

SOUTH AFRICA / JUDGMENT

Gada v Gada (24141/2000) [2006] ZAGPHC 211 (29 May 2006)

[2006] ZAGPHC 211

COURT

High Courts - Gauteng

BEFORE

M A Badenhorst

CASE / FILE NUMBER

24141/2000

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IN THE HIGH COURT OF SOUTH
AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 29/5/2006

CASE NUMBER : 24141/2000

UNREPORTABLE

In the matter between:

BETTY TAMARIA
GADA Plaintiff
(born THAOU
I.D.
620525 0803 086)
and
RAMOHIBIDU SIMON
GADA Defendant
(I.D. 610730 5290
089)

JUDGEMENT

1. On the 20th of September 2000 the Plaintiff instituted a divorce action against the Defendant. In the particulars of claim the Plaintiff sought a decree of divorce, custody of the two minor children born of the marriage between the parties, maintenance for each of the children at the rate of R2 500.00 per month per child and maintenance for herself at the rate of R3 600.00 per month, division of the joint estate and costs of suit.

2. On or about the 27th of November 2000 the Defendant filed a plea in opposition to the Plaintiff's action. The Defendant opposed the action of the Plaintiff in respect of the grounds for divorce alleged by the Plaintiff. Although the Defendant admitted in his plea that the marriage between the parties has irretrievably broken down, no counterclaim was filed on his behalf together with his plea. 3. In paragraph 4 of the plea of the Defendant dated 24 November 2000, the Defendant admitted the marriage relationship between the parties as follows: "Save for stating that the year in which the Plaintiff and Defendant were married is 1981, and not 1982, the Defendant admits that they were married in community of property and that the marriage still subsists."

2. On or about the 27th of November 2000 the Defendant filed a plea in opposition to the Plaintiff's action. The Defendant opposed the action of the Plaintiff in respect of the grounds for divorce alleged by the Plaintiff. Although the Defendant admitted in his plea that the marriage between the parties has irretrievably broken down, no counterclaim was filed on his behalf together with his plea.

3. In paragraph 4 of the plea of the Defendant dated 24 November 2000, the Defendant admitted the marriage relationship between the parties as follows:

"Save for stating that the year in which the Plaintiff and Defendant were married is 1981, and not 1982, the Defendant admits that they were married in community of property and that the marriage still subsists."

4. On the 2nd of March 2004 the Defendant as the Applicant in an application applied for an order of condonation for the late filing of his counterclaim supported by a founding affidavit by his attorney of record, Mr Gerhard Wagenaar, the particulars of which were supported by a confirmatory affidavit by the Defendant. In the affidavit Mr Wagenaar explained that he initially acted as a correspondent to Messrs. Couzyn's Incorporated in Johannesburg and filed the plea referred to above on the 27th of November 2000, duly instructed thereto by his correspondent. During or about the 26th of October 2001 the Defendant instructed Mr Wagenaar to represent him in the matter which was enrolled for trial towards the end of 2001. When Mr Wagenaar established that no counterclaim was filed he prescribed and filed the application for condonation for the late filing of the counterclaim. Mr Wagenaar states that he received instructions as attorney of record on the 29th of November 2005. In the affidavit Mr Wagenaar explains that after consultation by him with the Defendant, he established that the possibility existed that the Defendant and the Plaintiff were never legally married. After Mr Wagenaar conducted a thorough investigation, a counterclaim was subsequently filed and the Defendant's plea amended in terms whereof the Defendant denied that a legal marriage was entered into between the parties and in terms of which the Defendant prayed for an order that custody and guardianship of the minor girl Sharon be awarded to him in terms of Section 2 of the Natural Fathers' of Children born out of Wedlock Act, No. 86 of 1997. 5. This Court granted condonation for the late filing of the plea. The counterclaim was subsequently filed on the 4th of May 2004 and the Defendant's plea amended in terms of which the admission that a marriage relationship between the parties existed and quoted above, was withdrawn and substituted by paragraph 4 which reads as follows: "The Defendant denies that he was ever married to the Plaintiff as alleged

or otherwise and put the Plaintiff to the proof thereof.”

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5. This Court granted condonation for the late filing of the plea. The counterclaim was subsequently filed on the 4th of May 2004 and the Defendant's plea amended in terms of which the admission that a marriage relationship between the parties existed and quoted above, was withdrawn and substituted by paragraph 4 which reads as follows:

“The Defendant denies that he was ever married to the Plaintiff as alleged or otherwise and put the Plaintiff to the proof thereof.”

6. The matter was set down for trial and at the pre-trial conference dated 14 March 2004, the parties agreed in respect of the disputed marriage, that the facts in dispute comprises the question whether the Court should grant a decree of divorce, or alternatively to grant a declaratory order that no marriage existed between the parties. That in the event of the Court ordering a decree of

divorce, that a liquidator be appointed to attend to the division of the joint estate, and the quantum and principal of maintenance in respect of the Plaintiff. 7. At the commencement of the trial the Plaintiff testified that she had met the Defendant during November 1980, after which they engaged in an intimate relationship and she fell pregnant. As a consequence of her pregnancy, the Defendant became liable to pay lobola to her family which entailed that the Defendant had to pay an amount of money as a consequence of the impregnation. During 1980, both the Plaintiff and the Defendant were still at school and the Plaintiff in standard 9 at the time. The Plaintiff left school and went to her parents' farm where the child was born in January of 1982. According to the Plaintiff there was no animosity between the families. The Defendant paid

the labolla and all the parties involved accepted the situation. In the meanwhile, and after December 1981, the Defendant entered the employ of the South African Police Services and was resident at the barracks of the police in Krugersdorp. During weekends he stayed with his family at Magaliesburg. Soon after the Plaintiff gave birth to the baby during January 1982, the Plaintiff moved to Khagiso township near Krugersdorp where the Defendant had bought a house. The Plaintiff testified that she was allowed by the Defendant to move into his house with their child. She worked at a Manganese mine, approximately 20km from the Khagiso township and travelled to work on a daily basis. It is common cause that the Plaintiff lived with the Defendant for an uninterrupted period from May 1983 to 1996 according to the Plaintiff's evidence and according to the Defendant's evidence until at least 1994.

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divorce, that a liquidator be appointed to attend to the division of the joint estate, and the quantum and principal of maintenance in respect of the Plaintiff.

7.At the commencement of the trial the Plaintiff testified that she had met the Defendant during November 1980, after which they engaged in an intimate relationship and she fell pregnant. As a consequence of her pregnancy, the Defendant became liable to pay labolla to her family which entailed that the Defendant had to pay an amount of money as a consequence of the impregnation. During 1980, both the Plaintiff and the Defendant were still at school and the Plaintiff in standard 9 at the time. The Plaintiff left school and went to her parents' farm where the child was born in January of 1982. According to the Plaintiff there was no animosity between the families. The Defendant paid the labolla and all the parties involved accepted the situation. In the meanwhile, and after December 1981, the Defendant entered the employ of the South African Police Services and was resident at the barracks of the police in Krugersdorp. During weekends he stayed with his family at Magaliesburg. Soon after the Plaintiff gave birth to the baby during January 1982, the Plaintiff moved to Khagiso township near Krugersdorp where the Defendant had bought a house. The Plaintiff testified that she was allowed by the Defendant to move into his house with their child. She worked at a Manganese mine, approximately 20km from the Khagiso township and travelled to work on a daily basis. It is common cause that the Plaintiff lived with the Defendant for an uninterrupted period from May 1983 to 1996 according to the Plaintiff's evidence and according to the Defendant's evidence until at least 1994.

