THE DISSIPATION OF MARITAL ASSETS PENDING A DIVORCE ORDER IN SOUTH AFRICA: A PROPOSAL FOR REFORM

A thesis submitted in fulfilment of the requirements for the Degree of

MASTER OF LAWS

of

Rhodes University

by

Busisiwe Hlophane Maria Mahlangu

(Student no: g15m0866)

Supervisor: Assoc Prof Helen Kruuse

February

2023

I.

DECLARATION OF ORIGINALITY

1. I know that "plagiarism" means using another person's work and ideas without proper acknowledgement and pretending that it is one's own. I know that plagiarism not only includes verbatim copying, but also the extensive (albeit paraphrased) use of another person's ideas without proper acknowledgement. I know that plagiarism covers this sort of use of material found in Court judgments, textbooks, journal articles AND on the Internet.
2. I am aware of the University and the Law Faculty's policies on plagiarism as set out in the Faculty's Handbook.
3. I acknowledge and understand that plagiarism is wrong, and that it constitutes academic theft.
4. I understand that my research must be accurately referenced. I have followed the rules and conventions concerning referencing as set out in the Law Faculty's Handbook. I accept that merely putting a reference next to the copied words of others is not sufficient to avoid a charge of plagiarism, and that I understand the writing conventions applicable to using direct quotes and quotation marks.
5. This thesis is my own work, or the unique work of a group, if a group assignment.
6. I have not allowed, nor will I in the future allow anyone to copy my work with the intention of passing it off as his or her own work. I also accept that submitting identical work to someone else constitutes a form of plagiarism.

Signed ……BHM MAHLANGU…….

II.

ACKNOWLEDGEMENT

First and foremost, I would like to thank God for giving the wisdom, strength and the courage to complete this degree. If it was not for Him, I would not have been able to complete this degree.

Secondly, I owe my deepest gratitude to my supervisor, Professor Helen Kruuse. Thank you guiding me throughout my studies. Thank for continuous support, positive feedback, and constructive criticism. And most importantly, thank you for not ditching me when I was breaking down because of my depression. Instead, you pushed me and made me believe that I can do this. I am grateful for all you have done for me. You are an amazing supervisor.

Thirdly, I would like to thank my family for their continuous support. To my mom, thank you for endless prayers and encouragement. And to my dad, thank you for checking up on me and making sure that I am coping. Not forgetting my little brother, Linda, who made sure that I always communicate with my two boys and always cheer me up. With that being said, I owe a big shout out to my boys Akahlulwa and Simnikiwe Mahlangu. To me, you are the reason why I never gave up on this thesis. More than anything, I wanted to make you proud and surely once you are grown up, you will be proud to have a mother who has Master of Laws.

And lastly, I would like to thank my friends, specially mention to Siyabonga Malaza and Mpendulo Siphika. Thank you for walking this journey with me, always encouraging me, and supporting me. I will forever be grateful to have you by my side.

III.

ABSTRACT

Dissipation of marital assets takes place where one spouses uses the marital assets with the intention to frustrate the equitable distribution at the dissolution of marriage. This kind of behaviour usually occurs when one spouse anticipates a divorce or when the final divorce order is pending. In this context then, this thesis aims to critically analyse the effectiveness of the legal remedies available to spouses who are negatively affected by the dissipation of marital assets in marriage in community of property and marriage out of community of property with accrual. In this thesis the question is asked: does the current law adequately protect one spouse from another spouse unfairly hiding or dissipating assets from their estate to prevent the equitable distribution of these assets to the other spouse on divorce? In order to answer this question, this thesis proceeds by examining each of the remedies in detail, looking specifically at the statutory remedies set out in the Matrimonial Property Act 88 of 1984, specifically those contained in ss 8, 15 and 20 of that Act. It also considers remedies found in the common law. Ultimately, the study finds that these remedies do not provide adequate protection to spouses affected by the dissipation of marital assets and looks at the particular reasons for this finding. The study then concludes by proposing reforms to provide better protection to affected spouses. These legal reforms include: amending the legislative framework, changing the determinative date of the accrual, legislating a requirement for full disclosure of assets in terms s 8(1) of the Matrimonial Property Act and, finally, advocating for a flexible interpretation of the requirements of s 20 of the Matrimonial Property Act and the common law anti-dissipation remedy.

IV.

ABBREVIATIONS AND ACRONYMS

ANC	Antenuptial Contract
MPA	Matrimonial Property Act
MPR	Matrimonial Property Regime
S	Section
SALRC	South African Law Reform Commission

CURRENT COURT ABBREVIATIONS

CC	Constitutional Court
SCA	Supreme Court of Appeal
ECB / ECBHC	Eastern Cape High Court (Bhisho)
FB / FSHC	Free State High Court (Bloemfontein)
WCC / WCHC	Western Cape High Court (Cape Town)
KZD / KZDHC	KwaZulu-Natal High Court (Durban)
ECG / ECGHC	Eastern Cape High Court (Grahamstown)
GJ / GPJHC	South Gauteng High Court (Johannesburg)
NCK / NCHC	Northern Cape High Court (Kimberley)
KZP / KZPHC	KwaZulu-Natal High Court (Pietermaritzburg)
ECP / ECPEHC	Eastern Cape High Court (Port Elizabeth)
GP / GPPHC	North Gauteng High Court (Pretoria)
LT / LMPHC	Limpopo High Court (Thohoyandou)
ECM / ECMHC	Eastern Cape High Court (Mthatha)
NWM / NWHC	North West High Court, Mafikeng (Mmabatho)

LIST OF CASES

A

AB v JB [2009] ZAGPPHC 185.

B

Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd and Others [2021] ZASCA 126 (29 September 2021).

Badenhorst v Badenhorst 1964 (3) SA 679 (9).

Blatchford v Blatchford's Executors (1861) 1 EDC 365.

BM v NM 2010 (3) SA 220 (GSJ).

Brink v Kitshoff 1996 (4) SA 197.

Brookstein v Brookstein 2016 (5) SA 210 (SCA).

C

Carmel Trading Company Ltd v Commissioner for the South African Revenue Services and others (2017) ZAECGHC 75.

Clyne v Deputy Federal Commission of Tax (1983) ATC 4503.

Corporate Liquidator Pty (Ltd) v Wiggill 2007 (2) SA 520 (T).

D

Distillers Corporation Ltd v Modise 2001 (4) SA 1071 (O).

Du Plessis v Pienaar 2002 (4) SA 311 (SCA).

Durban City Council v Association of Building Societies 1942 AD 27.

E

East London Tuberculosis Association v Decawiz Investments (Pty) Ltd) [2014] ZAECGHC 69 (22 August 2014).

F

Frankel's Estate v The Master 1950 (1) SA 220 (A).

G

G v Minister of Home Affairs 40023/21) [2022] ZAWCHC 80 (11 May 2022).

Gugu v Zongwana 2014 (1) All SA 203 (ECM).

Government of the Republic of South Africa v Ngubane 1972 (2) SA 601 (A).

H

HM v AM [2020] ZAFSHC 162 (10 September 2020).

J

JA v DA 2014 (6) SA 233 (GJ).

Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163.

JTL v CHT and another [2021] ZAECELLC 4 (22 January 2021).

K

Knox D'Arcy Ltd and others v Jamieson and others 1996 (3) All SA 669 (A).

Kruger v Kruger 2005 JOL 14366 (T).

L

Lagesse v Lagesse 1992 (1) SA 173 (D).

Leeb v Leeb 2005 JOL 14366 (T).

Levin v Levin 1960 (4) SA 469 (W).

M

Macleod v Rens 1997 (3) SA 1039 (E) 1050.

Mareva Compania Naviera SA v International Bulkcarriers SA 1980 1 All ER 213.

Mathabathe v Mathabathe 1987 (3) SA 45 (W).

Marais NO and another v Maposa and others 2020 (5) SA ZASCA 111.

MB v NB 2010 (3) SA 220 (GSJ).

Milbourn v Milbourn 1987 (3) SA 62 (W).

Mulaudzi v Mudau and others [2020] ZASCA 148 (18 November 2020).

M & V Tractor & Implement Agencies Bpk v Vennootskap DSU Cillers and Seun en Andere 2000 (2) SA 571 (N).

M v M 2022 ZAGPJHC 484 (29 June 2022).

MWS v NSS and another 2021 (6) SA 201 (NWM).

N

NCM v VTM (2017) ZAECGHC 75.

ND v MD 2021 (1) All SA 909 (GJ).

Nel v Cockcroft 1972 (3) SA 592 (T).

O

Odendaal v Odendaal 2002 (1) SA 763 (W).

OG v ZG (2051/21) [2021] ZAECMHC 22 (10 June 2021).

P

PAF v SCF 2022 (6) SA 162 (SCA).

Pillay v Khrisha 1946 AD 946.

R

Reeder v Softline 2001 (2) SA 844 (W).

REM v VM 2017 (3) SA 371 (SCA).

RS v MS 2014 (2) SA 511 (GSJ).

RP v DP 2014 (6) SA 243 (ECP).

S

SB v RB [2015] 2 All SA 232 (ECLD).

Schmitz v Schmitz 2015 (3) All SA 85 [KZD].

Seedat's Executors v The Master 1917 AD 302.

Sishuba v *Skweyiya* 2008 JDR 0593 (E).

Sithole v Sithole 2021 (5) SA 34 (CC).

U

U v U [2019] ZAGPJHC 347 (26 September 2019).

V

Van der Merwe v Van Wyk 1921 EDL 298.

Visser v Hull 2010 (1) SA 521 (WCC).

Vuyeka v Ntshane and Others [2020] ZASCA 167 (11 December 2020).

W

Webster v Mitchell 1948 (1) SA 1186 (W).

WT and others v KT 2015 (3) SA 574 (SCA).

Women's Legal Centre Trust v President of the Republic of South Africa and Others 2022 (5) SA 323 (CC).

TABLE OF STATUTES

SOUTH AFRICAN STATUTES

Black Administration Act 38 of 1927

Civil Union Act 17 of 2006

Constitution of the Republic of South Africa, 1996

Deeds Registries Act 47 of 1937

Divorce Act 70 of 1979

Friendly Societies Act 45 of 1956

Insurance Act 22 of 1943

General Law Fourth Amendment Act 132 of 1993

Law of Evidence Amendment Act 45 of 1988

Matrimonial Property Act 88 of 1984

Marriage Act 25 of 1961

Prescribed Rate of Interest Act 55 of 1975

Recognition of Customary Marriages Act 120 of 1998

Trust Property Control Act 57 of 1988

FOREIGN STATUTES AND RULES

Germanic Civil Code of 1896

UK’s Civil Procedure Rules (1998)

DETAILED TABLE OF CONTENTS

Chapter 1: Introduction

1.1 The general purpose of the study----------1.

1.2 The background to the research topic ----------1.

1.3 The research question ----------2.

1.4 The objectives of the research ----------3.

1.5 Methodology ----------3.

1.6 Outline of the thesis ----------4.

Chapter 2: The Dissipation of Marital Assets: An Overview

2.1 Introduction ----------6.

2.2 Proprietary consequences of divorce ----------7.

2.3. The meaning and the nature of dissipation of marital assets ----------9.

2.3.1 How the defaulting spouse may personally dissipate the marital assets----------10.

2.3.2 How the defaulting spouse may use the bank to dissipate the marital assets ----------13.

2.3.3 How the defaulting spouse may use the trust form to dissipate the marital assets ------14.

2.4 A distinction between assets subject to the dissipation of marital assets and those that are not subject to the dissipation of marital assets ----------17.

2.4.1 Assets subject to the dissipation of marital assets ----------18.

2.4.2 Assets that are not subject to the dissipation of marital assets ----------19.

2.5 The legal consequences of the dissipation of marital assets ----------21.

2.6 Conclusion ----------22.

Chapter 3: Section 15 of the Matrimonial Property Act: A sufficient remedy?

3.1 Introduction ----------24.

3.2 The purpose of section 15 of the Matrimonial Property Act ----------27.

3.3 The main issues relating to s 15 of the Matrimonial Property Act ----------28.

3.4 Evidentiary burden and burden of proof ----------31.

3.5 The application of s 15 ---------- ----------32.

3.5.1 *Sishuba v Sikweyiya* 2008 JDR 0593 (E) ----------34.

3.5.2 *Marais NO v Maposa 2020* SA 111 (25 March 2020) ----------35.

3.5.3 *Mulaudzi v Mudau* [2020] ZASCA 148 (18 November 2020) ----------36.

3.5.4 *Vuyeka v Ntshane* [2020] ZASCA 167 (11 December 2020) ----------36.

3.5.6 *Matini v Matini* [2022] ZAGPPHC 218 (23 March 2022) ----------38.

3.6 Conclusion ----------40.

Chapter 4: Section 20 of the Matrimonial Property Act: A sufficient remedy?

4.1 Introduction ----------42.

4.2 The purpose of s 20 of the Matrimonial Property Act ----------43.

4.3 Application of s 20 of the Matrimonial Property Act ----------44.

4.4 The challenges associated with s 20 of the Matrimonial Property Act ----------48.

4.5 Conclusion ----------49.

Chapter 5: Power of the Court to order immediate division of matrimonial property subject to the accrual system: A sufficient remedy?

5.1 Introduction ---------- 51.

5.2 The purpose of s 8(1) of the Matrimonial Property Act ----------52.

5.3 An elaboration of the requirements of s 8(1) of the Matrimonial Property Act----------53.

5.3.1 Proving the right to share the accrual of the estate of the other spouse ----------53.

5.3.2 Proving that his or her accrual claim is being prejudiced or will probably be seriously prejudiced by the other spouse's conduct ----------54.

5.3.3 Proving lack of prejudice on the part of the third parties ----------56.

5.3.4 The contingent nature of the accrual claim ----------57.

5.4 Application of s 8(1) of the Matrimonial Property Act ----------57.

5.4.1 *MB v NB* 2010 (3) SA 220 (GSJ) ----------57.

5.4.2 *ND v MD* 2021 (1) All SA 909 (GJ) ----------58.

5.5 Conclusion ----------61.

Chapter 6: The anti-dissipation interdict in anticipation of divorce: A sufficient remedy?

6.1 Introduction ----------63.

6.2 The origin and the background of anti-dissipation interdict ----------63.

6.3 The application of anti-dissipation interdict in dissipation of marital assets in anticipation of divorce ----------65.

6.4 The procedure for bringing the anti-dissipation interdict ----------66.

6.4.1 Elaboration of the requirements in the context of anti-dissipation remedy ----------68.

6.4.1.1 The existence of *prima facie* right although open to some doubt ----------68.

6.4.1.2 A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted ----------70.

6.5 The evidentiary burden imposed on the affected spouse when relying on an anti-dissipation remedy ----------72.

6.6 Conclusion ----------73.

Chapter 7: Proposed reform

7.1 Introduction----------75.

7.2 Legislative framework in s 15 (9) of MPA ----------75.

7.3 Change in the determinative date of the calculation of the accrual ----------76.

7.4 Full disclosure requirements on spouses married out of the community of property with accrual system in line with s 8(1) of the MPA----------78.

7.5 Flexible interpretation of the requirements ----------78.

7.6 Concluding remarks ---------- 79.

CHAPTER 1

INTRODUCTION

1.1 The general purpose of this study

The general purpose of this study is to consider reforms to the law regulating the dissipation of marital assets pending a divorce order. In doing so, the study will investigate the statutory law and common law remedies aimed at protecting the affected spouses in marriage in community of property and marriage out of community of property. In this sense, the general topic of this study is whether the current law adequately protects one spouse from another spouse unfairly hiding or dissipating assets from their estate to prevent distribution of these assets to the other spouse on divorce.

The purpose of this first chapter is three-fold. First, the chapter briefly sets out the background to the challenges identified above. Secondly, the research question and the objectives of the research are set out. To conclude, the chapter sets out the methodology that is used in this research as well as the structure of the thesis.

1.2 Background to the research topic

South African law recognises three types of matrimonial property systems, namely: marriage in community of property; marriage out community of property without the accrual system; and marriage out of community of property with the accrual system.[1] In South Africa, if a couple dissolves their marriage by divorce,[2] the division of assets is based on the matrimonial property system chosen by the couples.[3] However, according to Driskell, the "dissolution of marriage is often wrought with contentious litigation including custody battles and property disputes".[4] This thesis focuses on the latter, being property disputes, and in particular, the attempt by one spouse to dissipate matrimonial assets pending divorce. In this regard, it is important to note that the dissipation of matrimonial assets may occur in marriages in community of property, and marriages out of community of property with accrual. Dissipation may also occur where parties are married out of community of property provided that the

[1] This is based on the nature of matrimonial property regimes as explained in J Heaton and H Kruger *South African Family Law* 4 ed (2015) 102.
[2] In South Africa, marriage may be entered into in terms of the Marriage Act 25 of 1961, the Civil Union Act 17 of 2006, or the Recognition of Customary Marriages Act 120 of 1998.
[3] Heaton and Kruger *South African Family Law* 41.
[4] E Driskell "Dissipation of Marital Assets and Preliminary Injunctions: A Preventative Approach to Safeguarding marital assets" (2006) 20 *JAAML* 135 at 135.

spouses were married before 1984 and the other spouse is seeking a redistribution of assets order in terms of s 7(3) of the Divorce Act.[5] There is also the possibility that dissipation will be at issue in marriages out of community of property *after* 1984, if the Constitutional Court confirms the recent decision of the Gauteng Division, Pretoria, namely *G v Minister of Home Affairs*.[6]

The South African Law Reform Commission, in an Issue Paper reviewing the Matrimonial Property Act ("MPA"), has identified the practice of dissipating marital assets prior to a divorce as a challenge for many spouses, particular women.[7] In a discussion relating to adequate protection of spouses upon divorce, the authors of the Issue Paper note that the proper division of assets pending divorce may be marred by the attempted or real dissipation of marital assets.[8]

While there are provisions in our common law[9] and statutory law[10] aimed at protecting a spouse who is prejudiced by an attempt by the other spouse to dissipate assets, it appears from case law that these provisions are problematic. In the last two decades, there has been an increase in cases involving the dissipation of marital assets pending a divorce order. Some of the challenges with the current law are that the remedies for dissipation of marital assets are "difficult to invoke",[11] "the onus that needs to be satisfied before the court is too onerous",[12] "remedies might be costly"[13] and the "remedies might be defective because the dissipation would have already been done."[14] As a result, this research is undertaken within the context of the perceived failure of available remedies to effectively protect a spouse who is prejudiced by the dissipation of assets by another spouse pending a divorce.

[5] Act 70 of 1979.
[6] (40023/21) [2022] ZAWCHC 80 (11 May 2022).
[7] Act 88 of 1984 (the MPA). See also the South African Law Reform Commission (SALRC) Issue Paper 41 (Project 100E) *Review of Aspects of the Matrimonial Property Act* (2021) para 37.
[8] *Ibid.*
[9] The common law remedy that will be discussed is an anti-dissipatory order (see chapter 6 infra).
[10] Statutory remedies that will be discussed are those found in ss 15, 20 and 8(1) of the MPA (see chapters 3, 4 and 5).
[11] J Heaton "The proprietary consequences of divorce" (chap 4) in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 108.
[12] *ND v MD* 2021 (1) All SA 909 (GJ) para 25.
[13] *BM v NM* 2010 (3) SA 220 (GSJ) para 26.
[14] *ND v MD* 2021 (1) All SA 909 (GJ) para 17.

1.3 The Research Question

This dissertation concerns the question of whether the current law adequately protects one spouse from another spouse who may be unfairly hiding or dissipating assets from their estate to prevent the distribution of these assets to the other spouse on divorce.

1.4 The objectives of the dissertation

1. The objectives of this research are to:

    a) critically analyse the current law regulating the dissipation of marital assets in South Africa pending a divorce order; and

    b) consider whether the existing law provides adequate protection for spouses married in community of property and spouses married out of community of property with the accrual system.

2. If it is found that the remedies do not provide adequate protection for affected spouses, the research will investigate whether alternative remedies flowing from South African law and foreign law can provide better solutions to protect the affected spouses.

1.5 Methodology

Given the nature of this research, a doctrinal desktop is used. This doctrinal method is adopted as an interpretative method in this research. The doctrinal method "asks what the law is on a particular issue".[15] This methodology is used to analyse the current law regulating the dissipation of marital assets pending a final divorce order. The method is used to analyse the legal doctrine and how it has been developed and applied.

The primary sources which are used include, amongst others, the Constitution,[16] the Matrimonial Property Act[17], the Divorce Act,[18] and South African case law relating to the dissipation of marital assets pending a divorce order. Secondary sources consist of South African textbooks, journal articles, internet sources, and foreign legislation and case law. The South African sources are used to interpret the law in general, while the law in foreign jurisdictions is used on a comparative basis.

---

[15] D Coetzee *A doctrinal research perspective of master's degree students in accounting* (Unpublished PhD, Northwest University, 2018) 75.
[16] Constitution of the Republic of South Africa, 1996.
[17] Act 88 of 1984.
[18] Act 70 of 1979.

In the final chapter, consideration is given to foreign law as a possible solution or, at least, as giving direction to reform. In this way a comparative method is adopted under the doctrinal method. The comparative method involves the "explicit comparison of aspects of two or more legal systems".[19] In this research, the comparison aspect is based on South African law and German law on the dissipation of marital assets pending a final divorce. The purpose of this method is to explore ways in which the South African legal system can afford better protection to spouses married out of community of property with accrual, as afforded under the German legal system. This comparative method is also in line with s 39(1)(c) of the Constitution[20] which states that when interpreting the bill of rights, a Court or tribunal may consider foreign law. I have chosen the German legal system given that its matrimonial property system bears similarities to the South African legal system.[21]

It is submitted that no research ethics issues have arisen as all materials used in this research are accessible in the public domain.

1.6 Outline of the research

This thesis is divided into seven chapters. Chapter one gives a general introduction to the thesis. The chapter is aimed at introducing the research topic, goals of the research, methodology to be used in this thesis as well as the structure of the thesis.

Chapter two seeks to provide a general discussion of the dissipation of marital assets in South Africa. This chapter will commence by defining what constitutes a dissipation of marital assets. Thereafter, the chapter considers how dissipation occurs. In conclusion, the chapter discusses the legal consequences of the dissipation of marital assets.

Chapter three discusses the statutory remedy for a spouse married in community of property contained in s 15 of the MPA. First, the chapter provides a general overview of the s 15 remedy. Secondly, the chapter discusses the main issues of s 15 as a remedy aimed at protecting spouses faced with the dissipation of marital assets. Thirdly, the dissertation will discuss previous cases that dealt with the application of s 15 remedy. To conclude, the chapter critically analyses the s 15 remedy.

---

[19] JT Retz "How to do comparative work" (1998) 46 *The American Journal of Comparative Law* 617 at 618.
[20] Constitution of the Republic of South Africa, 1996.
[21] See for example, PEJ Brooks "Matrimonial property regimes and succession in South African private international law" (1978) XI *CILSA* 289 at 300-304.

