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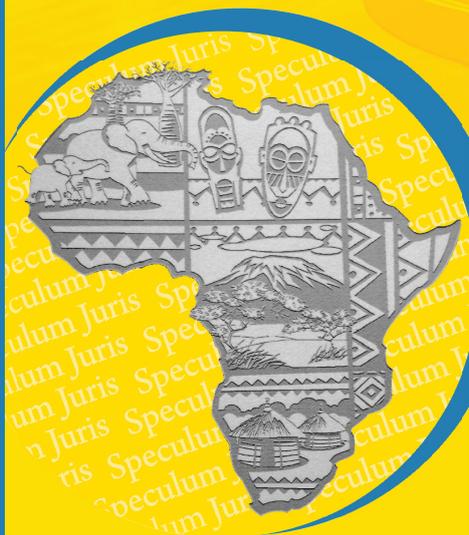
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# Revisiting Forfeiture of Patrimonial Benefits and the Death of a Spouse: The Case of *Mogau v Letsoalo*

Siyabonga Sibisi\*

Senior Lecturer, School of Law, University of KwaZulu-Natal

## Abstract

*The common law legal position is that forfeiture of patrimonial benefits (hereafter forfeiture) could only be ordered adjunct to a divorce decree or a separation order. Forfeiture is now regulated by section 9 of the Divorce Act 70 of 1979. Accordingly, the Divorce Act retains the position that forfeiture may only be ordered adjunct to a divorce decree. However, in terms of section 14 of the same Act, courts may no longer issue separation orders. Be that as it may, a divorce is not the only way of dissolving a marriage. A marriage may also be dissolved by death of a party to a marriage. In terms of current law, forfeiture may not be entertained when a marriage has been dissolved by death. But problems will occur when an ex-spouse passes away after a divorce decree but before a pending appeal could be finalised. This occurred in the case of *Mogau v Letsoalo*. This case note considers forfeiture and death of an ex-spouse pending appeal proceedings. In *Mogau v Letsoalo* the court entertained an appeal pertaining to forfeiture after the spouse had died. It is debatable whether, in such a case, the proceedings could still be regarded as divorce proceedings, as required by section 9.*

**Keywords:** Divorce; death; forfeiture; patrimonial benefits; marital fault

\* LLB LLM (UKZN), PhD Candidate (UKZN). Attorney of the High Court of South Africa.

## 1 INTRODUCTION

Section 9(1) of the Divorce Act<sup>1</sup> provides:

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, one party will in relation to the other be unduly benefitted.

This case note focuses on the first and the last line of this provision. The first line makes it clear that a forfeiture of patrimonial benefits order (hereafter a forfeiture order) may only be made if the proceedings in question are divorce proceedings and the ground for the divorce must be the irretrievable breakdown of a marriage. This raises an interesting question because a marriage may also be dissolved by death or an annulment of a voidable marriage.<sup>2</sup> Equally interesting is that the irretrievable breakdown of a marriage is not the only ground for a divorce. A divorce may also be decreed on the grounds of mental illness and continual unconsciousness.<sup>3</sup> Therefore, why did the legislature confine a forfeiture order to a divorce without considering death and annulment?

The simple answers to the above questions are that neither a deceased, nor a mentally ill or unconscious person can answer for themselves before a court. In the latter case, section 9(2) makes it clear that a forfeiture order cannot be made against in these circumstances. While the protection of certain categories of individuals must be prioritised, this protection cannot be offered at all costs. For instance, the facts warranting forfeiture may have occurred before the mental illness and continuous unconsciousness. They may also have occurred before the death of a spouse. The facts could be such that, had the marriage ended in a divorce, the court would have been able to order forfeiture. This note may be seen as advocating the expansion of the grounds upon which forfeiture may be ordered. Courts should be able to order forfeiture even in cases where the marriage has been dissolved by death of a spouse or where the spouse passed on immediately after *litis contestation* in the divorce matter where forfeiture is pleaded. It also advocates for transmission of all necessary rights of actions to the heirs in order to protect the deceased's estate. These arguments have recently received an indirect boost from the Constitutional Court judgment in *EB (Born S) v ER (Born B); KG v Minister*.<sup>4</sup> This judgment forms part of the discussions below.

