

Fault principle still a shadow in our South African divorce patrimonial consequences by Ms Lindiwe Gura,

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1. Introduction

This paper discusses the fault principle in the South African Law of Divorce before the enactment of the Divorce Act, 70 of 1979. The paper examines the reason for dissatisfaction with the fault principle and the influence it had on the 1979 legislation. The discussion will draw both on case law and commentaries by academic writers on the South African Divorce Law. An attempt will be made to comment on the application of the fault principle and how it relates to the 1979 Divorce Act.

2. Old divorce law

2.1 Grounds for divorce prior to Divorce Act 70 of 1979

There were four grounds for divorce prior to the 1979 divorce act, namely:

- a) Adultery**
- b) Malicious desertion**
- c) Imprisonment for at least five years after defendant has been declared a habitual criminal**
- d) Incurable insanity that was in existence for not less than seven years.**

3. Fault principle and the role it played in the granting of a divorce

The first three grounds stated above form the basis of the present discussion as they were founded on the fault principle.

Under the old divorce law, the fault principle played an important role. The spouses when deciding on the cause of the divorce were seen as the guilty and the innocent spouse¹. The defendant had to commit one of the matrimonial crimes, either adultery or malicious desertion²

The intention was the form of mens rea required to determine the defendant³. Unlawfulness was another element needed before the offending party could be said to have committed misconduct⁴. Only one act of misconduct, if not condoned by the innocent party, was sufficient for granting a divorce⁵.

The unlawfulness of the guilty spouse's conduct was constituted by the infringement of any of the objects of *Consortium Omnis Vitae*⁶.

Consortium was described by Harcourt J as: "an abstraction comprising the totality of a number of rights, duties and advantages accruing to the spouses in marriage and this totality is made up, for example, companionship, love, affection, comfort, mutual services, sexual intercourse"⁷.

There was room for grounds of justification in a divorce, in the absence of which the plaintiff could not be granted a divorce⁸. Where the plaintiff relied on malicious desertion, the defendant could for example, show that he/she left the matrimonial home for a justifiable reason. In an instance where the innocent party prayed for divorce on the basis of adultery, the defendant could prove that there was plaintiff's consent⁹.

The patrimonial consequences of the divorce were determined by the guilt principle¹⁰. Only the guilty party could be ordered to maintain the innocent party after divorce¹¹.

Upon an application for the forfeiture of benefits, the descendant forfeited all patrimonial benefits of the marriage¹².

The principle was been observed in *Murison v Murison*¹³ where the applicant sued the respondent, his wife, divorce on the ground of adultery with a man who joined as second defendant, and claimed against her dissolution of the marriage and an order of forfeiture of all benefits accruing to her from the marriage. The court in this instance awarded the order and stated as the reason that where a marriage is dissolved on the ground of adultery committed by one of the spouse's, such spouse forfeits any benefit, derived from the marriage, and the court has no discretion to withhold an order for forfeiture of patrimonial benefits if such an order is claimed by the injured spouse. *Ekstein v Ekstein*¹⁴ decision confirmed *Murison* that the court has no discretion in the case of forfeiture of patrimonial benefits.

*Nathan*¹⁵ also enunciated the above principle by saying that 'only the innocent' party who could claim that adultery or desertion was committed by the guilty party could use the remedy of forfeiture of benefits of the marriage. She further states that it was an all or nothing remedy, once the innocent party had proved the ground of divorce, the court had to order total forfeiture if the 'innocent' party asks for this relief.

4.Reasons for the ultimate rejection of the fault principle

The South African courts echoed their dissatisfaction with the divorce law, which was founded mostly on the fault principle. In *Strauss v Strauss*¹⁶, Smith J noted the majority of undefended cases where the plaintiffs filed actions for divorce on the basis of malicious desertion while the 'guilty' party left the matrimonial home because of ill treatment from the 'innocent' party.

In 1973, the Minister of Justice, HJO van Heerden (by then) established a Law Commission to enquire into divorce law in South Africa. The Commission found that it was wrong to assume that failure of marriages was attributable to one partner only, since a majority of cases the marriage broke down as a result of both parties' conduct. The Commission realized the divorce law's failure to encourage reconciliation as the innocent party avoided the risk of losing her ground of divorce. So, because the innocent party was

the only one who could institute a divorce action, she had the power to keep a dead marriage in existence for her own selfish reasons.

