# *LH v ZH 2022 (1) SA 384 (SCA)*

## Should section 18(a) of Matrimonial Property Act 88 of 1984 apply to all spouses in a marriage in community of property, irrespective of when the non-patrimonial damages were received?

## 1 Introduction

South Africa has three statutes that regulate marriages, namely the Marriage Act 25 of 1961 which regulates monogamous civil marriages that are entered into by spouses of the opposite sex, irrespective of their race; the Recognition of Customary Marriages Act 120 of 1998 which regulates monogamous and polygynous customary marriages entered into by South African black spouses, and lastly the Civil Union Act 17 of 2006 which regulates monogamous unions between spouses of the same sex or opposite sex, irrespective of their race, and the unions are registered either as a marriage or a civil partnership.

Prospective spouses, irrespective of the statute regulating their marriage, can choose the matrimonial property regime that will regulate their marriage. The matrimonial property regime that they choose will determine their proprietary rights both during the subsistence of their marriage and when the marriage is dissolved. (Marumoagae "The beginning of the end – dissolution of marriage under accrual system" 2015 *De Rebus* 36).

There are three main matrimonial property systems prospective spouses can choose from: (1) marriage in community of property; (2) marriage out of community of property subject to the accrual system and; (3) marriage out of community of property without the accrual system.

When spouses enter into a civil marriage, there is a rebuttable presumption that the marriage is in community of property (*Edelstein v Edelstein* 1952 3 SA 1 (A) para 10). Community of property results in spouses having a joint estate. This entails the spouses' becoming co-owners in undivided and indivisible half shares of all the assets and liabilities they have at the time of entering into a marriage and those they acquire during the marriage (*Estate Sayle v Commissioner for Inland Revenue* 1945 AD 388; *De Wet v Jurgens* 1970 3 SA 38 (A); *Mazibuko v National Director of Public Prosecutions* 2009 6 SA 479 (SCA)). According to section 14 of the Matrimonial Property Act 88 of 1984 (the MPA) the spouses have equal powers to manage the joint estate. Subject to a few exceptions (see below), the joint estate consists of all the assets and liabilities that both spouses have when getting married and all the assets and liabilities that both spouses acquire during the marriage.

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If spouses marry in community of property, certain assets are excluded from being part of the joint estate; these assets are the separate property of the spouse even though he or she is married in community of property (*Du Plessis v Pienaar* 2002 4 All SA 311 (SCA) para 1). These categories of assets include assets excluded in an antenuptial contract; assets excluded in a will or deed of donation; assets subject to a fideicommissum or usufruct; non-patrimonial damages; and damages as a result of a personal injury inflicted by the other spouse (see e.g. Heaton and Kruger *South African Family Law* (2015) 64-66).

In *LH v ZH* 2022 1 SA 384 (SCA) (*LH*), one of the categories of excluded assets was in issue, namely non-patrimonial damages, which are excluded from the joint estate in terms of section 18(a) of the MPA. In *LH*, the court had to determine whether non-patrimonial damages received before the marriage qualified as separate property.

This case note concerns the interpretation and application of section 18(a) of the MPA in the *LH* case. Section 18(a) provides as follows:

> notwithstanding the fact that a spouse is married in community of property –
> (a) any amount recovered by him or her by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him or her, does not fall into the joint estate but becomes his or her separate property.

## 2 Facts of the case

The appellant, who was the husband, and the respondent, who was the wife, were married to each other in community of property on 22 December 2015. In 2011, before the conclusion of their marriage, the defendant was involved in a motor vehicle accident which resulted in her being awarded non-patrimonial damages in the amount of R800 000. From the R800 000, she invested R550 000 in an interest-bearing account with Standard Bank (the investment money). The parties' marriage ended in divorce. The appellant claimed a half share of the investment money. The respondent objected to this on the ground that the investment money was not part of the joint estate since it represented non-patrimonial damages received as a result of a motor vehicle accident in 2011 and therefore should be excluded in accordance with section 18(a) of the MPA.

In support of her objection, the respondent relied on *Van Den Berg v Van Den Berg* 2003 6 SA 229 (T) (*Van Den Berg*), where it was held that compensation a spouse receives in terms of an insurance policy, as a result of having been disabled because of a delict that had been committed against him, are excluded from the joint estate in terms of section 18(a) of the MPA. The court held that non-patrimonial damages are personal in nature and that the "purpose and objective" of the damages are to meet the needs of the injured person (*Van den Berg* para 12). This applies regardless of whether the money is paid on the ground of delict or in terms of an insurance policy (ie a contract). The court

further held that if the legislature had intended the non-patrimonial damages to form part of the joint estate, "the purpose and objective" of the payment of non-patrimonial damages "would be negated" (*Van den Berg* para 12).

