CASE NO.: SA 2/2000

IN THE SUPREME COURT OF NAMIBIA

In the matter between

CATHERINA HENDRIKA MYBURGH

APPELLANT

And

COMMERCIAL BANK OF NAMIBIA

RESPONDENT

CORAM: Strydom, C.J.; O'Linn, A.J.A. *et* Manyarara, A.J.A.

HEARD ON: 12/10/2000

DELIVERED ON: 2000/12/08

APPEAL JUDGMENT

STRYDOM, C.J.: This is an appeal from the Full Bench of the High Court of Namibia. I will refer to the parties as they appeared before us. Mr. Grobler represented the appellant and Mr. Frank, S.C., appeared for the respondent.

The respondent issued a combined summons against the appellant in the High Court of Namibia. The respondent is a commercial bank and in the summons claimed payment of an amount of N$115 927,92, interest *a tempore morae* and costs of suit on a scale as between attorney and own

client. The respondent's cause of action was based on a written loan agreement. This document, together with statements setting out how the amount claimed, was calculated, as well as a certificate of indebtedness reflecting the total amount indebted, were attached to the particulars of claim. After the summons was served the appellant filed an appearance to defend. This in turn was met by the respondent with an application for Summary Judgment.

The matter thereafter came before Mtambanengwe, J., who granted summary Judgment for the respondent as prayed. An appeal was noted to the Full Bench of the High Court which upheld the judgment given by Mtambanengwe, J., and dismissed the appeal. An application for leave to appeal was likewise unsuccessful, whereafter the appellant petitioned this Court for leave to appeal. This application was successful.

The respondent's application for Summary Judgment was supported by an affidavit of one Salomon Petrus van der Wath, the Administration and Credit Manager of the respondent. He stated that all the relevant files and documentation representing the transaction with the appellant were in his possession and under his control and that the contents thereof were within his personal knowledge. He therefore verified the respondent's cause of action, as set out in its particulars of claim, and further stated that the appellant has no *bona fide* defence and that such notice to defend the action was delivered solely for the purpose of delaying the action.

According to the respondent's particulars of claim the appellant was required, in terms of the written agreement, to repay the loan in 60 equal

monthly payments of N$2 720,63 payable as from 21st November 1993. On 21st August 1996 the appellant was in arrears with her monthly installments in an amount of N$43 698,10. Because of this breach of the terms of the written agreement clause 6.1 thereof entitled the respondent to immediately claim the outstanding balance and interest. Furthermore clause 11 provides that all legal costs incurred by the respondent in successfully enforcing any of the provisions of the agreement, shall be payable as between attorney and his own client. However, no such order was asked for.

Of great importance was the way in which the appellant was cited in the particulars of claim. Most of the argument presented to the Court by both Counsel was devoted to this aspect of the case. This citation is set out in paragraph 2 of respondent's particulars of claim and I quote it herein in full, namely:

> "2. Defendant (now the appellant) is Catharina Hendrika Myburgh, an adult female married in community of property to Pieter Johan Myburgh, duly assisted by him in so far as it may be necessary, with *domicilium citandi et executandi* and also residing at no. 545 River road, Okahandja, Republic of Namibia."

The appellant herself did not file an affidavit in opposition to the application for Summary judgment. This was done by her husband, Mr. Myburgh, who said that he did so in his capacity as administrator of the joint estate of the parties. The appellant confirmed the contents of her husband's affidavit.

The defence set out therein is that the appellant has a counterclaim against the respondent which exceeds respondent's claim.

The counterclaim arose in the following way. Appellant bought from the respondent a truck and trailer for some N$236 000,00. In terms of the agreement between the parties the truck and trailer were to be insured. To comply with this requirement the truck and trailer were added on to Myburgh's Transport's insurance policy with the insurance company FGI. Myburgh's Transport is the name of the firm under which appellant's husband is trading. The truck and trailer were further leased to the deponent by the appellant to be utilized in his transport business. The monthly rental was N$31 000,00.