The Law Commission in paragraph two stated that ‘the objective of Divorce Law in South Africa is to lay down realistic rules for the dissolution of marriages¹⁷. By realistic rules it was meant rules that take due account of all those involved and the society, and which do not lose sight of Society’s Conception of what is reasonable and just. The Commission submitted that a system of divorce law which is based upon the guilt principle would not serve this objective, and gives an example of a couple who have been married for twenty years, and the wife, who has been actively involved in the family business, committed one act of adultery in a weak moment. Under the old law, this act could have resulted in the forfeiture by her of all the benefits acquired by or during the marriage. The Commission further submitted that it was a very harsh result, especially since the law required women as a matter of duty to assist the husband in his career or business so that she had no legal ground to claim any remuneration.

As I have stated above, the fault principle was harsh to the guilty party who might have committed only one act of misconduct, particularly with regards to maintenance and patrimonial results of the divorce. She could be deprived of the benefits despite her substantial contribution to the estate of the household. The fact that one party was seen to be at fault, usually led to enmity, bitterness and humiliation which had a negative effect on the minor children of the marriage.

Nathan also supported the latter contention by saying that insufficient attention was paid to the children’s interest, because the law did not encourage a possible reconciliation.

5. Present Divorce regime as per the 1979 Act

We have seen above how the court applied the fault principle to the South African Divorce Law. Attention will now be focused on the application of the law as contained in the Divorce Act 70 of 1979.

5.1 Grounds of Divorce

Section 3 of the Divorce Act provides:

“A marriage may be dissolved by a court by a decree of divorce and the only grounds on which such decree may be granted are.”

- a) The irretrievable breakdown of the marriage as contemplated in Section 4.
- b) The mental illness or the continuous unconsciousness, as contemplated in Section 5, of a party to the marriage.

The latter paragraph of the Section will not receive any attention in as far as it does not relate to the crux of this discussion.

Section 4 of the Divorce Act provides as follows:

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

Subject to the provision of subsection 1, and without excluding any fact or circumstance, which may be indicative of the irretrievable breakdown of the marriage, the court may accept the following evidence as proof of the irretrievable breakdown of the marriage:

- I) That the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action.
- II) That the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marriage relationship, or
- III) That the defendant has in term of sentence of court been declared a habitual criminal and is undergoing imprisonment as a result of such sentenced.
- IV) That the defendant does not contribute towards the common household although in position to do so.
- V) That the defendant assaults the plaintiff.
- VI) That plaintiff has tested HIV positive same which was transmitted to the plaintiff by the defendant.

If it appears to the court that there is a reasonable possibility that the parties may become reconciled through marriage counseling, treatment or reflection, the court may postpone the proceedings in order that the p-arties may attempt reconciliation

5.1.1 Criminal liability for infecting a person with HIV/AIDS

A person who unlawfully and intentionally infects another with HIV/AIDS, Which results in the latter's death will be guilty of murder. A person, who recklessly infects another with HIV/AIDS not caring whether the other person contracts the disease and dies, will also be guilty of murder. If the act involves exposure, the perpetrator may be guilty of attempted murder. Where there is negligence, the latter may be charged with culpable homicide. Negligence includes where a person foresaw the likelihood that he or she would infect the

other but does not take reasonable steps to protect the other, e.g. by using a condom. Where the victim has not yet died, the perpetrator may be guilty of an assault(See generally Kirby (1993) 9 SA Journal Human Rights at 15).

The South African Law Commission has however changed this position because of the evidentiary problems involved. It is my submission that one would succeed in a civil suite as the burden of proof is on a preponderance of probabilities.

5.1.2 Civil liability for infecting a person with HIV / AIDS

There are two type of civil action:

- a) International or negligent acts, which result in physical injuries or death
- b) International acts, which result in infringement of a person's dignity, privacy or reputation that cause sentimental damage.