The *LH* case was first heard by the Mthatha Regional Court, which agreed with the respondent. The court ordered the division of the joint estate but excluded the investment money from the division.

The appellant appealed to the High Court, Eastern Cape Division (ECD). At the ECD the judgment was split two to one. The majority judgment by Majiki J and Jaji J, confirmed the regional court's order that the investment money should be excluded from the division of the joint estate. Although they acknowledged that section 18(a) only applies to a spouse who is already married, they held that the failure (by the legislature) to specifically mention the spouse who was injured and received non-patrimonial damages before marrying in community of property does not appear to be an intentional exclusion. They held that "it is more of an omission than an exclusion" (para 6). In contrast, Mbabane AJ, who delivered the minority judgment, held that section 18 comes into effect upon spouses getting married in community of property. If the respondent did not want the investment money to form part of the joint estate, the parties should have entered into a marriage out of community of property (para 7). Consequently, when the parties entered into a marriage in community of property the investment formed part of their joint estate and fell to be divided on divorce. The appellant appealed to the Supreme Court of Appeal.

## 3 The judgment

### 3 1 The majority judgment

The Supreme Court of Appeal was split four to one. The majority judgment (by Mbha J, Schippers J, Govern J, and Hughes JA), delivered by Hughes JA, ruled against the respondent. The majority held that the rule in section 18(a) that non-patrimonial damages awarded during a marriage become the property of the injured spouse and do not form part of the joint estate does not apply to damages received prior to the marriage (para 10). The majority judgment set aside the ECD's judgment and ordered that the investment money be included in the division of the joint estate.

The majority judgment of the Supreme Court of Appeal does not give a detailed explanation for reaching its decision. The majority held that *Van den Berg* was irrelevant to the issue in *LH*, as *Van den Berg* dealt "primarily with the question of whether damages received during the course of a marriage in community of property were either contractual or delictual in nature" (para 4). The majority based their judgment on their interpretation of the statute (i.e. the MPA). They relied on the Supreme Court of Appeal's earlier decision in *SARS v United Manganese*

*of Kalahari (Pty) Ltd* 2020 4 SA 428 (SCA) (*Kalahari* case) where it was held that interpretation of a statute entails

> … an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The approach is as applicable to taxing statutes as to any other statute. The inevitable point of departure is the language used in the provision under consideration.

Accordingly, the majority judgment relied on textual interpretation to establish the meaning of section 18(a).

The majority also argued that if the respondent did not want the investment money to form part of the matrimonial estate, she should not have married in community of property. The majority judgment (para 11) stated as follows:

> … the respondent's contention that she was entitled to the protection afforded by [section] 18(a) is misplaced, absent the adoption of a different matrimonial property regime which excluded the investment by way, for example, of an antenuptial contract.

## 3 2 The minority judgment

The minority judgment, penned by Mocumie J, disagreed with the majority judgment, but it recognised the importance of interpreting the statute (para 15). "In the following sections I explore:

### *3 2 1 Damages*

Mocumie J (para 15) referred to *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC) (*Van der Merwe*) where it was held that the purpose of awarding damages is to place the injured party in the same position they would have been, "but for" the wrongful conduct (*Van der Merwe* para 37). Mocumie J also referred to *Van den Berg* (para 12) where it was held that:

> The damages received by the defendant are of a personal nature. Their purpose and objective is to take care of the defendant during or throughout his disabled life. Should the legislature have intended that such damages form part of the joint estate, the purpose and objective of such payment would be negated. It is, besides, fair and equitable to exclude the money from the joint estate notwithstanding the ethos of a marriage in community of property.

Guided by the decision in *Van der Merwe*, Mocumie J (para 15) stated:

> From the time that the RAF [Road Accident Fund] awarded the respondent non-patrimonial damages, those were ring-fenced for her personal use and for her personal injuries. The nature and purpose of the damages could not be changed by the respondent entering into a marriage in community of property. If these damages are ordinarily excluded from being divided, it matters not when the respondent received them. In any event, as a general

> rule, non-patrimonial damages are personal to a particular person, and are therefore not divisible whether or not they are expressly excluded. Therefore, portions of the settlement designated as 'pain and suffering' or 'loss of consortium' are not divisible between the spouses. This is the same rule that applies to gifts and inheritance – it is the spouse's 'personal property' and not divisible.