Chapter four discusses the remedy contained in s 20 of the MPA. The chapter commence by setting out the general purpose and understanding of the s 20 remedy. In addition, it considers case law to show the failure of this section to adequately protect spouses married in community of property faced with the dissipation of their marital assets.

Chapter five discusses the remedy available for marriages out of community of property with accrual, namely, s 3(1) of the MPA read together with s 8(1) of the MPA. Under this chapter, the focus is on the remedy available for spouses married out of community of property with the accrual system. The chapter starts by discussing the statutory remedy in s 3(1) read together with s 8(1) of the MPA. Case studies are then used to critically engage with this statutory remedy. Having discussed the statutory remedy, the effectiveness of these remedies using the case law approach will be analysed.

Chapter six discusses the general anti-dissipation remedy, a common law remedy that is available for both spouses married in community of property and out of community of property. In the introduction, the chapter gives a general background on the anti-dissipation remedy as a legal remedy for spouses who are faced with the dissipation of marital assets. Secondly, the chapter discusses the legal procedure in applying the common law anti-dissipation remedy. To conclude, the chapter discusses the remedy's effectiveness and its challenges.

Chapter seven sets out my proposals for reform of the law, which includes a change in the regulatory framework, a change in the determinative date for the calculation of accrual, the need for full disclosure pending a divorce order, and adopting a more flexible interpretation to the requirements. The purpose of this part is to provide solutions to the research problem articulated in the above chapters. The last part of the chapter provides a summary that ties all the chapters together.

CHAPTER 2

THE DISSIPATION OF MARITAL ASSETS IN SOUTH AFRICAN LAW: AN OVERVIEW

2.1 Introduction

Before setting out the legal remedies available for spouses faced with the dissipation of marital assets pending divorce, it is necessary to set out a general overview of what constitutes the dissipation of marital assets in South African law. Therefore, this chapter provides the general context and background as to when and how one can dissipate marital assets.

Traditionally, when parties get married, they intend to live together as spouses until one spouse dies; hence, the common phrase: "till death do us part" is used when spouses declare their vows to one another during the solemnisation of their marriage.[22] The above statement aligns with the definition of civil marriage as set out in *Seedat's Executors v The Master*.[23] In this case, the Court defined civil marriage as "the legally recognised life-long voluntary union between one man and one woman to exclude all other persons".[24]

However, due to the high rate of divorce in South Africa,[25] and the inclusion of other forms of partnerships, this traditional definition of civil marriage has been modified. As the law currently stands, civil marriage is defined as "a legally recognised voluntary union of one man and one woman to the exclusion of all other persons".[26] This definition of civil marriage demonstrates that, in modern times, civil marriages no longer last forever. As a result, it is now more important than ever to consider what happens to the parties' property when the spouses' divorce. In the last few decades, South African law has also come to recognise civil unions between same-sex couples and polygamous unions in customary and Muslim marriages.[27] As a result, property disputes are present in all such marriages.

---

[22] A Miller "Until Death Do Us Apart: A Proposal for the Philippines To Legalize Divorce" (2018) 24 *Connecticut Journal of International Law* 181 at 200.
[23] 1917 AD 302 at 309.
[24] *Seedat's Executors v The Master* 1917 AD 302 at 309.
[25] The statistical release on divorce in 2020 shows that there are 16 097 divorces in South Africa. See South African Divorce Statistics at Divorce Statistics in South Africa - Family and Divorce law (divorcelaws.co.za) (date accessed: 3 February 2023).
[26] J Heaton and H Kruger *South African Family law* 4 ed (2015) 13.
[27] Muslim marriages were brought under the protection of the Divorce Act in terms of *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC). The CC ordered (at para 87, section 1.7 of the order) that "all the provisions of the Divorce Act shall be applicable to Muslim marriages which were subsisting at 15 December 2014 … or which had been terminated in terms of *Sharia* law as at 15 December 2014, but in respect of which legal proceedings have been instituted and which proceedings have not been finally

2.2 Proprietary consequences of divorce

South African law regulates the division of assets upon divorce.[28] The operation of these regulations depends on the matrimonial property system chosen by the spouses.[29] It is thus vital that, before getting married, prospective spouses exercise their contractual freedom to choose the matrimonial property system that will govern their marriage. As set out in chapter 1 above, the prospective spouses can choose from one of the three matrimonial property systems: marriage in community of property; marriage out of community of property with accrual; and marriage out of community of property without accrual.[30]

Marriage in community of property is the default system of matrimonial property which applies to all civil marriages unless expressly excluded by the parties through an antenuptial contract.[31] This basically means that when spouses do not exercise their rights to enter into an antenuptial contract, their marriage will be in community of property.

A community of property regime entails that:

> "[t]he spouses become tied co-owners in the undivided and indivisible half-share of all the assets and liabilities they have at the time of their marriage as well as all the assets and liabilities they acquire during the marriage."[32]

Upon dissolution of the marriage, the joint estate is firstly used to settle the debts and liabilities incurred by the parties during the subsistence of the marriage. Then the residue will be distributed equally between the spouses.[33]

On the other hand, a marriage out of community of property with the accrual system entails a complete separation of property during the marriage, with sharing only occurring at the dissolution of the marriage. In other words, the accrual system allows both spouses to share in the growth of their estates at dissolution without a joint estate during the subsistence of their

---

determined as at the date of this order". Importantly, the court set out that all Muslim marriages would be treated as if they are out of community of property, except where there are agreements to the contrary, but that the court was entitled to redistribute assets in these marriages upon divorce (i.e. the s 7(3) discretion). The specific consequences for Muslim marriages regarding dissipation of assets is beyond the scope of this dissertation and will not be discussed infra.

[28] As set out in the relevant legislation discussed infra. See, in general, M De Jong "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of property upon divorce" (2012) 2 *Stell LR* 225 at 226-28.

[29] Heaton and Kruger *South African Family Law* 129.

[30] Sections 2(1) and 4 of the MPA.

[31] J Church "Proprietary consequences of marriage" in WA Joubert (ed) *The Law of South Africa* 2 ed (2006) 73.

[32] Heaton and Kruger *South African Family Law* 62.

[33] *Ibid*.

marriage.[34] The accrual system works on the rationale that one spouse contributes either financially or otherwise to the growth of the other spouse's estate and therefore should be entitled to a share in that spouse's estate on the dissolution of marriage.[35]

Thus, in general, the accrual system seeks to protect the spouse whom the complete separation of property would have prejudiced by providing such a spouse with the remedy to share in the growth of the other spouse's estate. For instance, a spouse whose estate – upon the dissolution of marriage – shows no or little accrual (growth) has a right to share in the growth of the other spouse's estate. In this regard, the accrual system seeks to assist a spouse who might find themselves in an unfavourable financial position upon the dissolution of marriage. Before the commencement of the MPA, marriages out of community of property had complete separation of property without the possibility of sharing the accrual. However, the position changed after the commencement of the MPA. The current position is that marriages out of community of property are subject to accrual unless the parties explicitly exclude the accrual system in their antenuptial contract.[36]

Lastly, a marriage out of community of property without the accrual system is known to be a "complete separation of property".[37] When prospective spouses choose to enter into a marriage out of community property without accrual, they must expressly exclude the accrual in their antenuptial contract.[38] The legal consequence of this matrimonial regime is that each spouse has full contractual capacity without the other spouse's consent. However, spouses are limited from entering into contracts that cancel or amend their chosen matrimonial property system under this regime.[39] Upon divorce, these spouses traditionally do not share in each other's estate upon the dissolution of marriage. Each party retains the estate they had before marriage and everything they acquired during the marriage.[40]

One of the practical effects in choosing the first two matrimonial property regimes is to create an equitable and fair distribution of marital assets upon divorce. However, case law indicates that spouses often find themselves in a difficult position where one spouse chooses to squander

[34] Section 3(1) of the MPA.
[35] *Ibid.*
[36] Section 2(1) of the MPA.
[37] Heaton and Kruger *South African Family Law* 90.
[38] *Ibid.*
[39] Unless the spouses approach the court to change their matrimonial property regime in terms of s 21 of the MPA or enter into a settlement agreement in the lead up to their divorce. See also Heaton and Kruger *South African Family Law* 91.
[40] However, see *G v Minister of Home Affairs* (40023/21) [2022] ZAWCHC 80 (11 May 2022).

or conceal the marital assets pending the final divorce order.[41] When one of the spouses squanders marital assets pending the final divorce order, that spouse jeopardises the Court's ability to give an equitable award to distribute the assets.[42] In other words, the distribution of assets in the matrimonial property regime chosen by the spouse might be legally impossible since those assets have been dissipated. This behaviour can then be defined as the "dissipation of marital assets".

2.3 The meaning and nature of dissipation of marital assets

According to Van Aswegen, dissipation of assets in this context is "preventative estate planning which consists of placing one's assets out of reach of one's spouse by means of discretional trusts or similar measures."[43] In the case of dissipation of marital assets, one spouse will squander or conceal marital assets in anticipation of divorce to avoid the fair division of marital assets. Thus, the dissipation of marital assets results in the other spouse being prejudiced upon the finalisation of the divorce. This is because the dissipation of assets results in an inequitable property distribution upon finalisation of the divorce, where some of the marital assets cannot be considered.

It is trite that the dissipation of marital assets may occur in marriages in community of property[44] and marriages out of community of property with the accrual system.[45] Under marriage in community of property, dissipation of marital assets occurs when one of the spouses dissipates the marital assets that belong to the joint estate pending a divorce order. Section 15(1) of the MPA allows a spouse to perform juristic acts without the consent of the non-contracting spouse. Section 15(2) and (3) of the MPA qualifies s 15(1) by requiring the consent of a spouse to perform certain juristic acts affecting the joint estate. Compliance with the formalities in both mentioned sections by spouses varies.[46] In terms of s 15(2) of the MPA, for the other spouse to perform any juristic act listed under the section, the required consent of

[41] Case law will be used in this dissertation to demonstrate that when spouses anticipate a divorce, one spouse might attempt to dissipate assets to avoid the equitable distribution of matrimonial property at the dissolution of marriage.
[42] E Driskell "Dissipation of marital assets and preliminary injunctions: A preventative approach to safeguarding marital assets" (2006) 20 *JAAML* 135 at 135.
[43] A van Aswegen "The protection of a spouse's right to share in the joint estate or accrual" (1987) 230 *De Rebus* 59 at 63.
[44] See *Marais NO v Maposa* 2020 (5) SA 111, *Mulaudzi v Mudau* [2020] ZASCA 148 (18 November 2020), *Vuyeka v Ntshane* [2020] ZASCA 167 (11 December 2020) and *AB v JB* [2009] ZAGPPHC 185.
[45] *ND v MD* 2021 (1) All SA 909 (GJ) and *MB v NB* 2010 (3) SA 220 (GSJ). But see *G v Minister of Home Affairs* (40023/21) [2022] ZAWCHC 80 (11 May 2022) as set out in chapter 1 (1.1) above. If confirmed by the CC, this will mean that the dissipation issue may be applicable to marriages out of community of property before 1984.
[46] Driskell 2006 *JAAML* 137.

the non-contracting spouse must be made in writing. On the other hand, in terms of s 15(3) of the MPA, the consent of the non-contracting spouse does not need to be made in writing.

In this regard, the dissipation of marital assets under this matrimonial property regime occurs when one spouse performs the listed juristic acts in terms of s 15(2) and 15(3) of the MPA without the required spousal consent in anticipation of divorce. Whereas, under marriage out of community of property with accrual, the dissipation of marital assets occurs before the determinative date to calculate the value of the accrual claim. It is worth noting that, in terms of s 3 of the MPA, a spouse's accrual claim only arises at the date of the dissolution of marriage. This means that the determinative date for calculating the value of the accrual claim is the date that the Court hands down the divorce order.

The Supreme Court of Appeal confirmed the above position in *Brookstein v Brookstein.*[47] This is problematic given that, as Schulze notes, once the divorce proceedings have been instituted, the other spouse may attempt to destroy his or her assets to decrease the accrual value.[48] As a result, the other spouse may dissipate assets that are strictly their assets but should be considered in the calculation of accrual. The spouse avoids this by dissipating his/her assets before the Court hands down the divorce order.

There are different methods that the defaulting spouse can use in order to dissipate marital assets. The most common way of dissipating the marital assets can take the following form: The spouse may choose to personally squander or hide the marital assets by transferring the assets to a trust, or to a friend or third party, or by claiming entitlements (such as pension benefits) that in turn affect the accrual or joint estate beforehand. Alternatively, a defaulting spouse may open several bank accounts, thus hiding financial assets in a bank account or a trust account or using the money in the joint account. Technological developments have also meant that spouses can dissipate assets through the purchase of digital currency such as bitcoin given that these transactions tend to be quick and anonymous.[49]

These methods are not the only ways one can use to dissipate assets; however, as noted by Driskell, "cases do, however, demonstrate some behaviours are more likely than other to be derivative of dissipation of marital assets."[50] An analysis of case law conducted in this

[47] 2016 (5) SA 210 (SCA).
[48] HCAW Schulze "Some thoughts on the application of section 8(1) of the Matrimonial Property Act 88 of 1984" (2000) 63 *THRHR* 116.
[49] C Hou "A Bit-ter Divorce: Using Bitcoin to Hide Marital Assets" (2015) 16 *North Carolina Journal of Law and Technology* 74.
[50] Driskell 2006 *JAAML* 142.

dissertation demonstrates that these behaviours are likely to be subject to dissipating marital assets. In the next part of the dissertation, I will discuss some of these common forms of dissipating marital assets in detail.

2.3.1 How the defaulting spouse can personally dissipate assets.

First, the defaulting spouse may personally dissipate marital assets by transferring the assets that belongs to the joint estate or is subject to the accrual to a third party or a family member. The transfer may happen before the Court grants a final divorce order under a marriage out of community with the accrual system or before the division of the joint estate in marriage in community of property. When the assets are legally transferred and are in the possession of the purchaser, the ownership of the asset changes. This is because the "identifying characteristic for transfer of ownership is that one person derives ownership from another person".[51] In this regard, the third party or the family member acquires ownership of immoveable property as soon as the transfer has been completed. In terms of immovable property, registration completes the transfer of ownership. This is because, once the marital assets have been registered in another person's name, they do not form part of the assets that can be divided upon divorce. As discussed above, a transfer of this nature was evident in the appeal case of *Mulaudzi v Mudau and other*s.[52] A full discussion of this case will be provided in chapter 3 infra.

Under a marriage in community of property, it is not legally permissible for a spouse to dispose specific assets without the consent of the other spouse as per s 15(2) and (3) of the MPA. However, case law has shown that the defaulting spouse may conceal the fact that they are married in community of property. Given that the legislation protects the third party in these instances (s 15(9) of the MPA), the assets are then lost to the estate despite the lack of consent of the other spouse. A detailed discussion on this matter is made in chapter 3 when dealing with remedies available for spouses married in community of property.

Another way in which the defaulting spouse may personally dissipate assets is by claiming entitlements that are part of the joint estate prior to the dissolution of marriage. Such entitlements may include, among other things, the pension benefits that may accrue to the spouse upon the dissolution of divorce. However, the challenge with pension benefits as

[51] H Mostert, A Pope, J Pienaar and P Badenhorst *The Principles of the Law of Property in South Africa* (2017) 160.
[52] [2020] ZASCA 148 (18 November 2020).

"entitlements" is that they are not considered as an asset in one's estate because the right will only vest when the pension accrues to that person, for example, when the person leaves his or her job for various reasons, resigns etc.[53] Moreover, in terms of s 7(7) of the Divorce Act[54] "a spouse's pension interest is deemed to be part of his or her assets upon divorce to determine patrimonial benefits to which spouses may be entitled". This means that the other spouse is entitled to a pension interest, but only upon the dissolution of marriage.

A pension interest is defined in s 1(1) of the Divorce Act as the amount that accrues to the member of the fund at the dissolution of marriage for the purposes of divorce.[55] As far as a pension interest is concerned, the defaulting party may, pending the finalisation of the divorce, access (and subsequently dissipate his or her pension fund) by resigning from their job and cashing out the pension benefits. By doing so, the other spouse cannot claim their pension interest directly from the pension fund upon the granting of a decree of divorce, as contemplated by s 7(7) of the Divorce Act. While the cashed-out pension benefit will still form part of the estate, it is often hard to trace even though it forms part of the legal pot.[56]

The issues in this situation are illustrated in a recent matter heard in the North West Division of the High Court. The applicant requested the Court to grant an interim interdict to protect their share in the pension interest of their spouse, who had recently resigned pending the finalisation of divorce in the case *MWS v NSS.*[57] In this case, the applicant (the innocent spouse) applied to interdict the respondent from claiming her pension for the purpose of s 7(7) of the Divorce Act. The evidence suggested that the respondent had summarily resigned from her job after the commencement of the divorce action but before it was finalised.

In this regard, the Court held that the respondent (the defaulting spouse) had the right to claim her pension benefits after resignation as it accrued to her after she had resigned from her employment. Further, the Court held that the applicant had failed to provide evidence that the

---

[53] Heaton and Kruger *South African Family Law* 130.
[54] Act 70 of 1979.
[55] Section 1 of the Divorce Act defines "pension interest" in relation to a party to a divorce action who is a member of a pension fund (excluding a retirement annuity fund) as meaning:
"(a) the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office.
(b) is a member of a retirement annuity fund which was bona fide established to provide life annuities for the members of the fund, and which is a pension fund, which means the total amount of that party's contributions to the fund up to the date of the divorce, together with a total amount of simple annual interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the purposes of that Act."
[56] Section 7(7) of the Divorce Act 70 of 1979.
[57] 2021 (6) SA 201 (NWM) (9 March 2020) para 6.

respondent's resignation and later claiming of her pension benefits was aimed at dissipating the marital assets pending the finalisation of the divorce.

Further, the Court noted that given that the respondent's pension benefits had accrued before the finalisation of the divorce, as a result the pension benefits were no longer subject to s 7(7)(a) of the Divorce Act.[58] In this judgment, the Court also held that the applicant had failed to satisfy the requirements of an anti-dissipatory application.[59]

The implication of this judgment is that the innocent party may be prejudiced by the dissipation of marital assets despite the existence of statutory and common law remedies aimed at prohibiting dissipation. This is so because, if the applicant fails to plead his or her case systematically, that is, by proving all the elements of an anti-dissipatory application, the case is unlikely to succeed in Court; and yet dissipation would have taken place already. In this regard, the case law demonstrates that proving the elements of the anti-dissipatory application may be burdensome to the party faced with the dissipation of marital assets. Further, the party might find it challenging to produce enough evidence of intention, as was the case in the *MWS* case, discussed in chapter six. In a nutshell, the applicant's spouse could not convince the Court that the other party's conduct constituted dissipation of marital assets.

2.3.3 How the defaulting spouse can use the bank to dissipate assets.

The defaulting spouse can dissipate assets by obtaining total control of a bank account, bank information, and banking pin. On the other hand, if the parties have a joint account, the spouse, recognised as the primary account holder can efficiently dissipate assets without obtaining total control of the bank account. This is so because, as highlighted in the first SALRC Issue Paper reviewing the MPA, when spouses open a joint account, the spouses do not have equal status in terms of the joint account.[60] In this regard, the spouse who is the primary account holder has more power than the other spouse. As such, they may use their power to dissipate funds that belong to the joint estate.

Secondly, the defaulting spouse may convince friends or family members to open several bank accounts in their name, which they will use to transfer money from the joint bank account or the bank account with money subject to the in community of property regime or the accrual

[58] *MWS v NSS* 2021 (6) SA 201 (NWM) (9 March 2020) para 16.
[59] *Ibid.*
[60] South African Law Reform Commission (SALRC) Issue Paper 34 (Project 100E) *Review of Aspects of the Matrimonial Property Act* (2018) 43.

system. This form of behaviour results in the dissipation of marital assets. When a bank account has been opened in the name of a friend or family member, its contents are effectively excluded from the marital assets subject to distribution upon divorce. Therefore, if the spouse hides money in the account that has been set up in the name of a friend or family member, they may be successful in the dissipation of marital assets.

2.3.4 Using a trust to dissipate assets.

A trust is defined as a "legal institution in which a person being the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or a charitable or other purpose".[61] This definition summarises the essence of a trust in that once a trust has been created, the trustee does not become the owner of the property in the trust.[62] The trustee holds the assets for the benefit of the beneficiaries as nominated in the trust and to properly administer the assets.[63] In the case of *RP v DP*[64] the Court held that the property held in a trust vests in the trustees in their official capacity as trustees. As such, the trustees do not have ownership rights over the property in their personal capacity.[65] It follows that the transfer of marital assets to a trust account means that the trustee spouse is no longer the owner of the property, and therefore those assets cannot be considered marital assets subject to division upon divorce.

This is reinforced in s 12 of the Trust Property Control Act[66], which states that: "[t]rust property shall not form part of the trustee's estate except in so far as he as the trust beneficiary is entitled to the trust property".[67] For this reason, spouses have used the trust form as a mechanism to dissipate marital assets. This is clear in the cases of *Badenhorst v Badenhorst*[68] and *KW v KT*[69] in particular. These cases are indicative of a growing trend in South Africa in which spouses use a trust to conceal marital assets in anticipation of divorce to avoid equitable distribution at the dissolution of marriage.

[61] E Cameron, M de Waal & P Solomon *Honoré's South African Law of Trusts* 6 ed (2018) 1.
[62] *Badenhorst v Badenhorst* 1964 (3) SA 679 (T) para 8.
[63] L Stander "Piercing the veneer of the trust in the South African trust law: liability of a trustee of a business trust for fraudulent trading" (2008) 165 *International Insolvent Review* 166.
[64] 2014 (6) SA 243 para 249.
[65] Act 57 of 1988.
[66] Act 57 of 1988.
[67] Section 12 of the Trust Property Control Act 57 of 1988.
[68] 1964 (3) SA 679.
[69] 2015 (3) 574 (SCA).

Consequently, in different cases relating to the use of trust as a means to dissipate marital assets, the Courts have suggested that the veil of the trust should be pierced when there are allegations that the trust has been used as an alter ego,[70] being an instance where the assets are treated as property belonging to the trustee.[71] In the SCA case of *WT v KT*[72] The Court was confronted with whether the discretionary family trust assets formed part of the joint estate of parties married in a community of property. A family discretionary trust account was created were WT (the first appellant) was the trustee. WT instituted divorce action against his wife KT (the respondent).

