interfere with the exercise of a narrow discretion if the trial court had not exercised it properly, or exercised it capriciously, influenced by incorrect law, failure to appreciate the facts, the judicial officers' failure to bring an unbiased judgment to bear or the latter's failure to act for substantial reasons.[68] The appellant was enjoined to satisfy this test before the appeal court. The appeal court held that there was no basis to interfere with the judgment of the trial court, as the trial record and judgment showed that the trial court had exercised its discretion "judicially and not capriciously, or upon any wrong principle, but for substantial reasons".[69] The court also held that the marriage had not been a short one and, although the civil marriage had lasted only two years, before this the parties had married under customary rites eight years before the civil marriage. The court added these eight years to the two years of the civil marriage and concluded that the marriage had not been of a short duration that justified an order of total forfeiture.[70] The appeal court, therefore, upheld the decision of the trial court.

4. DISCUSSIONS

The decision under the present discussion does not only draw attention to the general forfeiture of patrimonial benefits. It also draws attention to the more specific aspect of this provision, namely the impact of the duration of the marriage on a decision whether to award a forfeiture order or not. The following discussions now focus on the impact of the duration of the marriage on a court's decision whether or not to award a forfeiture and the impact of the duration of the marriage on the extent of the forfeiture.

4.1 The duration of the marriage as a factor

There are a few reasons the duration of the marriage stands out in sec. 9(1). It appears first on the list (but this does not mean that it is more important than the other facts), it is the only fault-neutral factor in sec. 9(1),[71] and the *Divorce Act* does not define what constitutes a short or a long marriage. Also, this factor adds credence to the argument that forfeiture of patrimonial benefits is not entirely based on the fault principle. Therefore, the accepted

67 The appeal court explained discretion in the narrow sense as on that "involves a choice between permissible alternatives". It added, "different judicial officers, acting reasonably, could legitimately come to different conclusions on identical facts". See *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 21.

68 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 23.

69 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 26.

70 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):paras. 31-40.

71 *KT v MR* 2017 (1) SA 97 (GP):par. 20.18; *N v N* [2022] ZAGPJHC 714 (21 September 2022):par. 6.

submission that forfeiture of patrimonial benefits is a lingering influence of the fault principle must be taken with a grain of salt.

A number of questions arise in considering the role of the duration of the marriage in a decision to award or not to award a forfeiture order. The first question is: How is the duration of the marriage determined? This question is relevant in the context of dual marriages between the same parties.[72] Another question relates to the role of the duration of the marriage in determining the extent of the forfeiture, if the order is granted. Seeing that the duration of the marriage is fault neutral, may a court make an order for total forfeiture if the duration of the marriage is the only factor present?

4.2 Determining the duration of the marriage

South Africa is rife with dual marriages between the same parties. Dual marriages occur when the same parties are spouses in marriages in more than one system.[73] For instance, because of the past non-recognition of customary marriages, Africans resorted to entering into both a civil marriage, under the common law, and a customary marriage, under living law. The civil marriage was for legal recognition, while the customary marriage was for cultural recognition. Although customary marriages have been fully recognised as marriages, the practice of entering into a dual marriage remains prevalent. The same is the case with marriages under religious rites. The current legal position is that Muslim and Hindu marriages are not afforded full legal recognition in terms of civil law.[74] To overcome this legal barrier, parties to a marriage simply conclude a dual marriage.

Determining the duration of the marriage in situations where the civil and the cultural or religious marriage occur more or less around the same time is relatively easier. However, problems will occur if there is a substantial break between these marriages. For instance, in *PP v JP*, the parties had concluded a customary marriage a few years before their civil marriage.[75] Although the facts regarding the date of the customary marriage are not clear, the court accepted that a customary marriage had been concluded. The biggest challenge in the context of customary marriages is that the parties may disagree on whether they were customarily married. While the parties, or at least one of them, may not regard themselves as married in terms of living customary law, the courts may come to a different conclusion. This is a clear disjuncture between the living law and the formal law. However, this issue is beyond the scope of this paper.

Therefore, with *PP v JP* as the authority, the duration of the marriage includes both a civil and a customary marriage. Does the duration of the marriage also include religious marriages? At the outset, it must be borne in

72 A dual marriage is where the same people are parties to marriages in more than one system. For instance, Hindu people may be married in terms of civil law and also in terms of their religious rites.

73 Osman 2019:9.

74 Van Heerden *et al.* 2021:235 & 245.

75 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 31.

mind that our courts do not have the power to decree a divorce in religious marriages and, unfortunately, parties who only enter into religious marriages, do not enjoy the benefits of a forfeiture order as courts lack jurisdiction, save only for specific instances.[76] However, courts do have the inherent jurisdiction to decree a divorce with respect to civil marriages in the context of dual marriages. It is, therefore, submitted that the courts ought to consider any religious marriage between the parties in determining the duration of the marriage, in the same way as the court did with respect to a civil and customary marriage in *PP v JP*. This argument is partially influenced by the recent decision of the Constitutional Court in *Women's Legal Centre Trust v President of the Republic of South Africa*[77] that confirmed that the continued non-recognition of Muslim marriages was unconstitutional. The court held that, until the legislature remedied the non-recognition, parts of the *Recognition of Customary Marriages Act*[78] will apply to Muslim marriages.[79] However, the above submission is made with respect to all other dual marriages. Doing otherwise will amount to discrimination on the ground of race and religion.