Mocumie J held that the damages received by the respondent were the same in nature and purpose as those received in the *Van der Merwe* case. Because of this, it should not matter when the respondent *in casu* received them (para 16). Furthermore, Mocumie held that the *Van der Merwe* case paved the way for interpreting section 18 of the MPA as a whole (para 18).

### *3 2 2 Interpretation of statutes*

Regarding the interpretation of statutes, Mocumie J held that the majority judgment failed to consider the context and purpose for which section 18(a) of the is intended. Mocumie J held that the textual interpretation used by the majority judgment takes away the purpose of the section. Mocumie J (para 17) held that, "[s]hould the legislature have intended that such (non-patrimonial) damages form part of the joint estate, the purpose and objective of such ment would be negated".

Mocumie also cited section 39(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution), which directs courts, amongst others, to promote the spirit, purpose, and object of the Bill of Rights when interpreting legislation. This provision was also cited in *Van der Merwe* (para 61) and *LH* (para 17). In the *Van der Merwe* case, the applicant, who was the wife, had instituted an action against the RAF after she sustained injuries when her husband intentionally ran her over with his motor vehicle, on a public road. The applicant lodged a claim with the RAF, which was rejected. The matter was referred to court. In court, the RAF acknowledged that it was liable to pay the applicant (based on the fact that she had been run over by a motor vehicle on a public road) but rejected her claim because sections 18(a)-(b) read with section 19(a) of the MPA prohibited claims for patrimonial damages between spouses married in community of property, as opposed to spouses married out of community of property. The RAF argued that the differentiation of the matrimonial property systems was not unfair, or alternatively, if it was unfair, it was justifiable to refuse to make payment because the applicant had married in community of property out of her own choice (*Van der Merwe* paras 14 and 59). Moseneke DCJ rejected the RAF's arguments. Among the reasons for the rejection, the following (para 61) was cited:

> … the constitutional validity [of a law] does not derive from the personal choice, preference, subjective consideration or other conduct of the person affected by the law. The objective validity of a law stems from the Constitution itself, which in section 2, proclaims that the Constitution is the supreme law and that the law inconsistent with it is invalid … Section 8(1) affirms that the Bill of Rights applies to all law and binds all organs of state including the judiciary. Section 39(2) obliges courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights …

> Thus the constitutional obligation of a competent court to test the objective consistency or otherwise of a law against the Constitution does not depend on and cannot be frustrated by the conduct of litigants or holders of the rights in issue. Consequently, the submission that a waiver would, in the context of this case, confers validity to a law that otherwise lacks a legitimate purpose, has no merit.

Moseneke DCJ, consequently, confirmed the court *a quo*'s order that section 18(b) unfairly discriminated against spouses married in community of property.

Mocumie J stated that the approach put forth in *Van der Merwe* meant that the Supreme Court of Appeal, the regional court as well as the High Court, were bound to interpret section 18(a) in accordance with section 39(2) of the Constitution (para 19). Mocumie J concluded that if section 39(2) of the Constitution is invoked, the court must follow the logic and interpretation set out in *Van der Berg* and *Van der Merwe* (para 22).

## 4 Criticism of the judgment

### 4 1 Interpretation of statutes

To determine whether section 18(a) should apply to a spouse married in community of property, regardless of when the non-patrimonial damages were received, it is crucial to ascertain the intention of the legislature and how the courts deal with the issue of interpretation. Several courts have addressed the issue of interpreting legislation. For instance, in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC), the Constitutional Court ruled that judicial officers must give preference to an interpretation that renders legislation constitutional over one that renders it unconstitutional (para 23).

In *Van den Berg*, the court held that when interpreting section 18(a) emphasis should be placed on the nature and purpose of the damages received by the spouse (para 29). It was also held that if the damages received are of a personal nature and their purpose and objective are to compensate the spouse for the personal injury he or she sustained, these damages are excluded by section 18(a) from forming part of the joint estate (para 12). In *LH*, it was not in dispute that non-patrimonial damages received by the respondent were for her personal use and that they were received because of an injury she sustained. Reading into the wording of the provision the legislature used the words "a delict committed against him or her [i.e. a spouse], does not fall into the joint estate" (s 18(a) MPA). The intention of the legislature, in my opinion, is to protect all spouses who are married in community of property regardless of whether the damages in question were received before or after the joint estate was created. Therefore, it should not matter that the respondent received non-patrimonial damages before she got married.

