

# Is forfeiture of patrimonial benefits in divorce proceedings still relevant in modern South Africa?

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When a decree of divorce is granted on the grounds of irretrievable breakdown 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 unduly benefit in relation to the other, then only will it consider granting such an order<sup>1</sup>. In addition, the party claiming division, transfer or forfeiture of benefits should provide the grounds on which he or she makes the claim.<sup>2</sup>

Where the courts grant an order for forfeiture of patrimonial benefits against a party, he or she forfeits not their share of the common property, but only the pecuniary benefit that they would otherwise have derived from the marriage.<sup>3</sup> In addition



to being an order for division, it is also an order stipulating that the party defending forfeiture is not to share in excess of what the party requesting forfeiture may have contributed over the contributions of the party defending same.<sup>4</sup>

Previously, the power of the court to order forfeiture of benefits was based on the common law principle that no person ought to benefit financially from a marriage which he or she caused to fail.<sup>5</sup> South African courts have since abandoned fault or conduct as the main reason for

a forfeiture order. In terms of the Divorce Act, 70 of 1979 (the Act), the court has discretion, when granting a divorce on grounds of irretrievable breakdown, to order that the patrimonial benefits be forfeited by the party who is the cause of the breakdown, provided that such party will unduly benefit if forfeiture is not granted in favour of the other. As a result, many allege that forfeiture of patrimonial benefits as provided for in the Act seems to seem to penalise those who are found to have committed substantial misconduct. It is

<sup>1</sup> Divorce Act, 70 of 1979.

<sup>2</sup> Supreme Court Act, 59 of 1959, Uniform Rule 18, Magistrates' Courts Act 32 of 1944, Rule 6.

<sup>3</sup> These include marriages in community of property and marriages out of community of property subject to the accrual system.

<sup>4</sup> 1937 WLD 126, at 127-8.

<sup>5</sup> Quansay "The order of forfeiture of benefits in divorce proceedings in Botswana".

## Forfeiture of patrimonial benefits (contd.)

therefore contended that it remains unrealistic to proceed from the view that the responsibility for the breakdown of the marriage lies only with one of the spouses while the other is completely innocent.

In the reported case *MC v JC*, after 26 years of marriage the husband obtained a partial forfeiture order based on his wife's adultery which was deemed to be 'substantial misconduct'. On appeal, the court made a comment in passing, holding that section 9(1) might infringe the right to equality because it placed the party who had committed substantial misconduct in an unfavourable position when it comes to the distribution of the patrimonial benefits of the marriage. As a result, the court pointed out that many may feel forced to remain in an unhappy marriage for fear of losing patrimonial benefits.<sup>6</sup>

Moreover, in the event that the court is tasked with having to consider a prayer for forfeiture of patrimonial benefits it does not only take into account the substantial misconduct, but also further factors such as the duration of the marriage, the circumstances which gave rise to the breakdown and whether the other party would be unduly benefited, since all factors are equally important.<sup>7</sup> In the reported case of *JW v SW*, the court held that substantial misconduct does not on its own justify an order for forfeiture.<sup>8</sup>

The courts' intention when

granting an order for forfeiture is therefore to protect vulnerable parties in divorce proceedings rather than punishing the party against which the order is sought. In the reported case *Tsebe v Tsebe*, the court found that the defendant used the proceeds of his pension pay-out exclusively for his own benefit, to the detriment of the joint estate and the plaintiff in particular. It was further found that the defendant would under these circumstances be unduly benefitted if the order for forfeiture was not granted. As a result the defendant was ordered to forfeit his claim to 50% of the plaintiff's pension interest held in the Post Office Retirement Fund.<sup>9</sup> It is important to note that where there is a risk that one spouse in a marriage may endanger the other spouse's interest in the joint estate pending the divorce, our law often seeks to protect such spouse against the deliberate or reckless conduct of the other during divorce proceedings.

It is however important to note that South African courts are reluctant to grant an order for forfeiture of patrimonial benefits due to its adverse effects and its interference with the applicable matrimonial property regimes governing the division of such estates. In light of the above, it is evident that forfeiture of patrimonial benefits is indeed relevant in modern South Africa to ensure that there is a level of protection in favour of vulnerable spouses, especially women. ●

# A Single Marriage Statute?

By **Sethabile Sithole**, Durban intern

Our country is one that has people from diverse cultures and backgrounds. This is evident in the existence of legal pluralism that exists in our legal system. This is discernable in the judicial accommodation of non-state law when it comes to religious marriages. Though not recognised under South African law, the courts have extended a piecemeal recognition of religious marriages, although this recognition still casts a shadow of uncertainty on the parties to these marriages. For this reason parties have entered into both civil and religious marriages.

