



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**

Case No: 775/2020

In the matter between:

**LONWABO HLAKEYANE**

**APPELLANT**

and

**ZIYANDA HLAKEYANE**

**RESPONDENT**

**Neutral citation:** *Lonwabo Hlakanyane v Ziyanda Hlakanyane* (775/2020) [2021] ZASCA 130 (30 September 2021)

**Coram:** MBHA, MOCUMIE, SCHIPPERS, GORVEN and HUGHES JJA

**Heard:** Appeal disposed of without the hearing of oral argument in terms of s 19(a) of the Superior Courts Act 10 of 2013.

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 30 September 2021.

**Summary:** Matrimonial Property Act 88 of 1984 – interpretation of s 18 – amount received as non-patrimonial delictual damages prior to marriage in community of property – part of the joint estate – not excluded by s 18(a) of the Act – appeal in terms of s 19(a) of the Superior Courts Act 10 of 2013.

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## ORDER

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**On appeal from:** Eastern Cape Division of the High Court, Mthatha (Majiki and Jaji JJ and Mababane AJ sitting as court of appeal):

1 The appeal is upheld with no order as to costs.

2 The order of the Eastern Cape Division of the High Court, Mthatha is set aside and replaced with the following order:

‘2.1 The appeal is upheld with no order as to costs.

2.2 The investment of the respondent is to be included in the joint estate for the purposes of division of the estate.’

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## JUDGMENT

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**Hughes JA (Mbha, Schippers and Gorven JJA concurring):**

[1] This appeal concerns the interpretation and application of s 18(a) of the Matrimonial Property Act 88 of 1984 (the Act). The parties were married in community of property on 22 December 2015. In 2011, the respondent was involved in a motor vehicle accident and was awarded non-patrimonial damages in the amount of R800 000. She invested an amount of R550 000 with Standard Bank in an interest-bearing account (the investment). The appellant contended that prior to the marriage the respondent had made him aware of the investment.

[2] In these proceedings the parties agreed that the appeal may be disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013. Further, the respondent also sought condonation for the late filing of her heads of argument, which was nine days overdue. There is no opposition from the appellant, the period is not excessive and a reasonable explanation has been proffered. Accordingly, the non-compliance is condoned.

[3] In 2018 the appellant instituted divorce proceedings in the Mthatha Regional Court seeking a decree of divorce and division of the joint estate. The respondent in

her amended plea contended that the investment did not form part of the joint estate and should be excluded as it constituted non-patrimonial damages received as a result of a delict committed against her in terms of s 18(a) of the Act. Section 18(a) of the Act states 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;

(b) he or she may recover from the other spouse damages in respect of bodily injuries suffered by him or her and attributable either wholly or in part to the fault of that spouse and these damages do not fall into the joint estate but become the separate property of the injured spouse.’

[4] The respondent placed reliance on *Van Den Berg v Van Den Berg*.<sup>1</sup> She contended that the non-patrimonial damages received as a result of the motor vehicle collision in 2011 were personal in nature and as such should be excluded from the joint estate. *Van Den Berg* is not relevant to the determination of this matter as it dealt primarily with the question of whether damages received by a spouse during the course of a marriage in community of property were either contractual or delictual in nature. That court reasoned:

‘The damages received by the defendant are of a personal nature. The 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.’<sup>2</sup>

[5] Upon conclusion of the divorce proceedings, the regional court ordered the division of the joint estate, but excluded the investment from the division. The regional court stated that the meaning of ‘married in community of property’ in s 18(a) of the Act referred ‘to the stage when it has to be determined if that property will be included in the joint estate’. That being the case, this would be at the stage of divorce as opposed to when such damages accrued to a person, thus the investment would fall out of the joint estate.

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<sup>1</sup> *Van Den Berg v Van Den Berg* 2003 (6) SA 229 (T).

<sup>2</sup> *Ibid* para 12.

