



FORFEITURE OF BENEFITS IN SOUTH AFRICAN DIVORCE LAW: WHAT SPOUSES NEED TO KNOW

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Forfeiture of Patrimonial Benefits and Piercing the Corporate Veil in South African Divorce Law

When a marriage dissolves in South Africa, the division of assets can quickly turn into a financial battlefield. Two legal mechanisms – forfeiture of patrimonial benefits and piercing the corporate veil – frequently intersect when one spouse attempts to hide wealth or claims that a clean break would be inherently unjust.

1. *What is Forfeiture of Patrimonial Benefits?*

By default, marriages in community of property or out of community of property with the accrual system mandate an equitable sharing of wealth upon divorce. However, Section 9(1) of the Divorce Act 70 of 1979 gives the court the power to order that one party forfeit their share of the matrimonial benefits.

The Legal Threshold for Forfeiture

A court will not grant a forfeiture order lightly. The applicant must prove that if the order is not granted, the other party will be unduly enriched at their expense. The court strictly weighs three specific factors:

1. **The duration of the marriage:** Short marriages are much more likely not to result in forfeiture orders.
2. **The circumstances which gave rise to the break-down:** Serious misconduct, though no longer a primary ground for divorce, is heavily weighed here.
3. **Any substantial misconduct on the part of either of the spouses:** This includes financial abuse, physical, emotional or psychological abuse, extramarital affairs, particularly where accompanied by substantial expenditure on third parties or severe marital neglect.

What can be forfeited?

Forfeiture only applies to the benefits derived from the marriage, not a spouse's own contributions. A party cannot be ordered to forfeit assets they brought into the marriage or entirely built themselves, they only forfeit the right to share in the other spouse's assets.

Depending on the circumstances, a court may order:

- Partial forfeiture; or
- Complete forfeiture of patrimonial benefits.

Each matter is determined on its own facts.

2. *Piercing the Corporate Veil in Matrimonial Disputes*

A common tactic in high-net-worth divorces involves a spouse transferring personal wealth into proprietary limited companies owned by a trust or by the family trusts itself. Because a company is a separate legal entity, that spouse may claim, *"I own nothing; the company owns everything."*

To counter this, courts can pierce the corporate veil (also referred to as disregarding the corporate personality).

Statutory and Common Law Foundations

- **Section 20(9) of the Companies Act 71 of 2008:** This section provides statutory power to a court to declare that a company is deemed not to be a juristic person if there is an unconscionable abuse of its separate legal personality.
- **The "Alter Ego" Test:** Under common law, if a spouse treats the company's bank account as their personal piggy bank, fails to hold proper board meetings and mixes personal expenses with corporate funds, the court will find that the company is merely the spouse's alter ego.

When the veil is pierced, the court pulls the hidden corporate assets back into the spouse's estate or joint estate or the accrual calculation, making them fully subject to division.

3. *The Intersection: Forfeiture Meets the Corporate Veil*

The overlap between these two legal principles usually manifests in complex, high conflict asset hidden scenarios.

[Spouse A Hides Wealth in a Shell Company / or Trust]



[Spouse B Proves "Alter Ego" Abuse] —► (Court Pierces the Corporate Veil)



[Assets Pulled Back into Matrimonial Pool] ◀—————|



[Spouse B Proves Undue Enrichment & Misconduct] —► (Court Orders Forfeiture)



[Spouse A Loses Claim to Spouse B's Personal & Recovered Assets]

Case Scenario: The Shield Turned Penalty

Consider marriage in community of property where Spouse A commits severe physical abuse and financial fraud (substantial misconduct), leading to a breakdown after just two years (short duration).

Simultaneously, Spouse A has been funnelling joint family cash into a private logistics company to reduce the visible size of the communal estate.

- **Step 1:** The court uses Section 20(9) of the Companies Act to pierce the corporate veil, determining that the logistics company's assets belong to Spouse A personally.
- **Step 2:** The court evaluates the divorce under Section 9(1) of the Divorce Act. Because of the short marriage and the severe misconduct, the court rules that Spouse A would be unduly enriched if given half of Spouse B's assets.
- **The Outcome:** Spouse A's corporate shield is destroyed, and they are ordered to forfeit any patrimonial claim to Spouse B's estate.

4. *Key Takeaways for Litigants*

- **Forfeiture requires precise proof:** You cannot get a forfeiture order simply because your spouse was unfaithful; you must prove quantifiable undue enrichment based on the three statutory factors.

- **Separate legal identity is not absolute:** The courts will not allow the Companies Act to be used as an instrument of strategic fraud to disadvantage a spouse during a divorce.
- **Evidence is everything:** Piercing the veil requires deep forensic accounting to prove that corporate governance was entirely ignored.

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