Mr. Myburgh further stated that he was also a client of the respondent. However, in 1995 the latter withdrew his overdraft facility and since then the parties have been involved in court cases, some of which have not yet been finalised.

Thereafter, so it is alleged, the respondent became involved in certain unlawful actions taken against the deponent. These actions culminated in FGI cancelling Mr. Myburgh's insurance with the company. Because the truck and trailer of the appellant were included in Myburgh Transport's insurance policy the cancellation of the policy also resulted in appellant being without insurance. Subsequently the truck and trailer were involved in an accident and because they were not insured the appellant suffered damages in excess of an amount of N$150 000,00.

Mr. Myburgh said that he verily believes that his inability to obtain alternative short term insurance was due to the interaction between insurance companies as a result of the unlawful actions of the respondent. What the deponent referred to as unlawful actions are set out in a handwritten statement of one W.J. Hennig. I will deal later more fully with this aspect in so far as it is necessary.

The first point argued by Mr. Grobler concerns the *locus standi* of the appellant and her citation in the Summons and particulars of claim. This issue is covered by various grounds of appeal which amount in essence thereto that the Court *a quo* erred or misdirected itself in finding that the appellant had *locus standi* to be sued. The Court *a quo* therefore erred to find that the disability brought about for women married in community of property was discriminating in terms of the Namibian Constitution and was swept away by the provisions of Article 66(1) of the Constitution when those provisions took effect on 21st March 1990. Grounds of appeal were also directed at the alternative finding of the Court *a quo* that the appellant, was on the facts, a *publica mercatrix* and had *locus standi* as a result thereof and that the Court *a quo* wrongly applied the provisions of the Married Persons Equality Act, Act No. 1 of 1996, or did not give sufficient weight thereto.

It is trite law that previously a woman married in community of property had limited contractual capacity and was regarded by the law as a minor. She could only validly contract with the assistance of her husband unless certain exceptions applied, one of which was that she was a *publica mercatrix* and the contract fell within the scope of her business. From this it followed that

a woman married in community of property could also not sue or be sued. It was the husband, as administrator of the common estate, who could sue on a contract entered into with his assistance, or who had to be sued. (See *Martins v Fick,* 1941 WLD 229 at 232; *Grobler v Schmilg and Freedman*, 1923 AD 496 at 501 and *African Life Assurance v Van der Nest and Another*, 1971(3) SA 672(C) at p. 675 A to B.)

If the common Law position of women married in community of property was left unchanged, as was submitted by Mr. Grobler, then there is substance in his argument that the respondent sued the wrong party and that Summary Judgment could not have been granted.

Mr. Frank, however, countered this argument by submitting that the position of women married in community of property was not left unchanged. Counsel submitted that the disabilities brought about for women married in community of property were in conflict with the provisions of Articles 10 and 14 of the Constitution and were therefore swept away by the application of Article 66(1) of the Constitution. Counsel further submitted that the provisions of the Married Persons Equality Act, Act No. 1 of 1996, which became law on the 28th May 1996, i.e. before Summons was issued in this matter, also had the effect of clothing the appellant with the necessary legal capacity to be sued. Lastly Mr. Frank submitted that the appellant was a *publica mercatrix* and that the contract on which she was sued fell within the source of her business.

Concerning the constitutional issue the dispute between Counsel was whether the common law, if it was in conflict with the Constitution,

remained valid until it was repealed or amended or declared invalid by a competent Court, which was the stance taken by Mr. Grobler, or whether the effect of the provisions of Article 66(1) was such that the common law in conflict with the Constitution became to that extent invalid when the provisions of the Constitution took effect on Independence. Mr. Frank submitted that that was the effect of Article 66(1).

There are mainly three Articles in the Constitution dealing with the validity of laws enacted or in existence prior to Independence. They are Articles 25, 66(1) and 140(1). Article 66(1) deals specifically with the common law and customary law and is therefore a good starting point to determine the meaning of these Articles in the context of the Constitution. This Article provides as follows:

> "66 (1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law."