8.The Plaintiff testified extensively with regard to her civil marriage to the Defendant. According to her evidence this ceremony

took place on the 9th of November 1982. She testified that after their "labolla marriage" and the birth of their first child, she moved in with Defendant during approximately May 1982. According to the Plaintiff the Defendant proposed that they enter into a civil marriage. For this purpose and

according to the Plaintiff the Defendant made the arrangements with the Government Department. The Defendant bought her a wedding ring and on the day of the appointment on the 9th of November 1982 she with her father, her cousin and the Defendant arrived at the Magistrate's Office in Khagiso where they signed all the papers, exchanged their vows, after which the Defendant put the wedding ring on the Plaintiff's finger. The Plaintiff referred to the person presiding at the ceremony as "a magistrate" and was described by the Plaintiff as a white male person. He gave the parties a marriage certificate which has been handed at the trial in as part of bundle A of documents. This certificate, so the Plaintiff testified, were in their possession for the past 22 years. In addition the Plaintiff testified that her husband, the Defendant was a member of the Catholic Church when they entered into the marriage. The Defendant wanted the Plaintiff to become a member of the church. According to her evidence the marriage was blessed by the priest of the Catholic Church and she was baptised because she was the Defendant's wife. The marriage certificate exhibited as Annexure "B1" of the bundle of documents, was issued on the day of marriage, the 9th of November 2008. The abridged marriage certificate indicates that the Plaintiff and the Defendant were married on the 9th of November 1982 by a marriage officer who signed his name as P. A. J. Harmse. The certificate is stamped by the Commissioner for Co-operation and Development, Private Bag x 5, Randfontein on the date of marriage. The marriage certificate indicates that the parties were married in community of property. The identity number of the Plaintiff and the Defendant and their date of birth were appended to the marriage certificate which was certified as a true extract from the marriage register under number 298/1982/302. The Plaintiff testified that the marriage officer, (the said mr Harmse) signed the marriage certificate in the presence of the Plaintiff and the Defendant. The Plaintiff also confirmed that she was a minor at the time of the marriage and that both her parents gave permission for the marriage. Her father accompanied her and the Defendant to the marriage councillor on the day of the marriage but her preferred to stay at home. 9. During cross examination the Plaintiff testified that she and the Defendant lived together until 1996 when she left the common home and filed for a divorce. The action instituted by her however did not proceed as the parties became reconciled. When questioned on the issue, Plaintiff confirmed that the allegation of the Defendant that he did not enter into a legally binding marriage with the Plaintiff was never raised during these proceedings and in particular during settlement negotiations which both parties attended.

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10. Mrs Helen Elizabeth Mostert, a official in the employ of the Department of Interior Affairs testified that she was involved with the Department, particularly in marriage affairs for the past 19 years. According to her the original marriage certificate which she inspected and which she identified as A1 of the bundle, appeared on the face value thereof to be valid. With reference to the marriage registrar she confirmed that since September 1999 all marriage particulars of all the races in the country were centralized on one computer system and that this process was ongoing. In respect of the marriage between the Plaintiff and the Defendant, a marriage certificate was computerised and processed and which comprised Annexure "B2" of the bundle. The fact that only one witness signed the marriage register did not raise concerns with her as the absence of a signature of a second witness would not jeopardize the validity of the marriage as she understood it, and she referred to the provisions of Section 30 of the Marriage Act No. 25 of 1961. 11. Mrs

Mofokeng of the Department of Home Affairs, Randfontein testified that she had been employed by the Department since January

the 12th 1983 and that she was stationed at the Department's offices at Randfontein. She confirmed that the duplicate marriage register (of which a copy form part of the bundle of documents "A") was removed from the original register which was kept at the offices of the department at Randfontein in a safe place and that the public had no access to the register. She also confirmed that the Commissioner who solemnised all the marriages referred to in the original register available in Court

was a Mr Harmse. She testified that there is only one additional certificate in the register apart from the Plaintiff and

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12. Mrs F R Lazzaro, the sister of the Defendant gave evidence for the Plaintiff and confirmed not only that the Defendant paid labolla to the family of the Plaintiff but that he also had the intention to enter into a legal marriage with the Plaintiff and he bought a wedding ring for that

purpose. She testified that she lived in the maternal family home at Magaliesburg where the Defendant also lived until he moved to the police barracks at the end of 1981, where he then stayed and occasionally returned home when he was not on duty. Mrs Lazzaro repeatedly confirmed that she and some of the elder brothers of their mother presented the labolla to the Plaintiff's family in accordance with the Defendant's intention to marry the Plaintiff. She also confirmed that according to her knowledge, the Defendant attended the marriage ceremony and that he showed the marriage ring to his family in her presence. When cross examined she confirmed that as far as she was concerned during all the years as a child in the common household of the Plaintiff and the Defendant, she believed that they were married and were made to believe that they were married. She therefore had all reason to assume that the Plaintiff and Defendant were legally married.

13. The documents incorporated in the bundle and which according to the Plaintiff's case constitutes proof of her marriage to the Defendant, comprises the copy of the marriage register to which a number 298/82/302 was appended. The marriage register is purportedly signed by the Defendant and the Plaintiff and one witness and the commissioner mr P A J Harmse. It was pointed out during the evidence and argument that only the first name of the Defendant (Simon) and of the Plaintiff (Betty) were incorporated in the marriage register while the Plaintiff and Defendant each has two first names. The identity numbers incorporating the date of birth, etc recently allocated in respect of both parties were appended on the register. In addition to the original marriage register, the Plaintiff and the Defendant on the face of it signed a document in which they declared their intention and desire that they be married in community of property. Two witnesses signed on this document including the witness mr Schlase, the same person who signed the marriage register throughout as a witness. The said document is dated the 9th of November 1982 and was also signed by the Commissioner mr Harmse. In addition the Defendant signed a declaration under Section 22(3) of the Administration Act, No. 38 of 1927 in which he declared that no customary union subsisted between him and any other woman. This document also contains the disputed signature of the Defendant and the same two witnesses, messrs Schlase and Moseane appended their signatures to the said declaration. In addition to the foregoing both the Plaintiff and the Defendant signed documents on which their personal particulars appear and in terms of which they have declared that they are not within the prohibited degrees of relationship and that there is no lawful impediment to their marriage. Both parties signed the declaration on the 9th of November 1982 and both documents were signed by the Commissioner, mr Harmse. The last document which formed part of bundle A is a purported consent to the marriage of a black female who is of age in the Province of Natal or the Transvaal in terms of Section 22 ter of Act 38 of 1927. In the document one Daniel Thatoe, the father of the Plaintiff purportedly gave his consent to the marriage with the Defendant. On the document appears to be an attempted signature with a pen supplemented with a thumb imprint. This document carries the stamp of the Commissioner for Co-operation and Development of Randfontein dated the 9th of November 1982 and was also signed by the Commissioner, mr Harmse. Further documentary proof of the marriage is contained in the abridged marriage certificate referred to above, with the same date stamp of the Commissioner of Co-operation and

Development signed by the Commissioner mr Harmse and referred to above forming part of bundle B and in addition, also forming part of bundle B, an issued computerized marriage certificate with the number 185754 and which according to the certificate was issued on the 30th of August 2002, containing the particulars of the Plaintiff and the Defendant with reference to their presently allocated identity numbers and which indicates that a civil marriage was entered into by the parties at Randfontein on the 9th of November 1982.

14.The Defendant presented his case by first calling an expert witness mr Leon Esterhuyse who testified that he was requested to examine and compare the disputed signature on the marriage registrar referred to above with certain specimen signatures on documents that he had received, including cheques signed by the Defendant over a period of twenty years. He came to the conclusion that there is a strong possibility that the disputed signature was not created by the Defendant but that the lessor possibility that he is the creator of the disputed signature and developed a completely new signature afterwards which differs radically from the original one, remains a factor which cannot be ignored. He also found that the same deficiency as far as a proper comparison standard is concerned, (the specimen signatures) also applies to that of the Plaintiff and that he maintains the same opinion as far as to either linking or excluding her as the creator of the disputed signature. Mr Esterhuyse qualified himself as a expert witness on the basis of 27 years experience in the field of forensic science and in particular forensic document examination.