For a) the victim must prove intention or negligence by the wrong doer. The requirement of intention is the same as that in criminal cases. Where there is death of the other person, the latter's dependents (for example, widow and children) can sue for loss of support and the deceased's estate can sue for funeral and hospital expenses. It is interested to enquire what the position would be in a husband and wife situation, married in community of property.

Wherein the victim sues under b) above, the latter will be entitled to claim sentimental damages. A Person's dignity may affect where he or she is falsely accused of being infected with HIV / AIDS. A person's privacy may be invaded by disclosure that he or she is infected with HIV / AIDS without his / her consent (See C V Minister of Correctional Services 1996(4) SA 292(T))

5.2 Case law and the irretrievable breakdown of the marriage.

On the first reported cases on this particular aspect was heard by Flemming J in Swart v Swart¹⁸ whose view was that the severity of one party's conduct should not be solely determined by looking at its nature in the abstract, but rather, the extent of its attributes to a certain marriage should be considered. Under the present law, the court in Swart v Swart opined, fault is not a prerequisite for the granting of a divorce (370 E).Conduct can cause the breakdown of a marriage in one instance and not to do so in another.

Behaviour which is inherently less blameworthy, can drastically destroy a marriage relationship while conduct, which is morally blameworthy like assault, can have very little effect on the marriage relationship (369 C-D).However the court expressed recognition of the relevance of fault. When deciding whether a marriage has irretrievably broken down the court must consider both the objective and subjective factors, which cause strains in the marriage.

In *Smith v Smith*¹⁹ the defendant was virtually bedridden due to physical illness. The plaintiff, her husband sought divorce on the basis of irretrievable breakdown. Brink J's reasoning was to the effect that Section 4 of Act 70 of 1979 does not allow the dissolution of the marriage on the basis of irretrievable break-down, no matter what the reason might be. Physical illness does not constitute a ground of divorce according to the court (607 H). The court viewed the fact that the plaintiff did not allege that he had lost love and affection for defendant as showing that breakdown of the marriage was not the cause.

The court said that marriage is meant to last 'forever' (611 C). A party to a marriage relationship must be there for his partner during hard times (611D). *Smith v Smith*²⁰ was brought to the bench of the Provincial Division on appeal. The court severed the bonds of marriage between the parties because of irretrievable breakdown for whatever reason.

In *Kruger v Kruger*²¹ the defendant, who was innocent, did not allow divorce to take place but the court granted divorce despite her objection. The court disregarded the cause of the breakdown. Unlike under the fault principle the plaintiff instituted the action notwithstanding his guilt. The court's decision demonstrates the present law's departure from the fault principle for purpose of the dissolution of marriage. (Sinclair first cases 356²²).

The Appellate Division was charged with the duty of interpreting provisions of Section 3 and 4 of Act 70 of 1979 in the case of *Schwartz v Schwartz*²³. The facts of the case were briefly that appellant fell in love with one Lintvelt. The Appellant left his wife Lintvelt. He did not love his wife anymore. He therefore intended to institute a divorce action in 1978 but was advised against it as he stood no chance of success due to the fault principle. Upon the coming into effect of the 1979 Act, the appellant instituted divorce action on the basis of section 3. The respondent denied that the breakdown of the marriage had reached a stage where there were no reasonable prospects of the restoration of a normal marriage relationship.

The unanimous decision of the court was handed down by Corbett JA (as he then was). He states that irretrievable breakdown was a non-fault criterion. The court found that when deciding on this ground the facts must be viewed objectively to determine whether the marriage has reached such a state of disintegration that there is no reasonable prospects of the restoration of a normal marriage relationship between them (473).

The court should consider 'what has happened in the past, that is the history of the relationship up to the date of the trial, and also to the present attitude of the parties to determine whether the relationship has reached such a state of disintegration that there is no reasonable prospect of the restoration of the normal marriage relationship (575 F-G). It is submitted that this reveals the subjective test which has to be applied in addition to the objective one.

Irretrievable breakdown can be borne of one partner's attitude towards the marriage not withstanding the 'innocent' party's eagerness to cling to the bonds of holy matrimony (478 G).The moral rights and wrongs were found o be non-issues in this case.