The respondent argued that the assets in the family discretionary trust account should form part of the joint estate upon the dissolution of marriage. The wife argued that this was because the trust was an alter ego trust. In addition, she alleged that she had contributed to the trust account. However, she was not nominated as a beneficiary.[73] The Court had to consider whether it could pierce the veneer of the trust to allow for redistribution. In analysing the facts before the Court, the Court held that it needed to act cautiously before the veneer of the trust could be pieced. For the veneer of the trust to be pierced, the trustee must have a fiduciary duty towards the other person seeking to pierce the veneer of the trust. As such, the SCA found that there was no legal basis that alleged that WT (as the trustee of the trust account) had a fiduciary duty to KT.[74] In conclusion, the Court held that the veil of this trust could not be pierced, and KT had no legal claim over the trust account.[75]

Shortly after this case was handed down, Smith criticised it, suggesting that the Court placed the innocent spouse in a very unpleasant position. He suggested that the case meant that the innocent spouse now had the burden to prove that a fiduciary duty was owed to him or her by the defaulting spouse.[76] As highlighted by Smith, innocent spouses whose marriage "did not

---

[70] A distinction should be draw between alter ego trust and a sham trust. In the case of *Clyne v Deputy Federal Commission of Tax* (1983) ATC 4503, the court held that for a trust to be considered a sham trust, it must be established by the court that the parties to the trust had the intention and the agreement to cloak or disguise others for transactions whereas an alter ego trust is defined in two situations. The first situation is where "assets are settled on a trust, but the trustee of the trust are mere puppets, doing what they have been instructed to do" and the second scenario is where "trust property is treated as if it were personally owned, instead of belonging to the trust". See RB Stafford *A legal comparative study of the interpretation and application of the sham and the alter-ego trust in the context of South African trust law: The dangers of translocation company law principles into trust law* (Unpublished LLM thesis, Rhodes University 2010) 109.
[71] *Ibid.*
[72] 2015 (3) 574 (SCA).
[73] *WT v KT* 2015 (3) 574 (SCA) para 31.
[74] *WT v KT* 2015 (3) 574 (SCA) para 32.
[75] *Ibid.*
[76] B Smith "Trusts assets and accrual claims at divorce: The SCA opens the door" (2017) *De Rebus* at 22-24.

fall within the ambit of s 7(3) of the Divorce Act and/or who were neither trust beneficiaries nor third parties who had contracted with the trust will not be able to use the piecing of the veneer of the trust remedy in the event where the trust is an alter ego trust."[77] This impediment was later rectified in the SCA judgment in *REM v VM*.[78]

The legal dispute between REM (the respondent) and VM (the appellant) concerned the proprietary consequences of the parties after the final divorce was granted. The parties were married out community of property with the inclusion of the accrual system. At the dissolution of their marriage, the respondent advanced several claims, including asking the Court to declare the assets in two trusts, namely, the Shajo trust and the RMF trust, as part of the appellant's assets to be included in the calculation of his accrual.[79]

In his defense, the appellant argued that the assets in these trusts were not his assets; as such, they should be "excluded from the determination of the accrual of the appellant's estate by virtue of the provisions of clause 6 of the ANC". [80] The question before the Court was whether these assets were excluded as per clause 6 of the ANC. The further issue was whether these assets belonged to the trusts or formed part of the appellant's estate, for the purposes of calculating the accrual.[81] In answering this question, the Court had to consider whether the trusts were alter ego trusts of the appellant.

Swain AJ (writing the concurring judgment) held that before the trusts can be declared to be alter ego trusts:

> "the respondent had to prove that the appellant transferred personal assets to these trusts and dealt with them as if they were assets of these trusts with the fraudulent or dishonest purpose of avoiding his obligation to properly account to the respondent for the accrual of his estate and thereby evade payment of what was due to the respondent, in accordance with her accrual claim."[82]

If such instances were proved, the Court would then declare the trusts as alter ego trusts, resulting in the assets of the trust being included in the calculation of the appellant's estate accrual.[83] However, the Court found that the respondent's evidence was insufficient to show

[77] *Ibid.*
[78] 2017 (3) SA 371 (SCA). See more recently, *PAF v SCF* 2022 (6) SA 162 (SCA).
[79] *REM v VM* 2017 (3) SA 371 (SCA) 374.
[80] *Ibid*.
[81] *REM v VM* 2017 (3) SA 371 (SCA) 377.
[82] *REM v VM* 2017 (3) SA 371 (SCA) 380.
[83] *Ibid.*

that the trusts were indeed alter ego trusts. [84] Although the respondent failed to prove her case; the SCA set a new test regarding the dissipation of marital assets using a trust. It held that, when dealing with the possible dissipation of marital assets using a trust, the determining factor should be whether "the spouse was seeking to advance a patrimonial claim that the other spouse had attempted to prejudice by administering a trust in such a manner as to amount to an unconscionable abuse of the trust form".[85]

This is a shift from the case of *WT v KT*[86] where the Court held that the determining factor should be whether a fiduciary duty was owed to an aggrieved spouse by the respondent and whether the aggrieved spouse was a beneficiary in terms of the trust agreement.

Although this is a positive development, it is still up to the aggrieved spouse to show prejudice. As seen in *REM v VM,*[87] this may be difficult if the dissipating spouse conceals information from the spouse.[88] Subsequently, it may be necessary to reform the law to deter the use of a trust as a mechanism to dissipate marital assets pending a final divorce, or at least make the disclosure of information mandatory.

Having established how a spouse can dissipate assets, the following sections will discuss the types of assets that may be and may not be subject to the dissipation of assets.

2.4 A distinction between assets subject to dissipation of marital assets and those not subject to dissipation of assets.

2.4.1 Assets that are subject to the dissipation of marital assets.

As set out above, the type of matrimonial regime that the spouses choose before they enter a marriage plays a vital role (although not always a deciding role) in determining assets that may be subject to dissipation of marital assets. Assets can take the form of immovable property, such as land and houses, or any assets that are permanently fixed on land. In the case of *Corporate Liquidator Pty (Ltd) v Wiggill*[89] the Court held that immovable property and the real rights in immovable property obtained during the subsistence of marriage are registered in the name of both spouses unless the registration takes place in the name of a partnership and the spouse is only involved in his or her capacity as a partner. The registration of the assets in the

[84] *Ibid.*
[85] *Ibid.*
[86] 2015 (3) 574 (SCA) para 32.
[87] 2017 (3) SA 371 (SCA).
[88] *Ibid.*
[89] 2007 (2) SA 520 (T) para 6.

name of both spouses demonstrates that the assets are co-owned by both spouses and form part of the joint estate. It is noteworthy that some immovable assets may be registered in one spouse's name only. However, as a result of the marital regime, for example, marriage in community of property, such assets become jointly owned by both spouses by operation of law and without the need for the registration of the assets.[90]

On the other hand, assets can take the form of movable property, for example, motor vehicles, furniture, money, clothing, etc. All the movable assets acquired during the substance of marriage belong to both spouses for the duration of the marriage only if the spouses are in marriage in community of property. If the parties divorce each other, the divorce order will determine the parties' rights and obligations to deal with the property. This is so because, as noted in the case of *Gugu v Zongwana,*[91] "upon the dissolution of marriages, the spouses tied co-ownership of determinable and undivided and indivisible shares of the joint estate automatically changes". This means that during the subsistence of the marriage, the spouses married in a community of property are prohibited from dealing with movable property that forms part of the joint estate in a manner that will frustrate the equitable distribution of assets upon divorce. This restriction is also extended to the incorporeal or immaterial property that forms part of the joint estate. [92]

Incorporeal property can either take the form of movable or immovable property. Examples of incorporeal property may include shares, membership interests in a close corporation,[93] and pension interests that have already accrued to one of the spouses.[94] If the pension interest has not yet accrued to the spouse, ss 7(7)(a) and 8 of the Divorce Act,[95] as discussed above, will apply if the marriage is dissolved. It should be noted that spouses married in a community of property are thus restricted from dissipating incorporeal property subject to the joint estate. An anti-dissipatory order can be used as a remedy to prevent the spouses from dissipating incorporeal property, as noted in the case of *MWS v NSS and Another*.[96] The above discussion shows that if a spouse married in a community of property conceals or squanders any of the assets discussed above, this would amount to the dissipation of marital assets.

[90] Section 17(4) of the Deeds Registries Act 47 of 1937.
[91] 2014 (1) All SA 203 (ECM) para 16.
[92] Section 17(4) of the Deeds Registries Act 47 of 1937.
[93] See for example, the facts in *Marais NO v Maposa* 2020 (5) SA 111 (SCA) discussed in chapter 3 infra.
[94] Heaton and Kruger *South African Family Law* 63.
[95] Act 70 of 1979.
[96] 2021 (6) SA 201 (NWM).

2.4.2 Assets that are not subjected to the dissipation of marital assets.

Assets excluded by a valid antenuptial contract or post-notarial contract in which community of property is excluded cannot be dissipated given that the one spouse solely owns them. However, one should be aware of the law's different treatment of the assets and the fruits of the assets. In the case of *Blatchford v Blatchford's Executors*[97] the Court noted that while assets can be excluded from the joint estate by a valid antenuptial contract, the fruits of such assets form part of the joint estate unless they are expressly excluded in terms of a valid antenuptial contract. For example, if a spouse excludes a farm from the joint estate but does not exclude the farm's fruits, then these crops form part of the joint estate. Suppose the defaulting spouse can squander the farm's fruits. In that case, the spouse may be found guilty of dissipation of marital assets because the farm's fruits form part of the joint estate because they were not expressly excluded from the joint estate in terms of the antenuptial contract.

Assets excluded from the joint estate in terms of a valid will or deed of donation cannot be dissipated.[98] A person who bequeaths assets or donates to a spouse married in community of property, on the condition that such assets should not form part of the joint estate, can ensure that a spouse solely owns such assets or donation.[99] Thus, the owner-spouse can then deal with these assets in any manner he or she wishes. However, it is essential to note that a third party can attach these separate assets to settle a debt of the joint estate.[100] Similar to the assets in which the spouse holds a limited real right in the form of usufruct or *fideicommissum*, such assets cannot be dissipated because they do not form part of the joint estate.[101]With regards to an engagement gift, the Court in the case of *Levin v Levin*[102] found that an engagement gift in the form of a ring did not form part of the joint estate and cannot be recovered by the husband upon the dissolution of marriage by divorce. Therefore, this discussion shows that upon divorce, separate assets that are not shared between spouses, are not subject to dissipation.

Some assets may not be subject to dissipation of marital assets because they have been excluded from the joint estate by legislation. For instance, s 17 of the Friendly Societies Act[103] states that "benefits due to a married woman in terms of the Act do not fall into the joint estate".

[97] (1861) 1 EDC 365.
[98] M De Jong and W Pintens "Default matrimonial property regimes and the principles of European Family Law: A European–South African comparison (part 2)" 2015 *TSAR* 3.
[99] *Ibid.*
[100] *Du Plessis v Pienaar* 2002 (4) SA 311 (SCA) para 4.
[101] *Van der Merwe v Van Wyk* 1921 EDL 298.
[102] 1960 (4) SA 469 (W).
[103] Act 25 of 1956.

Heaton and Kruger submit that this section constitutes unfair discrimination based on sex and marital status. Should it be challenged under the Constitution, it is likely to be declared invalid as a similar provision in the Insurance Act was found to be invalid in the case of *Brink v Kitshoff*.[104]

However, it should be noted that in the *Brink v Kitshoff* case, the Insurance Act discriminated against wives and not against husbands.[105] As such, arguably, one cannot rely on this Constitutional Court decision because the differentiation in the Friendly Societies Act may be seen to advance people who were previously disadvantaged, as envisaged by s 9(2) of the Constitution.[106] Although the Act came before the enactment of the Constitution, it is arguable that the Act would be found to constitute a justifiable limitation of the right of equality. This is based on the nature of the limitation and the fact that the limitation constitutes substantive equality rather than formal equality.[107]

Section 18 (a) of the MPA states that "any amount a spouse recovers by way of non-patrimonial damages for a delict committed against him or her is his or her separate property".[108] Thus, these assets cannot be dissipated because the assets do not form part of the joint estate. Moreover, s 8(b) of the MPA provides that "patrimonial and non-patrimonial damages awarded to a spouse as a result of bodily injuries caused either wholly or partly by his or her spouse become the injured spouse's separate assets".[109] Such assets cannot be dissipated as they are automatically excluded by the provisions discussed above.

In marriages out of community of property with the accrual system, it should be noted that the right to share in the accrual only comes into existence upon the dissolution of marriage by either death or divorce.[110] During the subsistence of the marriage, the parties are married out of community of property, and as such, the spouses have "full and unfettered control of his

[104] Heaton and Kruger *South African Family Law* 63.
[105] See s 44(1) and (2) of the Insurance Act 22 of 1943 and Heaton and Kruger *South African Family Law* 63.
[106] The Constitution of the Republic of South Africa,1996.
[107] I Currie and J de Waal *The Bill of Rights Handbook* 6 ed (2013) 209.
[108] Heaton and Kruger *South African Family Law* 64.
[109] *Ibid.*
[110] Section 3(1) of the MPA provides that (1) At the dissolution of a marriage subject to the accrual system, by divorce, or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

separate estate and the interest of the other spouse therein is similar to that of the heir in the estate of the testator."[111]

However, the spouses married out of community of property with accrual have an interest in how the estate is administered during the subsistence of the marriage.[112] This is because, upon the dissolution of the marriage, the interest will vest upon death or – if by divorce – on the date of the divorce order. In such instance, it thus becomes a right to a share in the other spouse's estate. As such, both spouses "have interest that their independent separate assets are not handled in such a manner as to prejudice the potential claim that the one has on the other's estate".[113] In *Reeder v Softline*[114] the Court made it explicit that the accrual system does not grant the spouses a right to respect each other's property. As noted by Heaton and Kruger, the "accrual and the accrual claim relate to monetary amount; they do not relate to assets nor do they entitle the spouse whose estate shows the smaller or no accrual to a claim a transfer of assets of the other spouse".[115] In this regard, the assets cannot be dissipated. However, a spouse will involve the Court to protect the interests of the parties in the form of the monetary amount that will be vested in the parties upon the determinative date of divorce.

The discussion above has focused on distinguishing between assets that can be dissipated and those that cannot be dissipated. The following section will focus on the legal consequences of the dissipation of marital assets.

2.5 The legal consequences of the dissipation of marital assets.

The legal consequence of the dissipation of marital assets differs depending on whether the innocent spouse is married in terms of marriage in community of property or whether the innocent spouse is married in terms of marriage out community of property with accrual. Under marriage in community of property, upon divorce, the assets will be distributed equally amongst the spouses unless one of the spouses claims for forfeiture of patrimonial benefits in terms of s 9(1) of the Divorce Act.[116] Section 9(1) of the Divorce Act grants the Court with:

[111] Van Aswegen 1987 *De Rebus* 62.
[112] C Marumoagae "The beginning of the end – The dissolution of marriage under accrual" (2015*)* 554 *De Rebus* 37.
[113] *Ibid.*
[114] 2001 (2) SA 844 (W) at 852.
[115] Heaton and Kruger *South African Family Law* 93.
[116] The forfeiture order is granted with a divorce order and the forfeiture of benefits order entails that the other spouse in the marriage forfeits the marital assets that they would have acquired as a result of their matrimonial property regime. See s 9 of the MPA.

> "the power to grant a divorce order on the grounds of irretrievable breakdown of the marriage to order total or partial forfeiture of benefits taking into account the following factors: the duration of the marriage, the circumstances which led to the breakdown of the marriage and any substantial misconduct on the part of either spouse."[117]

When a spouse attempts to dissipate marital assets before the Court has divided the marital assets equally between the spouses, the purpose of the joint estate regime is frustrated, and the equitable division between the spouses will not be possible. The innocent spouse runs the risk of not getting what she or he was legally entitled to, had the defaulting spouse not dissipated the marital assets.

When the spouses are married out of community of property with accrual, at the dissolution of marriage, the spouses share in the difference in the growth that the estate as shown during the subsistence of the marriage.[118] However, when the dissipation of marital assets occurs before the determinative date, the equal sharing in the accrual or the growth that the estate as shown during the subsistence of the marriage would not be possible. Thus therefore, the innocent spouse would be prejudiced in the sense that he or she will deprive of his or her rights flowing from the accrual claim.

2.6 Conclusion

In summary, it is evident from the discussion that spouses married in community of property and spouses who are married out of community of property with the accrual system are at the risk that their spouse might dissipate marital assets in anticipation of divorce or pending the final divorce order. While it would be very unusual, it is possible that dissipation of marital assets could take place where a spouse in a marriage entered into prior to 1984 has asked for a redistribution of assets in their marriage in terms of s 7(3) of the Divorce Act. However, no case law exists on this point. Also, if confirmed by the CC, *G v Minister of Home Affairs*[119] makes it possible that the dissipation issue may even come into play where marriages are out of community after 1984, but the Court has been asked to redistribute assets in the summons (leading to spouses trying to hide or conceal assets during the lead up to the divorce).[120] In all, the dissipation results in an inequitable distribution of assets upon divorce, as shown above. As highlighted by Acker: "Dissipation of marital assets has become a more prevalent issue in the

[117] *Ibid.*
[118] Marumoagae 2015 *De Rebus* 37.
[119] (40023/21) [2022] ZAWCHC 80 (11 May 2022).
[120] These two instances are mentioned to be comprehensive, but exploring these instances is beyond the scope of this dissertation.

distribution of assets over time".[121] For these reasons, South African law has provided legal remedies that the innocent spouses may use to prevent the dissipation of marital assets from occurring or from recovering assets that the defaulting spouse has dissipated.

These legal remedies depend on whether the spouse is married in terms of community of property or out of community of property with the accrual system. On the face of it, it seems that spouses who are faced with the dissipation of marital assets are protected by law. However, the question that needs to be answered is whether the current law adequately protects one spouse from another spouse unfairly hiding or dissipating assets from their estate to prevent the distribution of these assets to the other spouse on divorce. In the chapters that follow, the effectiveness of the each of the remedies will be discussed in detail.[122]

[121] S Acker "All's fair in love and divorce: Why divorce attorney's fees should constitute a dissipation of marital assets to retain equity in marital property distributions" (2006) 15 *Journal of Gender, Social Policy and the Law* 147 at 153.

[122] While a prejudiced spouse may technically apply for the defaulting spouse to be declared a prodigal as a potential remedy, it is doubtful whether this application will withstand constitutional scrutiny, as set out by various scholars. As a result, I do not discuss it as a remedy in this dissertation. For further readings, see J Heaton "The Proprietary Consequences of Divorce" in J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 57 at 113−114.

CHAPTER 3

SECTION 15 OF THE MATRIMONIAL PROPERTY ACT: A SUFFICIENT REMEDY FOR SPOUSES MARRIED IN COMMUNITY OF PROPERTY?

3.1 Introduction

As set out in chapter 1, all civil and customary marriages concluded between the parties in South Africa are marriages in community of property unless the parties elect to enter into an antenuptial contract (ANC) which excludes community of property and community of loss,[123] or it can be established that the "husband's *lex domicili* at the time of marriage provides that the marriage is out of community of property".[124]

To vary this situation, parties may either conclude an ANC which excludes community of property and community of loss, or a postnuptial notarial contract which excludes community of property and community of loss.

This default position was different when it comes to customary marriages entered into in accordance with s 22(6) of the Black Administration Act.[125] This section held that all marriages entered between the black couple were out of community of property.[126] However, in the recent Constitutional Court (CC) case of *Sithole v Sithole,*[127] the CC confirmed the invalidation of s 21(1)(2)(a) of the MPA which preserved the default position as governed by s 22(6) of the Black Administration Act. Currently, the default position for customary marriages is marriage in community of property. One of the patrimonial consequences of marriage in community of property is that spouses have a joint estate which includes all assets that the spouses accumulated during the subsistence of the marriage.

In this regard, this chapter seeks to critically analyse the effectiveness of s 15 of the Matrimonial Property Act (the s 15 remedy) which is a remedy aimed at protecting spouses who are married in community of property. The chapter commences by stating the origins of the patrimonial consequences of marriages in community of property. I will then discuss the

[123] An antenuptial contract can be defined as a contract that has been entered into by two parties before the conclusion of their marriage where they stipulate the terms and the conditions for the exclusion of community of property between them. See *Mathabathe v Mathabathe* 1987 (3) SA 45 (W) at 51.
[124] *Frankel's Estate v The Master* 1950 (1) SA 220 (A) 244. It is important to note that Muslim marriages are treated, by default, as out of community of property, as set out in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) para 87 (see the order of court, specifically 1.7). However, the court has a discretion to redistribute assets.
[125] Act 38 of 1927.
[126] *Ibid.*
[127] 2021 (5) SA 34 (CC) para 59.

purpose of the s15 remedy. Flowing from the discussion on the purpose of s 15 remedy, the main issues surrounding it based on various legal scholars and case law will be discussed. This chapter concludes with a summary that will look at the application of s 15 remedy pending a divorce order.

Under Roman-Dutch common law, a marriage in community of property was coupled with marital power.[128] Marital power can be defined as a "defunct system giving a male spouse absolute decision-making power in relation to marriages in community of property".[129] This implies that the rights of the husband in the marriage prevailed over his wife's rights.[130] Such rights included the right to "administer her goods, dispose of them at his own will, and to prevent his wife from dealing with her goods except with his knowledge and consent".[131] Hahlo sets out that, under marital power, a woman was treated as a minor under the guardianship of her husband.[132] To bring an end to this hardship suffered by wives and promote gender equality in marriages in community of property, marital power had to be abolished. As a result, when the MPA came into effect, it abolished the common law rule of marital power in s 11 of the MPA[133] as amended by s 29 of the General Law Fourth Amendment Act.[134]

According to s 12 of the MPA, the effect of the abolition of marital power is to put an end to the restrictions that were imposed on the capacity of a wife to contract and to litigate by the system of marital power.[135] Furthermore, s 14 of the MPA enshrines the abolition of marital power by giving equal power to spouses married in community of property regarding the administration of the joint estate.[136] In order to entrench the equality of spouses in the administration of the joint estate, s 15 of the MPA requires that spouses married in community

[128] Heaton and Kruger *South African Family Law* 61.
[129] A Starosta "A loophole in the joint administration of the estate of spouses married in community of property in the context of the purchase of land" (2018) 30 *Stell LR* 155 at 155.
[130] SD Mavundla, A Strode and DC Dlamini "Marital power finally obliterated: The history of the abolition of the marital power in civil marriages in Eswatini" (2020) 23 *PELJ* 1 at 3.
[131] Mavundla, Strode and Dlamini 2020 *PELJ* 3.
[132] HR Hahlo *The South African Law of Husband and Wife* 5 ed (1985) 161.
[133] See s 11 of the MPA which states that:
1. The common law rule in terms of which a husband obtains the marital power over the person and property of his wife is hereby repealed.
2. Any marital power which a husband has over the person and property of his wife immediately before the date of coming into operation of this subsection is hereby abolished.
3. The provisions of Chapter III shall apply to every marriage in community of property irrespective of the date on which such marriage was entered into.
4. The abolition of the marital power by subsection (2) shall not affect the legal consequences of any act done or omission or fact existing before such abolition.

