Forfeiture of Patrimonial Benefits and the Dissolution of Marriage through Death: *Monyepao v Ledwaba* (1368/18) [2020] ZASCA 54 (27 May 2020)

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Abstract

Section 9 of the *Divorce Act* 70 of 1979 provides for the forfeiture of patrimonial benefits when a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage. This case note discusses the possibility of an order for forfeiture of patrimonial benefits when a marriage dissolves after death under certain circumstances. It follows on the Supreme Court of Appeal decision in *Monyepao v Ledwaba* (1368/18) [2020] ZASCA 54 (27 May 2020). The respondent, the estranged first surviving spouse, and the deceased were married in terms of customary law in 2007. In 2008 the deceased left the matrimonial home. In 2009 the respondent entered into a civil marriage with another person. In 2010 the deceased also entered into a customary marriage with the appellant, the second surviving spouse. In 2012 the deceased died. Following his death, both the appellant and the respondent, as surviving spouses, were appointed co-executors of the deceased estate. The appellant sought an order directing the Master to withdraw the appointment as co-executor of the first surviving spouse on the ground that she had renounced her earlier customary marriage to the deceased when she entered into a civil marriage with another person. Alternatively, she sought an order in terms of section 9 of the *Divorce Act* that the first surviving spouse forfeit patrimonial benefits in favour of the deceased estate. The High Court, Polokwane granted the order. However, on appeal the full bench, Polokwane overturned the decision of the court *a quo*. The appellant took the decision of the full bench on appeal to the SCA. The SCA dismissed her appeal and upheld the decision of the full bench on the ground that a forfeiture order can be made only during divorce proceedings and it may be brought only by a party to the marriage and not by a third party. This note turns on this aspect of the decision. It will be argued that a forfeiture order should be available when a marriage is dissolved through death. It will also argue that a second spouse is a party to a customary marriage.

Keywords

Forfeiture of patrimonial benefits; customary marriages; deceased estate; intestate succession.

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1 Introduction

The legal questions that arise when civil and customary marriages interact have concerned courts and academics for years.[1] This refers particularly to a situation where a person is a party to both a civil marriage and a customary marriage, albeit with different people. The *Recognition of Customary Marriages Act*[2] (hereafter referred to as the *Recognition Act*) provides that a person who is a party to a customary marriage cannot enter into a civil marriage with another person and *vice versa*.[3] The subsequent marriage is void.[4] However, dual marriages are permitted provided that none of the parties is a party to a subsisting civil or customary marriage with another person.[5] Despite this, people still contract civil and customary marriages with different people.

With the above said, imagine a customary marriage that barely survives a year, and one more year later, one spouse has moved on to the extent of entering into a civil marriage with another person. Three further years later, death strikes; notwithstanding the civil marriage, the estranged surviving spouse, the respondent, returns to claim from the deceased estate, relying on the initial customary marriage. To add fuel to the fire, the deceased had also subsequently married another wife, who is the appellant, in terms of customary law. Both surviving spouses exert competing claims against the deceased estate. Such are the facts in *Monyepao v Ledwaba*.[6] It is submitted that in this situation public policy considerations determine that the estranged surviving spouse is unworthy to receive a benefit from the deceased estate – under both succession and marriage laws.[7]

In *Monyepao v Ledwaba* the Supreme Court of Appeal (hereafter the SCA) dealt primarily with the administration of the deceased estate. In the process the court had to determine the identity of the surviving spouse. The initial customary marriage between the deceased and the estranged surviving

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1 See generally *Thembisile v Thembisile* 2002 2 SA 209 (T); Bonthuys and Sibanda 2003 *SALJ* 784; Osman 2019 *PELJ* 1.

2 *Recognition of Customary Marriages Act* 120 of 1998 (hereafter the *Recognition Act*).