Furthermore, it is worth remembering that non-patrimonial damages are awarded as a *solatium* for the pain and suffering of an injured party (*Edouard v Administrator Natal* 1989 2 SA 368 (D) para 394H) and the purpose of awarding them is to place the recipient spouse in the same position she or he would have been but for the wrongdoing (*Van der Merwe* para 41). I submit that the majority judgment should have interpreted the wording of section 18(a) of the MPA using the ordinary meaning of the word. In addition, the majority judgment should have also looked at the purpose of section 18(a) holistically, which is to exclude non-patrimonial damages from forming part of the spouses' joint estate. I, thus, hold the view that the legislature's intentions were not followed by the majority judgment.

## 4 2 Matrimonial property regimes

I submit that the majority erred when they held that the respondent cannot rely on section 18(a) since she did not opt for a different marital regime and did not conclude an antenuptial contract. According to Clement Marumoagae, most people get married without being aware of the laws that have a direct impact on their estates. They only become aware during the dissolution of the marriage. (Marumoagae "The beginning of the end — dissolution of marriage under accrual system" July 2015 *De Rebus* 36). In contrast, I submit that there are prospective spouses who are aware of the legal implications of the matrimonial property system they have chosen. It is, therefore, absurd that the respondent, who had chosen to get married in community of property, was expected to conclude an antenuptial contract if she wanted the investment money to be excluded from the joint estate. As section 18(a) is aimed specifically at spouses married in community of property, it was reasonable for the respondent to assume that the provision would also apply to her and that her investment money would be excluded from the joint estate. By limiting the application of section 18(a) to spouses who receive non-patrimonial damages while married, the majority judgment has ultimately gone against the purpose of section 18(a). I, therefore, agree with Mocumie J finding that the nature and purpose of non-patrimonial damages cannot be changed by the fact that they were received before the respondent got married.

## 4 3 Discrimination analysis

Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit from the law. Section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including marital status, and section 9(4) provides that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 9(3). I submit that the differentiation made by the majority judgment amounts to unfair discrimination. The Constitutional Court, in *Harksen v Lane* 1998 1 SA 300 (CC) (*Harksen*), described discrimination as being unfair if "it impairs

or is likely to impair a fundamental human dignity of any individual or adversely affects them in any comparably serious manner" (para 50).

With reference to sections 9(1), 9(3), and 9(4) of the Constitution, the test set by the Constitutional Court in the *Harksen* case should be followed to determine whether the respondent's constitutional rights have been violated and whether this amounts to discrimination. It was held that the following questions must be answered (para 53):

(1) Does the provision differentiate between people or categories of people?
(2) Does the differentiation amount to discrimination? If the provision amounts to discrimination,
(3) is the discrimination unfair? If the discrimination is unfair,
(4) can this discrimination be justified in terms of section 36 of the Constitution?

Section 36(1) provides as follows:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

In *casu*, a differentiation is made between spouses whose non-patrimonial damages were awarded before they got married and those who received them during the existence of the marriage. The respondent has been denied protection under section 18(a) solely because she received the non-patrimonial damages before marriage. Had she received these damages during the existence of her marriage, section 18(a) would then apply to her. By limiting section 18(a) to spouses who are already married when receiving non-patrimonial damages, the majority judgment amounts to discrimination, I submit. I further submit that this discrimination cannot be justified in terms of section 36(1) of the Constitution. The purpose of section 18(a) is countered by separating spouses according to when non-patrimonial damages were received.

## 5 Conclusion

It is unfortunate that the majority judgment made the decision to limit the application of section 18(a). It is, therefore, important that this issue be settled by the Constitutional Court. The Constitutional Court rules provide that a litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal (see Rule 19(2) of the Constitutional Court Rules, GNR1675 in GG25726

of 31 October 2003). At the time of writing this case discussion, there was no indication that the respondent had lodged an appeal with the Constitutional Court.

This case, according to Mocumie J, also provides an opportunity for the legislature to make provisions with respect to spouses who receive non-patrimonial damages before they get married. In this regard, the legislature should read the judgment and thereafter consider amending section 18(a) of the MPA. Knowing our legislature, it will take years before this matter is attended to. In the meantime, spouses like the respondent will continue to suffer this injustice of having to share their non-patrimonial damages with their spouses, unless, before getting married, they get advice to sign an antenuptial contract whereby they exclude the non-patrimonial damages from being part of their matrimonial estate.

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