In regard to the effect and meaning of Article 66(1), Silungwe, J., for the Full Bench, concluded as follows on p. 390 of his judgment, namely:

> "Article 66(1) makes it quite clear that for any rule of the common law of Namibia in force at the time of Independence to have remained valid, it must not have fallen foul of the Constitution or any other statutory law. One question which immediately arises is whether the common law rule in question did or did not violate the Constitution. In the light of what has already been discussed above, the categorical answer is that the

> Constitution was violated with the result that the said common law rule at once became unconstitutional.
>
> The clear picture that emerges is that the common law rule that made women married in community of property victims of incapacity to sue or be sued was swept away by the Constitution at Independence. Further, the promulgation of the Married Persons Equality Act is, in my view, not only a re-affirmation of the Constitutional abolition of discrimination based on sex, as an *abundante cautela* legislative measure, for the avoidance of doubt, but that it is also designed to give content to the Affirmative Action provisions of Article 23(2) and (3)."

I respectfully agree with the conclusion arrived at by the learned Judge. The language of the Article means what it says namely that the customary law and common law in force on the date of Independence only survive in so far as they are not in conflict with the Constitution. The words, "or any other statutory law" contained in the Article, seem to me to refer to the future.

In the case of *Ferreira v Lewin NO and Others*, 1996(1) SA 984 (CC) the Constitutional Court of South Africa had to interpret section 4(1) of the Constitution of South Africa. This section provides in part that:

> "4(1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with (the Constitution's) provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency."

Although different words are used, the meaning of what was enacted is in my opinion very much the same as our Article 66(1). In this regard Ackermann, J., said the following on p. 1006 G namely:

> "On 27 April 1994 and subject to the qualification in the text of s.4(1) ('Unless otherwise provided expressly or by necessary implication in this Constitution') a law which is inconsistent with the Constitution ceases to have legal effect."

(Although the majority of the Court did not agree with certain parts of the judgment the majority specifically agreed with this interpretation. See p. 1079 I - J.)

Our Article 66(1), which is part of our Supreme Law, the Constitution (See Article 1(6)) provides for the validity of the common law to the extent that it is not in conflict with the provisions of the Constitution. There is nothing in the Article itself which postpones invalidity of the common law where it is inconsistent with the Constitution.

However, Mr. Grobler submitted that the answer as to when any part of the common law, which is in conflict with the provisions of the Constitution, becomes invalid, lies in Articles 140(1) and 25(1)(b) and (2) of the Constitution. These Articles provide as follows:

> "140(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court."

Article 25(1) provides:

"Save in so far as it may be authorised to do so by this Constitution Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction or until the expiry of the time limit set, whichever be the shorter, such impugned law or action shall be deemed to be valid.

(b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional, it may either set aside the law or allow Parliament to correct any defect in such law, in which event the provisions of Sub-Article (a) hereof shall apply."

Sub-Article (2) grants to persons, who claim that a fundamental right or freedom has been infringed or threatened, the right to approach a competent Court for protection.

As I understood Mr. Grobler he submitted that the words "all laws" in Article 140(1) and "any law" in Article 25(1)(b) refer also to the common law and not only to statutory enactments. Consequently Counsel argued that the common law remains valid until it is repealed or amended or declared unconstitutional by a competent Court.

In regard to Article 140(1) Mr. Frank argued that the opening words of the Article show that it is subordinate to the other articles in the Constitution which include Article 66(1) and Counsel referred the Court to *S v Marwane,* 1982(3) SA 714. At p. 747 H to 748 A the following is stated:

> "The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject' is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently if not almost invariably, qualifies such enactment by the method of declaring it to be subject to the other specified one."

(See further *Bongopi v Chairman, Ciskei Council of State, and Others*, 1993(3) SA 494 (Ck AD) and *Zantsi v Council of State, Ciskei, and Others*, 1995(4) SA 615 (CC).)