3 Section 3(2) of the *Recognition Act*.

4 Van Heerden, Skelton and Du Toit *Family Law* 228.

5 Section 10(1) of the *Recognition Act*.

6 Monyepao v Ledwaba (1368/18) [2020] ZASCA 54 (27 May 2020) (hereafter *Monyepao v Ledwaba*).

7 De Waal and Schoeman-Malan *Law of Succession* 116-120.

spouse, who is the respondent, was not dissolved by a divorce as required by section 8 of the *Recognition Act.* Instead, she entered into a civil marriage with another man. At the outset, the respondent's conduct amounted to polyandry, which is currently illegal in South African law. Nonetheless, it still raises the question of whether a civil marriage dissolves a customary marriage and vice versa. Although the *Recognition Act* settles this question as stated above, it is not completely academic in the light of calls by some scholars to remove the prohibition and the fact that such marriages are rife in reality. Maithufi and Moloi argue that since customary marriages are now fully recognised, there is no need to preserve the prohibition against polygamy in civil marriages.[8] In exerting her claim, the appellant, who is the second surviving spouse, argued that the estranged surviving spouse should forfeit any patrimonial benefit by virtue of section 9 of the *Divorce Act*[9] (hereafter referred to as the *DA*).

This note does not seek to discuss the administration of deceased estates. Save for a few instances where the context requires otherwise, it also does not seek to discuss the question of the co-existence of a civil and a customary marriage. Further, it will not discuss forfeiture in cases of unworthiness to inherit. Instead, this note discusses forfeiture of patrimonial benefits when a marriage ends through death, as raised in the judgment by the appellant. What should be noted is that the proceedings in question were not divorce proceedings as required by section 9 of the *DA* read with section 8 of the *Recognition Act*. This case note argues that a party to a polygamous marriage should be allowed to bring an application for forfeiture when a marriage ends through death.

2 Facts

The respondent and the deceased entered into a customary marriage on the 2nd of June 2007. In February 2008 the deceased had left the marital home for reasons not divulged to the court.[10] A child was born of this brief marriage.[11] In 2009 the respondent entered into a civil marriage with another person. In 2010 the deceased entered into a customary marriage with the appellant.[12] In 2012 the deceased died. Following his death, both the

8 Maithufi and Moloi 2005 *De Jure* 153. This argument advocates the position adopted in the erstwhile Transkei Province. Section 3(1) of the *Transkei Marriage* Act 21 of 1978 permitted polygamy in civil marriages. See West and Bekker 2012 *Obiter* 355.

9 *Divorce Act* 70 of 1979 (hereafter the *DA*).

10 *Monyepao v Ledwaba* para 7.

11 *Monyepao v Ledwaba* para 2.

12 *Monyepao v Ledwaba* para 8.

appellant and the respondent were appointed as co-executors of the deceased estate.[13]

The appellant objected to the respondent's being appointed as co-executor on the ground that the respondent had renounced her customary marriage to the deceased by entering into a civil marriage with another person. On this ground the appellant approached the Limpopo Division in Polokwane for an order declaring that the customary marriage between the respondent and the deceased terminated when the deceased left the matrimonial home. Alternatively, she sought an order declaring that any patrimonial benefits due to the respondent was forfeited in favour of the deceased estate in terms of section 9(1) of the *DA* and that the house in which the respondent and her minor daughter lived, which belonged to the deceased, should be transferred to the daughter. She also sought an order directing the Master of the High Court Polokwane to withdraw the respondent's appointment as co-executor and to appoint the appellant as the sole executor of the deceased estate.[14]

For the present purposes it suffices to say that the court *a quo* granted the forfeiture order in terms of section 9(1) of the *DA*. The court also held that the respondent had renounced her marriage to the deceased when she entered into a civil marriage with another person. This aspect of the judgment triggered the appeal before a full bench of the Limpopo Division, Polokwane (hereafter the full bench). The full bench held that it was incorrect of the court *a quo* to apply section 9(1) of the *DA* as this provision could be invoked only as an adjunct to a decree of divorce.[15] On the question of whether the civil marriage terminated the customary marriage between the respondent and the deceased, it held that section 8(1) of the *Recognition Act* applied.[16] Section 8(1) provides that a customary marriage is valid until terminated by a divorce decree. In terms of current law, a party to a subsisting customary marriage cannot enter into a valid civil marriage with another person.[17] Therefore, the subsequent civil marriage between the respondent and another person was a nullity.[18]

13 *Monyepao v Ledwaba* para 10.
14 *Monyepao v Ledwaba* para 2.
15 *Ledwaba v Monyepao* (HCAA06-2017) [2018] ZALMPPHC 61 (25 April 2018) (hereafter *Ledwaba v Monyepao*) paras 19-23.
16 *Ledwaba v Monyepao* para 11.
17 *Thembisile v Thembisile* 2002 2 SA 209 (T); *Netshituka v Netshituka* 2011 5 SA 453 (SCA); *TM v NM* 2014 4 SA 575 (SCA).
18 *Ledwaba v Monyepao* para 16.