Counsel for the respondent submitted that the refusal of the decree of divorce would result in he end of the relationship between appellant and Lintvelt and the resumption of a normal relationship between appellant and respondent. This argument was rejected by the court in determining whether or not a marriage has broken down irretrievably by reference to what would or might occur if and after an order of divorce has been refused (479 F-G).

Buy's J dealt with the meaning of 'break-down' in *Vermeulen v Vermeulen*²⁴. In his view, breakdown occurs over a period of time as a process during which period disintegration results from a variety of factors (775 H-I).The court expressed the difficulty which might be encountered in determining which acts caused the breakdown or resulted in the irretrievable breakdown of the marriage (775 I-J).*Coetzee v Coetzee*²⁵ saw the court deciding on the determination of irretrievable breakdown as contemplated by Section 4.1 of Act 70 of 1979..According to the court if there is no change in the pattern of the marriage with a clear distinction between the present and the previous time of marriage there cannot be a question of breakdown. Therefore a divorce cannot be granted. The court expressed its position by stating that if a marriage is dreary or unattractive 'it does not break as a result of a more reservation reservatio mentalis or change of animus without an accompanying factum'(705 D-E).

A brief reference to the guidelines provided for in section 4(2),(a) and (c) is warranted at this stage .In as far as section 4 (2),is concerned, both the physical and the mental elements must be present to satisfy these guidelines. Parties can live together under one roof and yet no more as husband and wife (Willie's 187²⁶).On the other hand they can live apart yet remain committed to their marriage .Adultery mentioned in section 4,2,b must have been found to be irreconcilable with the continuation of a normal marriage relationship. Section 4,2 does not lay down a minimum period of the defendant's imprisonment ,as this is a guideline.

I can also point out that in *Smith v Smith* (The full bench's decision)the court expressed its recognition of the granting of divorce on the basis of irretrievable breakdown where the defendant is mentally ill or unconscious despite non –compliance with the requirements of section 5.

5.3Divorce Act ,the fault principle and the consequences of divorce: what the court has to say:

The consequences of divorce can be either personal or patrimonial.

6.Division of assets and maintenance of spouse Section 7(2) of Act 70 of 1979 states inter alia:

‘With regard to the payment of maintenance by one party to the other, the court may, having regard to the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it might be relevant to the breakdown of the marriage, . . . make an order which the court finds just in respect of the payment of the maintenance by the one to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur’.

6.1 Forfeiture of benefits as a patrimonial consequence of divorce

Section 9 of Act 70 of 1979 is applicable herein and provides as follows:

When a decree of divorce is granted on the ground of irretrievable breakdown of a marriage, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party, if the court having regard to the duration of the marriage, the circumstances which gave rise to the breakdown therefore and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for the forfeiture is not made, the one party will in relation to the order be unduly benefited, (my emphasis).

Counsel for the appellant in *Koza v Koza*²⁷ attempted to convince the court that the innocent party must be granted an order of forfeiture should she claim it. However, the court rejected this argument, ruling that under the present Act, evidence had to be adduced to prove the factors mentioned in Section 9 (1) of Act 70 of 1979.

The matter of *Singh v Singh*²⁸ is in point here. The defendant in this matter committed adultery and the court found this act to be outweighing the duration of the marriage (of 20 years), (791 C-D). The court said that substantial misconduct refers to that conduct which is obvious and gross. The court, in passing, accepted the view of Hahlo and Sinclair that the term forfeiture of benefits is “redolent of crime and punishment”. To associate the patrimonial consequence of divorce under discussion with crime and punishment, yet proceed to grant forfeiture of benefits on the basis of one act of adultery, in my respectful submission, dictates against common sense and is devoid of all reasonableness. The order of forfeiture in *Singh v Singh* with respect, was too harsh and partial.

In the case of *Matyila v Matyila*²⁹, the court had to decide on the forfeiture of benefits. The court viewed substantial misconduct as a separate factor to be taken into account and that it must not be inferred from allegations relating to the breakdown of the marriage, the writer hereof ‘s respectful submission is that van Zyl J and O’ Danvan J tend to contradict themselves when quoting adultery as misconduct which may not necessarily be ‘substantial misconduct’ for a forfeiture order and yet proceed to say that it could be possible for a court to establish whether there has been any irretrievable of the marriage, no forfeiture order can be made.

