

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(ORANGE FREE STATE PROVINCIAL DIVISION)**

Case No. : 945/2007

In the case between:-

**STEPHANIE VAN DYK (born GERBER)** Plaintiff

*versus*

**FREDERIK PETRUS STEFANUS VAN DYK** Defendant

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**JUDGMENT BY:** MOCUMIE, J

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**HEARD ON:** 11 NOVEMBER 2008

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**DELIVERED ON:** 19 FEBRUARY 2009

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JUDGMENT

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**INTRODUCTION:**

[1] The parties to this litigation are husband and wife, who now stand on the threshold of a divorce. They were married out of community of property in 1989. By an antenuptial contract they regulated that their marriage will be subject to the accrual system. In the divorce proceedings Mrs Van Dyk, an

administrative assistant, is the plaintiff and Mr Van Dyk, a pharmacist, the defendant.

[2] In addition to seeking a decree of divorce and custody of the minor child plaintiff wants the court to order that defendant pays her maintenance until she remarries or dies but not to share in the accrual of her estate to the extent that it has increased from the time she received insurance payouts for her illness.

[3] Defendant has countered this claim by pleading that the declaration of the net value of the parties' respective estates at the time of contracting the marriage was nil. He further pleaded that during the subsistence of the marriage plaintiff's estate has shown the more substantial accrual and, on the contrary, he is entitled to compensation by plaintiff. Plaintiff has disputed these claims in her replication.

[4] At a Rule 37 pre-trial conference the parties agreed, which agreement the court acceded to, that it be adjudicated *in limine* whether the proceeds of the insurance payments to plaintiff for certain physical disabilities form part of the accrual and are therefore a benefit that defendant has a right to share in. The stated case stipulates in part:

“4. Dat die Eiseres gedurende die bestaan van die huwelik gediagnoseer is met veelvuldige sklerose.

5.1 Eiseres het lewensversekeringspolisse uitgeneem met benewens lewensdekking, verdere byvoordele ten aansien van onvattende kritieke siekte voordele sowel as omvattende ongeskiktheidsvoordele by die lewensversekeraars Momentum Lewensversekering en Resolution Health (SPASMED Plan).

5.2 Nadat die Eiseres gediagnoseer is met veelvuldige sklerose, is ‘n bedrag van R1 000 000-00 deur Momentum en R100 000-00 deur Resolution Health aan haar betaal op grond van hierdie diagnose en vanweë die feit dat sy dekking gehad het soos gedefinieer, synde ten aansien van ‘n kritieke siekte voordeel.

- 5.3 Voormelde uitbetalings het nie geskied op grond van enige bevinding dat Eiseres beroepsongeskik of 'n funksionele inkorting ervaar het soos in die betrokke poliskontrakte gedefinieer en/of uiteengesit nie.
6. Die Eiseres het die voornoemde bedrae, onder andere as volg aangewend:
- 6.1 R20 000-00 vir die opgradering van die badkamer van die voormalige gemeenskaplike woning ten einde die gebruik van die badkamer vir Eiseres gerieflik te maak;
- 6.2 R100 000-00 aan die Verweerder gegee;
- 6.3 R45 000-00 om deelyd in Sabie Rivier Sun aan te koop;
- 6.4 R800 000-00 as gedeeltelike betaling vir die aankoop van 'n woonhuis te Bethlehem waarvan Eiseres tans die eienaar is.”

[5] The parties agreed that:

- “(a) Die aanwas van die boedels van die partye onderskeidelik bepaal moet word aan die hand van Hoofstuk 1 van die Wet op Huweliksgoedere, 88 van 1984, waarby Artikels 3 en 4 ingesluit is;
- (b) Die berekening van die aanwas van die partye se onderskeie boedels, en meer spesifiek die van die Eiseres ‘n wesenlike invloed mag hê op die vraag of die Eiseres geregtig is op onderhoud na die egskeiding van die partye, en die bedrag waarop die Eiseres geregtig sal wees; en
- (c) Die partye in dispuut is of die voormelde uitbetalings van die versekeringsmaatskappye aan Eiseres deel vorm van die aanwas in haar boedel al dan nie.”