In *Mogau v Letsoalo*,<sup>5</sup> the appellant's mother passed away after lodging an appeal against the decision of a regional magistrate. The magistrate had decreed a divorce between the deceased (plaintiff in reconvention in regional court) and the respondent (defendant in reconvention in regional court), but declined to order forfeiture against the respondent. The appeal was against the decision not to order forfeiture against the respondent. The appellant was substituted as such after the death of his mother. The court heard the appeal in the interest of justice, despite the death of the mother.<sup>6</sup> While the decision is welcome for taking a bold step and entertaining an appeal pertaining to forfeiture when the deceased had passed on immediately after the divorce decree, the means of arriving at this decision did not follow any clear path as it completely ignored all existing precedent on forfeiture and death. It is further observed that the decision

1 70 of 1979.

2 Heaton *South African Family Law* 4 ed (2015) 113.

3 Divorce Act, s 3 which provides for the three grounds upon which a marriage may be terminated.

4 *EB (Born S) v ER (Born B); KG v Minister of Home Affairs* 2024 2 SA 1 (CC).

5 *Mogau v Letsoalo* [2022] ZAGPPHC 807 (26 October 2022).

6 *Mogau v Letsoalo* para 10.

brings to bear the interpretation of the words “... in relation to the other ...” as they appear in the last line in section 9(1). If one of the parties to the divorce has passed on, reference to “... in relation to the other ...” no longer arises, further rendering a forfeiture order redundant and incompetent if one adopts a literal approach to interpreting section 9(1). Because of this, this case note will argue that the court ought to have adopted a purposive approach to interpreting section 9(1).

The purpose of this note is to lead a discussion on forfeiture and death with special reference to *Mogau v Letsoalo*. It opens with a brief general note on forfeiture. This is followed by a more specific discussion on forfeiture and death. This is done through reference to decided cases on the subject. Both the common law and the statutory position are considered. A more focused discussion of *Mogau v Letsoalo* then follows. The decision in *Mogau v Letsoalo* will be criticised for failing to acknowledge precedent and distinguishing from the precedent. It will also be argued that, based on a literal interpretation, once the deceased died, the words “...in relation to the other ...”, as they appear in section 9(1), did not arise and the question of forfeiture fell away. It will also be shown that the only way that the court could have continued entertaining the matter is if a purposive interpretation of section 9(1) had been adopted. This did not happen in this case. The case is therefore criticised.

## 2 THE LEGAL FRAMEWORK BEFORE *MOGAU V LETSOALO*

### 2.1 General Note on Forfeiture

The rationale behind forfeiture is not to achieve fairness between parties at the end of a marriage.<sup>7</sup> In its common law form, it was aimed at ensuring that a person does not benefit financially from a marriage that he/she has wrecked.<sup>8</sup> A party to a marriage could therefore not approach a court for a stand-alone forfeiture order. The order could only be made adjunct to a divorce decree during the divorce proceedings or judicial separation.<sup>9</sup> Similar to a divorce, common law forfeiture was based on the fault principle and the innocent spouse was enjoined to prove that the guilty spouse had committed adultery or malicious desertion.<sup>10</sup> It had a punitive component in that a guilty spouse suffered economic disadvantages if he/she was the poorer spouse.<sup>11</sup> However, if the guilty spouse were the richer party, on a technicality, he/she could hardly forfeit anything unless they were entitled to a benefit from the poor spouse in terms of an antenuptial contract. A benefit in terms of an antenuptial contract became a patrimonial benefit which he/she could forfeit. Three common law features of forfeiture are: (a) a person could not forfeit what he/she brought into the marriage;<sup>12</sup> (b) only a patrimonial benefit could be forfeited; and<sup>13</sup> (c) courts could only order total forfeiture.<sup>14</sup>

Section 9 of the Divorce Act codified forfeiture. It retains the common law position to a greater extent.<sup>15</sup> However, there are several developments. The fault principle is no longer part of our law

7 Marumoagae “Factors Justifying Forfeiture of Patrimonial Benefits: *Molapo v Molapo* (2013) ZAFSHC 29 14 Mar 2013” 2015 *Obiter* 232–239. Also see Marumoagae “Forfeiture of Patrimonial Benefits – It’s Not About What’s Fair” July 2012 *De Rebus* 22.

8 *Murison v Murison* 130 AD 157.