The attitude of the Supreme Court, I submit, to misconduct and adultery in particular does not help to bring clarity into circumstances to be considered when dealing with

forfeiture. The striking differences in approach are to be found in the case of Singh v Singh^{supra} and Matyila v Matyila^{supra} above. This will continue to be the case as long as the ghost of the fault principle is given the freedom to roam and haunt our law of divorce.

7.Custody of the minor children and their interests

It is a well-known fact that the end of marriage by divorce, the children are likely to be negatively affected. One therefore realizes the importance of saving the children from the adverse consequences of divorce. The conduct of the spouses will be taken into account by the court in so far as it may be indicative of his or her suitability to look after the child or children.

The question in every case is which of the spouses will be care for the physical well being of the child, but also for its moral, cultural and religious development. However the conduct in this case need not be with reference to breakdown of marriage. The court in Zorbas v Zorbas³⁰ voiced its dissatisfaction with the award of custody of a minor child if an immoral conduct were to be committed by the parent's lover.

As a result, the court in awarding the custody of minor children takes all the circumstances into account in deciding what is in the best interests of the child, the age, state of health and social financial circumstances of each of the spouses, the characters, temperaments and past behaviour towards the child, their educational and religious needs and personal preference (Hahlo 390³¹).

The court will therefore as a result be reluctant to award custody to the parent whose character or past conduct is such as to render it undesirable to leave the children in his or her care. As it has been stated in French v French³² where F.S. Steyn J stressed the importance of protecting above all a young child's sense of security, that the child must feel that it is welcome, wanted and loved.

8.Award of costs

Section 10 of Act 70 of 1979 provides that the court may have regard to the means of parties, their conduct in so far as it may be relevant, and make a just order (my emphasis).

In Singh v Singh³³ the court recognized leading to the breakdown of the marriage and conduct in the course of the proceedings as factors that may lead to an adverse order for costs.

9.Conclusion

Finally one finds that our legislature has not gone far enough to address the deficiencies and injustices inherent in the fault principle. The fault principle is generally stated as a guideline in the Act. It must be removed from the statute book in clear and unambiguous terms. In my submission, its retention only serves to plague divorce law with confusion and uncertainty.

Endnotes

- ¹ OLIVIER 241: The South African Law of Person and Family Law 1986
- ² Ibid 24
- ³ Ibid
- ⁴ Ibid
- ⁵ Ibid
- ⁶ Ibid
- ⁷ Grobelaar v Havenga 1964 (3) SA 522 W 525
- ⁸ Olivier 242
- ⁹ Ibid
- ¹⁰ Hutchison, D et al Willie's Principle of South African Law (1991 p184)
- ¹¹ Ibid 184
- ¹² 1971 (1) SA 585 (0) 592 E-F
- ¹³ 1930 AD 157
- ¹⁴ 1995 C 100
- ¹⁵ Nathan CK You, Your Family and The Law pg 179
- ¹⁶ 1971 1 SA 585 (0) 592 E-F
- ¹⁷ RP 57 197 PAR 2
- ¹⁸ 1980(4) SA 364 (0) 396 (A-B)
- ¹⁹ 1982 (1) SA 606 (0)
- ²⁰ Ibid
- ²¹ 1980 (3) SA 283 (0)
- ²² Sinclair J "The Divorce Act of 1979, 1980 SAL J 353"
- ²³ 1984(4) SA 467 (A)
- ²⁴ 1989 (2) SA 772 (NC)
- ²⁵ 1991 (4) SA 702 9 (C)
- ²⁶ 10 ^{Supra}
- ²⁷ 1982 (3) SA 462 (T) (465 C-D)
- ²⁸ 1983 (1) SA 781 (C)
- ²⁹ 1987 (3) SA 230 (W)
- ³⁰ 1987 (3) SA 436 (W)
- ³¹ Hlahlo, H.R The South African Law of Husband and Wife, 5Th Edition 1985
- ³² 1971 (4) SA 298 (W) at 296
- ³³ ^{Supra}