In our Constitution Article 66(1), as it deals with a specific situation which is not made subject to any other provisions, is clearly the dominant provision to which Article 140(1) is subject to. If the words "all laws" contained in Article 140(1) is given the meaning contended for by Mr. Grobler so as to include also the common law, it would be inconsistent and incompatible with the clear provisions of Article 66(1) and Article 140(1), as the subordinate Article, must therefore give way to what is provided in Article 66(1).

Regarding Article 25 it seems to me that Sub-Article (1) has the same effect upon law made by Parliament and subordinate legislatures in so far as that law abolishes or abridges any fundamental right or freedom, which Article 66(1) has on the common law, namely that to the extent to which such law abolishes or abridges the fundamental rights and freedoms it would be invalid. Apart from the wording of the Sub-Article that is in my opinion also confirmed by the deeming provision set out in the proviso in Sub-sub (a). As to the effect and possible meaning of a "deeming" clause see *S v Rosenthal*, 1980(1) SA 65 (AD).

In this regard it was necessary to create a deeming clause in the circumstances where a Court has decided to exercise its power and to afford a legislature the opportunity to correct any defect in the impugned law. That can obviously only occur where such law is still in being and as a law which abolishes or abridges one of the fundamental rights or freedoms is invalid to that extent, according to sub-Article (1), a deeming clause which would revive such law was necessary.

Coming to sub-sub-Article (b) it seems to me that when interpreted in context with Articles 66(1) and 140(1) that there is no conflict in this regard. Article 66(1), as previously pointed out, renders invalid any part of the common law to the extent to which it is in conflict with the Constitution. As also pointed out, this occurred when the Constitution took effect. The Article does not require a competent Court to declare the common law unconstitutional and any declaratory issued by a competent Court would be to determine the rights of parties where there may be uncertainty as to what extent the common law was still in existence and not to declare any part of the common law invalid. That has already occurred by operation of the Constitution itself where there is conflict.

Seen in this context it follows that the words "any law" in Article 25(1)(b) and "all laws" in Article 140(1) can only refer to statutory enactments and not also the common law because in the first instance such laws, which were in force immediately before Independence, remain in force until amended, repealed or declared unconstitutional by a competent Court. The Constitution therefore set up different schemes in regard to the validity or invalidity of the common law when in conflict with its provisions and the statutory law. In the latter instance the statutory law immediately in force on Independence remains in force until amended, repealed or declared unconstitutional.

In *Government of the Republic of Namibia v Cultura 2000*, 1993 NR 328, Mahomed, C.J., discussed Article 140(1) and said the following:

> "Article 140(1) deals with laws which were in force immediately before the date of independence and which had therefore been

> enacted by or under the authority of the previous South African Administration exercising power within Namibia. Such laws are open to challenge on the grounds that they are unconstitutional in terms of the new Constitution. Until such a challenge is successfully made or until they are repealed by an Act of Parliament, they remain in force. (My emphasis)

I respectfully agree with this statement by the late Chief Justice.

Mr. Grobler is correct that a Constitution is *sui generis* and must be interpreted broadly and liberally and ordinarily the word "law" would include the common law as well as the statutory law unless of course there are clear indications of a different meaning. In my opinion, and as I have tried to show, there are such clear indications which in Articles 25(1)(b) and 140(1) limit the meaning to statutory law.

Mr. Grobler further submitted that if any person can decide for himself what common law rule in force before Independence is in conflict with the Constitution and need not anymore be applied, that it will lead to chaos. The answer is that where there is uncertainty this can be cleared up by the Legislator or any party involved can approach the Court for a declaratory order. The Namibian Constitution is also not the only one which contains provisions similar to that of Article 66(1). I have already referred to Section 4(1) of the south African Constitution and in the *Ferreira*-case, *supra*, p. 1006 G - 1008 C, Ackermann, J., discussed this issue and points out that there is also authority for this approach in Canada and that it is also followed by the German Federal Constitutional Court. In the above citation the learned Judge also explains that where a pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect a

subsequent declaration by a Court, in similar circumstances as set out in Article 25(1)(a), does not mean that it is the Court's order that invalidates the law.