15.During the presentation of his own evidence, the Defendant confirmed that he and the Plaintiff met when they were still at

school after which an intimate relationship developed between them. During 1981 the Plaintiff became pregnant. The pregnancy resulted in him offering an amount of damages to the family of the Plaintiff, so he testified. According to his testimony the pregnancy caused a rift between him and the Plaintiff's family, there was an outcry which resulted in him making the offer to pay damages to the family of the Plaintiff in an amount of R250.00. During early 1981 he entered into the employment of the South African Police. He was called up for police services on the 16th of December

1981. He initially moved to the barracks of the Khagiso Police Station but was transferred to the training college of the SAP during or about January 1982. The Plaintiff testified that he bought a house in Khagiso and moved to the house during the early part of 1982 and that the Plaintiff then asked him is she could move in with him to live with him in his house. According to the Defendant this made him glad because he could then be with his daughter to whom the Plaintiff has given birth during January of

1982. They were intent on raising the child together. At one stage during 1982 she informed the Defendant, so he testified, that she managed to obtain a marriage certificate and showed it to him. This he identified as the abridged marriage certificate. According to the Defendant the Plaintiff reminded him that since they were from disadvantaged areas, she could only work in Rustenburg if she was married to him. The Defendant however confirmed that she

commuted to work on a daily basis to her work place approximately 20km away from Khagiso. The Defendant admitted that they were living together in the particular house that they moved in together during May until 1984 when they moved into a new house. The Defendant admitted that they used the marriage certificate qualify for and register a bond over the new house. According to the Defendant the purported marriage between him and the Plaintiff entitled them to bypass or sidestep the influx control measurers which were in operation during that time. The Defendant admitted that they lived together until the breakdown in the relationship in 1996.

16. In his evidence, the Defendant denied that he was present when the alleged marriage ceremony took place on the 9th of November 1982 before Commissioner Harmse. He denied any knowledge of a marriage ceremony which he attended, or that the signature on the marriage register was his own. He testified that the date of birth on the marriage certificate was wrong as he was born on the 30th of July 1961 and the date inscribed on the marriage certificate as his date of birth reads the 2nd of May

1961. The Defendant denied that he ever intended to pay or paid labolla to the family of the Plaintiff. He initially testified that after he realized that the Plaintiff was pregnant he immediately went to see his eldest sister, Emma Gada at Natalspruit and he was advised by her to pay damages to the family of the Plaintiff. One day later during his testimony he informed the Court that he established for the first time that Emma was his biological mother and not his eldest sister as he was made to believe by his family through all the years of his youth.

17. After the Defendant left the common home, which, according to the Defendant took place on the 24th of December 1994, she issued a divorce summons against him after which settlement negotiations took place. The Plaintiff decided not to proceed with the action. According to the Defendant the legality of the marriage was never discussed or raised by any of the parties. The Defendant testified that he admitted the existence of the marriage in a plea filed on his behalf in reply to the Plaintiff's action because he was so advised by his former attorneys. He testified that according to the attorneys it would be an expensive and tedious procedure to defend the Plaintiff's action on that basis. It was only after he informed his present attorney of record, mr Wagenaar about the true facts as he alleges, (and set out above in paragraph 4) that he was advised and accordingly instructed his attorneys to amend the pleadings and in particular the plea and counterclaim in respect of his defence to the present action of the Plaintiff. The Defendant explained that his evidence in the Rule 43 procedure admitting the marriage, was also premised on the advice that he had received from his previous attorneys. The Defendant denied that he ever bought a wedding ring for the Plaintiff. He denied that he showed the ring to anyone and in particular to his family members including Mrs Lazzaro. He denied that he arranged for the civil marriage to take place as the Plaintiff testified. He also denied that the Catholic church of which he admitted he is a member, blessed the marriage between him and the Plaintiff. He

however admitted that he and the Plaintiff lived together as if they were married and that friends and family accepted them as a married couple.

18. Under cross examination the Defendant admitted that he lied under oath in the Rule 43 proceedings by admitting the existence of the marriage. He also admitted that as a member of the police force for many years, he realised what the seriousness was of taking the oath and knowingly presents false evidence, realizing that he can be prosecuted for criminal behaviour. The Defendant agreed that in his opposing affidavit filed in the Rule 43 proceedings, he admitted the evidence of the Plaintiff that they were married and that the marriage still subsists. The Plaintiff also admitted in the Rule 43 proceedings that two children were born “of the marriage between the parties”. In a supplementary affidavit filed in the same proceedings and signed by the Defendant on the 5th of March 2001, in paragraph 3 thereof, he repeated the averments made by him in the opposing affidavit referred to above (p.

63) and in paragraph 17 he explicitly referred to the Applicant (the Plaintiff) as his wife (p. 67). He admitted that when he signed the supplementary affidavit in March 2001, he attended the offices of mr Wagenaar in Pretoria. He knew at the time that the evidence was false but failed to point this out to mr Wagenaar who, at the time, was still acting as the correspondent of the Johannesburg attorney of the Defendant, messrs. Couzyns. The reports of the family advocate filed in the Court file contains no reflection of any kind that the Defendant informed them that no marriage relationship existed between the Plaintiff and the Defendant. It was only much later, during 2004, when the counterclaim had to be filed when the Defendant decided to disclose to mr Wagenaar that the marriage did not exist. When it was pointed out to the Defendant during cross examination that the fact that he was prepared to lie under oath previously, could reflect on the whole of his testimony, he replied that the non-existence of the marriage is a reality that he cannot run away from. 19. The last witness who supported the Defendant was mrs Emma Molilo the mother of the Defendant. She confirmed that the Defendant did not know that she was his mother until he confronted her on the second day of the trial with the testimony of mrs Lazzaro referred to in paragraph 12. She was then prompted, so it was alleged, to disclose to him that she was his biological mother and not his sister as he always believed. Mrs Molilo confirmed that the Defendant consulted with her during 1981-1982 and disclosed to her that he was responsible for the pregnancy of the Plaintiff. She advised him to pay damages as he was not yet ready for marriage. According to the witness the Defendant informed her later on that he followed her advice and she testified that she was aware that the Defendant and the Plaintiff were living together. She mentioned that although she knew that two children were conceived from the relationship between the parties, that she had no knowledge of whether they entered into a marriage or not. This concluded to evidence for the Defendant.

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19.The last witness who supported the Defendant was mrs Emma Molilo the mother of the Defendant. She confirmed that the Defendant did not know that she was his mother until he confronted her on the second day of the trial with the testimony of mrs Lazzaro referred to in paragraph 12 . She was then prompted, so it was alleged, to disclose to him that she was his biological mother and not his sister as he always believed. Mrs Molilo confirmed that the Defendant consulted with her during 1981-1982 and disclosed to her that he was responsible for the pregnancy of the Plaintiff. She advised him to pay damages as he was no yet ready for marriage. According to the witness the Defendant informed her later on that he followed her advice and she testified that she was aware that the Defendant and the Plaintiff were living together. She mentioned that although she knew that two children were conceived from the relationship between the parties, that she had no knowledge of whether they entered into a marriage or not. This concluded to evidence for the Defendant.