Was the subsequent customary marriage between the appellant and the deceased valid notwithstanding that the respondent, as the first surviving spouse, had not consented to the marriage as envisaged in *Mayelane v Ngwenyama*?[19] The full bench held that *Mayelane v Ngwenyama* applies prospectively and had no effect on the validity of the customary marriage between the appellant and the deceased.[20] The respondent also argued that the appellant's marriage to the deceased was invalid because the deceased had failed to obtain a court-approved contract as envisaged in section 7(6) of the *Recognition Act*.[21] Section 7(6) of the *Recognition Act* provides that a husband who wishes to enter into a subsequent customary marriage with another wife must approach the court for the approval of a written contract which will regulate the future matrimonial property system of his marriages.[22] The court pointed out that section 7(6) of the *Recognition Act* was not a requirement for validity and that non-compliance with the provisions of section 7(6) does not render a marriage invalid. The purpose of a court approved contract is to regulate the matrimonial property system of the marriage; if the husband failed to obtain this court-approved contract, the subsequent customary marriage was out of community of property.[23]

Against this decision of the full bench, the matter went on appeal to the SCA. The appellant sought to appeal the validity of the respondent's marriage to the deceased and the dismissal of her application for the forfeiture of patrimonial benefits against the respondent. On the other hand, the respondent sought to cross-appeal the validity of the appellant's marriage to the deceased.

3 Decision

The SCA confirmed the decision of the full bench. The appellant argued that the customary marriage between the respondent and the deceased was terminated when the deceased left the matrimonial home in February 2008. However, she did not place admissible evidence to prove this allegation.[24] In any event, section 8(1) of the *Recognition Act* provides that a customary marriage may be terminated only by a decree of divorce on the ground of the irretrievable breakdown of the marriage.[25] The SCA also affirmed that a civil marriage entered into with another person during the subsistence of a

19 *Mayelane v Ngwenyama* 2013 4 SA 415 (CC).
20 *Ledwaba v Monyepao* paras 33-34.
21 *Ledwaba v Monyepao* para 26.
22 *Ledwaba v Monyepao* para 26.
23 *Ledwaba v Monyepao* para 31; *Mayelane v Ngwenyama* 2013 4 SA 415 (CC).
24 *Monyepao v Ledwaba* para 18.
25 *Monyepao v Ledwaba* para 18.

customary marriage is a nullity.[26] Therefore, the respondent's civil marriage was null and void. It also found that an order for forfeiture in terms of section 9(1) of the *DA* could be made only adjunct to a decree of divorce and that only a party to the marriage could claim for forfeiture against the other party. Therefore, the appellant had no standing.[27]

It must be added that the respondent did make another attempt to question in the SCA the validity of the appellant's customary marriage to the deceased. The respondent argued that the customary marriage between the deceased and the appellant was not valid because at the time of the marriage the deceased was still married to her in terms of customary law and the necessary process in terms of custom had not been followed. However, the respondent failed to prove the rule of customary law upon which she based her claim.[28] As a result, both the customary marriages were valid.[29]

4 Discussion

As noted above, the judgment of the SCA in *Monyepao v Ledwaba* raises among other things an important question on whether section 9(1) of the *DA* may be applied when a marriage ends through death. It is submitted that had these been divorce proceedings, the court would have ordered forfeiture against the respondent at least on the ground that the marriage had been a short one that lasted for barely a year.[30] The only reason that forfeiture was not ordered was because the proceedings were not divorce proceedings and the appellant was, according to the SCA, a third party. As noted above, this case note seeks to discuss the possibility of invoking section 9(1) of the *DA* when the marriage ends through death.