9 *Vergottini v Vergottini* 1951 2 SA 484 (W) 485B and Hahlo *The South African Law of Husband and Wife* 2 ed (1963) 419.

10 Evans *Law of Divorce in South Africa* (1920) 125.

11 Van Heerden, Skelton and Du Toit (eds) *Family Law in South Africa* 2 ed (2021) 136.

12 Bonthuys “Striving for Substantive Gender Equality in Family Law: Selected Issues” 2005 *SAJHR* 547–557.

13 Evans *Law of Divorce* 125.

14 Hahlo “When is a Benefit Not a Benefit” 1984 *SALJ* 456–457.

15 Save that courts can no longer order judicial separation — see Divorce Act s 14.

for the purposes of a divorce decree.<sup>16</sup> Forfeiture may be ordered in divorce proceedings based on the irretrievable breakdown of a marriage.<sup>17</sup> The courts now have a narrow discretion between total forfeiture and partial forfeiture.<sup>18</sup> They are no longer bound to order total forfeiture. While the guilt principle is retained in the form of substantial misconduct, it is no longer a *sine qua non*. A forfeiture order may now be made even if both the parties are innocent.<sup>19</sup> The order may be based solely on the shortness of the marriage — a fault neutral factor.<sup>20</sup> However, precedent supports partial forfeiture where the short duration of the marriage is the only ground.<sup>21</sup>

## 2.2 Forfeiture and the Dissolution of Marriage Through Death

Despite the fact that a majority of marriages are dissolved by death,<sup>22</sup> forfeiture and the dissolution of marriage through death have not received much attention. Although Hahlo points out that forfeiture could be ordered on the ground of adultery if the marriage was dissolved by death,<sup>23</sup> there are only two cases that have dealt with divorce and death prior to the Divorce Act of 1979. Nevertheless, the law has always been clear that a forfeiture order may only be made in divorce proceedings between the parties to the marriage. The first reported case is *Ex parte Boshoff, No: In re Boshoff v Boshoff*<sup>24</sup> (hereafter *Ex parte Boshoff*), before the then Witwatersrand Local Division. In this case, the wife had deserted her husband, who had then approached the court for restoration of conjugal rights or, in the event of conjugal rights not being restored, a divorce decree and a forfeiture order.<sup>25</sup> However, the husband died before close of proceedings. The executor of the deceased estate then approached the court for an order substituting himself and instituting a claim for a divorce decree and a forfeiture order.<sup>26</sup> The court stated the legal position regarding malicious desertion. It was mandatory for the deserting spouse to be given an opportunity to restore conjugal rights before a divorce could be pursued.<sup>27</sup> Since the husband had died, this was no longer possible and neither was a divorce.<sup>28</sup> Therefore, a forfeiture order could not be made as a separate order at the instance of the executor.<sup>29</sup>

A couple of years after *Boshoff*, forfeiture and the death of a spouse resurfaced in *Ex parte Meyer, No: In re Meyer v Meyer*<sup>30</sup> (hereafter *Ex parte Meyer*), before the Durban and Coast Local Division. In this case, the husband (plaintiff) issued summons for, among others, a divorce and forfeiture against his wife, the defendant, on the ground of adultery.<sup>31</sup> The defendant failed to enter an appearance to defend prompting the husband to file a declaration.<sup>32</sup> Unfortunately,

16 Sibisi “Re-thinking Forfeiture of Patrimonial Benefits When a Marriage Dissolves Through Death” 2022 *Obiter* 260–262.

17 Divorce Act s 3 read with s 4(1).

18 *Ibid* s 9(1) which reads, “... either wholly or in part...”

19 *Singh v Singh* 1983 1 SA 781 (C) 788F-G.

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

21 A survey of decided cases shows that courts favour partial forfeiture if the shortness of the marriage is the only ground for the forfeiture order. See *T v R* and *PP v PJ* [2020] ZAGPJHC 281 (2 November 2020).

22 Sibisi 2022 *Obiter* 262.

23 Hahlo *The South African Law of Husband and Wife* 419.

24 *Ex parte Boshoff, No: In re Boshoff v Boshoff* 1953 3 SA 237 (W).

25 *Ibid* 237G.

26 *Ibid* 237H.

27 *Ibid* 238B.

28 *Ibid* 238B-C.

29 *Ibid* 238C.