20.It is against the background of the aforementioned evidence that this Court is called upon to decide the issue of whether the Plaintiff and the Defendant entered into a civil marriage relationship which was allegedly solemnized on the 9th of November 1982. From the evidence it appears to be common cause that the parties lived together as man and wife for a period that lasted for at least 11 years during which period cohabitation took place and the second child was conceived. It must be accepted that by virtue of the cohabitation the parties were known as a married couple. That this was the case was confirmed by mrs Rebecca Lazzaro the sister of the Defendant, who testified for the Plaintiff. Mrs Lazzaro impressed as a witness. As the sister of the Defendant no underlying motif could be attributed to her to give false evidence. The eldest daughter of the parties Sherene Portia Gada confirmed in her evidence that she never doubted

the existence of the marriage between her parents and that it was never disputed by any of the parties that a marriage relationship existed. 21. Where the evidence of cohabitation and repute is allied to evidence of a ceremony of marriage having been initially celebrated

between the parties, the presumption that the parties were validly married is very strong indeed and will be displaced only by clear contrary evidence. EX PARTE L (ALSO KNOWN AS A.), 1947 (3) S.A. p. 50 CPD at pp. 56-57 LEVINE v LEVINE 1939, CPD 246; OCHBERG v OCHBERG'S ESTATE AND ANOTHER, 1941, CPD 15 at pp. 32-33

20. It is against the background of the aforementioned evidence that this Court is called upon to decide the issue of whether the Plaintiff and the Defendant entered into a civil marriage relationship which was allegedly solemnized on the 9th of November 1982. From the evidence it appears to be common cause that the parties lived together as man and wife for a period that lasted for at least 11 years during which period cohabitation took place and the second child was conceived. It must be accepted that by virtue of the cohabitation the parties were known as a married couple. That this was the case was confirmed by Mrs Rebecca Lazzaro the sister of the Defendant, who testified for the Plaintiff. Mrs Lazzaro impressed as a witness. As the sister of the Defendant no underlying motif could be attributed to her to give false evidence. The eldest daughter of the parties Sherene Portia Gada confirmed in her evidence that she never doubted the existence of the marriage between her parents and that it was never disputed by any of the parties that a marriage relationship existed.

21. Where the evidence of cohabitation and repute is allied to evidence of a ceremony of marriage having been initially celebrated

between the parties, the presumption that the parties were validly married is very strong indeed and will be displaced only by clear contrary evidence.

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LEVINE v LEVINE 1939, CPD 246;

OCHBERG v OCHBERG'S ESTATE AND ANOTHER, 1941, CPD 15 at pp. 32-33

In addition to the foregoing the Court has, in the absence of direct evidence on the point presumed the authority of the person

who officiated at the marriage ceremony to perform it. EX PARTE ABRAHAMS 1937, E.D.L. 107 GOLDSTEIN v GOLDSTEIN, 1938, T.L.R. 402 OCHBERG's case supra at 33D 22. In FITZGERALD v GREEN 1911 E.D.L., p. 432 at 449 Kotze J. P. stated the legal position as it still prevails, as follows: "The ordinary mode of proving a marriage is no doubt by production of the register or a certified extract from it, but that it is not essential, however desirable it may be, for it is not the only way in which a marriage can be legally established It can be proved in different ways, as, for instance, by the evidence of witnesses, who were present at the marriage ceremony, or by satisfactory evidence of cohabitation and repute." WITTEKIND v WITTEKIND, S.A.L.R., 1948(1) p. 826 W.L.D. at 827-828 ANDERSON v ANDERSON, 1942 W.L.D., p. 86 23. In divorce actions it is the

accepted rule as it appears from the authorities referred to above, that apart from the evidence produced in respect of a marriage ceremony to furnish proof of the existence of such a marriage, that an authenticated copy of the marriage certificate must be produced, unless the Court is satisfied that production of such a certificate is impossible or impracticable.

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THE LAW OF SOUTH AFRICA 1ST re-issue, Vol. 16, par. 37 24. The Plaintiff testified that a marriage ceremony took place on the 9th of November 1982 where the Defendant was present and which ceremony was officiated by (what she described as) a Magistrate and referred to as a white male person. The marriage officer is identified on all the official documents forming part of the bundle as the Commissioner for Co-operation and Development of Randburg, one Mr P A G Harmse. The marriage register for the period 26 October 1982 to 1 February 1983 handed in as an exhibit shows that at least from 4 November 1982 to 25 January 1983, the said Mr

Harmse officiated all the marriages and his signature appears on some 40 marriage registers during this period. His signature also appears on all other documents identified above in paragraph 14 and which were presented for officiating the marriage ceremony which included the abridged marriage certificate. During the trial it was not suggested by any of the parties that the signature of Mr Harmse was not authentic and on the face thereof similar on all the

documents which he signed, or on the face of the documents tampered with, more particularly with reference to the marriage register and the abridged marriage certificate. It is also noticeable that the marriage register handed in as an exhibit reflects throughout the handwriting of the same person who completed all the particulars on all the forms of the marriage register, exhibited, and who also completed the copy of the marriage register in respect of the disputed marriage of the parties and which formed part of bundle “A”.

THE LAW OF SOUTH AFRICA 1ST re-issue, Vol. 16, par. 37

24.The Plaintiff testified that a marriage ceremony took place on the 9th of November 1982 where the Defendant was present and which ceremony was officiated by (what she described as) a Magistrate and referred to as a white male person. The marriage officer is identified on all the official documents forming part of the bundle as the Commissioner for Co-operation and Development of Randburg, one mr P A G Harmse. The marriage register for the period 26 October 1982 to 1 February 1983 handed in as an exhibit shows that at least from 4 November 1982 to 25 January 1983, the said mr

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25.The Defendant attacked the authenticity of the marriage register and the abridged marriage certificate on the basis that the register was not a public document and that it was signed by only one witness. With reference to the abridged marriage certificate, it was argued on behalf of the Defendant that the particulars on the register do not correspond with the particulars on the abridged

marriage certificate. The authenticity was further questioned as a consequence of the fact that the one copy which forms part of the original register of the marriage of the parties in the original marriage register and is retained in the register, appears to be removed. As pointed out above a copy of the original marriage register however was handed in as part of Bundle A.

26.On behalf of the Defendant argument was addressed in respect of the question whether the marriage register is a public document or not. The discrepancies that appear to exist in respect of the names of the parties between the marriage register (reflecting only their respective first names) and the abridged marriage certificate, reflecting both names of both parties, were also stressed during argument. However these issues in itself and in particular the question whether

the marriage register is a public document or not, do not impact on the validity of the marriage and/or proof thereof (taking into account all the circumstances and the presumption of the validity of the marriage referred to below). Registration of a marriage, though required by statute in the public interest and for the purpose of proof, is not essential to the validity of the marriage. Where for example a marriage has been solemnized in terms of the Marriage Act No. 25 of 1961, but the marriage register has for some or other reason not been completed, the Director-General of the Interior, may, after submission of such proof and after such enquiries as he may deem necessary, direct that the prescribed register with regard to the marriage, be completed. EX PARTE EFRON ET UXOR 1940 CPD 199 EX PARTE MICHAELSON ET UXOR 1941 (2) PHB 57 (W) GEOFFRE v GEOFFRE 1939 GWL 51 27. It was argued on behalf of the Defendant that the abridged marriage certificate and/or the marriage certificate issued by the Department of Interior forming part of Bundle B (B2) was also not a public document and therefore inadmissible in evidence. However a marriage certificate to which the parties are entitled to after the marriage is solemnized, serves as prima facie evidence of the particulars set out in it. The provisions of Section 42(3) of the Births, Marriage and Deaths Registration Act, Act 81 of 1963 provided that any marriage certificate issued in terms of that Act - "shall in all courts of law and public office be prima facie evidence of the particulars set forth therein". In W v W 1976(2) S. A. L. R, p. 308 W.L.D at 315A-C, Nestadt, J. explained the provision as follows: "This means that a judicial official must accept the particulars as correct until he is convinced that he cannot rely upon them. Whether such a conviction is justified must depend on the evidence which refutes or throws doubt upon the contents of the certificates. (R. v. Chizah, 1960 (1) S.A. 435 (A.D.)). Included in the presumption thus created would be all the essentials for the conclusion of a valid marriage including the capacity of the parties (Schmidt, Die Bewysreg, p. 110). A further (common law) presumption which is relevant in this regard is the presumption of the validity of a marriage flowing from evidence of the ceremony and subsequent cohabitation (Ex parte L. (also known as A.) 1947 (3) S.A. 50 (C)). The presumptions referred to may of course be rebutted."