[134] Act 132 of 1993.
[135] Act 88 of 1984.
[136] *Ibid.*

of property should not perform juristic acts which will have a fundamental impact on assets that forms part of the joint estate without the consent of the other spouse.[137]

Given the abolition of marital power, the MPA had to provide a way for the spouses to manage the estate jointly. As mentioned in chapter one above, s 15 (1) of the MPA allows a spouse to perform juristic acts without the consent of the non-contracting spouse. Section 15(2) and (3) of the MPA qualify s 15(1) by requiring the consent of a spouse to perform certain juristic acts affecting the joint estate.[138] The formalities of complying with both mentioned sections vary.[139] Accordingly, s 15(2) lists specific transactions upon which the consent of the non-contracting spouse needs to be in writing, while s 15(3) lists specific transactions that only require oral consent by the non-contracting spouse.

Section 15(3) creates some challenges in proving whether the consent of the non-contracting spouse was obtained or not. Although s 15(3) of the MPA allows for verbal consent, it is submitted that it may be difficult for the non-contracting spouse to prove their lack of consent in a Court where verbal consent suffices. Sufficient evidence must be put before the Court to show that the non-contracting spouses did not give consent. It can be said that this is one of the loopholes by the legislature on the part of the non-contracting spouse because the contracting spouse may deceive the third party and say that consent was given as required by s 15(3) of the MPA. Although s 15(3) of the MPA is required for fairly minor transactions, these minor transactions affect the joint estate even if to a limited extent.

The third-party may rely on the declaration by the contracting spouse and enter into a transaction in terms of s 15(3) of the MPA. When the non-contracting spouse attempts to interdict the transaction, they will need to go to Court. In such instances, only concrete evidence can assist the Court to come to the correct decision. In cases where the non-contracting spouses fail to adduce sufficient evidence, the contracting spouse will be successful in his dissipation of the marital assets. Moreover, the non-contracting spouse would have incurred unnecessary costs. The non-contracting spouse can seek adjustment at the dissolution of the marriage as

[137] Starosta 2018 *Stell LR* 155.
[138] See s 15(7) of the MPA "which also requires the consent of a non-contracting spouse when the contracting spouse wants to sell listed securities on the stock exchange and cede or pledge listed securities in order to buy listed securities; (b) alienate, cede or pledge - (i) a deposit held in his name at a building society or banking institution; (ii) building society shares registered in his name". Although this section relates to required consent for spouses married in community of property, it is, however, not considered in this thesis.
[139] Driskell 2006 *JAAML* 137.

stipulated by the section. However, the adjustment remedy is often said to be a weak and ineffective remedy. More discussion on this adjustment remedy will follow below.

3.2 Purpose of s 15 of the Matrimonial Property Act

Based on a reading of the case law, it is evident that, although there is this statutory restriction, spouses still elect to perform juristic acts which affect the joint estate without the required consent as per s 15(2) and (3) of the MPA. Hence, the question that one needs to ask is: what are the legal consequences of a contracting spouse who enters into any juristic acts that have a fundamental impact on the joint estate without the required consent? Section 15(9) of the MPA provides us with an answer to this question. Section 15(9) of the MPA deals with the legal consequences of a transaction entered into contrary to sub-secs 15(2) and (3) of the MPA. First, s 15(9)(a) of the MPA creates a mechanism for deemed consent. According to this section:

> "When a spouse enters into a transaction with a person contrary to the provisions of subsections (2) or (3) of this section or an order under the section 16(2) the person does not know and cannot reasonably know that the transaction is being entered into contrary to this provision or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3) or while the power concerned of the spouse has not been suspended, as the case may be."[140]

Secondly, in terms of s 15(9)(b) of the MPA, where a transaction concluded contrary to s 15(2) and (3) of the MPA has been found to be valid, in such cases, the non-contracting spouse may claim an adjustment in his or her favour upon the dissolution of the joint estate. In this respect, s 15(9) of the MPA is divided into two parts. The first part sets out the circumstances where consent will be deemed in order to protect the *bona fide* third party. A *bona fide* third party is someone who enters into a transaction with a contracting spouse not knowing (or could not have reasonably known) that the non-contracting spouse is married in community of property. The second part of the above-mentioned section sets out an adjustment remedy to protect the non-consenting spouse in the event that the section is successfully invoked.[141]

In cases where the Court finds in favour of the *bona fide* third party, the sale will not be nullified.[142] In the context of this dissertation, this means that the non-contracting spouse would have succeeded in dissipating the marital assets. With regards to the adjustment remedy, two

[140] *Ibid.*
[141] *Vuyeka v Ntshane* [2020] ZASCA 167 (11 December 2020) para 27.
[142] *Vuyeka v Ntshane* [2020] ZASCA 167 (11 December 2020) para 9.

requirements must be satisfied by the non-contracting spouse. First, the non-contracting spouse must prove to the Court that:

> "the contracting spouse at the time of the transaction knew or ought reasonably to have known that he did not have and would probably not have obtained the necessary consent, or that the power concerned has been suspended." [143]

Secondly, the non-contracting spouse must prove to the Court that the joint estate has suffered a loss as a result of that transaction by the contracting spouse.[144] If no loss was suffered by the joint estate, the transaction by the contracting spouse which required consent in terms of either s 15(2) or (3) of the MPA will be held to be valid and enforced.[145] This results in prejudicing the patrimonial interest of the non-contracting spouse in the joint estate.

In *Visser v Hull,*[146] Dlodlo J held that the purpose of s 15(9) of MPA is to:

> "protect the one spouse against the illicit selling or alienation of property forming part of the joint estate by the spouse who does that without the knowledge and/or consent of the innocent".

In the earlier case of *Sishuba v Skweyiya,* Plasket J held that this section seeks to balance the competing interests between the non-contracting spouse and the third party.[147] In general, s 15 seeks to regulate the matrimonial consequences of marriage in community of property after the abolition of marital power.[148] That is, the section was drafted with the intention to limit the contractual capacity of spouses to enter into a transaction that has a fundamental impact on the joint estate without required consent.[149] In a nutshell, s 15 of MPA serves as a legal remedy available to spouses who are affected by the selling or alienation of the property which forms part of the joint estate. At the same time, it also seeks to protect the *bona fide* third party. As a legal remedy, the question in this research is whether this remedy adequately protects the non-contracting spouse.

3.3 The main issue with s 15 remedy

The main issue with the s 15 remedy, as alluded to above, is the balance of protection that the legislation seeks to provide between the non-contracting spouse and the *bona fide* third

[143] Section 15(9)(b) of the MPA.
[144] *Ibid.*
[145] *Ibid.*
[146] 2010 (1) SA 521 (WCC) para 5.
[147] *Sishuba v Skweyiya* 2008 JDR 0593 (E) para 17.
[148] *Sishuba v Skweyiya 2008* JDR 0593 (E) paras 17 and 18.
[149] Section 15(2) and (3) of the MPA.

party.[150] It is important to note that if a third party contracting with a spouse satisfies the requirements of s 15(9)(a) of the MPA, then the non-contracting spouse will effectively lose the asset since the transaction will be deemed to be valid.[151] In this regard, the non-contracting spouse is said to have acquired the full contractual capacity to act regardless of the lack of required consent in s 15(2) and (3) of the MPA.[152] Further, a spouse who elects to dissipate the assets by selling them to a *bona fide* third party to create an unequal division of property will be successful in his or her dissipation, leaving the non-contracting spouse in an unpleasant position when it comes to obtaining her share of the estate.

In addition to the adjustment remedy at the dissolution of the marriage, there is also the common law action: the *Actio Paulina Utilis*. The *Actio Paulina Utilis* is a common law remedy available to a defrauded spouse. For the defrauded spouse to invoke this remedy, she or he will need to prove "that a deliberate fraud was perpetrated against him or her by the offending spouse".[153] This requirement makes it difficult for innocent spouses to use this remedy. This is so because proving fraud in the context of the dissipation of marital assets may be difficult. As noted by Singh, the failure of the contracting spouse to require consent does not ultimate mean that the contracting spouse had the intention to defraud the non-contracting spouse.[154] Another aspect of this action is problematic. In *Nel v Cockcroft*, the Court held that the remedy can only be invoked after the dissolution of marriage.[155] This decision has been heavily criticised on the basis that it is irrational to delay the action to recover the assets of the joint estate. The basis for criticism is that, by the time the right becomes ripe, that is after the dissolution of the marriage, the enforceability of such a right would be useless, hence there would be no assets to recover.[156]

In this regard, it is the argument of this dissertation that both of these remedies are weak remedies, and the reality is that the non-contracting spouse is without an immediate remedy if the *bona fide* third party falls under the protection of the section. The adjustment remedy is ineffective and often called a weak remedy because it only works where there are sufficient

[150] B van Heerden, A Cockrell and R Keightley (eds) *Boberg's Law of Persons and the Family* 2 ed (1999) 191.
[151] Even though the adjustment remedy is available, it appears only to be available at the dissolution of marriage. For more on this, see s 15(9)(b) of the MPA.
[152] A Barratt "Clarifying protection of spouses married in community of property? Discussion of *Visser v Hull* 2010 1 SA 522 (WCC) and *Bopape v Moloto* 2000 1 SA 383 (T)" (2011) *Stell LR* 272 at 275.
[153] D Singh "Do until it dies: A critical examination of s 15 of the Matrimonial Property Act 88 of 1984" (1991) 279 *De Rebus* 199 at 209.
[154] Singh 1991 De Rebus 201.
[155] 1972 (3) SA 592 (T) at 594.
[156] Heaton and Kruger *South African Family Law* 89.

assets in the joint estate to adjust at the dissolution of marriage.[157] It can also be described as weak in that it is "not easy to establish" the loss.[158] In cases where there are insufficient assets in the joint estate to distribute at the dissolution of marriage, the remedy will not protect the non-contracting spouse. Consequently, the contracting spouse would be successful in his or her attempt to dissipate assets and create an unequal distribution at the dissolution of marriage, whereas the affected spouse will be in a financially worse off position.

One should be cognisant of the fact that this adjustment remedy does not adequately protect the non-contracting spouse from an inequitable distribution at the dissolution of marriage. This is so because the adjustment remedy is not an equitable remedy: the estate will be inevitably reduced, and the non-contracting spouse will get an adjustment from a reduced estate. Although the non-contracting spouse will get a larger percentage of that reduced estate, it is submitted that – at the dissolution of marriage – the value of the estate could have been so reduced to the extent that even the larger portion of the estate awarded to the non-contracting spouse does not provide a suitable remedy.

This will be the case where for instance, more than half of the estate has been dissipated before the dissolution of the marriage. The result would be that the non-contracting spouse will only get a larger portion of the residue of the estate. This larger portion may, in many instances, be less than what the non-contracting spouse would have been entitled to at the dissolution of the marriage if it was not for the dissipation of the marital assets This argument is in line with Zaal's criticism that the adjustment remedy might not work because "where such contraventions lead to loss, there may well not be enough left in the joint estate at dissolution to make sufficient adjustment in favour of the unconsulted spouse".[159]

In terms of proving the validity of the contract between the third party and the contracting spouse, it is the third party who bears the onus of proof that he or she was indeed *bona fide*. However, it is up to the non-contracting spouse to challenge the transaction in Court.[160] Given that the non-contracting spouse has to start the Court action, and the inadequate adjustment remedy, some have questioned whether the legislature has achieved the right balance of protection between the third party and the non-consenting spouse in these circumstances – especially as it relates to the evidentiary burden and the burden of proof placed on the *bona*

[157] Barratt 2011 *Stell LR 275*.
[158] Van Heerden et al *Boberg's Law of Persons and the Family* 193.
[159] N Zaal "Marital milestone or gravestone? The Matrimonial Property Act 88 of 1984 as a reformative half-way mark for the eighties" 1986 *TSAR 5*7 at 60.
[160] *Marais NO v Maposa* 2020 (5) SA ZASCA 111 para 28.

fide third party.[161] This brings us to the next issue with this remedy, which is the evidentiary burden and burden of proof placed on the *bona fide* third party.

3.4 Evidentiary burden and burden of proof

According to Zeffertt and Paizes, "the incidence of the onus tells us who must satisfy the Court but that is not all that we need to know".[162] In addition to this statement, the authors tell us that "the degree or standard of satisfaction the quantum of proof – that is required by the Court in order to be satisfied must, necessarily, be provided by the party who bears the onus".[163] As the Court held in *Pillay v Khrisha*[164] it is the general principle in our law of evidence that the party who alleges the case, has the duty to prove it. In terms of s 15(9)(a) of the MPA,[165] the innocent third party bears the onus to prove the validity of the contract as it was held in the case of *Distillers Corporation Ltd v Modise*.[166]

The third party must prove that he did not know consent was lacking or that he could not have reasonably known that the required consent was lacking.[167] Certain academic writers argue that the section creates an onerous burden on the third party in that "the innocent third party is put to inquiry, but it is uncertain how far the law compels him/her to go in his/her search for a true position".[168] According to McLennan, "this section should be scrapped because the legislature has placed too onerous a burden on the third party".[169] Contrary to this position, it is submitted that the burden is necessary to protect the non-contracting spouse. It makes sense that, since the third party stands to benefit from the transaction, the burden should fall on the third party. The third party should therefore go the extra mile in satisfying the requirements of s 15(9) of the MPA to make sure that the transaction is held to be valid.

Moreover, based on the purpose of s 15 of the MPA as discussed above, there is no need to create equality between protecting a *bona fide* third party and the non-contracting spouse. Striking equal protection between a *bona fide* party and an innocent party might not promote

---

[161] See JS McLennan "The Perils of Contracting with Persons Married in Community of Property" (2000) 117 *SALJ* 367 at 371 and L Steyn "When third party cannot reasonably know that spouse's consent to contract is lacking" 119 (2002) *SALJ* 253 at 260.
[162] DT Zeffertt and AP Paizes *Essential Evidence* 2 ed (2019) 13.
[163] *Ibid.*
[164] 1946 AD 946 at 951.
[165] Act 88 of 1984.
[166] 2001 (4) SA 1071 (O) para 4.
[167] Section 15(9)(a) of the MPA.
[168] L Steyn "When a third party could not have reasonably known that a spouse's consent to the contract is lacking" (2002) 119 *SALJ* 253 at 260.
[169] JS McLennan "The Perils of Contracting with Persons Married in Community of Property" (2000) 117 *SALJ* 367 at 371.

the purpose of s 15 of the MPA which is to regulate the effective administration of the joint estate. As held by Dlodlo J in the case of *Visser v Hull,*[170] an "adequate inquiry by the third party is required". In addition, as stated in the 2018 South African Law Reform Commission Issue Paper reviewing the aspects of MPA, women are more likely to suffer from the dissipation of marital assets because men are often in better financial positions.[171] In such a case, if a balance is to be struck between protecting *bona fide* third parties and innocent spouses, it is likely that men, in general, will benefit from this provision – both as the seller and even as the protected buyer.

As a result of the above discussion, it transpires that s 15 of the MPA may not adequately protect the non-contracting spouses in marriage in community of property. The inadequate protection is caused by the fact that the remedy is not aimed at protecting non-contracting spouses only, but it is also aimed at protecting the *bona fide* third party. In this regard, one may wonder as to who must get the primary protection when it comes to the s 15 remedy.

Therefore, the next part of this chapter is aimed at demonstrating how s 15(9) of the MPA has been applied by the Courts in selected cases. This discussion is significant as it will lead us to answer the question of whether this remedy achieves its desired purpose – which is to adequately protect innocent spouses who are affected by the dissipation of marital assets.

3.5 The application of the s 15 remedy

3.5.1 *Sishuba v Skweyiya*[172]

In 2007, the High Court in *Sishuba v Skweyiya*[173] was confronted with the application of s 15(9) of the MPA. In this case, Mr Sishuba (the applicant) was married to Ms Skweyiya (the first respondent) in community of property. Upon their divorce, which took place in 2001, they entered into a binding settlement in which they agreed that Mr Sishuba would retain sole ownership of their joint property.[174] However, despite the settlement being reached, the title deed was never amended.

After his divorce from Ms Skweyiya, Mr Sishuba married Ms Sishuba (the second respondent) in community of property. In anticipation of the divorce to the second wife, Mr Sishuba

[170] 2010 (1) SA 521 (WCC) para 8.
[171] SALRC Project 100E*: Review of Aspects of Matrimonial Property Act* (2021) 37.
[172] 2008 JDR 0593 (E).
[173] *Ibid*.
[174] *Sishuba v Skweyiya* 2008 JDR 0593 (E) para 11.

attempted to sell the property subject to the settlement without any knowledge or consent of Ms Sishuba. Before the property could be transferred, Ms Sishuba was made aware of the attempt to sell the property. An interdict was instituted by Ms Sishuba to prohibit Mr Sishuba from selling the property. The basis of the interdict was that Mr Sishuba and Ms Sishuba were co-owners of the property and consent of the non-contracting spouse was required as per s 15(2)(a) of the MPA.

There were two questions before the Court, however, in this analysis, I focus on the second legal question. This was whether the Court could deem Ms Sishuba's consent to have been given in terms of s 15(9)(a) of the MPA.[175]

In applying the law, the Court noted that the application of s 15(9) of the MPA should promote the abolishment of marital power. Moreover, s 15(9) should be applied in the manner in which:

> "a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts that lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act and in which proper effect must be given to the fundamental right of everyone to equality before the law and the equal protection and benefit of the law".[176]

In this regard, the Court in the case of *Sishuba v Skweyiya* gave a useful summary of the rationale of the provisions of s 15(9) of the MPA which have been followed by subsequent cases.[177] In conclusion, the Court held that – based on the facts and evidence before the Court – the second respondent's consent could not be deemed to have been given. This was so because of the failure of Ms Skweyiya (the third party) to satisfy the requirements of deemed consent. The Court held that Ms Skweyiya's affidavit failed to prove that she could not reasonably have known that Ms Sishuba's consent was required to conclude the transaction.[178] Plasket J went further to state that Ms Skweyiya knew that Mr Sishuba was married and, for someone who was married in community of property with Mr Sishuba, a reasonable person in her position would have believed that Mr and Ms Sishuba were married in community of property.[179] Hence, the required consent was not deemed to have been given.

---

[175] *Sishuba v Skweyiya* 2008 JDR 0593 (E) para 13.
[176] *Sishuba v Skweyiya* 2008 JDR 0593 (E) para 24.
[177] *Ibid.*
[178] *Sishuba v Skweyiya* 2008 JDR 0593 (E) para 24-25.
[179] *Ibid.*

3.5.2 *Marais NO and another v Maposa and others*[180]

In 2020, in the case of *Marais NO and another v Maposa and others*[181], the SCA heard an application based on s 15(9) of the MPA. In this case, Mr and Mrs Broodie were married in community of property. Mr Broodie was said to be the father of two children of another woman – Ms Ledwaba. These two children were the first and second respondents in the matter. In 2014, Mr Broodie donated and transferred 75 per cent of the member's interest in their company Seepunt Eiendomme CC (Seepunt) which was the biggest asset in their joint estate to Ms Ledwaba and the two children. This transfer was effected without the consent of Ms Broodie as she only became aware of the transfer in 2016 when Mr Broodie died.

Ms Broodie brought an application to the Court seeking interim relief and setting aside the transfer of 75 per cent of the members' interest in Seepunt. The Court *a quo* held that Ms Broodie's consent was deemed to have been given in terms of s 15(9)(a) of the MPA. Ms Broodie applied for and was granted leave to appeal. In 2016, Ms Broodie died. Mr Marais and Mr Shongwe (the first and the second appellants) were duly appointed executors of Ms Broodie's estate The application was granted by the Court. The central issue before the SCA was whether the donation made by Mr Broodie was in line with s 15(3) of the MPA.[182]

The Court had to look at whether the donation would unreasonably prejudice the interests of Ms Broodie. In answering this question, the Court looked at the cost of the donation and the financial implications of the donation to the joint estate.[183] The Court found that the donation – which was worth 75 per cent of the members' interest in Seepunt – would indeed prejudice Ms Broodie as she would be left with a residue of two or three million from the joint estate which was worth of twenty million. Based on this prejudice, the Court held that Ms Broodie's consent was required.

The next issue was whether consent was deemed to have been given in terms of s 15(9)(a) of the MPA. For consent to have been deemed to be given, the onus is on the third party to prove to the Court that he or she did not know and could not reasonably have known that the contract being entered into was contrary to either s 15(2) or (3) of the MPA.[184] In her defence, Ms

[180] 2020 SA 111 (25 March 2020).
[181] *Ibid.*
[182] *Marais NO v Maposa* 2020 SA 111 ZASCA (25 March 2020) para 4, *Mulaudzi v Mudau* [2020] ZASCA 148 (18 November 2020) para 11 and *Vuyeka v Ntshane* [2020] ZASCA 167 (11 December 2020) para 27.
[183] It transpired that the donation amounted to R20 million leaving a residue of two or three million rand to Ms Broodie's estate (See *Marais NO* v *Maposa* 2020 SA 111 ZASCA (25 March 2020) para 41).
[184] Section 15(9) of the MPA.

Ledwaba argued that she knew Mr Broodie was married, however, she did not make an adequate inquiry as to the nature of their matrimonial regime. Further, when the donation was made, she did not inquire with Mr Broodie as to whether he discussed the donation with his wife.[185] With that being said, the Court considered the fact that Ms Ledwaba knew that Mr Broodie was married and that she failed to make an adequate inquiry when the donation was made as required by s 15 (9) (a) of the MPA.[186] The Court concluded that Ms Broodie's consent could not have been deemed to be given in these circumstances.[187]

Consequently, the agreement was declared void. In the context of this dissertation, this means that the contracting spouse failed to dissipate the marital assets, although the context of this case was upon succession and not pending a divorce.

3.5.3 *Mulaudzi v Mudau*[188]

In *Mulaudzi v Mudau,*[189] the SCA was also concerned with the application of s 15 of the MPA and the validity of the sale of immovable property. In this case, the second respondent (Mr Mudau) was married in community of property to the first respondent (Ms Mudau). Ms Mudau sued for divorce with the service of summons on Mr Mudau on 7 August 2012. The second respondent defended the action for divorce. On 13 February 2014, the Limpopo Division of the High Court granted a final order of divorce.

Before the divorce was finalised, Mr Mudau attempted to sell one of the properties that belonged to the joint estate without the required consent of Mrs Mudau as per s 15(2) of the MPA. When Mrs Mudau became aware of the sale transaction, she brought an application to Court to have the sale agreement set aside, alternatively, she sought an order from the Court to declare the sale agreement null and void. Ms Mulaudzi opposed the application based on s 15(9)(a) of the MPA. She alleged that she did not know and could not have reasonably known that the sale agreement was contrary to s 15(2) of the MPA because Mr Mudau represented himself as unmarried. Further, the deed of sale showed the second respondent to be the sole owner of the property, and the second respondent signed an affidavit where he declared that he was unmarried.

---

[185] *Marais NO v Maposa* 2020 SA 111 ZASCA (25 March 2020) para 43.
[186] *Ibid.*
[187] *Marais NO v Maposa* 2020 SA 111 ZASCA (25 March 2020) para 44.
[188] [2020] ZASCA 148 (18 November 2020).
[189] *Ibid.*

Based on the facts, the Court *a quo* held that consent was deemed to have been given because Ms Mulaudzi could show that she did not know, nor reasonably could have known that the husband required consent.[190] The full Court held that the agreement was null and void because the second respondent committed a fraudulent misrepresentation because he lied about his marital status. [191]The full Court further held that s 15(9)(a) of the MPA was not applicable in the given scenario because of the fraudulent misrepresentation. The matter was taken to the SCA, and the central issue in the SCA was whether s 15(9)(a) of the MPA was applicable in the given case.