30 *Ex parte Meyer, No: In re Meyer v Meyer* 1962 2 SA 688 (N).

31 *Ibid* 689B.

32 *Ibid* 689C.

the husband died before the trial could start. The applicant, the executor of the deceased estate, petitioned the court to be substituted as plaintiff. He also petitioned the court to proceed with the trial in order for him to seek a forfeiture order on behalf of the estate.<sup>33</sup>

In deciding the matter, the court stated the common law position that forfeiture could only be ordered adjunct to a divorce decree or judicial separation. The court did point out that some old writers wrote that forfeiture could be ordered on the ground of adultery even where the marriage was dissolved by death.<sup>34</sup> However, there was no case authority supporting this relief.<sup>35</sup> Further, the court held that the substantive relief sought by the deceased was a decree of divorce and that forfeiture was only sought as an ancillary relief.<sup>36</sup> Because the marriage had ended when the husband died, the ancillary claim also fell away.<sup>37</sup> The court also pointed out that the claim for forfeiture could not be transmitted to the heirs.<sup>38</sup>

The Divorce Act became effective on 1 July 1979,<sup>39</sup> after the decisions above. Nevertheless, the legal position in the above has largely remained, save that courts no longer issue separation orders and orders for restoration of conjugal rights. Since the passing of the Divorce Act, there have been only two cases dealing with death and forfeiture. The first case is *Monyepao v Ledwaba*,<sup>40</sup> decided in 2020. The second is *Mogau v Letsoalo supra*, which is the subject of this case note. In *Monyepao v Ledwaba*, the deceased husband had first married the respondent (first wife — FW) by customary rites in June 2007.<sup>41</sup> However, in 2008, the deceased left the marital home without dissolving his customary marriage to the respondent by a court order.<sup>42</sup> The FW then entered into a civil marriage with another man.<sup>43</sup> The husband also married the appellant (second wife – SW) by customary rites in 2010.<sup>44</sup> He died in 2012.<sup>45</sup> Following his death, the FW sought to exert a spousal claim against the deceased's estate, notwithstanding her civil marriage with another man. The SW also exerted a spousal claim on the same estate. Both the parties were issued letters of executrix.<sup>46</sup> As a result of the competing claims, the SW approached the court for an order that; (a) the customary marriage between the FW and the deceased was dissolved when the deceased left the marital home; and (b) the FW's patrimonial benefit of the customary marriage to the deceased is forfeited to the deceased's estate.<sup>47</sup>

The court *a quo* found that the customary marriage between the FW and the deceased had been dissolved in 2008, when the deceased left the marital home. On appeal before a full bench, the court held that the customary marriage between the FW and the deceased was valid as it had not been dissolved by a decree of divorce as required by section 8 of the Recognition of Customary Marriages Act.<sup>48</sup> Further, the civil marriage between the FW and another man was

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33 *Ibid* 689E.

34 *Ibid* 689H.

35 *Ibid* 690A.

36 *Ibid* 691B.

37 *Ibid* 691C.

38 *Ibid* 691D.

39 Divorce Act s 19.

40 *Monyepao v Ledwaba* [2020] ZASCA 54 (27 May 2020).

41 *Ledwaba v Monyepao* [2018] ZALMPPHC 61 (25 April 2018) para 7.

42 *Ibid* para 8.

43 *Ibid* para 9.

44 *Ibid*.

45 *Ibid* para 10.

46 *Ibid*.

47 *Ibid* para 2.

48 120 of 1998.

null and void.<sup>49</sup> The court *a quo* also ordered that the FW forfeit the patrimonial benefits of the customary marriage to the deceased's estate on two grounds. The first was that the customary marriage between the FW and the deceased had lasted for less than a year. The second was that the FW had committed substantial misconduct by entering into a civil marriage with another man when she still regarded herself as married to the deceased.<sup>50</sup> The full bench disagreed with this decision. It held that in divorce proceedings, forfeiture must be sought by a party to the marriage.<sup>51</sup> The full bench also held that the proceedings between the SW and the FW were not divorce proceedings and therefore it was incorrect to order forfeiture. Further, the SW was not a party to the marriage between the FW and the deceased.<sup>52</sup> Following the decision of the full bench, the SW appealed before the SCA. The SCA agreed with the decision of the full bench that forfeiture could not be claimed where the marriage had been dissolved through death.