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EX PARTE EFRON ET UXOR 1940 CPD 199

EX PARTE MICHAELSON ET UXOR 1941 (2) PHB 57 (W)

GEOFFE v GEOFFE 1939 GWL 51

27. It was argued on behalf of the Defendant that the abridged marriage certificate and/or the marriage certificate issued by the Department of Interior forming part of Bundle B (B2) was also not a public document and therefore inadmissible in evidence. However a marriage certificate to which the parties are entitled to after the marriage is solemnized, serves as prima facie evidence of the particulars set out in it. The provisions of Section 42(3) of the Births, Marriage and Deaths Registration Act, Act 81 of 1963 provided that any marriage certificate issued in terms of that Act - "shall in all courts of law and public office be prima facie evidence of the particulars set forth therein". In *W v W* 1976(2) S. A. L. R, p. 308 W.L.D at 315A-C, Nestadt, J. explained the provision as follows:

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28. In *R v CHIZAH* 1960 (1) SA 435 (A) the learned Chief Justice Steyn referred to some remarks by Fagan J in an earlier case *R v GILL* 1950 (4) SA 199 (C) at 201-2 in which the latter had said that once a certificate was challenged by evidence, its probative value was very little on account of the hearsay nature of the information which it contained. He then went on to say: "Luidens art. 40(2) geld 'n behoorlike ondertekende sertifikaat in alle gereghowe as prima facie bewys van die besonderhede daarin vermeld. Dit beteken dat 'n regterlike beampte die besonderhede as juis moet aanvaar totdat hy oortuig is dat hy nie op hul kan staatmaak nie. Of so 'n oortuiging geregverdig is, moet afhang van die getuienis wat die inhoud van die sertifikaat weerlê of in twyfel trek. By die besluit of sulke getuienis aanvaar moet word, sou die oorwegings deur FAGAN, R., in bedoelde passasie gemeld, wel ter sake kan wees, maar hul is nie die enigste oorwegings nie, en by teenbewys wat genoemde oortuiging nie wek nie, bly die statutêre prima facie bewys ongeskonde." At 416G-H See, also, *S v BRUHNS* 1983 (4) SA 580 (NC); *TERRY v SENATOR VERSEKERINGSMAATSKAPPY BEPERK* 1984 (1) SA 693 (A) AT 699C-E *R v Chizah* (and its disapproval of *R v Gill*) was discussed by the Appellate Division in *S v VELDTHUIZEN* 1982 (3) SA 413 (A) where little merit was found in the argument that a pathologist's report, which constituted prima facie evidence of certain facts in terms of s 212 (4) (a) of the Criminal Procedure Act 1977, was, once it was challenged, mere paper evidence: The words "prima facie evidence" cannot be brushed aside or minimised. As used in this section they mean that the judicial officer will accept the evidence as prima facie proof of the issue and, in the absence of other credible evidence, that that prima facie proof will become conclusive proof.

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TERRY v SENATOR VERSEKERINGMAATSKAPPY BPK, supra *H L HOFFMAN, D T ZEFFERTT*; *THE SOUTH AFRICAN LAW OF EVIDENCE*; 4th edition, p. 562-564 Act 81 of 1963 was repealed by the Births and Deaths Registration Act 51 of 1992. Since the commencement of the 1992 Act, it is the Marriage Act that regulates the registration of marriages. The said Act does not contain a provision similar to s 42(3) of the 1963 Act. The learned writers Sinclair and Heaton in the *Law of Marriage*, 2nd edition, pp 355-356 states that this is a lacuna and is presumably an oversight. “The legislature could surely not have intended that a duly signed certificate of marriage should no longer be prima facie evidence of the particulars set forth in it.” I agree with this view. 29. The Defendant's attempts to rebut the prima facie proof presented by both marriage certificates, can be categorized as follows:

TERRY v SENATOR VERSEKERINGMAATSKAPPY BPK, supra

H L HOFFMAN, D T ZEFFERTT; *THE SOUTH AFRICAN LAW OF EVIDENCE*; 4th edition, p. 562-564

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that a duly signed certificate of marriage should no longer be prima facie evidence of the particulars set forth in it.” I agree with this view.

29.The Defendant’s attempts to rebut the prima facie proof presented by both marriage certificates, can be categorized as follows:

- (a) The differences between the particulars on the marriage register and the marriage certificate nullifies any possible reliance on the marriage certificates. As already pointed out, the marriage certificate for the validity thereof, is not dependant on the particulars contained in the register. In any event as explained above, the only differences between the register and the certificates is in respect of the second names of both parties, which were not included in the marriage register but are correctly reflected in the marriage certificates. All the other particulars of the parties, including their identity numbers are correctly inscribed on the abridged marriage certificate. In the same vein the Defendant sought to cast doubt on the authenticity of the marriage certificate by virtue of the absence of the original copy of the marriage register pertaining to the marriage between the Plaintiff and the Defendant. The officials of the Department of the Interior could not explain the absence of the original copy from the register. Whatever the cause of the removal of the original copy might have been, the same considerations apply in respect of the marriage certificate and the authenticity thereof.
- (b) The absence of a second signatory as a witness on the said register, in itself renders the purported marriage a nullity. It is correct that only one witness signed the marriage register. The one witness who signed the marriage register in respect of the parties, also signed as a witness on all the marriage registers incorporated in the original marriage register for the period 26/10/82-01/02/83 which was handed in as an exhibit and to which reference were made in paragraph 13 above. In her testimony the Plaintiff said that on the day of her marriage to the Defendant, she was accompanied by her father and her cousin, Mrs Mirriam Mokotedi. Although she admitted that she could not remember who signed the register as witnesses, she was quite clear in her evidence that the Plaintiff, her father and her cousin were present during the ceremony. Section 29(2) of the Marriage Act stipulates as follows:
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copy might have been, the same considerations apply in respect of the marriage certificate and the authenticity thereof.

- (b) The absence of a second signatory as a witness on the said register, in itself renders the purported marriage a nullity. It is correct that only one witness signed the marriage register. The one witness who signed the marriage register in respect of the parties, also signed as a witness on all the marriage registers incorporated in the original marriage register for the period 26/10/82-01/02/83 which was handed in as an exhibit and to which reference were made in paragraph 13 above. In her testimony the Plaintiff said that on the day of her marriage to the Defendant, she was accompanied by her father and her cousin, Mrs Mirriam Mokotedi. Although she admitted that she could not remember who signed the register as witnesses, she was quite clear in her evidence that the Plaintiff, her father and her cousin were present during the ceremony. Section 29(2) of the Marriage Act stipulates as follows:

“(2) A marriage officer shall solemnize any marriage in a church or other building used for religious service or in a public office or private dwelling-house, with open doors and in the presence of the parties themselves and at least two competent witnesses” Section 29A provides in respect of registration of marriages the following: *“(1) The marriage officer solemnizing any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnized.”* At the trial, Mrs Mostert of the Department of the Interior confirmed that the absence of a signature of one witness as she understood it, does not nullify a marriage and that the provisions of Section 30, of the Marriage Act applies. On scrutiny of Bundle A and B and in particular the marriage register, she was convinced that there was compliance with all the provisions of the Act for her to state that on the face of the documents, a legally valid marriage had been entered into. She admitted however, that she was not legally qualified. It is inconceivable that the marriage entered into 23 years ago should be declared a nullity by the Court as a consequence of the marriage register reflecting the signature of only one witness although in terms of the uncontested evidence, two adult persons were present during the ceremony, which complies with the provisions of Section 29(2) quoted above. *EX PARTY DOW 1987 (3) S.A. 829 (D) at 833*

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Section 29A provides in respect of registration of marriages the following:

“(1) The marriage officer solemnizing any marriage, the parties thereto and two competent witnesses shall sign the marriage register concerned immediately after such marriage has been solemnized.”

At the trial, Mrs Mostert of the Department of the Interior confirmed that the absence of a signature of one witness as she understood it, does not nullify a marriage and that the provisions of Section 30, of the Marriage Act applies. On scrutiny of Bundle A and B and in particular the marriage register, she was convinced that there was compliance with all the provisions of the Act for her to state that on the face of the documents, a legally valid marriage had been entered into. She admitted however, that she was not legally qualified. It is inconceivable that the marriage

entered into 23 years ago should be declared a nullity by the Court as a consequence of the marriage register reflecting the signature of only one witness although in terms of the uncontested evidence, two adult persons were present during the ceremony, which complies with the provisions of Section 29(2) quoted above.