Mr. Grobler also referred the Court to the cases of *Ex Parte: Attorney general: in re: Corporal Punishment by Organs of State*, 1991 NR 178 (SC); *S v K*, 2000(4) BCLR 405 (NmS) and *S v Sipula*, 1994 NR 41 (HC) and submitted that in those cases no distinction was drawn between the common law and customary law, on the one hand, and statutory law, on the other hand, regarding the invalidity thereof concerning the Constitution. Counsel therefore argued that those cases were authority for his submission that the common law survived the coming into effect of the provisions of the Constitution where the common law was in conflict with the Constitution.

I must point out that in none of those cases was this distinction pertinently before the Court or was there an attempt to interpret the three Articles of the Constitution as it became necessary in the present instance, and those cases are not any authority for the submissions made by Counsel. The *Sipula*-case was a judgment given by two Judges on review where there was no argument put before the Court. A reading of the case shows, as do the other two cases, that there was no reference to the provisions of Article 66(1). As far as this judgment is concerned, and the excerpt from it referred to by Mr. Grobler, this must be read in the context of what was discussed by the learned Judge, namely that the power to impose corporal punishment by the Linyianti Tribal Khuta was given statutory recognition by Proc. R.320 of 1970, section 1(1) and (2) thereof. It is therefore covered by the provisions

of Articles 25(1)(b) and 140(1) of the Constitution and remained in force until amended, repealed or declared unconstitutional by a competent Court.

Mr. Grobler further argued that the disabilities to which women married in community of property are subjected to are not in conflict with the Constitution. Counsel submitted that women under the common law had a choice and where they decided to marry in community of property they do so voluntarily. In this regard the Court was referred to *Knox D'Arcy Ltd. And another v Shaw and Another*, 1996(2) SA 651 (W) at p. 660 C - D. Counsel also submitted that if a Court has to decide on the constitutionality of the common law principle that a woman, married in community of property, does not have *locus standi in judicio*, it will have to make a value judgement whether, despite the fact that a woman entered into a marriage in community of property out of her own free will, there is an "overriding principle or public policy which is violated thereby".

The Court *a quo* came to the conclusion that the disabilities occasioned by a marriage in community of property were in conflict with various provisions of the Constitution, *inter alia* Article 10(2), and applied in this regard the principles laid down by this Court in *Müller v President of the Republic of Namibia and Another*, 2000(6) BCLR 655 (NmS).

The two Articles of the Constitution which are clearly applicable to decide this issue are Articles 10(2) and 14(1). They provide as follows:

> "10 (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion,

creed or social or economic status." (my emphasis); and

14 (1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution." (My emphasis.)

In the *Müller*-case, *supra*, p. 665 A - C, the Court set out the guidelines to be followed where Article 10(2)applies. The Court's approach to the particular issue before it should be to determine -

"(i) whether there exists a differentiation between people or categories of people;

(ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article;

(iii) whether such differentiation amounts to discrimination against such people or categories of people; and

(iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of Article 23 of the Constitution."

In the present instance there can be no doubt that a differentiation exists between men married in community of property and women married in community of property. It can in my opinion also not be denied that this differentiation is based on one of the enumerated grounds, namely sex. Only women are, on marriage in community of property, subjected to the disabilities occasioned by such marriage.