4.1 Forfeiture of patrimonial benefits

The forfeiture of patrimonial benefits has its roots in Roman law[31] and it could be made only adjunct to a divorce or a separation decree.[32] Under Roman law the grounds for the forfeiture of patrimonial benefits were malicious desertion, adultery, incurable mental illness and imprisonment of

26 *Monyepao v Ledwaba* para 19.
27 *Monyepao v Ledwaba* para 21.
28 *Monyepao v Ledwaba* 14.
29 *Monyepao v Ledwaba* 14.
30 *Ledwaba v Monyepao* para 12.
31 *Swil v Swil* 1978 1 SA 790 (W) 792H.
32 *Ex parte Meyer: In Re Meyer v Meyer* 1962 2 SA 688 (N) (hereafter *Ex parte Meyer*) 690H.

at least five years.[33] However, under Roman-Dutch law, which was received in South Africa, a party could rely only on malicious desertion and adultery as grounds for forfeiture of patrimonial benefits.[34] The whole purpose behind the forfeiture patrimonial benefits is to ensure that a person does not benefit from a marriage that he or she has wrecked.[35] The word "wrecked" does suggest some form of blameworthiness or fault. It must be added that our divorce jurisprudence is no longer dependent on fault. Further, an order of a forfeiture of patrimonial benefits may be made in the absence of fault. Below it will be shown that the order may be based on the shortness of the marriage. Therefore, it is safe to say that the purpose of the forfeiture of patrimonial benefits is to prevent undue benefit. The concept of undue benefit is discussed below.

While fault is no longer a ground for a decree of divorce in South Africa,[36] the fault principle has not completely left out divorce jurisprudence.[37] This is the case because our courts are permitted to fall back on fault to determine questions such as the forfeiture of patrimonial benefits,[38] the redistribution of assets[39] and spousal maintenance.[40] In *Monyepao v Ledwaba* there were various instances of fault. Although the courts did not divulge the reason that the deceased left the matrimonial home, an inference of infidelity cannot be ruled out when one considers that the respondent "married" another person in a civil marriage a year after the deceased left the matrimonial home. Besides this possible inference, the respondent was committing adultery with another person while still married to the deceased. It remains debatable whether the relationship between the appellant and the deceased was adulterous. However, as polygamy is permissible in customary law and as the SCA held that the latter customary marriage was also valid, it is argued that the relationship between the appellant and the deceased was a marriage and not adulterous.

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33 *Swil v Swil* 1978 1 SA 790 (W) 793A; *C v C* 2016 2 SA 227 (GP) para 28.

34 *Ex parte Boshoff: In re Boshoff v Boshoff* 1953 3 SA 237 (W) (hereafter *Ex parte Boshoff*) 238B.

35 *Murison v Murison* 1930 AD 157; Cronje and Heaton *South African Family Law* 150.

36 Barrat *et al. Law of Persons and the Family* 334.

37 Barrat *et al. Law of Persons and the Family* 349; Skelton and Carnelley *Family Law* 122.

38 Barrat *et al. Law of Persons and the Family* 334.

39 Section 7(5) of the *DA*.

40 Section 7(2) of the *DA* lists the parties' conduct as far as the breakdown of the marriage is concerned as a factor that the court may consider before awarding maintenance to a spouse on divorce. Skelton and Carnelley *Family Law* 135 question the extent to which the court must fall back on the fault principle in determining whether to award maintenance to a spouse. Also see Carnelley 2016 *Speculum Juris* 11.

What may be forfeited is a patrimonial benefit. A patrimonial benefit is one that accrues to a party by virtue of the marriage.[41] In other words, a party does not work for this benefit. Instead, a party gets it as a share in the joint estate, an accrual or a benefit in terms of the antenuptial contract.[42] Because only a patrimonial benefit may be forfeited, it follows that a person cannot forfeit what the person brought into the marriage.[43] However, there is an argument to the effect that a person should forfeit what the person brought into the marriage.[44] In the present case, the respondent stood to benefit on two grounds. The first is a share in the joint estate by reason of her customary marriage, and second, the surviving spouse inheritance from the deceased estate. These included a house in which she lived with her minor daughter[45] and a substantial portion of R3.8 million.[46]

4.2 Section 9(1) of the Divorce Act

Section 9(1) of the *DA* provides that

> When a decree of divorce is granted on the ground of the irretrievable break-down 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.