The South African Law Reform Commission ("the Commission") seeks input on whether existing laws should be reshaped into a single marriage statute and, if so, how. There are currently three laws in which the three types of marriages recognised in South Africa are governed, viz., the Marriage Act of 1961, the Recognition of Customary Marriages Act of 1998 and the Civil Union Act of 2006.

One of the primary questions from the Commission is whether they should create a single statute that is all inclusive and has consequences applying to all types of marriages, or an omnibus statute which has different chapters regulating the different types of marriages. If the former is to be adopted, the question is what about the requirements which are unique and only exist in one type of marriage and not the other? Some examples would be the payment of a bride-price or the marriage being conducted by a marriage officer. In such cases, would we have to do away with such requirements or apply them across the board?

The Commission Issue Paper 35 on Single Marriage Statute is available on its website at [www.justice.gov.za/salrc](http://www.justice.gov.za/salrc) and it is open for comments on any of the issues contained in the issue paper. For those who are interested in making comments, an extension has been given until 31 August 2019. Workshops will also be held in the various provinces in due course. In addition, a consolidated questionnaire will be available in all nine official languages. The commission is liaising with the Council for the Blind to have the questionnaire available in braille as well.

<sup>6</sup> *MC v JC* 2016 (2) SA 227 (GP).

<sup>7</sup> 1989 1 SA 597, 602-3.

<sup>8</sup> *JW v SW* 2011 (1) SA 545 (GNP).

<sup>9</sup> *Tsebe v Tsebe* [2016] ZAGPPHC 575 – Forfeiture of pension interest in a divorce matter.



# Celebrating One of Our Own

By Muchengeti Hwacha,  
Johannesburg intern

ProBono.Org would like to extend a congratulatory message to one of our partner attorneys Dakalo Singo, of Werksmans. He was featured in the Mail & Guardian's annual list of eminent South Africans under the age of 35.

His work in representing refugees against the Minister of Labour resulted in a landmark Constitutional

Court judgement, which affirmed the labour rights of this marginalised community. That judgment has become the catalyst for ProBono.Org, with support from the HCI Foundation, to develop a campaign and monitoring mechanism to ensure its effective enforcement.

**Congratulations Dakalo, continue the good work.**

## Children's Project – training for legal practitioners

By Elsabe Steenhuisen

### 1. Short dialogues

This year our children's project is conducting a series of eight two-hour dialogues in four Gauteng regions (Alberton, Roodepoort, Boksburg and Johannesburg) spread over the year. Their aim is to create a platform for recently admitted and young legal practitioners to engage with each other and with more experienced colleagues on various topics.

The first two dialogues (held on 28 March and 4 April) served to improve the practical skills of dealing with professional/client relationships – the conflict, the emotions, the relentless contact and insistence on feedback, the overload of information, the lack of co-operation and clear instructions. The third and fourth dialogues (held on 24 and 30 May) dealt with the lessons of practice we only learn the hard way.

Attendees compared and shared their experiences with that of the speaker and their colleagues.

The fifth dialogue was held on 11 July at Klopper Jonker Attorneys in Alberton and dealt with appropriate billing practices, the difference between fees and disbursements, managing clients' perceptions in respect of fees and clear communication with clients about fees. The speaker touched on overreaching, underreaching, deposits and fee estimations. This dialogue will be repeated on 29 August at Coetzee Attorneys in Roodepoort.

The last two sessions will be held on 16 August at Hogan Lovells, Sandton and on 23 August at Alice Swanepoel Attorneys, Boksburg. The speaker will open the discussion with reference to best practice in respect of the charging of professional fees and the levying of disbursements. He will

conclude with ethical ways of dealing with advocates and with the courts.

ProBono.Org is indebted to Ramsden Small Attorneys that made Suné Bosch and Jonathan Small available to lead the dialogues for 2019, and to the firms for hosting the dialogues.

If you would like to attend the remaining dialogues, you are welcome to book your place with Phumi at [phumi@probono.org.za](mailto:phumi@probono.org.za). Please note that space is limited.