In determining whether the differentiation amounts to discrimination the Court, in the *Müller*-case, *supra*, p. 666, came to the conclusion that discrimination as used in Article 10(2) refers to the pejorative meaning of the word. Various guidelines were laid down to determine in a particular instance whether a differentiation based on one of the enumerated grounds is discriminatory. Following those guidelines it must be concluded that women can claim to have been part of a prior disadvantaged group. This is acknowledged by the Constitution itself. (See Article 23(3)). Where such differentiation is based on stereotyping which does not take cognizance of the equal worth of women but reduces them, in the eyes of the law, to minors who cannot act independently, but need the assistance of their husbands, there can also be no doubt that such disabilities to which such women are subjected, impair the dignity of women as a class or individually. The differentiation takes no cognizance of the fact that in many marriages in community of property the intelligence, training, qualifications or natural ability or aptitude of the woman may render her a far better administrator of the common estate than the husband. The impact of these common law rules on women is that as far as the common estate is concerned they remain minors for as long as the marriage subsists. Even where the

husband becomes insane the wife does not acquire contractual capacity and must either allow her husband's curator to administer the joint estate or apply to Court for authorization to administer her own property as though her husband were an absent person. (See *Tucker's Fresh Meat Supply (Pty) ltd v Echakowitz,* 1958(1) SA 505 (AD).) In my opinion such disability brought about by a marriage in community of property, which renders the wife subject to the marital power of the husband, is discriminatory and offends against Article 10(2) of the Constitution. That is also the case in regard to Article 14(1) which guarantees to the husband and wife equal rights during the marriage. Where a wife is during the marriage, in these respects, subject to "guardianship" of the husband, the parties do not have equal rights.

For the reasons set out above I have come to the conclusion that these rules of the common law are in conflict with the provisions of the Constitution and that they ceased to exist when the provisions of the Constitution took effect on Independence, i.e. 21 March 1990. Because of the conclusion to which I have come, it is no longer relevant to decide whether the appellant was a *publica mercatrix*.

Reference must also be made to the Married Persons Equality Act, Act No. 1 of 1996 (the Act). Of particular relevance is section 2 of the Act. This section reads as follows:

"2(1) Subject to the provisions of this Act with regard to the administration of a joint estate -

(a) the common law rule in terms of which a husband requires the marital power over the person and property of his wife is hereby repealed; and

(b) the marital power which any husband had over the person and property of his wife immediately before the commencement of this Act, is hereby abolished.

(2) The abolition of the marital power by paragraph (b) of subsection (1) shall not affect the legal consequences of any act done or omission or fact existing before such abolition."

It is, as I have tried to show, not the Act which brought to an end the marital power which a husband had over the person and property of his wife, but the Constitution itself and at the stage when the provisions of the Constitution took effect. Although enacted *abundante cautela* the Act ensures certainty as to the legal position.

In regard to subsection (2) Mr. Grobler submitted that if the Act was applicable to the present instance it specifically kept intact the appellant's right to rely on her disability and more particularly her lack of *locus standi*, as the contract was entered into before the Act became operative in May 1996. This argument cannot avail the appellant and if this is the correct interpretation of subsection (2) then the subsection itself is unconstitutional because it cannot set the clock back and declare constitutional what is unconstitutional. The agreement was in any event entered into at a time when the provisions of the Constitution had already taken effect, i.e. 21st

October 1993, and when the appellant was no longer subject to the marital power of her husband.

The other provisions of the Act, set out in Part II, regulate the situation in regard to marriages in community of property irrespective of the date on which such marriages were contracted, and are in my opinion necessary. Section 9 deals with litigation by or against spouses and subsection (5) thereof provides that where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefore. If section 9(5) is not applicable in the present instance, as was submitted by Mr. Grobler, then in any event the parties, being equal co-owners of the joint estate, without any impediment to the rights of the appellant, since 21 March 1990, had to be sued jointly. (See Van der Merwe & De Waal: *Law of Thing and Servitudes,* para. 209 ff.) However, that would depend on whether the debt sued for formed part of the joint estate. In my opinion it did not as I will try to show later.