The decision in *Monyepao v Ledwaba* has been criticised for adopting a literal interpretation of section 9 of the Divorce Act, resulting in someone who had purported to enter into a void civil marriage and committed polyandry or adultery in the process, to benefit unduly. It has been argued that this is *contra bonos mores* and does not inspire any confidence in the law.<sup>53</sup> It has also been argued that a purposive interpretation considers the purpose of section 9, which is to prevent a person from benefitting from a marriage that h/she has wrecked.<sup>54</sup> This purposive approach had been adopted by the court *a quo*. The decision is also criticised for finding that the SW was not a party to the marriage between the deceased and the FW. Because a polygynous customary marriage involves more than one wife; it was therefore incorrect to regard the SW as an outsider.<sup>55</sup>

### 3 *MOGAU v LETSOALO*

#### 3.1 Facts

The respondent (husband) and the deceased (wife) were married and divorced twice. They each had children from previous relationships. The first marriage was entered into in community of property in 2000. This marriage was dissolved by divorce in 2003, after which they remarried again in 2004. The second marriage was also a marriage in community of property and it lasted until 2017, when the husband left the common home. He then instituted divorce proceedings in July 2018.<sup>56</sup> In response, the wife counter-claimed forfeiture against the respondent. A divorce was decreed in 2019 but the forfeiture claim was dismissed. The wife then noted an appeal against the decision not to order forfeiture.<sup>57</sup> Unfortunately, the wife passed away before the appeal could be heard. There were several delays in getting the case on the roll. These delays continued after the death of the wife.<sup>58</sup> The appellant, a descendant of the deceased, was appointed executor of the deceased estate and he decided to continue with the appeal.<sup>59</sup>

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49 *Ibid* para 16.

50 *Ibid* para 18.

51 *Ibid* para 21.

52 *Ibid* para 23.

53 Sibisi "Forfeiture of Patrimonial Benefits and the Dissolution of Marriage Through Death: *Monyepao v Ledwaba* (1368/18) [2020] ZASCA 54 (27 May 2020)" 2022 *PELJ* 1 10.

54 *Ibid* 11.

55 *Ibid*.

56 *Mogau v Letsoalo* para 2.

57 *Ibid* para 1.

58 *Ibid* para 4.

59 *Ibid* para 5.

### 3 2 Decision

Despite the appellant's failure to make a case for condonation and substituting himself for the deceased, the appeal court held that it was in the interest of justice that the delays be condoned and that the appellant be substituted for his deceased mother. The court held that the appeal had consequences for the heirs of the deceased.<sup>60</sup>

Having substituted the appellant for the decision, the court proceeded to hear and decide on the matter. The court held that the nature of marriage in community of property entails equal sharing on dissolution of the marriage. This includes everything owned and owed by the parties. Both assets and debts belong to the joint estate.<sup>61</sup> The court held that it was the deceased who bore the onus of establishing her entitlement to a forfeiture order.<sup>62</sup> It also held that in terms of section 9 of the Divorce Act, it had a discretion whether to order or refuse forfeiture taking into account the three factors, namely, the duration of the marriage, the circumstances which led to the break-down of the marriage and any substantial misconduct by either spouse. If any of these factors are present, the enquiry moves to whether the failure to order forfeiture will result in an undue benefit.<sup>63</sup>

The marriage lasted 15 years, which the court held to have been a lengthy period. Furthermore, the deceased had failed to establish any fault on the part of the respondent. In addition, the court found that the respondent had contributed to the joint estate in various ways, wherever he could.<sup>64</sup> As for the cause of the irretrievable break-down of the marriage, the court referred to a dicta in *Kritzinger v Kritzinger*<sup>65</sup> that "human experience suggests that generally speaking where there is a break-down of a marriage the conduct of both parties most probably always contribute to it".<sup>66</sup> Therefore, the respondent did not unduly benefit. The appeal was dismissed.<sup>67</sup>

## 4 DISCUSSIONS

The case of *Mogau v Letsoalo* remains an interesting decision on death and forfeiture. Although the marriage in question was dissolved by a decree of divorce, the case does in a way deal with the court's power to order forfeiture when one of the spouses has died. Based on the cases discussed above, and the reading of section 9(1), forfeiture may only be ordered adjunct to a divorce decree. It follows that if the proceedings in question are not divorce proceedings, the court does not have the power to order forfeiture. Although the court dismissed the claim for forfeiture, however, the ground for the dismissal was not the fact that section 9(1) was only applicable between parties to a marriage. The forfeiture claim failed because the facts did not justify it. However, the proceedings were an appeal based on the record of the trial court. Since the deceased had already passed away, the words "in relation to the other ...", as they appear in section 9, quoted above, did not arise because the appellant was not a party to the marriage. Below is a critical discussion of the decision and an attempt to explain the meaning of the words "in relation to the other ...".