Contrary to the full Court finding, the SCA held that s 15(9) (a) of the MPA was applicable in the given scenario.[192] This was based on the fact that the transactions fell within the ambit of s 15(2)(a) of the MPA which requires the formal consent of the non-contracting spouse to "alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate".[193] Based on the facts, it was evident that Mr Mudau concluded the transactions without the required consent. As a result, the Court had to decide whether s 15(9)(a) applied to the benefit of the third party.

Ledwaba AJA, writing for the majority, held that Ms Mulaudzi was able to prove to the Court that she did not know and could not have reasonably known that the consent of the wife was required before she concluded the sale agreement with the second respondent. The Court based its finding on the fact that Mr Mudau presented himself as unmarried. The deed of sale described Mr Mudau as a single person. Mr Mudau also included an affidavit that described him as unmarried. Ms Mulaudzi relied on the deed of sale and the affidavit in proving that she did not know and could not have reasonably known that Mr Mudau was married as required by s 15(9)(a) of the MPA. [194] The Court further held that the appellant's reliance on the deed of the sale and the confirming affidavit was reasonable. As such, s 15(9)(a) was applicable.

3.5.4 *Vuyeka v Ntshane and others*[195]

This was an appeal against the Gauteng Division of the High Court, Johannesburg which made the following orders:

[190] *Mulaudzi v Mudau* [2020] ZASCA 148 (18 November 2020) para 9.
[191] *Mulaudzi v Mudau* [2020] ZASCA 148 (18 November 2020) para 10.
[192] *Mulaudzi v Mudau* [2020] ZASCA 148 (18 November 2020) para 12.
[193] Section 15(2)(a) of MPA.
[194] *Mulaudzi v Mudau* [2020] ZASCA 148 (18 November 2020) paras 12 -13.
[195] 2022 (2) SA 452 (SCA) (11 December 2020).

"1 That the deed of transfer dated 19 May 2009 and having registration number 015157/09 in respect of the property described therein as Erf 12103 Diepkloof Township Registration Division IQ be and is hereby cancelled.

2 The second respondent is directed to give effect to the cancellation of the above deed of transfer in records of the Deeds Registry Office, Johannesburg.

3 The first respondent is to pay the costs of the application."[196]

In this case, the first respondent (Mrs Ntshane) and the deceased (Mr Ntshane) were married in community of property. They lived together with their children at their residential home situated in Erf 12103 Diepkloof, Soweto until the children became old and moved to their own houses. Mrs Ntshane moved to Limpopo due to age and the deceased stayed behind.[197] It is at the death of Mr Ntshane that Mrs Ntshane become aware of the sale of their residential home. The transaction between Mr Ntshane and the appellant (Mr Vuyeka) was concluded without the required consent in terms of s 15(2) of the MPA.[198]

The appeal concerned the question as to:

> "whether the appellant has brought himself within the protection afforded to third party purchasers by s 15(9)*(a)*. If he has not, the sale is a nullity for want of the first respondent's consent. If he has, the first respondent is deemed to have consented to the sale and is valid".[199]

In dealing with the above legal question, the Court considered the effect of failure to comply with s 15(9)(a) of the MPA as outlined in an earlier judgment of *Marais NO v Maposa*[200] and the interpretation of s 15(9)(a) of the MPA as outlined in the case of *Sishuba v Skweyiya*.[201] In para 29 of the case, the Court went further in analysing s 15(9)(a) of the MPA and held that the phrase "cannot reasonably know" required the Courts to consider an objective test, ie whether a reasonable person in the same position of the third person could have reasonably known that the contracting spouse was married in community of property. [202]

Moreover, the Court held that the objective test was required in order to give protection to the spouses and protect them from the "maladministration of the joint estate". The Court further held that a failure to apply an objective test would render s 15(9)(a) of the MPA ineffective in

[196] *Vuyeka v Ntshane* 2022 (2) SA 452 (SCA) (11 December 2020) para 1.
[197] *Vuyeka v Ntshane* 2022 (2) SA 452 (SCA) (11 December 2020) para 3.
[198] *Ibid.*
[199] *Vuyeka v Ntshane* 2022 (2) SA 452 (SCA) (11 December 2020) para 9.
[200] 2020 (5) SA 111 (SCA) paras 26-30.
[201] [2008] ZAECHC 25 (6 March 2008).
[202] *Vuyeka v Ntshane* 2022 (2) SA 452 (SCA) (11 December 2020) paras 9-10.

that it would promote equality in marriage in community of property.[203] Going back to the facts, the Court noted that although Mrs Ntshane was legally represented, her affidavits lacked significant facts.[204] This is so because the affidavit does not state the date that Mrs Ntshane moved to Limpopo, when the children moved out of the residential home, and who was staying at the property when the house was sold and from the time it was sold.[205]

The evidence submitted by Mr Vuyeka showed that Mr Ntshane was staying alone at the time of the sale contract, and he represented himself as an unmarried man. Moreover, this submission was supported by two legal documents, being the deed of transfer dated 2009 and the power of attorney to transfer property.[206] Given these submissions, the Court held that Mr Vuyeka was protected by s 15(9)(a) of the MPA in that "he was not aware that the deceased was married and could not reasonably have known that he was".[207] In conclusion, the appeal was upheld, and the order of the High Court is dismissed.

3.5.5 *Matini v Matini*[208]

In this recent 2022 case, the Court was also confronted with an application by a wife to nullify a sale based on the failure of the husband to comply with s 15(9) of the MPA. In this case, the applicant (the non-contracting spouse) and the first respondent (the contracting spouse) were married in community of property. The first respondent entered into a sale transaction of immovable property with the fourth and fifth respondents (the third parties) without the required consent as stipulated by s 15(2) of the MPA. The intention of the mentioned sale agreement was for the third parties to preserve the property and sell the property to the second and the third respondents (the children of the first respondent's first marriage) once they reached the age of majority. As per the agreement, the property was later sold to the children. In the process of getting divorced, the applicant applied to Court to have the first and subsequent sale nullified on the basis that the first respondent did not get the required consent as per s 15(2) of the MPA.[209]

In presenting her case, the applicant submitted that the sale of the immovable property was contrary to the law as the first respondent did not have the required consent. Contesting this

[203] *Vuyeka v Ntshane* 2022 (2) SA 452 (SCA) (11 December 2020) para 10.
[204] *Vuyeka v Ntshane* 2022 (2) SA 452 (SCA) (11 December 2020) para 12
[205] *Ibid.*
[206] *Vuyeka v Ntshane* 2022 (2) SA 452 (SCA) (11 December 2020) para 13.
[207] *Ibid.*
[208] [2022] ZAGPPHC 218 (23 March 2022).
[209] *Matini v Matini* [2022] ZAGPPHC 218 (23 March 2022) para 6.

submission, the first respondent submitted that prior to the sale, he asked for the applicant's consent, however, she showed no interest in the sale contract.[210] This submission was supported by affidavits deposed to by the second and third respondents.[211] Based on these two submissions by the applicant and the first respondent, the Court had to make the decision as to whether the sale was lawful – in that consent could be deemed in terms of s 15(9) of the MPA.

In doing so, the Court commenced by stating the effects and operation of s 15 of the MPA as held in the SCA case of *Marais NO v Maposa*[212] and *Vuyeka v Ntshane*[213] as discussed above. Based on these effects and operation, the Court held that the sale would only be nullified if the applicant could prove that the third parties to the transaction knew or could have reasonably known that consent was required as per s 15(9) of the MPA. The Court held that the starting point to this enquiry was whether the third parties in this case could not have known that the consent was lacking. This is based on the evidence submitted by the first respondent which demonstrated that the applicant wanted nothing to do with the property, and that they had met with the family where the applicant had declared this intention.

While the Court found that the fifth respondent "was … not in the position of a third party who has no knowledge of the circumstances of the spouse with whom he or she is contracting," she did not connive with the first respondent and could have thought consent was obtained.[214] In conclusion, the Court held that there was deemed consent by the applicant and such, the sale was valid. In the context of the dissertation, this adds to many cases where the contracting spouse has successfully managed to dissipate the marital assets regardless of the protection as stipulated in s 15 of the MPA.

What emerges from the cases is the following: First, the non-contracting spouse cannot fully rely on the remedy as set out in s 15 of the MPA because of the challenges as discussed above. Secondly, there is still uncertainty regarding the application of s 15 of the MPA (see, for example, the Limpopo full Court of appeal's dealing with the application of s 15 remedy in the case of *Mulaudzi v Mudau* where the Court erroneously found that s 15 did not apply at all). Thirdly, the dissipation of marital assets is often a gender-related issue as women are likely to suffer at the hands of their husbands as in most cases discussed above, the contracting spouses are husband. Finally, this remedy is costly and onerous to invoke. Moreover, while these cases

[210] *Matini v Matini* [2022] ZAGPPHC 218 (23 March 2022) para 6.5.
[211] *Ibid.*
[212] 2020 (5) SA 111 (SCA) para 26-30.
[213][2020] ZASCA 167 (11 December 2020).
[214] *Matini v Matini* [2022] ZAGPPHC 218 (23 March 2022) para 12.

show that non-contracting spouses can be protected, this is only on very clear evidence which may be difficult for spouses – especially in interdict-type proceedings to show. This may be contrary to the purpose of the remedy as envisaged by the Act.

3.6 Conclusion

As the law currently stands, the non-contracting spouse cannot fully rely on the consent provisions of the MPA.[215] This is so because of the exception created by s 15(9), namely that if a third party can prove that they did not know or could not have reasonably known that consent was required, the contracting spouse will be successful in dissipating the marital assets and the non-contracting spouse is left with the right of adjustment at dissolution – a weak and often valueless remedy, as mentioned previously. It should be noted, as pointed out in this chapter, dissipation of assets hurts the innocent non-contracting spouse.

The negative impact on the innocent spouse prevails regardless of the existing legislative measures aimed at providing the remedy for the dissipation of marital assets. As demonstrated in this chapter, the right of the innocent non-contracting spouse to claim adjustment in terms of s 15 (9), is not always effective. This is so because, the estate might have fewer assets or no assets at all, whereupon an adjustment applies to a smaller estate at the dissolution of marriage. It is also within the Court's discretion not to award an adjustment notwithstanding the sale of property without the consent of one of the spouses.[216] It is for the above-mentioned criticisms that this research is necessary to investigate possible solutions that will effectively protect the spouses married in community against the dissipation of marital assets to a bona fide third party or mala fide third party.

Consequently, this failure of protecting non-contracting spouses will take us back to the era of marital power, which was abolished by the MPA, and renders the abolition of marital power as per s 11 of the MPA ineffective. This is because gender inequality in the business realm is still evident in that most men are the ones that run the businesses, whereas females stay at home and look after children.[217] Moreover, cases that have been discussed in this dissertation show

[215] Section 15(1-8) of the MPA.
[216] Van der Heerden et al (eds) *Boberg's Law of Persons and the Family* 193.
[217] See for example, *G v Minister of Home Affairs* 40023/21) [2022] ZAWCHC 80 (11 May 2022) para 13 where the court quotes from a report submitted to the court with approval (the Bonthuys and Coetzee report) that, inter alia, "cultural understanding and practices associated with heterosexual marriages often exploit and deepen [gender] inequalities by supporting an unequal division of care and household labour between men and women in families. South African cultures share the assumption that women are responsible for or naturally predisposed towards child-rearing and household work. *This often confines women in heterosexual relationships at home,*

that parties who suffer from the dissipation of the marital assets are the wives. Furthermore, s 15 (9) as explained above works in favour of the third party, as opposed to a non-contracting spouse who requires regulative protection due to the dissipation of assets that affects them negatively. For these reasons, s 15 requires better regulation to adequately protect non-contracting spouses and promote the purpose of s 15 of the MPA. It is important to acknowledge that *bona fide* third parties do require protection, however, this protection should be separated from the protection of non-contracting spouses.

where they perform unpaid care and household labour, while at the same time freeing up their husbands to develop professionally and increase their wealth". My emphasis.

CHAPTER 4

SECTION 20 OF THE MATRIMONIAL PROPERTY ACT: A SUFFICIENT REMEDY FOR SPOUSES MARRIED IN COMMUNITY OF PROPERTY?

4.1 Introduction

Section 20(1) of the Matrimonial Property Act ("MPA") sets out as follows:

> "A Court may on the application of a spouse if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse and that other persons will not be prejudiced thereby, order the immediate division of the joint estate in equal shares or on such other basis as the Court may deem just".[218]

Section 20(1) of the MPA provides for the immediate division of the joint estate if it can be established that the conduct of one's spouse has or will fundamentally prejudice the other spouse's interest in the joint estate. Thus, the Court has discretion regarding how the joint estate assets should be distributed. The Court may choose to either order immediate division of the joint estate in equal share by virtue of the matrimonial property system chosen by the spouses or on another basis the Court deems just.[219] In terms of s 20(2) of the MPA, the Court may further replace the matrimonial property system (marriage in community of property) chosen by the spouses with another matrimonial property system subject to such a condition as it deems just.[220]

In this regard, s 20 of the MPA serves as a statutory remedy available for a spouse in marriage in community of property in which the dissipation of marital assets will prejudice them. This remedy works in circumstances where divorce is not anticipated but the spouse may want to protect their estate from the actions of the other spouse. The related question in this research is whether this legal remedy provides sufficient protection to prejudiced spouses in marriage in community of property. To answer this question, the first part of this chapter will discuss the legislative purpose of s 20 of the MPA. After that, the dissertation will focus on the Court's approach in applying s 20 of the MPA based on case law. This chapter will conclude with a summary of the effectiveness of s 20 of the MPA as a legal remedy to prejudiced spouses in marriage in community of property.

---

[218] Section 20 of the MPA.
[219] *Ibid.*
[220] Section 20(2) of the MPA.

4.2 The purpose of section 20 of the Matrimonial Property Act.

In analysing the purpose of s 20 of the MPA, an in-text contextual approach is adopted interpret the wording of the provision. In terms of the in-text contextual approach, the purpose and the object of the legislature are prevailing factors when it comes to the interpretation of legislation.[221]This approach is adopted in order to ascertain the true meaning of s 20 of the MPA as contemplated by the lawmakers by looking at the objectives of the MPA.

Taking into account the objectives of the MPA which was to amend the matrimonial property law found in different legislation and repeal common law rules,[222] it can be said that MPA seeks to provide legal protection to spouses in different marital regimes. The Court in *Kruger v Kruger*[223] set out that the main purpose of s 20 of the MPA is to "protect spouses against any conduct which recklessly, negligently and or illicitly is aimed at prejudicing the innocent spouse seriously". Moreover, in the case of *AB v JB* the Court held that the legislative purpose of s 20 of the MPA is to "protect women and bring about parity in the status of women in particular vis-à-vis the management and administration of their joint estate".[224]

In achieving the legislative purpose of s 20 of the MPA, the Court allows for the immediate division of the joint estate before the dissolution of marriage. It is a general rule that the division of property under marriage in community follows the dissolution of marriage. This section, in effect, allows for a deviation from this general rule.[225] In granting the order, the Court must be satisfied that the order is just and equitable, taking into account all the relevant factors. In an *obiter dictum* in *Leeb v Leeb*[226] the Court suggested that a Court, dealing with such an application,

> "will determine the basis on which the joint estate is to be divided by taking into account factors such as duration of the marriage; the assets each spouse brought into the marriage; each spouse's debts at the commencement of the marriage; each spouse's contribution to the joint estate during the marriage; the prejudice one spouse suffered in respect of assets of the joint estate as a result of the other spouse's conduct; and the antenuptial debts that were settled from the joint estate during the subsistence of the marriage."[227]

---

[221] C Botha S*tatutory Interpretation: An Introduction for Students* 5 ed (2005) 97.
[222] Preamble of the MPA.
[223] 2005 JOL 14366 (T) para 16.
[224] [2009] ZAGPPHC 185 para 6. While the section is gender-neutral, the court could be said to referring to the majority of the cases where women are most often prejudiced.
[225] PA van Niekerk *A Practical Guide to Patrimonial Litigation in Divorce Actions* (2011) para 4.2.1.
[226] 1999 (2) All SA 588 (N).
[227] *Leeb v Leeb* 1999 (2) All SA 588 (N) para 597.

Although the Court's comment was *obiter dictum*, it is instructive. The word "may" in s 20 of the MPA implies that the Court is not mandated to order this immediate division of the joint estate. This is so because the word "may" in the interpretation of legislation confers discretionary powers.[228] In this regard, the Court may choose not to grant the order for the immediate division of the joint estate. This is so because, the remedy is only granted in "limited circumstances"[229] where the affected spouse has managed to provide sufficient evidence to prove to the Court that the other spouse has the intention to dissipate assets.

Having outlined the purpose of s 20 of the MPA, the next part of the dissertation will consider the Court's approach in applying s 20 of the MPA below. The importance of the subsequent analysis is to provide a critical analysis as to whether s 20 of the MPA serves its legislative purpose, which is to provide prejudiced spouses married in community of property with a legal remedy in circumstances where the other spouse threatens to dissipate marital assets.

4.3 Application of section 20 of the Matrimonial Property Act.

One of the cases that dealt with the application of s 20 of the MPA is the case of *AJ v JB*.[230] In this case, the applicant (Ms AB) and the respondent (Mr JB) were married to each other in community of property. In 2007, Ms AB instituted divorce proceedings against Mr JB. Pending the divorce proceedings, Ms AB instituted an interlocutory application in terms of s 20 of the MPA to the High Court in the Transvaal Provincial Division (as it then was).

In dealing with Ms AB's application, Vilakazi AJ outlined six prerequisites the applicants must satisfy before the order can be granted. [231] These prerequisites are as follows:

> "It is clear from the wording of the section that before the Court may issue such an order, it must be satisfied that: (i) The interests of the applicant in the joint estate are being or will probably be seriously prejudiced by the conduct or intended conduct of the respondent; (ii) The guilty/delinquent spouse will not be prejudiced thereby; (iii) There are proper and substantive grounds for such an application; (iv) Applicant must set out the nature and extent of the prejudice being or about to be caused by the respondent, in other words material evidence of the actual disposal of the assets or diminution of the undivided half share of the joint estate must be set out in full to enable the Court to assess whether the urgency to grant the relief is real, potential or imminent and capable of being carried out by the delinquent spouse: (v) The

[228] Botha *Statutory Interpretation: An Introduction for Students* 97.
[229] *SB v RB* [2015] 2 All SA 232 (ECLD, George) (16 April 2014) para 30.
[230] [2009] ZAGPPHC 185.
[231] See *AB v JB* [2009] ZAGPPHC 185 para 10.

applicant must set out fully the nature and extent of the assets and liabilities of the joint estate and indicate their value or obtain a valuation thereof. This need not be done with mathematical precision, but it will be enough to give the Court an idea of the size of the value of the assets, for it is obvious that any tempering of the assets of the joint estate will invariably have an impact on the liabilities that are on the interest of the creditors. (vi) Applicant must indicate practical and workable solutions, set out the nature of the relief sought concisely, and furnish full and proper facts to enable the Court to exercise its discretion judicially".[232]

Having read the requirements, it is evident that the prejudiced spouse, in this case, was faced with an onerous evidentiary burden to discharge in persuading the Court to use its discretion in terms of s 20 of the MPA. In satisfying the requirements as outlined by the Court, Ms AB provided the Court with a list of assets that she alleged belonged to the joint estate.[233] Ms AB alleged that at the time she was residing with Mr JB, Mr JB approached her numerous times asking her to sign the deed of sale of one of the immovable properties that belong to the joint estate, but she refused.[234] As a result, Ms AB was of the view that Mr JB had the intention to diminish the joint estate and his administration of the joint estate was prejudicial to her share in the joint estate. [235]

In analysing Ms AB's application, Vilakazi AJ noted that the Court must weigh out and balance the interests of the affected parties, the applicant, the respondent, and the creditors.[236] In addition, based on the nature of the remedy, the Court held that Ms AB had to furnish the Court with sufficient evidence, which will enable the Court to use its discretion and grant Ms AB an order for immediate division of the joint estate. [237] To cast doubt on Ms AB's assertions regarding her prejudice, Mr JB also furnished the Court with evidence in his opposing affidavit.[238] In the opposing affidavit, Mr JB submitted to the Court the following averments:

- "(a) If an order for the division of the joint estate is ordered, the children who are presently living with and being cared for by him will have no roof over their heads;
- (b) He has always been responsible for payment of the bond to safeguard this precious asset of the joint estate;

[232] *AB v JB* [2009] ZAGPPHC 185 para 10.
[233] *AB v JB* [2009] ZAGPPHC 185 para 12.
[234] *Ibid.*
[235] *AB v JB* [2009] ZAGPPHC 185 para 14.
[236] *AB v JB* [2009] ZAGPPHC 185 para 16.
[237] *AB v JB* [2009] ZAGPPHC 185 paras 17-18.
[238] For full discussion of the evidence of Mr JB see *AB v JB* [2009] ZAGPPHC 185 para 19.

- (c) If the common home is sold at this stage, the joint estate will suffer losses; the property is presently situated in the vicinity or in the corridor between Kempton Park and the OR Thambo Airport; there is a lot of development taking place around the area and there is also uncertainty as to what the future holds for the residents or owners of properties in the area as the Airport continues to develop and expand towards their area. He contends that it would be prudent to hold on to the property until there is clarity and certainty about the development being earmarked for the area. Placing the property on the market at this stage might be prejudicial as the future might hold better prospects.

- (d) At present, he is running the business a close corporation and it is the only source of income for the family and generation of wealth for the joint estate. The proceeds of the business are used to pay all expenses of the family and the joint estate. Besides, there are also a number of employees who are dependent on the business.

- (e) The respondent contends that an order for the division of the joint estate will necessarily result in the sale of the business known as CBS and by virtue of its one-man business closely associated with him personally, it is unlikely to attract any buyers. The business is inextricably linked to him and cannot survive without him."[239]

Having read Ms AB's founding affidavit and Mr JB's opposing affidavit, the Court held that the evidence submitted by Ms AB was insufficient to convince the Court to use its discretion and grant the order of immediate division of the joint estate.[240]

This is based on the failure of Ms AB to furnish the Court with full and proper evidence on the joint estate. The Court held that the information submitted by Ms AB was based on hearsay evidence as it was "conjuncture, speculations, and suspicions".[241] There was no substantial evidence to support her averments. Moreover, Ms AB failed to provide the Court with evidence that proved that Mr JB intended to diminish the joint estate or that Mr JB's administration of the joint estate was prejudicial to her half of the share in the joint estate. [242] Given this finding, the Court dismissed the wife's application with costs.