Many marriages commence with a long period of pre-marital cohabitation. Should courts include this period when determining the duration of the marriage? It is conceivable that, during the period of cohabitation, the parties pool their resources towards a common estate. In *Soupionas v Soupionas*,[80] the court did consider that the parties cohabited for a period of nine years before marriage.[81] In this case, the court relied on this period in order not to order any forfeiture. Although there was violence involved from both the parties, the court found that there was no substantial misconduct for the purposes of forfeiture, as they both knew the situation they were marrying into.[82] According to the court, considering this period was "sound public policy".[83] It is submitted that the court should consider the period of pre-marital cohabitation, especially where the parties have pooled their resources towards a common estate.

4.3 What constitutes a short or a long duration of a marriage?

The legislature does not provide a guideline to this question in the *Divorce Act*. Courts have equally been unhelpful in laying down any general rules. However, in *Wijker v Wijker*, the court regarded 35 years as a long duration.[84] In *Botha v Botha*, the court stated that "10 years of duration cannot be regarded as being very short duration".[85] In *PP v JP*, the marriage had lasted 10 years. The

76 See, generally, *Amar v Amar* 1999 (3) SA 604 (W).
77 *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 (5) SA 323 (CC).
78 *Recognition of Customary Marriages Act* 120/1998.
79 See, generally, *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 (5) SA 323 (CC):par. 86.
80 *Soupionas v Soupionas* 1983 (3) SA 757 (T).
81 *Soupionas v Soupionas* 1983 (3) SA 757 (T):759A-B.
82 *Soupionas v Soupionas* 1983 (3) SA 757 (T):758D-759A.
83 *Soupionas v Soupionas* 1983 (3) SA 757 (T):759B.
84 The parties were married in 1956 and the marriage broke down in 1991. See, generally, *Wijker v Wijker* [1993] 4 All SA 857 (AD):paras. 3 and 14.
85 *Botha v Botha* 2006 (4) SA 144 (SCA):par. 13.

court stated that this was not a short duration.[86] On the other hand, 20 months was regarded as a short duration in *T v R*.[87] The point of departure is that a marriage of 10 years or longer is a long marriage and a marriage of less than 10 years may be viewed as a short marriage, depending on the circumstances of each case.

4.4 The impact of the duration of the marriage

In *PP v JP*, it was argued that a short duration warrants total forfeiture. The court did not have to decide on this argument as it found that the marriage was not of a short duration. Therefore, the question whether a short duration warrants an order for total forfeiture remains. In *KT v MR*, the court stated:

> While not cast in stone, it must therefore follow that in the determination of whether a benefit is undue, a Court is more likely to make such a determination where the marriage is of short duration as opposed to circumstances where the marriage was of a long duration. Simply put, the longer the marriage the more likely it is that the benefit will be due and proportionate and conversely, the shorter the marriage the more likely the benefit will be undue and disproportionate.[88]

The court then proceeded to make an order for partial forfeiture. It is submitted that the court was influenced by the absence of any other factor besides the short duration of the marriage.[89] *KT v MR* is authority that a forfeiture order may be made solely on the basis of the short duration of a marriage.

Seeing that *KT v MR* lends authority for partial forfeiture in cases of a short duration, under what circumstances may a court make an order for total forfeiture? As noted earlier, in *PP v JP*, the court did not have to decide this, as it held that the marriage had been of a long duration. A perusal of case law, as shown below, indicates that courts are more inclined to base an order for total forfeiture on substantial misconduct other than the short duration of the marriage. It would appear that a short duration coupled with substantial misconduct equals total forfeiture. On the other hand, a long duration coupled with substantial misconduct equals partial forfeiture. As noted in *KT v MR*, a short duration alone equals partial forfeiture; whereas a long duration without any substantial conduct does not justify any forfeiture order. Courts are also reluctant to order total forfeiture in cases of long marriages coupled with substantial misconduct. There is an assumption that the longer the marriage, the higher the likelihood that both the parties have contributed to the marital estate, thus rendering any benefit due and proportionate.[90] Nevertheless, in *Moodley v Moodley*,[91] the court did order total forfeiture against the plaintiff. In this case, the marriage had lasted 20 years. The substantial misconduct

86 *PP v JP* [2020] ZAGPJHC 281 (2 November 2020):par. 31.
87 *KT v MR* 2017 (1) SA 97 (GP):par. 23.
88 *KT v MR* 2017 (1) SA 97 (GP):par. 20.19.
89 *KT v MR* 2017 (1) SA 97 (GP):par. 20.11.
90 *KT v MR* 2017 (1) 97 (GP):par. 20.19.
91 *Moodley v Moodley* [2018] ZAKZHC 48 (14 July 2018).