Consequently I am petitioned to answer the following questions set out in the stated case:

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- (1) “...of die voornoemde betalings wat die eiseres ontvang het deel vorm van die aanwas van haar boedel al dan nie...”

(2) "...of die voordeel/vrugte wat sy daaruit getrek het, deel vorm van die aanwas van haar boedel al dan nie..."

[6] The relevant provisions of the Matrimonial Property Act, 88 of 1984 (*"the Act"*) stipulate as follows:

### **"3 Accrual system**

(1) At the dissolution of a marriage subject to the accrual system, by divorce or by death of one of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the estate of the other spouse or his estate for the amount equal to half of the difference between the accrual of the respective estates of the spouses.

2. ...

3. ...

### **4. Accrual of estate**

(1) (a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of

his marriage exceeds the net value of his estate at the commencement of that marriage.

(b) In the determination of the accrual of the estate of a spouse-

(i) any amount which accrued to that estate by way of damages, other than damages for patrimonial loss, is left out of account;

(ii) an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;"

Section 18 of the Act further reads:

**“18 Certain damages excluded from community and recoverable from other spouse**

Notwithstanding the fact that a spouse is married in community of property –

(a) any amount recovered by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him, does not fall into the joint estate but becomes his separate property.”

[7] Mr Daffue for plaintiff submitted that the policy payments were made for the exclusive benefit of plaintiff because of the pain and suffering that she will endure for the rest of her life as a result of the multiple sclerosis. He argued that the money was paid as *solatium* and not for her inability to earn an income in the future.

[8] Ms Erasmus, on behalf of defendant, argued that in our law

“[i]t is true that an insurance policy under normal circumstances forms part of the joint estate. Section 15(2) (c) of the Act provides that a spouse in a marriage in community of property shall not without the consent of the other spouse alienate, cede or pledge any shares, insurance policies etc forming part of the joint estate...”

Ms Erasmus has also drawn attention to the following passage in LAWSA, Vol 16, First Re-Issue par 107 :

“The Matrimonial Act is silent as regards other assets. Insurance policies which fall in the estate of one spouse, as well as the benefits derived from such policies, are not excluded from the accrual sharing and must therefore be taken into account when the value of the estate is calculated.”( footnote omitted)

- [9] Ms Erasmus' view is based on the fact that section 63 of the Long Term Insurance Act 52 of 1998, which amended the Insurance Act 27 of 1943, makes provision for the protection of certain policies from community of profit and loss but not from accrual sharing. The author **Hahlo** in his work, **The South African Law of Husband and Wife, 5th ed, 306-307**, criticises this legal position but acknowledges that as long as the law has not changed the *status quo* remains. Ms Erasmus argued that the insurance company paid plaintiff in terms of a contract not a delict as provided for in s18(a) (quoted above) and that as the *causa* was contractual such

payments had to be dealt with in terms of section 4(1)(b)(i) of the Act.

[10] Counsel on both sides have focused a lot on the meaning of the word “*damages*” in the English text and its synonym “*vergoeding*” in the Afrikaans text (the signed text) in section 4 (1)(b)(i) and 18 (a) of the Act and whether “*vergoeding*” should not be given the narrow meaning of “*skadevergoeding*” to be in unison with the meaning of “*damages*”. Words cannot be divorced from their context. In **Jaga v Donges N.O and Another** 1950 (4) SA 653 (A) at 663 **Schreiner JA** cited with approval the English case **Re Bidie** (1949) Ch 121 (CA) at 129 the following remarks of Lord Greene MR:

“The first thing to be done, I think, in construing particular words in a section of an Act of Parliament is not to take those words in *vacuo*, so to speak, and attribute to them what is sometime called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context.