[239] *AB v JB* [2009] ZAGPPHC 185 para 19.
[240] *AB v JB* [2009] ZAGPPHC 185 para 22.
[241] *AB v JB* [2009] ZAGPPHC 185 para 14.
[242] *AB v JB* [2009] ZAGPPHC 185 para 22.

In an earlier judgment of *Kruger v Kruger*,[243] the Court reached a similar judgment when it was concerned with the application of s 20 of the MPA. Importantly, it dealt with the question of whether the applicant has established − on a balance of probabilities − that she was entitled to an order in terms of s 20. The Court also considered what the section intended.[244] The applicant (being the wife) submitted that the respondent's conduct (her husband) was severely prejudicing her share of the joint estate. This is so because the husband wanted to use the house as security for his legal costs and the wife feared that the husband might lose his employment which would result in the loss of the house.[245] Hence, she asked the Court to divide the joint estate in accordance with s 20 of the MPA.

In analysing the evidence submitted by the applicant wife, the Court held that there was no severe prejudice against her, taking into account the increase in the value of the house, pension interest in the future, and the fact that the respondent was against the escalation of the legal costs increasing the joint estate's liabilities.[246] Given these factors, the Court held that the applicant failed to adduce substantial evidence to prove serious prejudice.

In *SB v RB*[247] the High Court in the Eastern Circuit Local Division confirmed this approach in that Courts should only grant an order in terms of s 20 of the MPA in limited circumstances, provided that the prejudiced spouse has satisfied its requirements.[248]

These three cases, as discussed above, highlight three points that are important to consider within the context of the dissipation of marital assets before the dissolution of marriage: (1) First, in invoking this remedy, the applicant bears the onus to prove on a balance of probabilities that the Court should grant the order. (2) Secondly, in satisfying the requirements as outlined by the Court, the applicant is required to adduce cogent and concrete evidence. (3) The Court will only grant an order in terms of s 20 of the MPA in clearest cases as this is a drastic remedy and overrides the normal consequences of the division of property under marriage in community of property.

In the context of this dissertation, it is submitted that it is these three points that lead to the difficulties that the prejudiced spouse may face in bringing an application in terms s 20 of the MPA within the context of the dissipation of assets. This begs the following question: can a

[243] *Kruger v Kruger* 2005 JOL 14366 (T).
[244] *Kruger v Kruger* 2005 JOL 14366 (T) para 12.
[245] *Kruger v Kruger* 2005 JOL 14366 (T) para 13.
[246] *Kruger v Kruger* 2005 JOL 14366 (T) para 15.
[247] *SB v RB* [2015] 2 All SA 232 (ECLD).
[248] *SB v RB* [2015] 2 All SA 232 (ECLD) para 30.

prejudiced spouse married in community of property rely on s 20 of the MPA in protecting her or his assets in the joint estate before the dissolution of marriage? In answering this question, the next part of the chapter will analyse these difficulties and evaluate the effect of s 20 of the MPA.

4.4 The difficulties and the effectiveness of section 20 of the Matrimonial Property Act

In *Visser v Hull,*[249] the Court held that, for the innocent spouse to get an immediate division of the joint estate, she or he must prove on a balance of probabilities that she or he is entitled to the remedy as governed by s 20 of the MPA. In the case of *AB v JB,*[250] the Court held that granting this order is within the Court's discretion. The challenge, as highlighted by De Jong and Pintens, is that this remedy is seen as a drastic one that a Court will only grant in the clearest cases.[251] Thus, the affected party must have exhausted all the available remedies such as the s 15 remedy as discussed in previous chapters. Furthermore, the applicant must adduce evidence convincing the Court to use its discretion. Such evidence must be based on concrete evidence and not hearsay evidence. Thus, if the evidence is based on hearsay, the Court is likely to dismiss the application and grant costs in favour of the other spouse as seen in the above discussion of the case of *AB v JB.*

Given the difficulties experienced by the applicant spouses in the cases discussed above, I argue that it is worth investigating whether there are better ways to protect spouses married in community of property that are at risk in this context. One area that needs particular attention is the evidentiary burden on the innocent spouse in the current remedy available: the innocent spouse must submit all the necessary information to enable the Court to exercise its judicial discretion.[252] As held in the case *AB v JB*[253] the Courts are often reluctant to exercise their judicial discretion if "the information is inadequate or particularities of the prejudice to the applicant are sketchy".[254] It should be noted that, in an application involving the dissipation of marital assets, the innocent party might find it challenging to adduce all the material evidence because of their difficulty in finding evidence of transactions that may have been deliberately hidden from them by the other spouse.

[249] 2010 (1) SA 521 (WCC) para 17.
[250] [2009] ZAGPPHC 185 para 11.
[251] M De Jong "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of property upon divorce" (2012) 2 *Stell LR* 225 at 254.
[252] *AB v JB* [2009] ZAGPPHC 185 para 10.
[253] [2009] ZAGPPHC 185 para 11.
[254] *Ibid.*

For instance, the spouse who wishes to dissipate the marital assets might conceal the necessary documents the innocent party needs to submit before the Court. On the other hand, it might turn out that the necessary documents have been destroyed. In this regard, it may be expensive to recover the dissipated evidence. External parties such as private investigators and forensic auditors might be needed in order to recover the necessary documents.

As noted above, for the applicant to successfully invoke the remedy under s 20 of the MPA, the applicant must furnish evidence proving that the joint estate will or has been seriously prejudiced by the respondent's conduct. Proof of serious prejudice requires the applicant to provide cogent and concrete evidence which will convince the Court to grant the immediate division of the joint estate or alternative remedy as it deems just. Furthermore, the applicant must prove how, and to what extent, the conduct of the other party will be detrimental to the joint estate as both parties have rights to a certain extent to deal with properties that belong to the joint estate.

Based on these difficulties, it can be argued that this requirement imposes an onerous burden on the innocent party. This is so because, in accordance with the marriage in community regime, the 'delinquent' spouse is entitled to use his marital assets until the dissolution of marriage – subject to s 15 (9) of the MPA[255] as discussed above, and therefore any restriction-on his or her marital assets is a limitation to his or her right to property as governed by s 25 of the Constitution.[256] Thus, it will be difficult for the innocent spouse to prove that limiting the right to property of the delinquent spouse before the dissolution of marriage will not prejudice the delinquent spouse. Further, as mentioned above, the prejudiced spouse will only be protected in the clearest of cases, and should the prejudiced spouse fail to discharge the onus of proof, the other spouse will successfully dissipate the marital assets. In this regard, it is an opportune time to consider whether there is a more flexible remedy with less onerous requirements to protect spouses married in a community of property from the dissipation of marital assets. Alternatively, one could also look at ways in which to ease the burden of proof by, for example, requiring a duty of disclosure by the other spouse.

4.5 Conclusion

It is clear from the discussion above that although s 20 of the MPA provides prejudiced spouses with another remedy within the context of the dissipation of assets, the remedy does not

[255] Act 88 of 1984.
[256] The Constitution of the Republic of South Africa, 1996.

adequately protect the prejudiced spouse as the Courts will only grant the remedy in clearest cases. Based on the cases surveyed where s 20 was used, none of the applicant spouses were successful.[257] Cognisant of the discussion of s 15 of the MPA as discussed in chapter 3 of the thesis, it is apparent that the statutory remedies aimed at protecting the affected spouse in marriage in community of property needs reform. In conclusion, it is submitted that the spouses married in community of property cannot entirely rely on statutory remedies aimed at protecting them when faced with the dissipation of marital assets pending the final divorce order.

[257] See the following cases discussed above: *AB v JB* [2009] ZAGPPHC 185 and *Kruger v Kruger* 2005 JOL 14366 (T).

CHAPTER 5

THE POWER OF THE COURT TO ORDER THE IMMEDIATE DIVISION OF MATRIMONIAL PROPERTY SUBJECT TO THE ACCRUAL SYSTEM: A SUFFICIENT REMEDY?

5.1 Introduction

As highlighted in the previous chapters, marriage out of community of property with accrual allows the spouse whose estate did not show any growth or showed less growth during the subsistence of marriage to have an accrual claim in the estate of the other spouse.[258] One of the purposes of marriage out of community of property with the accrual system is highlighted in a report of the South African Law Commission (as it then was), where the authors noted that "the fundamental idea is that one spouse contributes financially and otherwise to the growth of the other of the other spouse's estate and should therefore be entitled to share in that spouse's estate on the dissolution of the marriage".[259]

In terms of the general rule, the accrual claim arises at the dissolution of marriage in accordance with s 3(1) of the MPA.[260] The wording of s 3(1) of the MPA effectively means that the right to accrual will only vest upon the final divorce and not before.[261] Moreover, the claim is only for the "amount equal to half of the difference between the accrual of the respective estates of the other spouses".[262] This principle was reinforced in the case of *Reeder v Softline*[263] where the Court held that a spouse can institute a claim for the division of accrual only on the date of the divorce or after the divorce has been granted. Consequently, during the subsistence of the marriage, the spouse has a contingent right that will arise only at the dissolution of the marriage. The SCA case of *Brookstein v Brookstein*[264] confirmed that the dissolution of the marriage

[258] Section 3(1) of the MPA 88 of 1984.
[259] South African Law Commission *Report Pertaining to Matrimonial Property Law with Special Reference to the Matrimonial Affairs Act, 1953, the Status of the Married Woman, and the Law of Succession in so far as it affects the Spouses* (1982) 26.
[260] See s 3 of the MPA 88 of 1984 "At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses".
[261] PA van Niekerk *The Practical Guide to Patrimonial Litigation in Divorce in Divorce Actions* (2003) para 3.4.2.
[262] *Ibid.*
[263] 2001 (2) SA 844 (W) at 849.
[264] 2016 (5) SA 210 (SCA).

means the date of the divorce order and not the close of pleadings, as had been found in the High Court decision in *Schmitz v Schmitz*.[265]

Dissipation of assets with the intention to deplete the accrual claim in a marriage out of community with accrual usually occurs before the dissolution of marriage. When one spouse anticipates divorce or there are pending divorce proceedings, one spouse may try to squander, conceal, and dissipate the assets so that the alienator spouse will have less assets at the dissolution of marriage, which reduces the extent of the difference in accrual between the estate of the alienator spouse and that of the prejudiced spouse.[266] The question that arises from the above discussion is whether there is anything the prejudiced spouse can do in the interim to protect their contingent right?

Our law gives the prejudiced spouse in a marriage out of community of property with accrual a statutory remedy in s 8(1) of the MPA.[267] According to s 8(1) of the MPA:

> "A Court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the Court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Chapter or on such other basis as the Court may deem just".[268]

5.2 The purpose of section 8(1) of the Matrimonial Property Act

The immediate division of accrual is an exception to the general rule set out in s 3(1) of the MPA. This statutory remedy allows a Court to exercise discretion to protect the prejudiced spouse in the circumstances described in s 8 of the MPA, notwithstanding the fact that the right is a contingent one only. The main purpose of s 8 of the MPA is to protect the prejudiced spouse in a marriage out of community of property with accrual facing the dissipation of marital assets.[269]

This remedy is conditional upon the applicant satisfying the Court that, among other things, the marriage is subject to the accrual system; that she or he has a right to share the accrual of the estate of the other spouse at the dissolution of the marriage; that she or he will suffer a

[265] 2015 (3) All SA 85 [KZD].
[266] *ND v MD* [2021] 1 All SA 909 (GJ) (16 September 2020) para 2.
[267] 2001 (2) SA 844 (W) at 849.
[268] *Ibid.*
[269] *ND v MD* [2021] 1 All SA 909 (GJ) (16 September 2020) para 22.

severe prejudice as a result of the other spouse's conduct if the Court does not grant the division of the accrual; and that other parties will be prejudiced by the immediate division of the accrual.[270]

5.3 The elaboration of the requirements of s 8(1) of the MPA

As is clear from the case law, these requirements are onerous to satisfy in circumstances where the modus operandi of any spouse accused of dissipating assets is to conceal information. The prejudiced spouse often finds him- or herself in a disadvantageous position to protect his or her contingent right in the accrual. This is so because the remedy is final. As such Courts are reluctant to grant a final order if there is not enough evidence. Moreover, based on the case law, it appears that parties who invoke this remedy are not likely to succeed because of a lack of enough evidence to prove serious prejudice and the intention of the other spouse to dissipate assets to frustrate the equitable distribution of the accrual at the dissolution of marriage.[271] Given this context, the next part of the dissertation will investigate the requirements with reference to applicable case law.

5.3.1 Proving the right to share the accrual of the estate of the other spouse

One of the requirements that may be difficult and onerous to satisfy is proving that the prejudiced spouse has a right to share the accrual of the other spouse's estate. The Court, in *MB v DB,*[272] held that the applicant (the alleged prejudiced spouse) bears the onus of establishing the monetary value of the accrual claim. For example, the prejudiced spouse may adduce concrete evidence, such as the deed of sale proving the value of the assets or annual financial statements in order to show a smaller accrual.[273] This concrete evidence will be used to demonstrate the plaintiff's accrual claim against the defendant's estate.

In *MB v DB,*[274] the applicant (MB) relied on the statements made by the respondent (DB) to calculate the accrual claim. Such evidence was considered hearsay because the probative value of the financial statements relied upon the credibility of the defendant and not the plaintiff herself.[275] As a result, the Court held that the evidence was incomplete and inadmissible.[276]

---

[270] *ND v MD* [2021] 1 All SA 909 (GJ) (16 September 2020) para 24.
[271] *Ibid.*
[272] 2013 (6) SA 86 (KZD) para 22.
[273] 2013 (6) SA 86 (KZD) para 17.
[274] 2013 (6) SA 86 (KZD) para 36.
[275] See s 3 of the Law of Evidence Amendment Act 45 of 1988, which defines hearsay evidence as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".
[276] *MD v ND* 2013 SA 86 (KZD) paras 93-94.

This example shows that, without full disclosure on the part of the alienator spouse, the prejudiced spouse will often find him- or herself in a difficult position to satisfy this requirement of proving the right to share in the accrual of the estate of the other spouse.

It may be argued that, in some cases, the prejudiced spouse would find it easy to prove the accrual claim in the estate of the other spouse especially in cases where "there is a large disparity between the extent of the respective spouses' estate".[277] However, it is submitted that where both parties argue that they have accrual claims against each other, the prejudiced spouse will find it difficult to prove the accrual claim in the estate of the other spouse, as evident in *ND v MD*.[278] Moreover, cases consulted in this research show that many cases dealing with the dissipation of assets deal with the latter situation i.e. where both parties argue that their estate showed no growth or little growth during the subsistence of the marriage.[279]

5.3.2 Proving that their accrual claim is being or will probably be seriously prejudiced by the other spouse's conduct.

The applicant spouse is, in terms of s 8(1) of the MPA, required to prove that his or her right to an accrual claim is being or will probably be seriously prejudiced by the other spouse's conduct. The challenges associated with satisfying this remedy are numerous. First, the prejudice in question that needs to be proved should be a continuous or future prejudice.[280] This is because this remedy does not address past prejudice. Thus, if the applicant cannot prove further prejudice by the respondent's conduct, then she cannot rely on this remedy.[281] In the research context, this is a shortfall of the remedy because the failure to recognise past prejudice is a disadvantage. After all, the spouse would have dissipated the assets either way. The remedy is thus ineffective in so far as it fails to recognise past prejudice as insight into the likelihood of future prejudice without a Court order.

Secondly, as noted in the case of *ND v MD*[282] it is unclear whether the applicant is required to established on-going prejudice as per the date when the application was launched, or must the prejudice be on-going when the application is heard.

Regarding the requirement of proving future prejudice, Gilbert AJ noted that:

---

[277] *ND v MD* 2021 (1) SA 909 (GJ) paras 35-36.
[278] 2021 (1) SA 909 (GJ) para 36.
[279] *ND v MD* [2021] 1 All SA 909 (GJ) (16 September 2020) and *MB v NB* 2010 (3) SA 220 (GSJ).
[280] *ND v MD* 2021 (1) All SA 909 (GJ) para 42.
[281] *Ibid.*
[282] *ND v MD* [2021] 1 All SA 909 (GJ) (16 September 2020) para 44.

> "should it be required that such prejudicial conduct is ongoing when the application is ultimately heard, and the other order is granted, which may be many months later, as in the present instance, that may defeat the purpose of section 8(1) as by then the alienator spouse may have made considerable progress in dissipating all his or her assets".

Although the judge noted this issue, he held that he would not decide on the matter. Consequently, It is submitted in this dissertation that it is time to reconsider s 8(1) of the MPA and its failure to recognise past prejudice on the part of the prejudiced spouse. Further, in proving future prejudicial conduct, the applicant must satisfy the Court that the respondent intends to dissipate assets. Again, this requirement may pose challenges, as more than a mere allegation of such intent is required to obtain this remedy successfully. Moreover, how does one prove intention? In the case of *M v M* the Court held that in interpreting the intention of the other spouse, "the Court will consider evidence, and if the conclusion is reached that the alienation was made with intention, then the Court will include the value of such alienation into the accrual calculation".[283] Based on the case analysis, one can infer that the Court requires concrete evidence to prove the intention of the alienator spouse.

However, it is not clear as to what kind of evidence will suffice to prove intention. It is clear that hearsay evidence is insufficient and Courts will not easily grant an exception on this general rule.[284] This is based on the case law analysis above, and the rules of evidence themselves.[285] For example, a rule of evidence is that "no evidence is ordinally admissible to prove the content of a document, except the original document itself".[286] As a result, it appears that only real and original documentary evidence will suffice to prove the intention of the alienator to frustrate the accrual so that, at the determinative date, the prejudiced will not have an accrual claim. Real evidence can be defined as "things which are examined by the Court as

[283] 2022 ZAGPJHC 484 (29 June 2022) 71.
[284] The exception of admissibility of hearsay is governed by s 3(1) of the Law of Evidence Amendment Act 45 of 1988: "Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or (c) the court, having regard to- (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice".
[285] See the case of *Macleod v Rens* 1997 (3) SA 1039 (E) at 1050 where the court held that in civil cases the rule of evidence should be stated as follows: "The proved facts should be such as to render the interference sought to be drawn more probable than any other reasonable evidence, if they allow for another more or equally probable interference, the inference sought to be drawn could not prevail".
[286] Zeffertt and Paizes *Essential Evidence* 127.

means of proof, upon proper identification, itself becomes evidence".[287] In the context of the research, real evidence will consist of tangible objects that will prove the intention of the alienator spouse to dissipate the assets. On the other hand, documentary evidence consists of everything that is in the form of a document.[288] Moreover, the party who chooses to rely on documentary evidence must satisfy the Court on the authenticity of the document. This means that the document was written or executed by the person who purported to have done so, to avoid the document being considered as hearsay evidence.

Furthermore, based on the case law analysis which follows, the tendency (given the circumstances of such a claim) is for prejudiced spouses to rely on hearsay evidence to show the intention of dissipation of marital assets[289] as a result of the alienator's spouse concealing the actual evidence. Given that the alienator spouse has strong constitutional rights to use his property as he or she sees fit,[290] the prejudiced spouse faces an uphill battle in showing that such right to use property is not absolute and can be limited in s 36 of the Constitution.[291]

5.3.3 Proving a lack of prejudice on the part of the other parties

The prejudiced spouse is not only required to prove prejudice on their side, but they are also required to prove that the other parties who are affected by the dissipation of the assets will not be prejudiced if the Court orders the immediate division of the accrual. The parties referred to in matrimonial property disputes may include third parties such as creditors and dependents to the spouses. In the case of *JA v DA*, the Court held that this requirement might be hard to satisfy because in most, if not all, cases the third party to whom the other spouse has alienated assets will be prejudiced if the application was granted.[292] For example, consider a situation where an innocent third party has a transaction pending with the alienator spouse. In such a situation, what will happen to the third party when the immediate division is granted? Consequently, I agree with Sutherland J's statements in *JA v DA* that this requirement is challenging to satisfy,[293] considering the nature of the remedy and the prejudice the third party may suffer in case the remedy is granted.

5.3.4 The contingent nature of the accrual

[287] Zeffertt and Paizes *Essential Evidence* 271.
[288] Zeffertt and Paizes *Essential Evidence* 271-272.
[289] *Ibid.*
[290] Section 26 of the Constitution of the Republic of South Africa, 1996.
[291] The Constitution of the Republic of South Africa, 1996.
[292] 2014 (6) SA 233 para 36.
[293] *Ibid.*

The relief afforded by s 8(1) of the MPA may also not be satisfactory in preventing the dissipation of assets. This is because the accrual claim is contingent. In this sense, the accrual claim will only vest as the spouse's right once a Court order for an immediate division of the accrual has been granted. Thus, the dissipating spouse may frustrate the purpose of this remedy by dissipating marital assets pending the hearing of the spouse's application.

In different cases, the Court has acknowledged that the spouse's contingent right to the accrual claim can be protected using s 8(1) of the MPA.[294] However, it remains unclear whether the granting of the immediate division of the accrual will occur after the interim order has been granted or after the divorce order has been granted, since the claim arises at the dissolution of the marriage, as noted above. This is another confusion in our law that needs attention.

Against this background, it is worth noting that this remedy is a final remedy as opposed to interim relief, as such is granted by application of the *Plascon-Evans* rule. This rule states that "the relief can only be granted if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavits, justify the granting of the relief".[295] As such, the Courts are often reluctant to grant such an order if the requirements as stipulated in s 8(1) of the MPA have not been satisfied. In this regard, the next part of the thesis will look into the case law analysis on cases dealing with s 8(1) of the MPA.

5.4 Application of section 8(1) of the Matrimonial Property Act

5.4.1 *MB v NB* 2010 (3) SA 220 (GSJ)

This case concerned the patrimonial consequences and the obligations of MB (the plaintiff) and NB (the defendant). In this case, the parties (MB and NB) were married out of community of property with the inclusion of the accrual system. At the dissolution of the marriage by divorce, there were various issues before the Court which concerned the patrimonial entitlements of each party. However, for the purpose of this thesis, focus will be given to the issue relating to the plaintiff's accrual claim as reported from paragraph 37 of the judgment.

The main issue in relation to the plaintiff's accrual claim was the value of the estate assigned to NB.[296] As noted by the Court, it was alleged that, after the parties had separated, NB had been dissipating the matrimonial assets by hiding his own assets and squandering the assets to

[294] *Reeder v Softline* 2001 (2) SA 844 (W) 851.
[295] *ND v MD* 2021 (1) All SA 909 (GJ) para 25.
[296] *MB v NB* 2010 (3) SA 220 (GSJ) para 37.

reduce his accrual.[297] In this regard, the Court was asked to locate the amounts and take them into account for the purposes of the accrual calculation. The Court was asked to do so on the basis that the calculation of the accrual claim was at the dissolution of the marriage ie when the Court grants a final order and not when the parties choose to separate. On such basis, NB argued that, before the date of the final divorce, he had the right to freely deal with his own assets. [298] To resolve this impasse, in *MB v NB,*[299] the Court held that the date for the calculation of the accrual was *litis contestatio*. The Court reasoned that using *litis contestatio* as the date for the calculation of the accrual would expedite the trial and limit the dissipation of the matrimonial assets.[300]

While this finding could be useful for prejudiced spouses, we know that the SCA has held that the determinative date is the date where the Court grants the divorce order. In this vein, I argue that that if we continue to use the date of the dissolution of the marriage as the date to calculate the accrual as held in the case of *Brookstein v Brookstein,*[301] we are opening the door for the dissipation of matrimonial property. Moreover, we run the risk that the alienating spouse might get away with dissipating assets and prejudicing the other spouse. In the nutshell, using *litis contestatio* as the date of the calculation of the accrual serves two purposes, expediting the trial and protecting the matrimonial assets until a court makes the final order.