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60 *Ibid* para 9.

61 *Ibid* para 12.

62 *Ibid* para 13.

63 *Ibid* para 14.

64 *Ibid* para 18.

65 *Kritzinger v Kritzinger* 1989 1 SA 67 (A).

66 *Mogau v Letsoalo* para 21.

67 *Ibid* para 23.

#### 4 1 Departure from Precedent on Forfeiture and Death

The basic tenet of judicial precedent is that courts may only depart from precedent in exceptional circumstances to correct error or oversight.<sup>68</sup> Admittedly, *Ex parte Boshoff supra* and *Ex parte Meyer supra* are on equal footing with *Mogau v Letsoalo*. They are all decisions of two of various divisions of the High Court. In *Mogau v Letsoalo*, the substantive relief claimed in the court *a quo* was the divorce decree. Equally true, forfeiture was also claimed as a substantive counter-relief by the deceased, unlike in *Ex parte Meyer* where forfeiture was only claimed as ancillary relief.<sup>69</sup> Although *Monyepao v Ledwaba*, being a decision of the SCA, is binding on *Mogau v Letsoalo*, these two decisions also differ from each other. In *Monyepao v Ledwaba*, the marriage had been dissolved by the death of a spouse and the claim for forfeiture was sought as a stand-alone claim and not in conjunction with a claim for a divorce decree. In *Mogau v Letsoalo*, the court had already decreed a divorce and pronounced on forfeiture. The matter was an appeal against the dismissal of the forfeiture claim by the regional court.

*Mogau v Letsoalo* may be distinguished from the decisions above, and various important questions arise. Was the appeal proceedings still divorce proceedings? If this question is could be answered in the affirmative, a follow up question arises. May a deceased person still be involved in divorce proceedings after death? One way of approaching this is that the appeal still formed part of the divorce proceedings, however, once one party has deceased, there can be no more divorce proceedings between the parties. Even if the deceased had passed away after the initiation of divorce proceedings, but before the court could decree a divorce, the proceedings in question would have become obsolete immediately after the death of the deceased. The marriage in question would have been terminated automatically by death. A forfeiture order would also have become redundant as it may only be made in divorce proceedings.

#### 4 2 Were Appeal Proceedings Still Divorce Proceedings?

It is submitted that the court ought to have pronounced on the decisions above dealing with forfeiture and the death of a spouse. The court ought to have justified the proper basis for entertaining an appeal relating to a forfeiture claim after the death of a spouse. The question whether the proceedings were still divorce proceedings, as required by section 9(1), even after the passing away of the wife ought to have been addressed first. In turn, the court would have answered the question whether a deceased person may still be locked in divorce proceedings after death. In South African law, death brings about the end of legal subjectivity. It terminates all rights and obligation.<sup>70</sup> Since the capacity to litigate is part of legal subjectivity,<sup>71</sup> death also terminates capacity to litigate. It terminates any existing marriage, if not already terminated by a divorce decree. The rules of the law of succession will then immediately set in. The estate of the deceased vests in the master and then the executor of the deceased estate.<sup>72</sup>

The precedent set in *Mogau v Letsoalo* is that the heirs of a deceased person may approach the court, apply for condonation and lodge an appeal for the purposes of a forfeiture claim. As noted above, while the forfeiture appeal was dismissed, the dismissal resulted because the facts did not justify a forfeiture order. Had the facts justified it, the court would have ordered forfeiture. Essentially, the court did allow the transmission of the action for forfeiture to the heirs of the deceased. In doing so, the court did not address precedent on this issue. Under the

68 Wallis “Whose Decisis Must We Stare?” 2018 *SALJ* 1 2. Also see Devenish “The Doctrine of Precedent in South Africa” 2007 *Obiter* 1 2.