This provision retains the common law to a certain degree. An order of forfeiture of patrimonial benefits may be made adjunct to a divorce decree only when the ground for a divorce is the irretrievable break-down of a marriage. This is a slight shift from the common law, as the courts can no longer issue separation orders.[47] In deciding on whether a party should forfeit any patrimonial benefits, the court must have regard to three factors, namely, the duration of the marriage, the circumstances which gave rise to the break-down of the marriage and any substantial misconduct by either party. These three factors are a closed list. The court may not consider any extra factor such as fairness.[48] The court may make an order of forfeiture of

41 Skelton and Carnelley *Family Law* 155.
42 Heaton and Kruger *South African Family Law* 136-137.
43 *JW v SW* 2011 1 SA 545 (GNP).
44 Heaton 2014 *SALJ* 439.
45 *Ledwaba v Monyepao* para 2.
46 *Ledwaba v Monyepao* para 4.
47 Section 14 of the *DA*.
48 Marumoagae 2015 *Obiter* 232.

patrimonial benefit only if it is satisfied that if the order is not made, the one party will, in relation to the other, be unduly benefited.[49]

While the court is conjoined to have regard to all three factors, it is not a requirement that all these factors must be pleaded and proved.[50] A court may make an order of forfeiture of patrimonial benefits even if only one of the factors is proved. This is the case provided that the court is satisfied that should the order not be made, the one party will, in relation to the other, be unduly benefited. In *Wijker v Wijker*[51] the court held that the determination of whether a party has unduly benefited is a two-stage enquiry. First, the court must ask if a party has indeed benefitted. This is a factual enquiry. For instance, in *Monyepao v Ledwaba* the respondent stood to benefit a house and one third of R3.8 million. The second stage is to determine whether the benefit is undue. This entails a value judgment considering the three factors. The marriage had lasted for barely a year. In *T v R* the court granted an order of the partial forfeiture of patrimonial benefits sorely on the ground that the marriage had lasted for only 20 months.[52] Further, in *Monyepao v Ledwaba* the marriage broke down in 2008 when the deceased left the matrimonial home. It is unfortunate that the reason that the deceased left the matrimonial home is unknown. That the respondent was living with a man in a marriage-like relationship while she was still a party to a customary marriage with the deceased is substantial misconduct. Therefore, the benefit to the respondent was undue.

The concept "undue benefit" is not defined in the *DA*. Neither does the *DA* prefer any meaning to be assigned to the three factors above. However, the factors are relatively straightforward. It is the meaning of undue benefit that should be discussed. Marumoagae submits that it is "a benefit (being property subject to the joint estate) accruing to a person whose conduct does not justify such a person receiving such a benefit."[53] In *Molapo v Molapo* the court held that "undue" could be described as "disturbingly unfair".[54] It is submitted that undue benefits refer to something that one acquires in the absence of a legal or moral entitlement. It is further submitted that the court should have due regard to culture and religion to determine if a benefit is undue. In this regard the court should be careful to uphold

49 Heaton and Kruger *South African Family Law* 135.

50 *Klerck v Klerck* 1991 1 SA 265 (W); *Binda v Binda* 1993 2 SA 123 (W). The correctness of these decisions was confirmed by the Appellate Division in *Wijker v Wijker* 1993 4 SA 720 (A) 729G.

51 *Wijker v Wijker* 1993 4 SA 720 (A).

52 *T v R* 2017 1 SA 97 (GP) para 20.18.

53 Marumoagae 2014 *De Jure* 98.

54 *Molapo v Molapo* (4411/10) [2013] ZAFSHC 29 (14 March 2013) para 22.13.

constitutional norms such as equality and human dignity as envisaged in the *Constitution*.[55]

It is submitted that the conduct of the respondent in marrying another man while she was still a party to a customary marriage to the deceased did amount to polyandry – which is unlawful in South Africa. In addition, it may be bigamous. It is submitted that these factors amount to substantial misconduct for the purpose of forfeiture. That she returned to claim spousal benefits from the deceased estate despite having entered into a civil marriage with another man lends itself to two interpretations. The first is that, at the time of entering into the civil marriage, she knew she was still married to the deceased. Second, she thought that her marriage to the deceased had been terminated at least when the latter left the marital home. That she was still married to the deceased may have come to her attention only after the death of the deceased. In the light of what has been said above, the benefit to the respondent was undue.