[6] Unhappy with the outcome in the regional court, the appellant appealed to the Eastern Cape Division of the High Court, Mthatha (high court). The high court was split two to one, the majority, Majiki and Jaji JJ, confirmed the regional court's order excluding the investment from the joint estate. It acknowledged that s 18(a) applied only to a spouse injured after the conclusion of their marriage, but went on to state: 'Still, I would not view the non-reference to the spouses who were injured and paid before their marriage in community of property as an intentional exclusion. The failure to specifically provide for them appears to be more of an omission than an exclusion. Therefore, in the light of the fact that I find no exclusion of the class of people in the respondent's position, I would conclude that their personal injury [pay-out] too, should not form part of the joint estate.'

[7] Mbabane AJ in a minority judgment concluded that s 18 'by its design, applies where there is a joint estate. The concept of a joint estate comes into being on the date of the marriage'. He understood that the object of the section was to protect spouses and that the respondent had a choice to exclude the investment, one way of which was by entering into a marriage out of community of property. Thus, when the parties were married in community of property that investment formed part of the joint estate.

[8] The proper approach to the interpretation of a statute was recently restated in *C:SARS v United Manganese of Kalahari (Pty) Ltd*:

'It is 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.'<sup>3</sup>

[9] The context of s 18 must be read in its entirety, and apparent therefrom is the plain language and words used. The section highlights that delictual damages received by a spouse during the course of a marriage in community of property, which are non-patrimonial in nature (s 18(a)); and damages for bodily injuries owing to the fault of

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<sup>3</sup> *C:SARS v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 8.

one's spouse in terms of s 18(b) must be excluded from the division of the joint estate on divorce.

[10] The protection afforded by s 18(a) applies notwithstanding a marriage in community of property. In such a case, damages recovered during such a marriage for non-patrimonial loss becomes the property of the injured spouse and does not form part of the joint estate. It does not apply to damages recovered prior to such a marriage. Consequently, the damages attained by the respondent which were received before the conclusion of the marriage between the parties were the property of the respondent. On being married in community of property, the property of each party to the marriage fell into the joint estate, inclusive of any damages for non-patrimonial losses recovered prior to the marriage.

[11] Thus, the respondent's contention that she was entitled to the protection afforded by s 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. Therefore, the appeal must succeed.

[12] In the result the following order is granted:

1 The appeal is upheld with no order as to costs.

2 The order of the Eastern Cape Division of the High Court, Mthatha is set aside and replaced with the following order:

'2.1 The appeal is upheld with no order as to costs.

2.2 The investment of the respondent is to be included in the joint estate for the purposes of division of the estate.'

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W HUGHES  
JUDGE OF APPEAL

## Mocumie JA

[13] I have had the benefit of reading the judgment of Hughes JA in which my other colleagues concur. However, I find myself in respectful disagreement with her conclusion that the appeal ought to succeed on the basis that ‘the respondent’s contention that she was entitled to the protection afforded by s 18(a) is misplaced, absent the exclusion of the investment by way of an antenuptial contract.’

[14] The majority disagrees with the crux of the respondent’s plea. They are of the view that ‘the non-patrimonial damages received as a result of the motor vehicle collision in 2011 were personal in nature and as such should be excluded from the division of the joint estate. Thus, the reliance on *Van Den Berg v Van Den Berg*.’<sup>4</sup> However, they accept that ‘the damages [paid to] the respondent which were received before the conclusion of the marriage [in community of property] between the parties were the property of the respondent. They also hold the view that ‘on being married in community of property, the property of each party to the marriage fell into the joint estate.’ In addition, they hold that ‘*Van Den Berg* is not relevant to the determination of this matter as it dealt primarily with the question of whether damages received by a spouse during the course of a marriage in community of property were either contractual or delictual in nature.’

[15] As the majority in this judgment has mentioned, the principles of interpretation of statutes are trite.<sup>5</sup> The Act does not define the word ‘damages’. The point of departure must be the common cause fact which the majority judgment also acknowledged that the damages were non-patrimonial and thus personal in nature. In *Van der Merwe v Road Accident Fund and Another*,<sup>6</sup> the Constitutional Court in interpreting the word ‘damages’ stated that the notion of damages is best understood not by its nature but by its purpose. The primary purpose of awarding damages is to place, to the fullest possible extent, the injured party in the same position [they] would

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<sup>4</sup> *Van Den Berg v Van Den Berg* 2003 (6) SA 229 (T) para 12.