EX PARTY DOW 1987 (3) S.A. 829 (D) at 833

Only material defects renders a marriage void ab initio. The absence of a signature of one witness on the marriage register constitutes no more than a formal defect which does not detract from the identification of the parties, the consensus to the marriage, the competence of the marriage officer and the presence of both parties and two witnesses.

- (c) The opinion evidence of mr Esterhuyse shows conclusively that the Defendant did not sign the marriage register and certificate. In argument on behalf of the Defendant it was pressed upon me that the expert opinion of mr Leon Esterhuyse should be accepted without any reservation on the basis that the expert witness came to the conclusion that the Defendant did not sign the marriage certificate or at least, that Esterhuyse's evidence shows or point in a direction that on probabilities the Defendant did not sign the marriage certificate. Even when expert evidence is available in respect of handwriting or signature, it is trite that the Court should not place too great reliance upon it and the Court is still required to consider their evidence very carefully. In *ANNAMA v CHETTY* 1946 AD 142 at 155, GREENBERG JA referred as follows to the function of an expert; "...His function is to point out similarities or differences in two or more specimens of handwriting and the Court is not entitled to accept his opinion that these similarities or differences exist, but once it has seen for itself the factors which the expert draws attention to, it may accept his opinion in regard to the significance of these factors. Thus where the Court sees an absolute identity between two signatures, an expert's opinion as to the unlikelihood of such an identity in two genuine signatures is an opinion by which the Court may be guided."

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“...His function is to point out similarities or differences in two or more specimens of handwriting and the Court is not entitled to accept his opinion that these similarities or differences exist, but once it has seen for itself the factors which the expert draws attention to, it may accept his opinion in regard to the significance of these factors. Thus where the Court sees an absolute identity between two signatures, an expert’s opinion as to the unlikelihood of such an identity in two genuine

signatures is an opinion by which the Court may be guided.”

Mr Esterhuyse expressed his opinion on the basis that there is a strong possibility that the disputed signature was not created by Mr Gada but, that the lesser possibility that he did sign the marriage certificate remains a factor which cannot be ignored although he the Defendant appears to have developed a completely new signature afterwards. I do not agree. In the first place the only comparative signature available dates from approximately seven years after the disputed signature on the marriage certificate dated the 9th of November 1982. I cannot agree with the argument advanced on behalf of the Defendant that there is a remarkable difference between the disputed signature and the comparative signature dated the 12th of October 1989. I am fortified in my observation by the resemblance of the last “a” of Gada which appears on both signatures of 1989 and 1994. If the signatures dating from 1989 to 1994 are compared, it is clear that the signature of the Defendant underwent some development but remained in essence the same. The conclusion follows that the Defendant signed not only the marriage certificate and the register but also all of the other documents forming part of Bundle A on which the Defendant’s signature appears and which in every case, exhibits a remarkable similarity. 30. In further submissions on behalf of the Defendant, the Court was asked to accept that the Plaintiff had a motive to obtain a marriage certificate in some illegal way to enable her to live in Khagiso in order to avoid the influx control measures enforced by the government of the time. The facts however contradict that the Plaintiff had such a motive. It was common cause in the evidence that she continued to commute to her work some 20km outside Khagiso for a period of more than a year. There is nothing in the evidence to suggest that the Plaintiff’s motive was to enter into a marriage at all costs with the sole intention of avoiding influx control measures.

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signature appears and which in every case, exhibits a remarkable similarity.

30. In further submissions on behalf of the Defendant, the Court was asked to accept that the Plaintiff had a motive to obtain a marriage certificate in some illegal way to enable her to live in Khagiso in order to avoid the influx control measures enforced by the government of the time. The facts however contradict that the Plaintiff had such a motive. It was common cause in the evidence that she continued to commute to her work some 20km outside Khagiso for a period of more than a year. There is nothing in the evidence to suggest that the Plaintiff's motive was to enter into a marriage at all costs with the sole intention of avoiding influx control measures.

31. The Court was also invited to make a deduction detrimental to the Plaintiff by virtue thereof that the Plaintiff repeatedly referred to a Magistrate in her evidence and the fact that she according to her testimony, attended the marriage ceremony at a Magistrate office. This deduction is not warranted. The Plaintiff nor the Defendant nor the public at large would necessarily know the difference between a marriage officer of the Department of Co-operation and Development who happens to be a Commissioner in the employ of the said Department as it was then known, and a Magistrate. The same officials of the Department of Co-operation

and Development who officiated during 1980 and onwards in litigation between black people, also solemnized marriages. For the public there would be no difference between such an official and a Magistrate and the offices of the Department and the Magistrates'

office.

32. In an attempt to discredit the witness Mrs Rebecca Lazzaro, the sister of the Defendant, reference were made on behalf of the Defendant, to the fact that she, Rebecca apparently had no knowledge of the fact that her brother and the Plaintiff were married during

1982. In her evidence however, she confirmed that during 1981 she was informed by the Defendant that he wanted to pay labolla. In her evidence she also confirmed that she had personal knowledge that the Defendant bought the wedding rings, brought it home and showed it to his family members including the witness and telling them that he was going to get married. In her testimony she confirmed that she was involved in paying labolla on behalf of the Defendant to the Plaintiff's family. When it was put to her that the Defendant will deny that he ever paid labolla, she confirmed that the Defendant brought the money for the labolla to their home and that she and another elderly family member referred to as "an uncle" took the labolla money to the Plaintiff's parental home. In addition she confirmed that she accepted that the Defendant was obligated to marry the Plaintiff in terms of a well known custom that because he impregnated the Plaintiff, he had to pay labolla and was under an obligation to marry her. When it was put to Mrs Lazzaro, she denied that she left the family home where the Defendant grew up when he was only 12 years old (later on it was suggested that she left the home when he was only 10 years old).

This the witness Mrs Lazzaro also denied. As pointed out above Mrs Lazzaro impressed as reliable and convincing in her testimony in particular during cross examination and there is no reason why her evidence should not be accepted. The fact that Mrs Lazzaro when questioned elected not to disclose that Emma was really the biological mother of the Defendant, does not detract from the above. If she knew, which I accept to be the case, she decided to guard the secret as she was called upon to give evidence before the Defendant disclosed in his evidence that he was informed for the first time during the trial that Mrs Emma Molilo was his biological mother and not his sister.

33. As a witness, the Defendant did not impress and in particular his explanations for the fact that he previously admitted the existence of the marriage with the Plaintiff, including in his evidence on oath in the Rule 43 proceedings where he *inter alia* referred to the Plaintiff as his wife. The Defendant admitted to the fact that during meetings with the family advocate he did not deny the existence of the marriage but co-operated with the family advocate as the husband of the Plaintiff and the father of their children. Although the demeanour cannot be a decisive factor in rejecting the evidence of the Plaintiff, the Defendant was not candid with the Court and his replies were less than satisfactory. 34. It is still the approach of the Courts in South Africa as explained above, that where a man and a woman are proved to have

lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in

consequence of a valid marriage and not in a state of concubinage. Schwickard, van der Merwe, *Principals of Evidence*, 2nd Edition, 2002, p. 473. The Defendant was unable to rebut this presumption and the *prima facie* proof presented by the marriage certificate. In the premises the Plaintiff succeeded in proving that she and the Defendant entered into a valid legally binding marriage on the 9th of November 1982 and that this marriage still exists. The marriage between the parties has irretrievably broken down by virtue thereof that the parties have not been living together since at least 1996.

33. As a witness, the Defendant did not impress and in particular his explanations for the fact that he previously admitted the existence of the marriage with the Plaintiff, including in his evidence on oath in the Rule 43 proceedings where he *inter alia* referred to the Plaintiff as his wife. The Defendant admitted to the fact that during meetings with the family advocate he did not deny the existence of the marriage but co-operated with the family advocate as the husband of the Plaintiff and the father of their children. Although the demeanour cannot be a decisive factor in rejecting the evidence of the Plaintiff, the Defendant was not candid with the Court and his replies were less than satisfactory.