69 *Ex parte Meyer* 691B.

70 Heaton *The South African Law of Persons* 6 ed (2021) 27.

71 Kruger and Skelton (eds) *Law of Persons in South Africa* 2 ed (2018) see chapter 5 on status.

72 Boezaart *Law of Persons* 7 ed (2020) 165.

common law, such action could not be transmitted to the heirs.<sup>73</sup> Unfortunately, the court did not address the common law in this regard.

### 4 3 The Meaning of the Words “... in Relation to the Other ...”

#### 4 3 1 The Ordinary/Literal Meaning of the Words

The words “...in relation to the other...” in section 9(1) are another reason why the court ought to have justified its decision to entertain the appeal, despite the death of the wife. Courts have never focused on the meaning of these words. There is a reason why the legislature included them in the first place and they cannot be ignored. As such, they must be interpreted. The first step is that the words should be given their ordinary meaning.<sup>74</sup> If the ordinary meaning is considered, the words “...in relation to the other...” mean the parties to the marriage must be compared to each other. Their respective contributions to the estate must be considered. A spouse should not be enriched unduly at the expense of the other spouse. Equity must be achieved between the parties by considering the three factors that appear in section 9(1). The parties to the marriage must be compared to each other and this does not relate to third parties such as their heirs. It can therefore be argued that once the deceased has passed on, the words “in relation to the other party ...” does not arise. Any pending claim for forfeiture then becomes redundant.

#### 4 3 2 The Purposive Interpretation of the Words

Based on the above, giving the words their ordinary meaning, entails that the court would not be able to entertain a matter dealing with forfeiture and death of a spouse. The ordinary meaning of the words “in relation to the other party ...” is not helpful because it requires that the parties be compared to each other; as already pointed out above, the comparison became impossible when the wife died. Based on this ordinary meaning, the court was prevented from entertaining the appeal based on forfeiture. The purpose of the legislation must therefore be considered. The purpose qualifies the ordinary meaning of the words.<sup>75</sup> Accordingly, the purpose behind section 9(1) is to ensure that a spouse does not unduly benefit from the dissolution of marriage by divorce. The benefit will be undue if the marriage has been of a short duration or if a spouse committed substantial misconduct. The court is empowered to order forfeiture if it is found that a spouse will unduly benefit at the expense of the other spouse.<sup>76</sup>

An ordinary interpretation presents a further hurdle to a court dealing with forfeiture and death. Based on this interpretation, forfeiture may only be ordered in divorce proceedings where the ground for the divorce is the irretrievable breakdown of the marriage. As pointed out above, this ordinary interpretation was adopted by the SCA in *Monyepao v Ledwaba*. If the purpose of section 9(1) is considered, the court will be able to order forfeiture even where the marriage ended in death or one spouse passed on immediately after the divorce decree, but before finality could be achieved on the question of forfeiture. A purposive interpretation will enable the court to order forfeiture in line with the purpose behind section 9(1) if the proved facts justify it.

## 5 *EB (BORN S) v ER (BORN B); KG v MINISTER OF HOME AFFAIRS*

The impact of the judgment of the Constitutional Court in *EB (Born) v ER (Born B)* (hereafter *EB v ER*) on death and forfeiture is hereby considered. This judgment was passed exactly a year

<sup>73</sup> *Ex parte Meyer* 691D.

<sup>74</sup> Botha *Statutory Interpretation: An Introduction for Students* (2012) 111.

<sup>75</sup> *Ibid* 111–112.

<sup>76</sup> *Wijker v Wijker* 1993 [1993] 4 All SA 857 (AD) para 19 and *Tsebe v Tsebe* [2016] ZAGPPHC 575 (24 June 2016) para 15.

after *Mogau v Letsoalo*, *EB v ER* challenged the absence of the redistribution of assets remedy where the marriage was dissolved by death. The redistribution of assets remedy is provided for in section 7(3) of the Divorce Act and was therefore a divorce remedy and not available in the event the marriage was dissolved by death.