included assault, adultery, and malicious desertion.[92] The court considered that the plaintiff, after he left the common home, had not contributed towards the maintenance of the property, paying rates, household expenses, and the maintenance of the children.[93]

The decision in *Singh v Singh*[94] is also worth mentioning. In this case, the marriage had lasted 22 years. However, the marriage had a great deal of substantial misconduct on the part of the defendant (adultery and malicious desertion by being away from home for about 73 nights in one year), coupled with the latter's meagre contribution to the joint estate.[95] These facts fundamentally affected the decision which was to award total forfeiture against the defendant. The warning in *N v N* resonates. In this case, the court warned that "a forfeiture order may not be granted simply to balance factually that one spouse had made a greater contribution than the other spouse to the joint estate".[96]

5. CONCLUSION

This case note has not discussed forfeiture of patrimonial benefits in general. In particular, it has focused on the impact of the duration of the marriage on a decision whether to order forfeiture or not. In light of the above, one may conclude that there is no one size fits all. There is no guarantee that a short marriage warrants an order for total forfeiture. Equally true, while it is indeed conceivable that the longer the marriage, the more likely it is that the parties have each contributed to marital estate, albeit in unequal shares; however, it cannot be guaranteed that the court would not order total forfeiture. The decision in *Singh v Singh* bears testimony to this.

However, one may draw certain guided assumptions. These assumptions are guided by the cases referred to earlier. The first guided assumption is that a short duration, on its own, does not merit total forfeiture. The second guided assumption is that a short duration, coupled with substantial misconduct, does merit an order for total forfeiture. The third guided assumption is that complete forfeiture may be ordered in long marriages in cases where there is substantial misconduct, coupled with meagre contribution by the defendant.

92 *Moodley v Moodley* [2018] ZAKZHC 48 (14 July 2018):par. 18.
93 *Moodley v Moodley* [2018] ZAKZHC 48 (14 July 2018):par. 22-25.
94 *Singh v Singh* 1983 (1) SA 781 (C).
95 *Singh v Singh* 1983 (1) SA 781 (C):784.
96 *N v N* [2022] ZAGPJHC 714 (21 September 2022):par. 20.

BIBLIOGRAPHY

BARRATT A (ED.)
2016. *Law of persons and the family*. 2nd edition. Cape Town: Pearson.

BONTHUYS E
2014. The rule that a spouse cannot forfeit at divorce what he or she has contributed to the marriage: An argument for change. *South African Law Journal* 131(2):439-460.

CARNELLEY M
2016. The impact of the abolition of the third party delictual claim for adultery by the Constitutional Court in *DE v RH* (CCT 182/14) [2015] ZACC 18. *Speculum Juris* 30(1):1-14.

CARNELLEY M & BHAMJEE S
2012. Protecting a wife financially at the time of divorce – A comparison between South African women married in terms of South African civil law and Islamic law, with specific reference to the *mahr. Obiter* 33(2):482-502.

EVANS MD
1920. *Law of divorce in South Africa*. Johannesburg: Hortors Limited.

HAHLO HR
1963. *The South African law of husband and wife*. 2nd edition. Cape Town: Juta and Co Ltd.

1984. When a benefit is not a benefit. *South African Law Journal* 101(3):456-459.

HEATON J
2005. Striving for substantive gender equality in family law: Selected issues. *South African Journal on Human Rights* 21(4):547-574. https://doi.org/10.1080/19962126.2005.11865148

HEATON J & KRUGER H
2015. *South African family law*. 4th edition. Durban: LexisNexis.

MARUMOAGAE C
2014. The regime of forfeiture of patrimonial benefits in South Africa and a critical analysis of the concept of unduly benefited. *De Jure* 47(1):85-99.

2015. Factors justifying forfeiture of patrimonial benefits orders. *Obiter* 36(1):232-242.

OSMAN F
2019. The million rand question: Does a civil marriage automatically dissolve the parties' customary marriage? *Potchefstroom Electronic Law Journal* 22:1-25. https://doi.org/10.17159/1727-3781/2019/v22i0a4337

SIBISI S
2022. Re-thinking forfeiture of patrimonial benefits when a marriage dissolves through death. *Obiter* 43(2):260-275. https://doi.org/10.17159/obiter.v43i2.14252

SINCLAIR J
1983. The financial consequences of divorce in South Africa: Judicial determination or private ordering? *The International and Comparative Law Quarterly* 32(1):785-811. https://doi.org/10.1093/iclqaj/32.4.785

SMITH BS
2017. Statutory discretion or common law power? Some reflections on “veil piercing” and the consequences of (the value of) trust assets in dividing matrimonial property at divorce – Part Two. *Journal for Juridical Sciences* 42(1):1-18. https://doi.org/10.18820/24150517/JJS42.v1.1

QUANSAH EK
2005. The order for forfeiture of benefits in divorce proceedings in Botswana: A relic of a bygone era or a ghost from the past? *University of Botswana Law Journal* 1(6):120-127.

VAN HEERDEN B, SKELTON A & DU TOIT Z
2021. *Family law in South Africa*. 2nd edition. Cape Town: Oxford University Press Southern Africa.