34. It is still the approach of the Courts in South Africa as explained above, that where a man and a woman are proved to have

lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in

consequence of a valid marriage and not in a state of concubinage. Schwikkard, van der Merwe, Principals of Evidence, 2nd Edition, 2002, p. 473. The Defendant was unable to rebut this presumption and the prima facie proof presented by the marriage certificate. In the premises the Plaintiff succeeded in proving that she and the Defendant entered into a valid legally binding marriage on the 9th of November 1982 and that this marriage still exists. The marriage between the parties has irretrievably broken down by virtue thereof that the parties have not been living together since at least 1996.

35. At the pre-trial conference the parties agreed that in the event of the Court finding that there was a valid marriage entered between the parties, the joint estate shall be divided by the parties and in addition, it was agreed between the parties that a liquidator be appointed to give effect to the division of the joint estate. I accordingly make provision in the order for the appointment of a Liquidator to be nominated by the parties within 20 days from date of this order failing which the Law Society of the Northern Province be requested to appoint a Liquidator forthwith to give effect to this order. In respect of the minor child the parties have agreed that custody be awarded to the defendant which I also regard in the child's interest. With regard to costs there is no reason why the order should not follow the result. 36. In the premises I make the following order:

1. A decree of divorce is granted;
2. Division of the joint estate;
3. That a Liquidator be appointed to be nominated by the parties through their respective attorneys within 20 days from date of this order failing which the Law Society of the Northern Province be requested and authorized to appoint a Liquidator forthwith.
4. That the Liquidator so appointed shall have the powers and duties as set out in the annexure attached hereto marked "A". That custody and control of the minor child born of the marriage be awarded to the Defendant by consent between the parties;

The Defendant is ordered to pay the costs of the action. M A BADENHORST (ACTING JUDGE)
Annexure "A"

1. The Liquidator shall take control over the joint estate and shall enjoy all the powers as administrator thereof. Without derogating from the generality of the foregoing, the Liquidator shall also be entitled :- 1.1 to accumulate details of all the assets, movable or immovable, tangible or intangible which form part of the joint estate; 1.2 to accumulate details of all liabilities of the joint estate; 1.3 to make all investigations necessary and in particular to obtain from the parties all information with regard to the assets and liabilities of the joint estate; 1.4 to obtain information regarding the financial affairs of the parties from bank managers and/or managers of any other financial institution with regard to the assets and liabilities of the joint estate; 1.5 to obtain information from all the auditors or any other person who may have knowledge of the financial affairs of any companies, close corporations, trusts or businesses in which the Plaintiff, the Defendant and/or the joint estate of the parties may have an interest; 1.6 to obtain copies of the financial statements of

an companies, close corporations, trusts or businesses in which the Plaintiff, the Defendant and/or the joint estate of the parties may have an interest; 1.7 to inspect the books of accounts of any companies, close corporations, trusts or businesses in which the Plaintiff, the Defendant and/or the joint estate of the parties may have an interest; 1.8 to physically inspect the assets of the joint estate and to compile a full inventory of all assets referred to in paragraph 1.1 above; 1.9 to obtain sworn valuations of all the assets referred to in paragraph 1.1 above; 1.10 to interrogate or interview the Plaintiff and the Defendant and any other person in order to give effect to paragraphs 1.1 and 1.2 above; 1.11 to subpoena the Plaintiff, the Defendant and witnesses out of the above Honourable Court for purposes of interviewing and/or interrogating such persons at a date, place and time to be determined by the Liquidator and to ensure that the proceedings in terms hereof are recorded in order to give effect to paragraphs 1.1 and 1.2 above; 1.12 to inspect all books, vouchers, cheques, deposit slips, bank statements and, in general, all documents in possession of any person, for the purposes of giving effect to paragraphs 1.1 and 1.2 above; 1.13 to make and retain copies, at his discretion, of all the documents and books referred to in paragraph 1.12 above; 1.14 to submit, after completion of his duties referred to in paragraphs 1.1 and 1.13 above, a full report of his investigations to both the Plaintiff and the Defendant; 1.15 to distribute the nett assets of the joint estate in accordance with paragraphs 2 and 3 hereunder between the Plaintiff and the Defendant on such basis as may be agreed upon between them, alternatively if no such agreement can be reached, to sell the assets of the joint estate either by public auction or private treaty (the Plaintiff and the Defendant having a right also to bid) and thereupon to divide the nett proceeds between the Plaintiff and the Defendant in accordance with paragraphs 2 and 3 hereunder; 1.16 to engage the services of any suitable qualified person or persons to assist him in determining the proper value or whereabouts of any of the assets of the joint estate and to pay such person or persons the reasonable fees which may be charged by him; 1.17 to afford both the Plaintiff and the Defendant personally the opportunity to make recommendations to him about any matter relevant to his duties and to this order and to the identity of any purchaser as well as the purchase price of any asset, including, but not necessarily limited to: - 1.17.1 the time and/or manner in which any assets shall be realised; 1.17.2 the price for which any assets should be realised; 1.17.3 the sequence in which any assets should be realised; 1.18 to give due consideration to the wishes of the parties pursuant to the representations made by them and make such decisions in respect thereof as he may deem fit; 1.19 to sell any assets to either the Plaintiff or the Defendant for a price that he deems to be the true market price of such assets; 1.20 to sign any documents as may be necessary to effect the transfer of any assets sold from the person in whose name it is registered to the purchaser thereof; 1.21 not to realise any movable assets excluding shares, unit trusts and insurance policies without giving both Plaintiff and Defendant ten days notice of his intention to do so; 1.22 to give both parties a first right to purchase any assets as envisaged in paragraph 1.21, in the case of sale by treaty at the same price he is able to obtain from a bona fide third party, or in the case of a public auction, at a better price than that offered by a bona fide third party; 1.23 to apply to this Court for any further directions as he shall or may consider necessary; 1.24 to institute legal proceedings

against any persons for the delivery to him of any assets, deeds or documents of the joint estate in whatever Court it shall be appropriate to bring such proceedings; 1.25 to instruct and appoint attorneys and/or counsel to institute proceedings on his behalf for the purposes of obtaining delivery of any assets alleged to be vested in the jointestate and to obtain such other or alternative relief as the circumstances may require, the costs of Counsel and/or attorneys to be paid by the joint estate in accordance with the principals enounced in Muller v The Master and Others. 1992

- (4) SA 277 (T); 1.26 to collect debts due to the joint estate unless the same be disposed of by sale; 1.27 to defend any action launched against the joint estate; 1.28 to pay the liabilities of the joint estate; 1.29 to pay his reasonable apportion such fees between the parties in the same proportion as they are entitled to the assets of the joint estate; 1.30 to direct in terms of Section 7
- (8) of the Divorce Act No. 70 of 1979 that a portion not exceeding 50% of a party's pension interest as at date of divorce be paid to the other party as and when the pension benefits accrue to the party entitled to these and to require the pension fund concerned to endorse its records accordingly; 1.31 to obtain full particulars of all the Plaintiff's and the Defendant's insurance policies including life policies, endowment policies, annuity policies and retirement annuity policies from the underwriters thereof, alternatively from such underwriter's duly authorised agents and to deal with such policies in his discretion in order to enable the Liquidator to give effect to the provisions of paragraphs 2 and 3 below; 1.32 to instruct banks and/or financial institutions to deal with the investments and bank accounts as the Liquidator may in his discretion deem necessary in order to protect the rights of one of the parties or both parties in order to give effect to the provisions of paragraphs 2 and 3 below; 1.33 to allocate, in his discretion, both assets and liabilities between the parties.
- 2. The division of the nett assets referred to in paragraph 1.15 above shall be subject to the protection of the rights and claims of secured and preferent creditors of the joint estate.
- 3. The division of the nett assets referred to in paragraph 1.15 above shall be equal proportions between the Plaintiff and the Defendant but subject to paragraph 4.36 below.
- 4. Any losses suffered by the joint estate as a result of the wrongful behaviour of the parties in dissipating the joint estate's assets, shall be borne exclusively by such party and a distribution and division of the assets of the joint estate or the proceeds thereof, as the case may be, shall accordingly be subject to adjustment in accordance with the Liquidator's discretion.