In my opinion Mr. Grobler's reliance on the *Knox*-case, *supra*, is inappropriate. In that case it was argued that restraint of trade clauses in contracts were *per se* unconstitutional as they offend against section 26(1) of the South African Constitution which protected the right to engage freely in economic activity. In the course of his judgment the learned Judge confirmed the right of private persons to contract freely and stated that the Constitution would not, as a matter of policy, protect such persons against their own foolhardy or rash decisions and the Court rejected the application. Although marriage is an institution of private law the interest of the State and the public in the institution is amply illustrated by the many legal rules

concerning the contracting of a valid marriage, the proprietary and other rights during the marriage and its dissolution and the effects thereof. To this extent the Constitution itself provides that parties to a marriage shall be entitled to equal rights as to marriage, during marriage and at its dissolution, (Article 14(1)) and the Courts must give effect to this and the other provisions of the Constitution, e.g. Article 10(2). This is also not an instance where meaning and content must still be given to the provisions of the Constitution, as was the case with Article 8 where the Court had to determine the content and meaning of words such as degrading treatment or punishment. See *Ex Parte Attorney General: in re: Corporal Punishment by Organs of State*-case, *supra*, p. 188 D - F. In order to determine whether the rules of the common law, which subjected women married in community of property to the marital power of the husband, are discriminatory no value judgment is necessary.

I have therefore come to the conclusion that Mr. Grobler's attack on the *locus standi* of the appellant, and the other grounds of appeal based on that, cannot succeed.

I now turn to the appeal against the Court *a quo*'s finding that the appellant did not comply with Rule 32 and that no *bona fide* defence to respondent's claim was set out. The grounds of appeal in this regard are the following:

> "10. The Honourable Judges misdirected themselves on the facts and/or the law alternatively erred in finding that the appellant had no valid counterclaim to the claim of the respondent.

11. The Honourable Judges misdirected themselves on the facts and/or the law, alternatively erred in finding that the issue was whether the respondent interfered with the contractual rights of the appellant and not to find that the claim of the appellant against the respondent is delictual in that there was no contractual relationship between the appellant and the insurance company.

12. The Honourable Judges misdirected themselves on the facts and/or the law, alternatively erred not to find that because the respondent unlawfully caused that the insurance on her vehicles was cancelled she has a valid claim for damages.

13. The Honourable Judges misdirected themselves on the facts and/or the law alternatively erred to find that the appellant could have obtained alternatively (*sic*) insurance despite the clear allegation by the appellant's husband that his inability to arrange for alternative insurance was likewise applicable to the appellant."

Mr. Grobler submitted in this regard that if the Court should find that the appellant had *locus standi* it would follow that the truck and trailer would be her property in her own right and would not form part of the joint estate of the parties. This seems to me to be correct. The appellant entered into the sale agreement for her own account. She undertook to pay the monthly installments and undertook to fulfil the other obligations concerning the agreement such as insuring the truck and trailer etc. This, so it seems, was

also the attitude of appellant and her husband for they entered, in respect of the truck and trailer, into a lease agreement whereby he utilised the vehicles in his transport business and paid to the appellant an amount of N$31 000,00 per month as rent. This would not have been legally possible if the vehicles were acquired for the joint estate and Mr. Myburgh's claim in his statement that, in the event of a judgment against appellant, such judgment would be against the joint estate, is at best for him, based on an incorrect view of the law and does not fit the facts. The same applies in my opinion to the loan agreement in respect of which the summons is issued against the appellant. Also in this regard the contract is in her name and was concluded and signed without any assistance from her husband.

I have already referred to the affidavit of one Hennig which was attached to Mr. Myburgh's affidavit and in which Hennig sets out how one Cassim, the Deputy Risk Control Manager of the respondent, requested him to attempt to arrange that the insurance on Myburgh Transport's trucks be stopped. This, according to Hennig's affidavit he succeeded in doing.

I shall accept for purposes of this case, without deciding, that Mr. Myburgh has shown that there was an unlawful interference with his contractual rights by the respondent. The question is where does that leave the appellant.