### 2. Workshops in Children's Court practice

The second of this series of workshops was held on 19 July hosted by our partners, Werksmans Attorneys.

Presenter and former magistrate Alice Swanepoel shared her years of experience in handling Children's Court matters. The gathering was also an opportunity for the legal

practitioners who had attended the first session to probe more deeply into the intricacies of representing children and their interests.

We were also honoured by a surprise guest speaker, Acting Judge Clute Swanepoel. His significant depth of knowledge and particular experience in the higher courts provided an additional layer of detail to the session.

These workshops highlighted the need for legal practitioners to discuss practical scenarios with each other and with experts on Children's Court practice. Plans for 2020 workshops will focus on this aspect and we will call on legal practitioners to indicate which scenarios they would like to be discussed.

Our thanks for the contributions of the speakers and the host, and the participation of the attendees. ●



# HCI Foundation Workshop



In Johannesburg on 25 July the HCI Foundation held a well-received workshop for its grantees. The objectives of the day were to share good practices, encourage collaborations, deepen an understanding of monitoring and evaluation, explore fundraising and sustainability and to celebrate and inspire individuals and organisations. The activities included getting to see the work of the participating organisations through their colourful displays, creative group work and a feedback session on the 2018 survey sent out by the HCI Foundation. This survey highlighted the need for funders to have more contact with grantees, enable peer learning and provide mentorship to small NPOs. We thank the Foundation for a well executed and worthwhile engagement. ●



On 15 August the Johannesburg office held its annual Women's Day event. 50 Community members came from the Johannesburg area as well as Tembisa, Zola and Dobsonville. Candice Pillay from Hogan Lovells spoke to them about child and spousal maintenance and 30 attorneys, advocates and mediators made themselves available for private consultations on the day. In addition, information was provided by the Teddy Bear Clinic, the CCMA, POWA, the Legal Resources Centre, MES and the Deeds Office. Thanks to Candice and to the legal practitioners who volunteered their time to advise and assist the women who had legal issues. ●

# Sexual Orientation and Gender Identity (SOGI)

By Swazi Malinga

Diversity Training Programme for ProBono.Org and law firm affiliates

ProBono.Org identified the need to sensitise our staff on all aspects of sexual diversity and inclusivity. We engaged Enza, an accredited training provider specialising in gender diversity.

The training was offered in three sessions spread over three months.

The programme aimed to sensitise legal practitioners who provide services to their LGBTI clients and focused specifically on the health and justice service needs of the LGBTI community, especially those targeted for hate crimes because of their sexual orientation or gender non-conformity. The intention



was to stimulate dialogue by creating a space for shared learning and problem solving. Sensitising frontline legal workers improves access to treatment and care for vulnerable groups.



The training curriculum was made up of the following modules:

**Module 1:** Intersectionality

**Module 2:** Gender & Sexuality Sensitisation

**Module 3:** Understanding Health & Justice Needs

**Module 4:** Creating A Welcoming & Safe Environment

**Module 5:** Gender, Sexuality And The Law

**Module 6:** Understanding Hate Crimes

**Module 7:** Being Transgender

**Module 8:** Gender Based Violence

# Amnesty International Youth Assembly

By Muchengeti Hwacha,  
Johannesburg intern



On 2 August 2019 delegates from 150 countries descended on Johannesburg for Amnesty International's (AI's) Annual Global Assembly. This gathering constitutes the organisation's highest decision making body and befitting the magnitude of the occasion, former Deputy Chief Justice Dikgang Moseneke gave the keynote address.

AI describes itself as a world embracing movement, working for the protection of human rights. The famed story of the Nobel

Peace Prize winning organisation dates back to 1961, when British lawyer Peter Benenson wrote an article 'The Forgotten Prisoners' for the newspaper The Observer. The article was a call to action, an inspirational stance against the plight of prisoners of conscience.

AI invited ProBono.Org to take part in the YOUTH POWER ACTION! session. The youth gathering brought together young human rights activists to share stories of their past journey and ideas for future action. From

reproductive rights activists in Latin America, to trauma counselling for Syrian refugees in Turkey, we heard testimonies that gave life to cursory coverage of the news media. We had moments of deep reflection, we had moments of youthful light-heartedness, but most importantly we had moments to connect and find allies in the work we are so passionate about. We experienced an energy in that room, a driving force for good, that we hope to carry with us in our human rights work. ●



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