35. At the pre-trial conference the parties agreed that in the event of the Court finding that there was a valid marriage entered between the parties, the joint estate shall be divided by the parties and in addition, it was agreed between the parties that a liquidator be appointed to give effect to the division of the joint estate. I accordingly make provision in the order for the appointment of a Liquidator to be nominated by the parties within 20 days from date of this order failing which the

Law Society of the Northern Province be requested to appoint a Liquidator forthwith to give effect to this order. In respect of the minor child the parties have agreed that custody be awarded to the defendant which I also regard in the child's interest. With regard to costs there is no reason why the order should not follow the result.

36. In the premises I make the following order:

1. A decree of divorce is granted;
2. Division of the joint estate;
3. That a Liquidator be appointed to be nominated by the parties through their respective attorneys within 20 days from date of this order failing which the Law Society of the Northern Province be requested and authorized to appoint a Liquidator forthwith.
4. That the Liquidator so appointed shall have the powers and duties as set out in the annexure attached hereto marked "A".

That custody and control of the minor child born of the marriage be awarded to the Defendant by consent between the parties;

The Defendant is ordered to pay the costs of the action.

M A BADENHORST

(ACTING JUDGE)

Annexure "A"

1. The Liquidator shall take control over the joint estate and shall enjoy all the powers as administrator thereof. Without derogating from the generality of the foregoing, the Liquidator shall also be entitled :-

1.1 to accumulate details of all the assets, movable or immovable, tangible or intangible which form part of the joint estate;

1.2 to accumulate details of all liabilities of the joint estate;

1.3 to make all investigations necessary and in particular to obtain from the parties all information with regard to the assets and liabilities of the joint estate;

1.4 to obtain information regarding the financial affairs of the parties from bank managers and/or managers of any other financial institution with regard to the assets and liabilities of the joint estate;

1.5 to obtain information from all the auditors or any other person who may have knowledge of the financial affairs of any companies, close corporations, trusts or businesses in which the Plaintiff, the Defendant and/or the joint estate of the parties may have an interest;

- 1.6 to obtain copies of the financial statements of an companies, close corporations, trusts or businesses in which the Plaintiff, the Defendant and/or the joint estate of the parties may have an interest;
- 1.7 to inspect the books of accounts of any companies, close corporations, trusts or businesses in which the Plaintiff, the Defendant and/or the joint estate of the parties may have an interest;
- 1.8 to physically inspect the assets of the joint estate and to compile a full inventory of all assets referred to in paragraph 1.1 above;
- 1.9 to obtain sworn valuations of all the assets referred to in paragraph 1.1 above;
- 1.10 to interrogate or interview the Plaintiff and the Defendant and any other person in order to give effect to paragraphs 1.1 and 1.2 above;
- 1.11 to subpoena the Plaintiff, the Defendant and witnesses out of the above Honourable Court for purposes of interviewing and/or interrogating such persons at a date, place and time to be determined by the Liquidator and to ensure that the proceedings in terms hereof are recorded in order to give effect to paragraphs 1.1 and 1.2 above;
- 1.12 to inspect all books, vouchers, cheques, deposit slips, bank statements and, in general, all documents in possession of any person, for the purposes of giving effect to paragraphs 1.1 and 1.2 above;
- 1.13 to make and retain copies, at his discretion, of all the documents and books referred to in paragraph 1.12 above;
- 1.14 to submit, after completion of his duties referred to in paragraphs 1.1 and 1.13 above, a full report of his investigations to both the Plaintiff and the Defendant;
- 1.15 to distribute the nett assets of the joint estate in accordance with paragraphs 2 and 3 hereunder between the Plaintiff and the Defendant on such basis as may be agreed upon between them, alternatively if no such agreement can be reached, to sell the assets of the joint estate either by public auction or private treaty (the Plaintiff and the Defendant having a right also to bid) and thereupon to divide the nett proceeds between the Plaintiff and the Defendant in accordance with paragraphs 2 and 3 hereunder;
- 1.16 to engage the services of any suitable qualified person or persons to assist him in determining the proper value or whereabouts of any of the assets of the joint estate and to pay such person or persons the reasonable fees which may be charged by him;
- 1.17 to afford both the Plaintiff and the Defendant personally the opportunity to make recommendations to him about any matter relevant to his duties and to this order and to the identity of any purchaser as well as the purchase price of any asset, including, but not necessarily limited to: -
- 1.17.1 the time and/or manner in which any assets shall be realised;

1.17.2 the price for which any assets should be realised;

1.17.3 the sequence in which any assets should be realised;

1.18 to give due consideration to the wishes of the parties pursuant to the representations made by them and make such decisions in respect thereof as he may deem fit;

1.19 to sell any assets to either the Plaintiff or the Defendant for a price that he deems to be the true market price of such assets;

1.20 to sign any documents as may be necessary to effect the transfer of any assets sold from the person in whose name it is registered to the purchaser thereof;

1.21 not to realise any movable assets excluding shares, unit trusts and insurance policies without giving both Plaintiff and Defendant ten days notice of his intention to do so;

1.22 to give both parties a first right to purchase any assets as envisaged in paragraph 1.21, in the case of sale by treaty at the same price he is able to obtain from a bona fide third party, or in the case of a public auction, at a better price than that offered by a bona fide third party;

1.23 to apply to this Court for any further directions as he shall or may consider necessary;

1.24 to institute legal proceedings against any persons for the delivery to him of any assets, deeds or documents of the joint estate in whatever Court it shall be appropriate to bring such proceedings;

1.25 to instruct and appoint attorneys and/or counsel to institute proceedings on his behalf for the purposes of obtaining delivery of any assets alleged to be vested in the jointestate and to obtain such other or alternative relief as the circumstances may require, the costs of Counsel and/or attorneys to be paid by the joint estate in accordance with the principals enounced in Muller v The Master and Others. 1992

(4) SA 277 (T);

1.26 to collect debts due to the joint estate unless the same be disposed of by sale;

1.27 to defend any action launched against the joint estate;

1.28 to pay the liabilities of the joint estate;

1.29 to pay his reasonable apportion such fees between the parties in the same proportion as they are entitled to the assets of the joint estate;

1.30 to direct in terms of Section 7

(8) of the Divorce Act No. 70 of 1979 that a portion not exceeding 50% of a party's pension interest as at date of divorce be paid to the other party as and when the pension benefits accrue to the party entitled to these and to require the pension fund concerned to endorse its records accordingly;

1.31 to obtain full particulars of all the Plaintiff's and the Defendant's insurance policies including life policies, endowment policies, annuity policies and retirement annuity policies from the underwriters thereof, alternatively from such underwriter's duly authorised agents and to deal with such policies in his discretion in order to enable the Liquidator to give effect to the provisions of paragraphs 2 and 3 below;

1.32 to instruct banks and/or financial institutions to deal with the investments and bank accounts as the Liquidator may in his discretion deem necessary in order to protect the rights of one of the parties or both parties in order to give effect to the provisions of paragraphs 2 and 3 below;

1.33 to allocate, in his discretion, both assets and liabilities between the parties.

2. The division of the nett assets referred to in paragraph 1.15 above shall be subject to the protection of the rights and claims of secured and preferent creditors of the joint estate.
3. The division of the nett assets referred to in paragraph 1.15 above shall be equal proportions between the Plaintiff and the Defendant but subject to paragraph 4.36 below.
4. Any losses suffered by the joint estate as a result of the wrongful behaviour of the parties in dissipating the joint estate's assets, shall be borne exclusively by such party and a distribution and division of the assets of the joint estate or the proceeds thereof, as the case may be, shall accordingly be subject to adjustment in accordance with the Liquidator's discretion.

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