4.3 Forfeiture of patrimonial benefits when the marriage is terminated through death

The benefit to the respondent was clearly undue. Arguably, the respondent was not entitled to claim spousal benefits from the joint estate and the deceased estate when she clearly did not regard herself as married to the deceased. It is submitted that had she regarded herself as married to the deceased, she would not have purported to enter into a civil marriage with another person. The only benefit that the respondent was supposed to claim was on behalf of her minor daughter with the deceased. The question is, should the SCA have confirmed the forfeiture of patrimonial benefits order? The answer is not as straightforward as it may seem.

If one adopts a literal interpretation of section 9(1) of the *DA*, a court may order of forfeiture adjunct to a decree of divorce only when the ground for a divorce is the irretrievable breakdown of a marriage. The consequence of this interpretation is that the respondent does not forfeit anything because these were not divorce proceedings. Nonetheless, her conduct did amount to marital fault. In the light of the facts of this case, it is submitted that this outcome is against public morals. It does not inspire any public confidence in the law.

On the other hand, a purposive interpretation is to be considered. The purpose of section 9(1) of the *DA* is to prevent a person from unduly

55 Respectively, ss 9 and 10 of the *Constitution of the Republic of South Africa*, 1996.

benefitting from a marriage that he or she has wrecked. It is also there to ensure that people do not get more than what may be due to them considering the duration of a marriage. In *Monyepao v Ledwaba* the court *a quo* adopted a purposive interpretation in allowing a claim of an order of forfeiture; however, this was overturned by the full bench and the SCA in favour of a literal interpretation of section 9(1) of the *DA*. The decisions of the full bench and the SCA were informed by the fact that the proceedings before the court had not been divorce proceedings and therefore it was incompetent of the court to make an order in terms of section 9(1) of the *DA*.

The full bench and the SCA made interesting remarks regarding the issue of standing in proceedings in terms of section 9(1) of the *DA*.[56] These courts stated that a section 9(1) of the *DA* application could be made only by a party to a marriage and, by inference, not a third party or, to borrow words from the SCA, "an outsider".[57] According to both courts, the appellant's customary marriage to the deceased was valid. This means that the appellant was not a third party in the strict sense of the word. At least she was a party to the polygamous marriage between herself, the deceased and the respondent; at most, she had a substantial interest in the matter. This was enough to give her standing in the application. It is submitted that a finding to the effect that the appellant was not a party to the marriage could be arrived at only if the court had a monogamous civil marriage in mind. This is regrettable.

There is another reason that the full bench and the SCA ought not to have adopted a literal approach. Section 9(1) of the *DA* was drafted in the context of a civil marriage in terms of the common law. At the time of drafting this provision the legislature did not have customary marriages in mind. Certainly, the legislature did not have complex situations such as that reflected in *Monyepao v Ledwaba* in mind. Section 9(1) of the *DA* is not designed for customary marriages. Be that as it may, section 8(4)(a) of the *Recognition Act* introduces section 9(1) into customary marriages. A surviving spouse in a polygamous customary marriage should be able to protect the family estate after the death of her husband. She should be able to protect it even against a co-surviving spouse. This may be a recipe for frivolous and vexatious litigation between surviving spouses after the death of their husbands. However, a court can always make a cost order to guard

56 *Monyepao v Ledwaba* para 21.
57 *Monyepao v Ledwaba* para 21.

against a party or a legal representative who fails to advise his or her client adequately.