In the case of *Dantex Investment Holdings (Pty) Ltd v Brewer and Others NNO,* 1989(1) SA 390 (AD) it was stated that an intentional interference with contractual rights can in certain circumstances constitute a delict. What the requirements for liability are, are however, less clear (p. 395 D - F). The

Court (p. 396 A - B) further pointed out that a plaintiff, who bases his claim for patrimonial loss on an intentional wrongful act of another, must allege and prove, *inter alia*, that such person intended to cause the plaintiff loss. McKerron: *The Law of Delicit,* 7th Ed, p. 47, stated that an intentional act can be defined as an act whose consequences were foreseen and desired.

Under the circumstances, and bearing in mind the requirements of Rule 32(3)(b), one would at least expect that the appellant would place facts before the Court from which it was clear that the respondent knew, or ought to have known, that any wrongful interference with the contractual rights of the husband of the appellant would also affect the rights of the appellant and that the respondent, at least, accepted the risk. The appellant entered into separate contracts with the respondent and it did not follow thereby that she would insure her truck and trailer together with those of her husband.

Mr. Grobler submitted that the parties must have agreed to effect the insurance of the appellant's truck and trailer in this way. If there was such an agreement then the appellant should have alleged so and should have set out facts to substantiate such an agreement. This was not done. The only allegations made in this regard by the husband of the appellant were that she was required by the contract of sale to take out insurance before delivery which she had to maintain during the period of the contract. It seems that the Court was asked to infer from the above averments that the respondent knew, or ought to have known, what the situation regarding the insurance was and that it was therefore foreseeable that any wrongful

interference with the contractual rights of appellant's husband would also cause her patrimonial loss.

However, in the absence of any allegation that notice of insurance was to be in a specific form, e.g. according to the contract of sale between the parties, or specific allegations as to how and what notice was given, such notice could take almost any form from an informal verbal confirmation to a most elaborate and complete set out of data and information. No material facts were set out by appellant or her husband from which a Court could even infer that the respondent, when it unlawfully interfered with the contractual rights of Mr. Myburgh, foresaw that by doing so they would also affect the rights of the appellant and that they accepted that risk. It seems to me that before it can be said that the respondent should have foreseen that its unlawful interference could also affect the appellant, facts should have been placed before the Court from which it could infer that the respondent knew what the situation regarding appellant's insurance was or facts which would have shown that they ought to have known. This was the more necessary as the affidavit of Hennig, on which the allegation of unlawful interference is based, and the other documents attached by appellant's husband, nowhere even mentioned the appellant.

Also in regard to another important aspect of the case the information put before the Court consisted of no more than bald statements. This regards the allegation by Mr. Myburgh that, after his insurance policy had been cancelled, he was unable to obtain other insurance for his vehicles or that of the appellant. No details were given of the attempts made by him and whether he saw one or ten insurance companies and which those

companies were. Such information would at least have gone some way to establish *bona fides* and to support the claims of Mr. Myburgh. If any reasons were given by the insurance company or companies for their refusal then none did so on the basis that they were interacting and did refuse as a result of the respondent's unlawful actions. The high-water work of Mr. Myburgh's allegations in this regard is that he verily believes that that was the case. (See *Caltex Oil SA Limited v Webb and Another,* 1965(2) SA 914 (N) at 917 H.) Furthermore if the boycott by the insurance companies was aimed at Myburgh's Transport or Mr. Myburgh no reason was given why the appellant would not have been able to obtain insurance for her vehicles. There is no allegation that she even tried herself to get insurance.

In the oft quoted case of *Maharaj v Barclays National Bank Ltd.,* 1976(1) SA 418 A at 426 C, Corbett, J.A., (as he then was) stated the following in regard to Court Rule 32(3)(b), namely:

> "The word 'fully' as used in the context of the Rule (and its predecessors) has been the cause of some judicial controversy in the past. It connotes, in my view that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence ... At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standard of pleadings."

In my opinion the appellant failed to allege material facts which disclosed a *bona fide* defence to the claim of the respondent.

In the result the appeal is dismissed with costs.

(signed) STRYDOM, C.J.

I agree.

(signed) O'LINN, A.J.A.

I agree.

(signed) MANYARARA, A.J.A.

/mv

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