As at the date of the judgment, the redistribution of assets remedy was applicable in divorce matters in the following marriages:

- A civil marriage entered into before the commencement of the Matrimonial Property Act 88 of 1984 (on 1 November 1984) in terms of an antenuptial contract by which community of property, profit and loss, and accrual are excluded;
- All customary marriages regardless when entered into; and.
- All civil marriages entered into in terms of the former homeland statutes.<sup>77</sup>

Even if the marriage in question fell within the qualifying spectrum of marriages, a claim for redistribution of assets would fail if the marriage had not been dissolved in divorce. In *EB v ER*, the civil marriage in question had been entered into prior to 1 November 1984, and it was in terms of an antenuptial contract by which community of property, profits and loss and accrual were excluded; however, the husband had died after *litis contestation* but before the divorce could be finalised.<sup>78</sup> In the divorce pleadings, the applicant (wife) had pleaded for a decree of divorce and redistribution of assets in terms of section 7(3).

After the husband's death, the executor of the deceased estate rejected the wife's claim for redistribution because the marriage had been dissolved by death and only a divorce court granting a decree of divorce could make a redistribution order.<sup>79</sup> This prompted the wife to approach the High Court for an order declaring section 7(3) constitutionally invalid for failing to provide a redistribution remedy where the marriage had been dissolved by death, whereas such remedy exist where the marriage had been dissolved by a divorce.<sup>80</sup> The High Court upheld her claim.<sup>81</sup> It ordered a reading-in to section 7(3) to enable a court to entertain a redistribution claim where a marriage was dissolved through death.<sup>82</sup> This reading-in would apply regardless when the marriage in question had been entered into.

Argument was made to justify the differentiation between spouses whose marriages was dissolved by divorce and those dissolved by death. The former could claim redistribution and the latter could not. It was argued that redistribution should not be made available in case of death because the other spouse was not available defend the claim. The Constitutional Court acknowledged that a similar thinking probably influenced the confinement of forfeiture of patrimonial benefits claims to divorce. However, according to the court, this was not a legitimate government purpose for the differentiation.<sup>83</sup>

The impact of *ER v EB* on forfeiture and death can be summarised as follows. The rejection of the reasons for not extending the redistribution remedy to marriages that have been dissolved by death does bring into question the reasons for not extending the forfeiture remedy where the marriage has been dissolved by death. The fact that the other spouse is not around to defend

<sup>77</sup> See overall the Divorce Act (as amended) s 7(3). The homeland marriages were by default out of community of property, profit and loss.

<sup>78</sup> *ER (Born S) v EB (Born B)*; *KG v Minister of Home Affairs* 2024 2 SA 1 (CC) para 11.

<sup>79</sup> *Ibid* para 12.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid* para 13.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Ibid* para 51.

forfeiture should not stand. An applicant should easily succeed against this argument in the event that the constitutionality of the differentiation in section 9(1) is questioned.

There are sound reasons for abandoning the differentiation in section 9(1). Sometimes forfeiture may be necessary for the deceased's estate to avert an undue claim against it. The case in *Mogau v Letsoalo* was an attempt to avert what was seen as an undue claim against the deceased estate — hence the deceased had raised forfeiture in the divorce proceeding. As pointed out above, the facts did not justify forfeiture. But what if the facts had justified forfeiture in favour of the deceased's estate? Would any justice be served if an executor had to abandon a claim for forfeiture simply because the proceedings were not divorce proceedings? This outcome surely goes against the purpose of section 9(1), as argued above.

## 6 CONCLUSION

This note concurs with the final decision in *Mogau v Letsoalo*. However, the method of arriving at the decision is flawed because precedent on forfeiture, as espoused in *Ex parte Boshoff*, *Ex parte Meyer* and *Monyepao v Ledwaba* was not addressed. The court also failed to address the question of whether the proceedings in question were still divorce proceedings after the end of the deceased's legal subjectivity. Since the literal interpretation of section 9(1) was not helpful in the court's decision to entertain the appeal based on forfeiture as a point of departure, it ought to have adopted a purposive approach in interpreting section 9. This purposive approach would have provided the court with a clear legal path for entertaining the appeal based on forfeiture, despite the death of the deceased.

Furthermore, this case note shows that the recent Constitutional Court judgment in *EB v ER* may provide a genesis for future challenges on the constitutionality of section 9(1) in so far as it differentiates between marriages dissolved by divorce and those dissolved by death. Reasons similar to those justifying the differentiation in section 9 have been rejected. It is only a matter of time before a litigant successfully challenges the constitutionality of this provision.