The method of construing statutes that I myself prefer is not to take out particular words and attribute to them a sort of prima facie meaning which may have to be displaced or modified, it is to read the statute as a whole and ask myself the question: 'In this statute, in this context, relating to this subject matter, what is the meaning of that word?'

- [11] "*Damage*" is "*skade*." If the culprit causes the victim "*damage*" (s)he will be ordered to pay "*damages*"/"*skade vergoeding*" to the victim. "*Vergoeding*" has the more expansive meaning of "*compensation*". A victim can suffer damages *ex contractu* or *ex delicto*. On the other hand compensation ("*vergoeding*") could be paid out for a variety of reasons or causes. In my view "*vergoeding*" in the Afrikaans text, which trumps the English text to the extent of their inconsistency, signifies compensation of any sort and therefore encompasses more than damages in the strict legal sense of the term. There is no reason to declare that an amount that is recovered by an insured as non-patrimonial compensation does not fall within the exclusion or exemption contemplated in section 4(1)(b)(i). Put differently such

compensation should not be taken into account when the value of the accrued estate is calculated.

- [12] It is common cause that plaintiff was diagnosed with multiple sclerosis. In terms of the Momentum policy clause 7.10 multiple sclerosis is defined as:

“[a] disease, as diagnosed by a suitably qualified specialist practitioner, of the central nervous system characterised by disseminated patches of demyelisation in the brain and spinal cord resulting in multiple neurological symptoms and signs, with remissions exacerbations.”

Clause 13 of Resolution Health policy defines multiple sclerosis in the same terms and so it is with both policies that paid out. What is of relevance in both these policies is that even if they do not exclude these payouts from accrual plaintiff was not paid because of a disease which led to her being declared disabled and therefore affecting her future earning capacity. I am of the view that the damages suffered

by plaintiff *in casu* were of a personal nature. The purpose and objective of the insurance cover was for plaintiff's convenience, to make her life easier and more bearable during and throughout her disabled life. The payouts are what **Schäfer** in his work, **Family Law Service, B14, p15**, refers to as "*solatium*" which he defines as "*special damages for non-patrimonial damages claimable under the actio injuriarum.*" **P J Visser and J M Potgieter, Skadevergoedingsreg** at pp 18 – 19 give the following description of non-patrimonial damages:

“Dit is ‘n afname in die kwaliteit van die hoogs persoonlike (of persoonlikheids) belange van ‘n regssubjek by die bevrediging van sy regserkende behoeftes, welke verandering nie sy ekonomiese posisie raak nie.”

- [13] The case of **Van der Berg v Van der Berg** 2003 (6) SA 229 (T) referred to by both counsel is distinguishable from the one under review. In that case the marriage was in community of property and, more pertinently, the damages were recovered squarely under s18 (a) of the Act which

provides that any damages recovered by a spouse by way of damages, other than damages for patrimonial loss, by reason of a delict committed against such spouse, does not fall into the joint estate but becomes the recipient spouse's separate property. **Shongwe J** (as he then was) found that it was

“quite clear that the provisions of s18(a) were intended to exclude any damages or compensation by reason of a delict from the joint estate.”

The issue was whether the benefits received from the insurance policies as a result of the husband's injury in a shooting incident rendering him disabled were exempted from accrual sharing. The court found that the damages were not-patrimonial but brought about by reason of a delict committed against the defendant and therefore personal in nature. The Supreme Court of Appeal came to the same conclusion in **Botha v Botha** 2006 (4) SA 144 (SCA) at 148I-149C.