<sup>5</sup> See para 8 above. This approach was endorsed recently by the Constitutional Court in *Road Traffic Management Corporation v Wymark Infotech Pty Ltd* (440/2017) [2018] ZASCA 11 (6 March 2018).

<sup>6</sup> *Van der Merwe v Road Accident Fund and Another* (CCT48/05) [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) (30 March 2006).

have been in, but for the wrongful conduct.<sup>7</sup> The court in *Van den Berg* in defining the nature of this category of damages stated as follows:

‘The damages received by the defendant are of a personal nature. The 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.’<sup>8</sup>

[16] Besides the fact that ‘this matter ...dealt primarily with the question of whether damages received by a spouse during the course of a marriage in community of property were either contractual or delictual in nature...’ as the majority contends, the damages the respondent received are exactly the same in nature and were awarded for the same purpose as the damages *Van der Merwe* and *Van den Berg* dealt with. From the time that the RAF 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.

[17] The other significant principle in interpretation the majority judgment lost sight of is the aspect that deals with the context and the purpose for which the text or section is intended for. The textual interpretation preferred by the majority does not assist in resolving the issue in this matter as it undercuts the purpose of the section. The issue requires a close examination of the relevant context and purpose of the section. Should the Legislature have intended that such damages form part of the joint estate, the purpose and objective of such payment would be negated.

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<sup>7</sup> Paragraph 37.

<sup>8</sup> *Van Den Berg v Van Den Berg* 2003 (6) SA 229 (T) para 12.

[18] First, in my considered view, the judgment of the Constitutional Court in *Van der Merwe*, laid the foundation upon which s 18 in its entirety should be interpreted. The RAF contended that the applicant chose to marry in community of property and should have been held to the proprietary consequences of her choice, therefore, respondent waived the right to attack the validity of the laws.<sup>9</sup> The Constitutional Court held that the objective validity of a law is derived from the Constitution and not personal choice or preference. It stated as follows:

‘Section 39(2) obliges courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. And importantly, s 172(1) makes plain that when deciding a constitutional matter within its power, a court must declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency. 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, confer validity to a law that otherwise lacks a legitimate purpose, has no merit* (Emphasis added).’<sup>10</sup>

[19] In this case, even if ‘the validity of the law’ was not challenged, as the minority of the full court held, which the majority in this Court seems to uphold, the approach propounded in *Van der Merwe* means that this Court and so too the regional court and the full court, is bound to interpret s 18 (a) in line with the dictates of s 39(2) of the Constitution which binds courts when interpreting any legislation; by taking into account the spirit and purport of the values underpinning the Constitution including s 9, the equality clause. To do otherwise would be unjust and inequitable.

[20] Second, the regional court correctly held that the division of the estate must be determined at the time of the dissolution of the marriage, not when the marriage was entered into. So, in my view, and in line with the interpretation I espouse above, as at the time of the division of the joint estate the respondent was entitled to the same protection which ‘a spouse in a marriage in community of property’ provided by s 18(1)(b). That RAF awarded the respondent the damages before her marriage in

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<sup>9</sup> The *Van der Merwe* case para 59.

<sup>10</sup> Ibid at para 61.



community of property cannot be used to disadvantage her. The law cannot impose such an interpretation of the joint estate on the parties as suggested by the majority.

[21] In conclusion, conscious of the role of courts in the determination of issues before them and the responsibility to defer certain matters to the legislature, I would be remiss if I do not state that this is an opportunity for the legislature to study this judgment, and make express provision for this class of persons as the respondent in this matter to avoid any confusion in the future.

[22] Finally, if s 39(2) is invoked, as it ought to be, this Court is bound to follow the interpretation and logic propounded in *Van der Berg* and *Van der Merwe*. In the result, I would find that the damages paid by RAF to the respondent for her non-patrimonial/special damages meant for her personal use, before her marriage in community of property, do not fall into the joint estate. The appeal ought not to succeed.

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BC MOCUMIE  
JUDGE OF APPEAL

**APPEARANCES**

For appellant: Z Z Matebese SC (with H Kelaotswe)

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