5.4.2 *ND v MD* 2021 (1) All SA 909 (GJ)

In the case of *ND v MD*, the Court dealt with an application for interim relief and an immediate division of the accrual in terms of s 8(1) of the MPA. In the case, the applicant (the wife) had already instituted divorce proceedings against the respondent (the husband). This was an interlocutory application which was brought on urgent basis in order to:

(a) Obtain *interim* relief to prohibit the husband from dissipating the marital assets until the finalisation of the divorce in the main action proceedings.

(b) Request the Court to order immediate division of the accrual as governed by s 8(1) of the MPA.[302]

[297] *MB v NB* 2010 (3) SA 220 (GSJ) para 38.
[298] *Ibid.*
[299] It is important to note that this case was decided before *Brookstein* which confirmed the determinative date as the date the divorce order is handed down.
[300] *MB v NB* 2010 (3) SA 220 (GSJ) paras 40-41.
[301] 2016 (5) SA 210 (SCA) paras 19-20.
[302] *ND v MD* 2021 (1) All SA 909 (GJ) para 2.

In assessing the evidence, the Court set out some general principles relating to the application of s 8(1) of the MPA and the interim relief. This was done in order to provide an understanding as to how these two remedies may be used in order to protect the contingent right in the accrual claim pending the finalisation of the divorce. The Court held that the main purpose of the s 8(1) remedy is to protect the vulnerable beneficiary spouse in the context of the dissipation of the marital assets.

In order for the vulnerably beneficiary spouse to be protected by this remedy, the Court found that the spouse would have to satisfy the following requirements:

> (a) "the marriage is subject to the accrual system.
>
> (b) he or she would have a right to share in the accrual of the estate of the other spouse at the dissolution of the marriage.
>
> (c) such right is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse; and
>
> (d) other persons will not be prejudiced by an immediate division of the accrual".[303]

Gilbert AJ held that the relief sought in terms of s 8(1) of the MPA is a final relief as opposed to interim relief.[304] Against this fact, the Court held that, although the vulnerable beneficiary spouse is not required to determine the exact value of the accrual claim, the vulnerable beneficiary spouse had to have sufficient evident at his or her disposal to prove the right to the accrual claim.[305]

In considering the interim relief, the Court held that there is a distinction between the interim relief in terms of s 8(1) of the MPA and an anti-dissipatory remedy (as discussed in the chapter that follows) as the remedies are distinct. For the purpose of this part of this chapter, the focus will be on the interim relief to prevent one spouse from alienating marital assets. As held by Gilbert AJ, interim relief in the terms of s 8(1) of the MPA is defined as a legal remedy "aimed at preserving the contingent right to share in the accrual, so that when the accrual claim is awarded, there is an accrual left in the marriage".[306] Whereas an anti-dissipatory remedy is

[303] *ND v MD* 2021 (1) All SA 909 (GJ) para 24.
[304] *ND v MD* 2021 (1) All SA 909 (GJ) para 25.
[305] *ND v MD* 2021 (1) All SA 909 (GJ) paras 34-35.
[306] *ND v MD* 2021 (1) All SA 909 (GJ) para 45.

aimed at prohibiting the alienator spouse from dissipating his or her assets until the accrual claim is granted and quantified.[307]

For interim relief, the vulnerable beneficiary spouse is required to satisfy the requirements of an ordinary temporary interdict as mentioned above.[308] In the case of *ND v MD*, the Court dealt with the first requirement which is proving the *prima facie* right although open to some doubt. In analysing this requirement, the Court held that the applicant is only required to prove his or her contingent right although that right is open to some doubt. As such, such contingent right does not need to be determined.[309] Furthermore, the Court noted that the requirements of an interim interdict should not be interpreted in isolation. Instead, it found that they must be interpreted holistically so that a weakness in any of the requirements can be counter-balanced by the strength in relation to the other requirements".[310] This shows that the bar is not set too high for the interim interdict as opposed to the s 8(1) remedy.

After providing the analysis as discussed above, the Court went on to apply the principles to the present facts of the case. Both parties alleged that they had an accrual claim in the estate of the other spouse.[311] In the founding affidavit, the applicant submitted that there was a partial disclosure on the side of the respondent, in that he failed to disclose his interest in different companies, close corporations and various investments and motor vehicles.[312] The husband's failure to properly disclose his interests, made it impossible for the applicant to prove clear right in terms of the s 8(1) remedy. However, the Court noted that – although the applicant failed to satisfy the requirements of the s 8(1) remedy in that she could not show that was entitled to the accrual claim – the applicant was able to satisfy the requirements of an interim interdict, specifically the *prima facie* right in the estate of the other spouse and a reasonable apprehension of harm if the interdict was not granted. This was so because the applicant was able to adduce evidence such as bank statements and "various other documents" which demonstrated that, on the face of it, the applicant was entitled to the accrual claim.[313]

---

[307] *Ibid.*
[308] The requirements are as follows: "The existence of a *prima facie* right, although open to some doubt, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted; that the balance of convenience favours the granting of the interdict; and the absence of a suitable alternative remedy". See *Setlogelo v Setlogelo* 1914 AD 221 at 227.
[309] *ND v MD* 2021 (1) All SA 909 (GJ) para 48-49.
[310] *ND v MD* 2021 (1) All SA 909 (GJ) para 50.
[311] *ND v MD* 2021 (1) All SA 909 (GJ) paras 89-90.
[312] *ND v MD* 2021 (1) All SA 909 (GJ) para 86.
[313] *ND v MD* 2021 (1) All SA 909 (GJ) para 95.

Furthermore, the Court looked at the behaviour of the respondent after the divorce proceedings were instituted.[314] It did so in order to ascertain whether the applicant did indeed have a reasonable apprehension that, if the respondent was not interdicted, he would frustrate the equitable distribution at the dissolution of marriage. The Court considered the respondent's specific behaviour, namely: changing the matrimonial home's locks, and returning and removing certain property from the matrimonial home such as the television and certain motor vehicles.[315] In conclusion, the Court granted the interim order to prevent and interdict the respondent from removing, disposing, and selling any protected matrimonial property.[316]

5.5 Conclusion

Despite good intentions, a case law analysis shows that s 8(1) does not provide adequate protection for spouses married out of community, including the accrual system. The failure of s 8(1) of the MPA to provide adequate protection to a prejudiced spouse is based on both procedural and substantive aspects. In respect of the substantive aspect, it can be argued that the requirements to be satisfied by the prejudiced spouse are difficult in the circumstances. As a result, they impose an onerous onus on the prejudiced spouse to satisfy. I tend to agree with Strydom J in the case of *M v M*[317] where the Court held that "section 8 of the MPA provides some remedy but without a full and immediate disclosure by the spouses of their assets a party would not be in a position to approach a Court". This is so because, for the prejudiced spouse to be successful in his or her claim, he or she needs to adduce substantive evidence. Such evidence should be obtained from both parties. This means that the claim for the prejudiced spouse is based on full disclosure on the part of the defendant. And as seen in the case of *ND v MD,*[318] *MB v NB,*[319] and the recent case of *M v M,*[320] full disclosure of the defendant is not always possible. Hence the prejudiced spouses find it hard to satisfy the requirements established by s 8 (1) of the MPA.

Moreover, as evident above, the remedy is final compared to temporary interim relief. In this regard, the Courts are reluctant to grant a final order, which inevitably impairs the defendant's rights when there are missing documents, or there is no sufficient evidence that warrants the Courts to use its discretion. It appears that the Courts will only use discretion in the most

[314] *ND v MD* 2021 (1) All SA 909 (GJ) para 87.
[315] *ND v MD* 2021 (1) All SA 909 (GJ) paras 80-81.
[316] *ND v MD* 2021 (1) All SA 909 (GJ) para 108.
[317] 2022 ZAGPJHC 484 (29 June 2022) para 163.
[318] 2021 (1) All SA 909 (GJ).
[319] 2010 (3) SA 220 (GSJ).
[320] 2022 ZAGPJHC 484 (29 June 2022).

straightforward of cases where the applicant has successfully discharged the onus imposed on him or her. Moreover, as shown above, it is improbable for the plaintiff to satisfy all the requirements required by s 8 of the MPA.

Relating to the procedural aspects of a claim, it has been shown from the discussion above that the determinative date of the calculation of the accrual system, being the divorce order (as held by the Court in the case of *Brookstein v Brookstein*)[321] appears to further prejudice the applicant spouse. As such, it results in the alienator spouse dissipating assets pending the final divorce order, even though the immediate estate division is ordered. Litigation takes time and gives the alienator spouse enough time to dissipate the marital assets to frustrate the equitable distribution at the final divorce order. Based on the above analysis, it is submitted that, until these two issues have been resolved, s 8 of the MPA remains an inadequate remedy to protect prejudiced spouses in the dissipation of marital assets.

In this regard, it is submitted that there may be good reasons not only to reform the law to provide better disclosure rules, but also to consider setting a date for determination of the accrual at *litis contestatio* rather than at date of the dissolution of marriage. A full discussion on these recommendations will follow in the last chapter of the dissertation.

[321] 2016 (5) SA 210 (SCA) paras 19-20.

CHAPTER 6

ANTI-DISSIPATION INTERDICT IN ANTICIPATION OF DIVORCE CASES: A SUFFICIENT REMEDY?

6.1 Introduction

The previous chapters discussed statutory remedies that both spouses married in community of property[322] and those married out of community of property with accrual[323] might invoke when faced with the dissipation of marital assets pending divorce. The previous chapter concluded that these statutory remedies do not provide adequate protection to spouses faced with the dissipation of marital assets. It was further pointed out that the inadequate protection may be due to the fact that there are onerous requirements that spouses need to satisfy to be protected by these statutory remedies. As a result, this chapter focuses on the common law remedy that may be used to protect both spouses married in community of property and those married out of community of property with the accrual system. Specifically, the chapter will focus on what is called an "anti-dissipation or anti-dissipatory remedy". The primary purpose of this chapter is to investigate the effectiveness of this anti-dissipation remedy pending a divorce order.

The first section of this chapter involves a brief discussion of the origin and background of the anti-dissipation remedy in general. The second section focuses on the applicability of the anti-dissipation order in divorce cases. The third section will investigate the legal procedure**s** the affected spouse must comply with in bringing the application in terms of anti-dissipation interdict. Specifically, the discussion under this section will focus on the nature of an urgent interdict application and the evidentiary burden imposed on the affected spouse when relying on an anti-dissipation remedy. In conclusion, the chapter will provide an analysis of the effectiveness of the remedy in divorce cases.

6.2 The origin and background of the anti-dissipation order

This remedy derives from the case of *Knox D'Arcy Ltd and others v Jamieson and Others*.[324] In the mentioned case, a group of companies (respondents) instituted an action prohibiting former employees (defendants) from dealing with their assets. The Court had to consider whether such a remedy existed in South African law. The Court defined the remedy as a distinct type of interdict that prevents the defendant from wasting his or her assets at any stage before

[322] Sections 15 and 20 of the MPA.
[323] Section 8 of the MPA.
[324] 1996 3 All SA 669 (A).

the Court grants a judgment against him or her.[325] The Court noted that the effect of this remedy affects the defendant's right to deal with his or her property. As such, the Court noted that granting such a remedy may lead to gross abuse, be overly oppressive, and may prejudice the defendant.[326] In addition, the Court held that if such a remedy is granted by the Court, it should be used sparingly in cases where justice could not be served without preventing the defendant from using his or her property.[327] Having analysed the evidence presented to the Court by the parties and the applicable law to the issue at hand, the Court confirmed the existence of the anti-dissipation remedy as a distinctive interdict that can be used where the affected party has satisfied the requirements of an "interim interdict viz: (a) a claim against a respondent; and (b) that the respondent is concealing or dissipating assets with the intent of frustrating the claim."[328]

The anti-dissipation remedy has the same effect as the *Mareva* injunction remedy, which is an English law remedy that derives its name from an English Court of Appeal case of *Mareva Compania Naviera SA v International Bulkcarriers SA*.[329] The *Mareva* injunction is a Court order that has the effect of preventing the defendant from dealing with his assets by freezing the defendant's assets so they cannot be dissipated.[330]

In the context of dissipation of marital assets to marriages out of community of property with accrual, the anti-dissipation remedy is used in the circumstances "where the alienator spouse alienates his or her assets so that once the accrual claim is granted and quantified, there may be no assets left to satisfy that monetary judgment."[331] In the divorce context then, the anti-dissipation remedy prevents the alienator spouse from squandering his or her assets so that there are insufficient assets for the beneficiary spouse upon the Court's determinative date of the accrual claim.[332] In marriage**s** in community of property, the anti-dissipation interdict has also been used to preserve the marital assets since the spouse has an undivided half share in the marital assets that belong to the joint estate.

[325] *Knox D'Arcy Ltd v Jamieson* 1996 3 All SA 669 (A) at 373D.
[326] *Ibid.*
[327] *Knox D'Arcy Ltd v Jamieson* 1996 3 All SA 669 (A) at 374D.
[328] *Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd* [2021] ZASCA 126 (29 September 2021) para 1.
[329] 1980 1 All ER 213.
[330] Rule 6.1 of the UK's Civil Procedure Rules (1998).
[331] *ND v MD* 2021 (1) All SA 909 (GJ) para 45.
[332] *ND v MD* 2021 (1) All SA 909 (GJ) para 55.

Having provided the origin and background of the anti-dissipation order, the following sections will discuss the application of the anti-dissipation remedy in the specific context highlighted above, that of the dissipation of marital assets in anticipation of divorce cases.

6.3 The applicability of anti-dissipation remedy in dissipation of marital assets in anticipation of divorce cases

As discussed above, the case that confirmed the existence of the anti-dissipation order dealt with a commercial dispute where a group of companies applied for the anti-dissipation remedy to interdict the defendants from dealing with their assets. In this section, the research focuses on how the anti-dissipation remedy can be used in the dissipation of marital assets. As discussed in previous chapters, when a spouse anticipates the breakdown of the marriage, an embittered spouse may attempt to dissipate assets to frustrate the equitable division of marital assets at the dissolution of the marriage. In this regard, the question is whether the affected spouse can rely on the anti-dissipation remedy as a legal recourse to prevent the other spouse from dissipating the marital assets.

Our courts have confirmed the applicability of the anti-dissipation order in cases dealing with the dissipation of marital assets where a divorce between the spouses is anticipated. In the case of *RS v MS,* [333] the Court held that when one of the spouses squanders the marital assets pending a final divorce order, the affected spouse may rely on the anti-dissipation order as a remedy to interdict the other spouse from dealing with his or her assets until the outcome of the divorce proceedings. In the case of *NCM v VTM,* [334] the Court again confirmed the existence of the anti-dissipation remedy. In so doing, the Court applied the principles of an anti-dissipation remedy as developed in the case of *Carmel Trading Company Ltd v Commissioner for the South African Revenue Services,* [335] a case dealing with a spouse's pension interest in a pending divorce case. As per the principles, the anti-dissipation order functions as a legal remedy that prevents spouses from resorting to wasting marital assets in anticipation of divorce.[336] In the words of Hurtle J, the anti-dissipation order is not used to limit the defendant's right to deal with his or her assets or property; instead, it is used to preserve the property until the outcome of the divorce.[337]

[333] 2014 (2) SA 511 para 18.
[334] (2017) ZAECGHC 75 paras 24-25.
[335] (2017) ZAECGHC 75 para 25.
[336] *Ibid.*
[337] *JTL v CHT* [2021] ZAECELLC 4 (22 January 2021) para 6.

As it was held in the case of *JTL v CHT*[338] the anti-dissipation remedy works in circumstances where the spouse is in the process of wasting the marital assets. Once the assets have been wasted, the affected spouse cannot rely on the anti-dissipation remedy because the remedy is used to prevent the other spouse from wasting the assets.

This remedy can be brought by way of an urgent application at the time the spouse attempts to dissipate the marital assets.[339] An application of this nature may take the form of an interim interdict. In this respect, the next section of this chapter will focus on the procedure for bringing the anti-dissipation application.

6.4 The procedure for bringing the anti-dissipation order

An anti-dissipation remedy is sought by way of application proceeding. In an application proceeding, the procedure is paper based, consisting of a notice of motion and a founding affidavit.[340] The founding affidavit must contain all the legal elements of the applicant's case as the applicant stands or falls by his or her founding affidavit.[341] Further, the parties may provide supporting documents to support the averments made in the affidavits.[342]

In brief, the hearing of application proceedings consists of the legal argument by the legal practitioners as per the affidavit. The Court may allow for oral evidence in exceptional cases where one or more of the disputed facts cannot be decided on the affidavit presented by the parties.[343] In seeking an anti-dissipation remedy, the affected spouse is required to gather substantial evidence that will be annexed to the founding affidavit to prove that the other spouse is attempting to waste the marital assets to frustrate the equitable division at the dissolution of the marriage.

The challenge with this type of application is the same as that discussed in previous chapters, namely, that the affected spouse might struggle to adduce the evidence, especially when the other spouse has concealed the evidence. In this regard, the application may often be based on hearsay evidence which would cause a Court to dismiss the application, as seen in the case of *NCM v VTM*.[344]

---

[338] [2021] ZAECELLC 4 (22 January 2021) para 5.
[339] S Peté et al *Civil Procedure: A Practical Guide* 3 ed (2017) 146.
[340] *Ibid.*
[341] *M & V Tractor & Implement Agencies Bpk v Vennootskap DSU Cillers and Seun* 2000 (2) SA 571 (N) para 5.
[342] Peté *Civil Procedure* 146.
[343] Peté *Civil Procedure* 155.
[344] (2017) ZAECGHC 75.

It is trite that the anti-dissipation application is brought by way of an urgent application. An urgent application is where the applicant asks the Court to dispense with the standard rules of Court relating to service and notice periods.[345] In an urgent application, the applicant must demonstrate the urgency of the matter by informing the Court fully as to why the applicant is urgent and why he or she cannot wait to obtain relief by making the application in the usual way. The failure of the applicant to demonstrate the urgency of the matter could result in the Court deciding the matter on standard Court rules of service and notice periods. The failure of the spouse to demonstrate the urgency requirement will give the other spouse enough time to dissipate the assets. Thus, it renders the anti-dissipation application ineffective. In a nutshell, it is submitted that the nature of the proceedings makes it doubly difficult for the spouse to preserve the assets, in that the spouse is first required to prove urgency of the application and secondly to provide evidence of concealment.

The urgent application may be brought by way of an interlocutory interdict, where a divorce action is already pending in Court. An interdict can be defined "as a Court order which either orders a person to refrain from performing some act or a person to perform a particular act".[346] In this interlocutory application, the affected spouse requests the Court to grant temporary relief (with the effect of preserving the marital assets) until the finalisation of the divorce. The interdict is usually temporary and preserves a contingent right or quasi-right (in our context, this would depend on the nature of the matrimonial property regime). It does so by enforcing a right for a limited period until the Court confirms whether the applicant has a clear right.[347] The interdict is used by the affected spouse to order the other spouse to refrain from dissipating their assets. Based on the nature of the order, the order is only granted provided that specific requirements have been met.

For the applicant to succeed in his or her application, the onus is on him or her to adduce real evidence to satisfy the requirements of an interdict as established in the case of *Setlogelo v Setlogelo.*[348] These requirements are as follows:

a. "The existence of a *prima facie* right, although open to some doubt;

b. a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;

[345] *Ibid*.
[346] Peté *Civil Procedure* 453.
[347] *Ibid.*
[348] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

c. the balance of convenience favours the granting of the interdict;

d. the absence of a suitable alternative remedy."[349]

6.4.1 Elaboration of the requirements in the context of an anti-dissipation application

6.4.1.1 The existence of a *prima facie* right, although open to some doubt

(a) *Proving a prima facie right although open to some doubt*

A "prima facie" right has been defined in the words of Innes JA to indicates "that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required".[350] This means that the applicant is required to prove more than a mere allegation,

Court rulings have demonstrated a spouse married out of community with the accrual system can use the interdict in order to preserve the contingent right in the accrual claim. The leading case law in this matter is the case of *Reeder v Softline*.[351] In order for the spouse in a marriage out of community with the accrual system to succeed in the application, the spouse is required to prove the requirements of an interdict. In this note, I focus on the first requirement which is proving a *prima facie* right although open to some doubt. Before one can commence with the analysis of the requirement, it is important for the purpose of this dissertation to distinguish between a contingent right and a vested right as analysed by Cloete J in the case of *Reeder v Softline*.[352]

(b) Summary of the facts in Reeder

The applicant (the prejudiced spouse) was married to the respondent (the alienator spouse) out of community of property with the accrual system. While divorce proceedings were pending, the applicant brought an interlocutory application for the immediate division of the accrual in terms of s 8(1) of the MPA, alternatively an order in which the shares of the respondent would be kept in a trust pending the divorce action.

The Court noted that although the spouse married out of community of property with the accrual system has not vested a right during the subsistence of the marriage, the Court will

[349] *Ibid.*
[350] *East London Tuberculosis Association v Decawiz Investments (Pty) Ltd* (1497/2014) [2014] ZAECGHC 69 (22 August 2014) para 49.
[351] 2001 (2) SA 844 (W).
[352] *Ibid.*

protect the contingent right by an interdict.[353] In defining what constitutes a contingent right, the Court used the definition as established in the case of *Durban City Council v Association of Building Societies*[354] where the learned judge noted that a contingent right refers to the "conditional nature of someone's title to the right". On the other hand, the definition of a vested right was well captured in the case of *Jewish Colonial Trust Ltd v Estate Nathan:*[355]

> "Unfortunately, the word 'vest' bears different meanings according to its context. When it is said that a right is vested in a person, what is usually meant is that such person is the owner of that right - that he has all rights of ownership in such right including the right of enjoyment. If the word 'vested' were used always in that sense, then to say that a man owned a vested right would mean no more than that a man owned a right. But the word is also used in another sense, to draw a distinction between what is certain and what is conditional; a vested right as distinguished from a contingent or conditional right. When the word 'vested' is used in this sense Austin, points out that in reality a right of one class is not being distinguished from a right of another class but that a right is being distinguished from a chance or a possibility of a right, but it is convenient to use the well-known expressions vested right and conditional or contingent right".[356]

Based on the above quote, I note that a spouse married out of community of property with the accrual facing the dissipation of matrimonial property is required to prove a *prima facie* contingent right although open to some doubt. In its recent judgment, the Court in the case of *ND v MD*[357] dealt with the meaning of proving a *prima facie* contingent right in the accrual in the context of the dissipation of matrimonial property. In its judgment, the Court held that the spouse married out of community with accrual is required to prove the accrual claim will accrue in his or her favour once vested – although open to some doubt.[358] Importantly, based on the requirement, the Court held that the *extent* of such right need not to be determined.[359]

In marriages in community of property, the spouse will have to show *prima facie* right in order to preserve the rights in the joint estate. The arising question is what then constitutes a *prima facie* right although open to some doubt in marriage in community of property. It is trite that

[353] *Reeder v Softline* 2001 (2) SA 844 (W) 851.
[354] 1942 AD 27 at 33.
[355] 1940 AD 163 at 175-76.
[356] *Reeder v Softline* 2001 (2) SA 844 (W) 849.
[357] [2021] 1 All SA 909.
[358] *ND v MD* [2021] 1 All SA 909 paras 48-49.
[359] *Ibid.*

the standard of proof in civil case is on a balance of probabilities. This means that the applicant is required to prove that his or her version of the truth is more probable than the other.