[14] In De Villiers v De Villiers Case No 2269/2000 OPD, Unreported, (delivered on 29/10/2001) by Van Zyl AJ (as she then was), the parties were married out of community of property with accrual sharing of their respective estates. Plaintiff took out two life policies. When he suffered a stroke the policies paid out on the basis that the benefits arose from occupational incapacity and consequently affected his future loss of income. Van Zyl AJ came to the conclusion that the benefits formed part of the accrued estate for purposes of Chapter 1 of the Act .The De Villiers case is distinguishable from this case on the following bases:

14.1 The policies were paid out by the insurer in terms of the policy contract that provided for loss of future income and earning capacity;

14.2 Loss of future income and earning capacity were considered to be damages for the purposes of a claim for damages; and

14.3 The case did not deal with compensation to the insured's future medical expenses such as staying in a care-facility, costs of professional care-givers and general damages arising from pain and suffering, loss of amenities of life and discomfort.

[15] In this case plaintiff is still employed. The diagnosis of multiple sclerosis did not wipe out her future earning capacity but affected what **PJ Visser and JM Potgieter** *supra* refer to as her highly personal interests. I am therefore of the view that the policy payouts in this case are non-patrimonial damages which in terms of section 4 (1)(b) (i) should not be taken into account when calculating the accrual value of plaintiff's estate. If the insured payouts were to be included in the calculation of the accrual it would lead to absurd results which could not have been intended by the Legislature. It would not be fair or equitable to have defendant, an able-bodied business man, share in the proceeds which may in due course be depleted.

[16] Unlike some of the other sections of the Act which deal with assets that are excluded from the accrual of a spouse's estate like section 4 (1) (b) (ii) and 5(1), section 4(1) (b) (i) makes no mention of assets which replace non-patrimonial damages. In this case the timeshare that plaintiff acquired at Sabie River Sun and the immovable property she bought in Bethlehem are investments from which she may or may not have derived some fruits/interest. I am mindful of the views of authors in this field including **Sinclair**, An introduction to the Matrimonial Act 1984, 35, fn 132; **Joan Church** "Proprietary Consequences of Marriage", **LAWSA**, Vol. 16, 2<sup>nd</sup> Re-Issue, par. 107; **Cronje and Heaton, South African Family Law**, 2ed (2004), 102 fn 93. They maintain that because section 4(1) (b) (i) does not make provision for assets which replace non-patrimonial damages or adjustment of non-patrimonial damages in accordance with the consumer price index (CPI) or any other mechanism the capital amount (policy payouts), in accordance with the maxim *inclusio unius est exclusio alterius*, is excluded but the fruits of the assets are included in the calculation of the accrued estates. Plaintiff has conceded this much.

[17] I hold a different view. In **Administrator, Transvaal, And Others v Zenzile and Others** 1991(1) SA 21 (AD) at 37G-H the court held that this *maxim*

“...is not a rigid rule of statutory construction (see Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics 1911 AD at 28); and it must at all times be applied with great caution (see South African Estates and Finance Corporation Ltd v Commissioner for Inland Revenue 1927 AD 230 at 236; Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA, and Another 1958 (4) SA 572(A) at 648G-H)”.

Its application should be determined on the set of facts presented. Looking at the facts as a whole, I consider that the maxim cannot be usefully invoked in support of the contention by counsel for the defendant despite the concession by plaintiff’s counsel. Its application would have extraordinary and unjust results. In my view the fact that the defendant is not entitled to share in the capital amount as I have set out in the preceding paragraphs implies that he

cannot share in the fruits/interest, if any, the plaintiff has derived from such investments. The Act's silence in this regard hardly warrants an inference that it was the intention of the Legislature to divest the plaintiff of the interest or fruits gained in the manner already outlined with regard to the capital amount/policy payouts.

[18] The question of costs can be conveniently reserved for later determination.

### **ORDER**

[19] The questions set out in the stated case are answered as follows:

- 1. The proceeds of the policies paid to the plaintiff are non-patrimonial and should not be taken into account in the calculation of her accrued estate.**
- 2. The fruits or interest derived from the policies are excluded and should not be taken into account in the calculation of the accrued estate.**

**3. Costs are reserved for later determination.**

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**B.C. MOCUMIE, J**

On behalf of plaintiff:

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On behalf of defendant:

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