It must be added that this was not the first time in South African law that a claim for the forfeiture of patrimonial benefit was brought in circumstances when the marriage had ended through the death of one of the parties. There are two notable cases in this regard: *Ex parte Boshoff: In re Boshoff v Boshoff* and *Ex parte Meyer: In re Meyer v Meyer*. In both these cases, the husbands had died after the institution of divorce proceedings. The respective co-executors had approached the courts for an order of forfeiture against the surviving spouses.[58] The basis for refusing to grant the order in *Ex parte Boshoff* was that the court could not grant it in the absence of a divorce decree.[59] Further, the main action brought by the husband had been for the restoration of conjugal rights.[60] A divorce decree and a forfeiture order were sought as alternatives.[61] In *Ex parte Meyer* the husband had instituted an action for divorce and forfeiture on the ground of adultery. Following the husband's death, a divorce decree was no longer possible.[62] The executor of the estate then approached the court for an order substituting himself and an order of forfeiture against the surviving spouse. The court did not grant the order of the forfeiture of patrimonial benefits on the ground that it could not be granted as a stand-alone order[63] and it could be made only adjunct to a decree of divorce.[64]

It is interesting to note that in both these decisions, the courts did not reject the idea of transmitting the action for forfeiture of patrimonial benefits to the heirs of the deceased. The courts dismissed both cases on procedural grounds. Under Roman law, an action against a deserting surviving spouse could be transmitted to the heirs on the ground of adultery.[65] The heirs were then entitled to bring action for forfeiture against a deserting surviving spouse of the deceased.[66] Whether the transmission of this action to the heirs was received into South African law is unclear. However, as noted above, in *Ex parte Boshoff* and *Ex parte Meyer*, the court did not reject the idea that the action could be transmitted to the heirs.

58 *Ex parte Boshoff* 237H.
59 *Ex parte Boshoff* 238A.
60 *Ex parte Boshoff* 238B.
61 *Ex parte Boshoff* 238A.
62 *Ex parte Meyer* 689A-E.
63 *Ex parte Meyer* 689G.
64 *Ex parte Meyer* 689H.
65 Hahlo *Law of Husband and Wife* 419.
66 Hahlo *Law of Husband and Wife* 419.

4.4 Was the respondent entitled to anything from the deceased estate?

In terms of section 9(1), the court may order the complete or partial forfeiture of patrimonial benefits. This note has argued that the court ought to have ordered the forfeiture of patrimonial benefits in this case. As noted above, in *T v R* the marriage had lasted 20 months, and the court ordered the partial forfeiture of patrimonial benefits. Should the court have ordered the partial forfeiture of patrimonial benefits in line with *T v R*? It is submitted that the facts of *T v R* are distinguishable from *Monyepao v Ledwaba*. In *T v R* the parties were in a civil marriage and neither of the parties committed marital fault. Instead, the marriage broke down because the parties were constantly away at work.[67]

It is unfortunate that the reason that the deceased left the matrimonial home in *Monyepao v Ledwaba* is unknown. Could this have been substantial misconduct in the form of desertion on the part of the deceased? This is less likely. Had this been the case, the respondent would have said so. What is clear is that the marriage relationship between the parties lasted barely a year; and a year later, the respondent was already "married" to another person while she was still a party to a customary marriage with the deceased. This case is clearly distinguishable from *T v R* and for this reason it is submitted that the court ought to have made complete forfeiture at least in respect of the R3.8 million pay-out. It is further submitted that the decision to allow the respondent to also keep the house was justified as this was in the best interest of the minor child born of the marriage between the respondent and the deceased.

5 Conclusion

The facts of *Monyepao v Ledwaba* are unique and merit different treatment from the courts. The conduct of the respondent who, despite having entered into a civil marriage with another man, returned only to exert a claim in the deceased estate amounts to marital fault. It is one thing for the respondent to exert a claim but another for courts to adopt a rigid application of the law when it was clear that considerations of public policy suggest that the surviving spouse should not receive any benefit. Section 9(1) of the *DA* was not drafted with customary marriages in mind. Therefore, the court ought to have taken this into consideration, together with the facts of the case. A surviving spouse should be able to protect her husband's estate, even

67 *T v R* 2017 1 SA 97 (GP) paras 20.2-20.5.

against a co-surviving spouse. In this case the appellant was a party to a customary marriage that included her, the deceased and the respondent. It is not correct to say she was a third party or an outsider. The court ought to have confirmed the court *a quo*'s decision in ordering the forfeiture of patrimonial benefits against the respondent. This is in line with the purpose of section 9(1) of the *DA*, to ensure that a person does not unduly benefit from a marriage he or she has wrecked.

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List of Abbreviations

DA	Divorce Act 70 of 1979
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SCA	Supreme Court of Appeal