However, in the context of an interim interdict, the Court in the case of *Webster v Mitchell*[360] held that "it will be sufficient for the appellants to establish a case founded upon the greatest probabilities". This evidences that, in the interim order, the Courts are holding the applicant spouses to too high a standard. This is so because in terms of the interim interdict, the spouse will be required to prove that he or she has a reasonable prospect in the main action although there is no sufficient proof that he or she will be successful.[361] The ordinary meaning of *prima facie* evidence was defined in *Webster* as "evidence which does not affect the burden of proof but that, in the absence of some evidence to the contrary, the fact in issue must or may be taken to be proven".[362]

As a result, it will be sufficient for a spouse married in community of property to provide a marriage certificate as proof that he or she is entitled to his or her share in the joint estate. A marriage certificate is documentary evidence which proves that the parties are married.[363] As a result, if a spouse married in community of property adduces such documentary evidence, the Court is likely to grant the interim interdict in order to preserve the dissipation of the marital assets that belongs to the joint estate. In this regard, in the absence of some evidence in relation to the validity of the certificate or an antenuptial contract between the parties, the marriage certificate serves as *prima facie* evidence because it will prove that the spouses indeed are married in community of property.

6.4.1.2 A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted

The second requirement that the applicant has to satisfy is that the spouse has a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted.[364] In this regard, the applicant is often required to prove to the Court that the respondent intends to, or is in the process of, dissipating the marital assets. Furthermore, the applicant must show that, if their contingent right is not preserved, there will be no or little accrual left at the determinative date, leading to the applicant suffering irreparable harm. In

[360] 1948 (1) SA 1186 at 1187.
[361] *Ibid.*
[362] DT Zeffertt and AP Paize *Essential Evidence* (2010) 70.
[363] Zeffertt and Paizes *Essential Evidence* 41.
[364] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

marriage in community of property, the affected spouse will have to prove a well-grounded apprehension of irreparable harm if the other spouse is not interdicted from dissipating the marital assets. One case that dealt with this requirement is the case of *MWS v NNS*[365] where the applicant submitted that: (a) he has a

> "well-grounded apprehension that the first respondent is not prepared to share the pension interest with him, in that in the pending divorce action, she sought an order for forfeiture. The applicant submits that should the pension benefit be paid out to the first respondent; she will take steps to dissipate the money as quickly as possible and leave him without recourse in the final divorce".

In light of the applicant's submission, Leeuw JP held that the applicant presented no concrete evidence to substantiate his fear and beliefs that the first respondent would dissipate the resignation benefits.[366] As such, the applicant failed to satisfy the second requirement. This demonstrates that satisfying this requirement may impose an onerous burden on the affected spouse.

6.4.1.3 The balance of convenience favours the granting of the interdict

In satisfying this requirement, the applicant will have to prove to the Court that the interim relief will not cause an undue encroachment on the defendant's right to the use and enjoyment of his property as governed by s 26 of the Constitution.[367] For instance, the Court held in *ND v MD*[368] that Courts should be reluctant to burden a respondent's right to the use and enjoyment of his property where the applicant has not provided sufficient proof of that necessity.

6.4.1.4 The absence of a suitable alternative remedy

In this regard, the prejudiced spouse is required to prove that there is no alternative remedy. Therefore, this implies that if the conduct the prejudiced spouse is trying to interdict is one that falls under the MPA, the spouse will have to prove to the Court that the remedies under the MPA will not address the conduct.[369] From the case law, it does not appear that respondents have taken this point. However, failure to prove this requirement, the Court will not grant the interdict as requested by the prejudiced spouse.

---

[365] *MWS v NSS and Government Employees Pension Fund* 2021 (6) SA 201 (NWM) para 6.
[366] *MWS v NSS and Government Employees Pension Fund* 2021 (6) SA 201 (NWM) para 36.
[367] The Constitution of the Republic of South Africa, 1996.
[368] 2021 (1) All SA 909 (GJ) para 64.
[369] Heaton and Kruger *Family Law* 80-81.

The case studies in this dissertation demonstrate that the first two requirements of an interdict may pose challenges and an onerous burden on the affected spouse. It is submitted that the bar may be set too high for the affected spouse to satisfy the requirements of an interdict successfully in the context of divorce proceedings. Against this background, before the spouse can discharge the evidentiary burden imposed on them, they are faced with the challenge of satisfying the requirements of an ordinary interdict in this regard. The next part of the dissertation will focus on the evidentiary burden imposed on the affected spouse when relying on an anti-dissipation remedy.

6.5 The evidentiary burden imposed on the affected spouse when relying on an anti-dissipation remedy

In *RS v MS*[370] Bester AJ held that in order for a Court to grant relief to an affected spouse, the spouse must prove the following requirements:

> "1. The respondent spouse has assets within the jurisdiction of the Court;
>
> 2.The respondent prima facie has no bona fide defense against the applicant's contended for contingent accrual claim;
>
> 3.The respondent spouse intends to defeat the applicant's claim or render it hollow by dissipating or secreting assets."[371]

In proving the requirements of anti-dissipation relief, the Courts have noted that the last requirement is difficult to prove.[372] This is so because the vulnerable spouse must provide *prima facie* evidence that the alienator spouse has the intention to defeat the applicant's claim.[373] This is so because it is difficult for the prejudiced spouse to prove the actual intention. A spouse may present his or her own reasons as to why he is selling his or her property. It is also unclear as to what kind of evidence will suffice in order to prove the intention. Furthermore, because this type of relief is used to restrict the respondent from dealing with his or her own property, a mere allegation will not suffice. As noted in the case of *U v U* [374] substantial evidence of the alienator spouse acting *mala fide* with the intent to defeat the other

[370] 2014 (2) SA 511 para 17.
[371] *Ibid.*
[372] See *ND v MD* 2021 (1) All SA 909 (GJ) para 55 and *RS v MS* 2014 (2) SA 511 para 17.
[373] *RS v MS* 2014 (2) SA 511 para 17.
[374] [2019] ZAGPJHC 347 (26 September 2019) para 28.

spouse's claim will be required. Based on the requirements, it may be argued that the vulnerable spouse bears a heavy onus to satisfy before such an order can be granted.[375]

Moreover, in the case of *HM v AM*[376] the Court held that the anti-dissipation remedy is only granted in the clearest of cases where the applicant can adduce sufficient evidence that the respondent has a *mala fide* intention to dissipate the assets. In this regard, this evidentiary burden placed on the applicant may be too onerous, considering that the respondent might try to conceal the real evidence needed to discharge the onus on the applicant.

6.6 Conclusion

Arguably, it is submitted in this dissertation that the procedural hurdles associated with bringing this remedy may be too high, especially in cases where the other spouse is actively trying to conceal assets from the other spouse. This flows from the fact that during divorce proceedings, when one spouse suspects that the other spouse is attempting to dissipate assets, he or she will have to bring an urgent interdict to protect her propriety rights and quasi-propriety rights in the assets that form part of the joint estate.

The main challenge with relying on an interdict is the onus and the onerous requirements the affected spouses will have to satisfy before the Court can be found in their favour. This is evident in the cases mentioned above, as the judges have made it explicit that the affected spouses need to provide evidence to satisfy the requirements of an interdict.[377] In most cases, as shown above, it may be challenging to produce such concrete evidence. In the context of the dissipation of marital assets pending the final divorce order, concrete evidence as required in an ordinary interdict proceeding imposes an onerous burden on the affected spouse.

Further, the Courts have noted that, even if the interim interdictory relief was ordered against the defendant, such an order is only effective until the Court grants a divorce. Once the divorce order has been granted, the delinquent spouse may dissipate his or her assets, pending the determination of the extent of the accrual. This is so because, according to the Court in *ND v MD,* the interim interdict is limited to the duration of the trial proceeding for relief.[378] Thus, a spouse will still have to approach the Court for further interdictory relief, while the delinquent spouse may continue dissipating assets to distort the accrual's value upon the determinative

[375] *RS v MS* 2014 (2) SA 511 para 24.
[376] [2020] ZAFSHC 162 (10 September 2020) para 13.
[377] See the cases: *MWS v NSS and Government Employees Pension Fund* 2021 (6) SA 201 (NWM) and *OG v ZG* (2059/21) [2021] ZAECMHC 22 (10 June 2021).
[378] 2021 (1) All SA 909 (GJ) para 102.

date. Moreover, it should also be noted that this remedy is only available if marital assets are not dissipated. This relief cannot be invoked if the marital assets have already been dissipated.

This evidences that interim relief also has challenges, negatively affecting a beneficiary spouse. In summary, it appears on one hand that spouses married out of the community of property with accrual are faced with a heavy onus to discharge to successfully preserve the contingent right in the accrual. On the other hand, spouses married in community of property are also faced with a heavy onus to discharge to protect their assets in the joint estate.

CHAPTER 7

PROPOSALS FOR REFORM AND CONCLUDING REMARKS

7.1 Introduction

In the previous chapters, a detailed discussion was dedicated to all the legal remedies afforded to spouses in marriage in community of property and marriage out of community of property with the inclusion of the accrual system who are prejudiced by the dissipation of marital assets pending a divorce order. In the final analysis, this discussion is evidence that these legal remedies do not provide adequate protection to spouses faced with the dissipation of marital assets because of challenges outlined above. Some of these challenges include the fact that these legal remedies are costly to invoke, the bar is set too high for the parties to satisfy the requirements as required by the relevant provisions of the MPA, and that some of these remedies might be ineffective because the dissipation would have already occurred.

In addition, this research shows that, with the implementation of the MPA, lawmakers have attempted to deal with these challenges by providing legal remedies for affected spouses in marriage in community of property and marriage out of community of property with accrual. However, in careful consideration of the application of these remedies in practice, one can see that, even if these remedies are implemented, they are usually ineffective. Importantly, case decisions and journal articles in this thesis show that there is a need to reform the remedies that deal with the dissipation of marital assets. It is clear then that the legislative and judicial branches of government need to do something in order to give adequate protection to spouses faced with the dissipation of marital assets.

Against this background, this final chapter seeks to propose certain reforms to the remedies discussed above and make some concluding remarks. This chapter is divided into four areas that require reform. The first part of this chapter deals with the first proposal which recommends a change to the legislative framework of s 15 of the MPA. The second part of this chapter discusses the proposal that the determinative date for the calculation of the accrual claim be changed. The third part of the chapter deals with the proposal that the legislature impose full disclosure requirements on spouses married out of community of property in line with s 8(1) of the MPA. Finally, the chapter will discuss the need for a flexible interpretation of the requirements of ss 8(1) and 20 of the MPA. Finally, the chapter will provide concluding remarks.

7.2 Legislative reform in s 15(9) of the MPA.

In chapter three of the dissertation, the dissertation considered the s 15(9) remedy which is aimed at protecting spouses married in community of property.[379] I argued that this statutory remedy does not provide adequate protection to non-contracting spouses because of the challenges outlined in that chapter. As a result, I recommend that there should be a change in the legislative framework, specifically s 15(9) of the MPA. My argument for reform in this setting is that the balance that the s 15 remedy seeks to strike between the non-contracting spouse and the *bona fide* third party creates a hurdle in providing adequate protection to non-contracting spouses. In this vein, I argue that, for the section to be effective, the regulatory framework should be changed. First, I recommend that the section should be modified in the sense that it should be clear as to who should get primary protection between the non-contracting spouse and the *bona fide* third party.[380] This recommendation is in line with arguments that have been advanced by academic scholars.[381] In the context of this thesis , it is submitted that this protection should shift towards protecting non-contracting spouses in order to prevent the contracting spouses from dissipating the matrimonial assets and give effect to the purpose of s 15(9) of the MPA as held in various cases discussed in chapter 3 of the thesis.

Alternatively, I propose that the s 15(9) remedy be redefined in order to give detailed guidelines as to what the *bona fine* third party needs to do before entering into a transaction contemplated in s 15 of the MPA. [382] It is submitted in this thesis that – since the third party stands to benefit from the transactions – legal obligations should be placed on him or her to check whether the contracting spouse is married, and if so, which matrimonial property regime governs their marriage. Moreover, there should be consequences where a third party fails to comply with the obligations. This recommendation will provide better protection because third parties will know that, should they fail to comply with the obligations, they will face legal consequences.

7.3 Change in the determinative date of the calculation of the accrual claim

In chapter five of the dissertation, I set out that the determinative date of the calculation of the accrual claim is the date of divorce. This was clarified in the SCA judgment of *Brookstein v*

[379] Section 15(9) of the MPA 88 of 1984.
[380] JS McLennan "The Perils of Contracting with Persons Married in Community of Property" (2000) 117 *SALJ* 371.
[381] Ibid. See also L Steyn "When a third party cannot reasonably know that spouse's consent to contract is lacking" 119 (2002) *SALJ* 253 at 260.
[382] Act 84 of 1984.

Brookstein.[383] However, in that chapter, I raised challenges and concerns in relation to this date. As a result, I submit that there may be good reasons to change to the current determinative date. The challenge is that the current determinative date of the accrual gives one spouse much more of an opportunity to dissipate marital assets pending the dissolution of marriage. As a result, the innocent spouse may suffer prejudice, as demonstrated in the above paragraphs. In the case of *MB v NB*, the Court held that the determinative date should be *litis contestatio* which is the close of pleadings.[384] The effect of *litis contestatio* is to free the plaintiff's right in the civil case.[385] The Court in the case of *MB v NB* held that this type of determinative date can limit the dissipation of marital assets subject to accrual and would provide more protection to the vulnerable spouse.[386] However, this is a High Court decision and it was overridden by the Supreme Court of Appeal decision in the case of *Brookstein v Brookstein*.[387] In this case, the SCA found simply that a plain interpretation of the section meant that the determinative date of the accrual is the dissolution of marriage which is effectively the actual divorce order. [388]

My first recommendation for the challenge outlined above is in line with the case of *MB v NB*,[389] which is that the determinative date should be *litis contestatio*. Based on the case discussion in chapter five of the thesis, it is evident that matrimonial assets are mostly dissipated around the time of *litis contestatio*, therefore if the determinative date shift to *litis contestatio*, the prejudiced spouse will get better protection.

Alternatively, as argued by De Jong, it is recommended that what is missing in our South African law is a system established in certain European countries where the determinative date is the date on which the divorce summons is served and not the date of the dissolution of marriage.[390] For instance, in Germany, under the matrimonial system of *Zugewinngemeinschaft* (which is known as the community of accrued gain), the determinative date as regulated by s 1384 of the Germanic Civil Code of 1896[391] is the date the divorce summons is served and not the date of the dissolution of marriage. Under this matrimonial system, the gain accrued during the subsistence of marriage is divided equally between the spouses after the dissolution of the

[383] 2016 (5) SA 210 (SCA) paras 19-20.
[384] 2010 (3) SA 220 (GSJ) paras 41-42.
[385] As held by Holmes AJ in the case of *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 608D-E.
[386] 2010 (3) SA 220 (GSJ) paras 41-42.
[387] 2016 (5) SA 210 (SCA) paras 19-20.
[388] *Brookstein v Brookstein* 2016 (5) SA 210 (SCA) para 16.
[389] 2010 (3) SA 220 (GSJ) paras 41-42.
[390] M De Jong "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of property upon divorce" (2012) 2 *Stell LR* 225 at 234.
[391] De Jong 2012 *Stell LR* 234.

marriage.[392] However, the gains accrued before and after marriage do not form part of the joint estate. This section's purpose, as Schulze has noted, is to prevent the dissipation of the marital assets pending a final divorce order.[393]

7.4 Full disclosure requirements on spouses married out of the community of property with accrual system in line with s 8(1) of the MPA

The case studies in chapter five of the thesis showed that spouses who dissipate matrimonial assets in marriages out of community of property with the inclusion of the accrual usually conceal assets after the divorce action has been instituted. In this regard, I recommend that the Courts should require full disclosure on all the assets held in the name of each spouse.[394] The full disclosure requirement should be made compulsory in order to deter the spouses from dissipating assets in order to reduce their accrual claim. The need for full disclosure will also assists the prejudiced spouse with evidence needed in order to calculate the accrual. The full disclosure should be accompanied by an undertaking by each spouse from dealing with their assets until the right to accrual claim materialise.

7.5 Flexible interpretation of the requirements

As evident by chapter four and six infra, the bar is set too high for the spouses who choose to rely on s 20 of the MPA or the anti-dissipatory remedy. The spouses are faced with onerous obligations to satisfy the requirements as established in the above-mentioned remedies. I recommend that the requirements as established in the anti-dissipation remedy and s 20 of the MPA should be interpretated in a less restrictive manner in order to adequately protect the prejudiced spouses. Taking into account the nature of dissipation of matrimonial asset, I argue that the requirements should be modified or redefined in order to give adequate protection to prejudiced spouses. This recommendation stems from the failure of the prejudiced spouses to satisfy the requirements established in both these remedies. The cases studies in this dissertation showed that the prejudiced spouses find it challenging to discharge the onus placed on them because of the onerous evidentiary burden placed on them.

[392] *Ibid.*
[393] Schulze 2000 *THRHR* 117.
[394] *M v M* 2022 ZAGPJHC 484 (29 June 2022) para 163.

7.6 Concluding remarks

In conclusion, it is submitted that the dissipation of matrimonial assets is a growing trend in South Africa in anticipation of divorce cases. And as evident in this thesis, remedies aimed at deterring this behaviour are not effective because of the challenges submitted in previous chapters. Ultimately, it is the argument of this thesis that there should be legal reform to all the remedies aimed at protecting one spouse from another spouse who dissipates the matrimonial assets.

BIBLIOGRAPHY

BOOKS

Cameron E, De Waal M and Solomon P *Honoré's South African Law of Trusts* 6 ed (2018) Juta: Cape Town.

Currie I and De Waal J *The Bill of Rights Handbook* 6 ed (2013) Juta: Cape Town.

Heaton J and Kruger H *South African Family Law* 4 ed (2015) Lexis Nexis: Durban.

Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2015) Juta: Cape Town.

Mostert H, Pope A, Pienaar J, and Badenhorst P *The Principles of the Law of Property in South Africa* (2017) OUP: Southern Africa.

Joubert WA (ed) *The Law of South Africa* (2006) Butterworths: Durban**.**

Peté S, Hulme D, Palmer R, Sibanda O, and Palmer T (eds) *Civil Procedure: A Practical Guide* 3 ed (2016) Oxford University Press: Southern Africa.

Van Heerden B, Cockrell A, and Keightley R (eds) *Boberg's Law of Persons and the Family* 2 ed (1999).

Van Niekerk PA *A Practical Guide to Patrimonial Litigation in Divorce Actions* (2011) Lexis Nexis: Durban.

Zeffertt DT, and Paizes AP *Essential Evidence* (2010) Lexis Nexis: Durban.

JOURNALS

Brooks, PEJ "Matrimonial property regimes and succession in South African private international law" (1978) XI *CILSA* 289.

De Jong, M "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of property upon divorce" (2012) 23 *Stell LR* 225.

De Jong, M and Pintens, W "Default matrimonial property regimes and the principles of European family law – A European–South African comparison part 2" 2015 *TSAR* 551.

Driskell, E "Dissipation of marital assets and preliminary injunctions: A preventative approach to safeguarding marital assets" (2006) 20 *Journal of the American Academy of Matrimonial Lawyers* 35.

Hou, C "A Bit-ter Divorce: Using Bitcoin to Hide Marital Assets" (2015) 16 *North Carolina Journal of Law and Technology* 74.

Mavundla SD, Strode A and Dlamini DC "Marital power finally obliterated: The history of the abolition of the marital power in civil marriages in Eswatini" (2020) 23 *PELJ*

Miller, A "Until Death Do Us Apart: A Proposal for the Philippines To Legalize Divorce" (2018) 24 *Connecticut Journal of International Law* 181.

McLennan, JS "The perils of contracting with person married in community of property" (2000) 117 *SALJ* 367.

Retz, JT "How to do comparative work" (1998) 46 *The American Journal of Comparative Law* 617.

Schulze, HCAW "Some thoughts on the application of section 8(1) of the Matrimonial Property Act 88 of 1984" 2000 (63) *THRHR* 116.

Singh, D "Until it dies: A critical examination of section 15 of the Matrimonial Property Act" (1991) March *De Rebus* 199.

Steyn, L "When a third party could not have reasonably known that a spouse's consent to the contract is lacking" (2002) 119 *SALJ* 253.

Stander, L "Piercing the veneer of the trust in the South African trust law: liability of a trustee of a business trust for fraudulent trading" (2008) 165 *International Insolvent Review* PAGE?

Starosta, A "A loophole in the joint administration of the estate of spouses married in community of property in the context of the purchase of land" (2018) 30 *Stell LR* 155.

Van Aswegen, A "The protection of a spouse's right to share in the joint estate or accrual" (1987) 230 *De Rebus* 59.

Zaal, N "Marital milestone or gravestone? The Matrimonial Property Act 88 of 1984 as a reformative half-way mark for the eighties" 1986 *TSAR* 57.

OTHER SOURCES

Coetsee, D *A doctrinal research perspective of master's degree students in accounting* (Unpublished PhD, North West University, 2018).

Stafford, RB *A legal comparative study of the interpretation and application of the sham and the alter-ego trust in the context of South African trust law: The dangers of translocation company law principles into trust law* (Unpublished LLM thesis, Rhodes University 2010)

South African Law Reform Commission Issue Paper 34 (Project 100E) *Review of Aspects of Matrimonial Property Assets* (2018).

South African Law Reform Commission Issue Paper 41 Extension (Project 100E) *Review of Aspects of the Matrimonial Property Act* (2021).

South African Law Commission *Report Pertaining to Matrimonial Property Law with Special Reference to the Matrimonial Affairs Act, 1953, the Status of the Married Woman, and the Law of Succession in so far as it affects the Spouses* (1982) 26.

South African Divorce Statistics at Divorce Statistics in South Africa - Family and Divorce law (divorcelaws.co.za) (date accessed: 3 February 2023).