

199/69

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE Provincial Division.)
Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

S. A. MUTUAL FIRE & GENERAL INS. CO. LTD Appellant,

versus

GOLIATH BALI Respondent

Appellant's Attorney
Prokureur vir Appellant Webber & Son

Respondent's Attorney
Prokureur vir Respondent K. J. van der Merwe

Appellant's Advocate
Advokaat vir Appellant J. F. Coetzer

Respondent's Advocate
Advokaat vir Respondent T. M. M. van der Merwe

Set down for hearing on
Op die rol geplaas vir verhoor op 23.2.1970.

3.11.6. 3-5. 2.4.15

Coram: Slegers J. van Borch, Botha, Trollip, J. A. & Middel, A. J. A.

(E.C.D.)	9.45 am	11.00 am
	11.15 am	1.00 pm
	2.15 pm	4.00 pm
	4.15 pm	4.30 pm

Postea 19-3-70 per Botha J.A. -
appeal dismissed with costs

[Handwritten signature]

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA.
(APPELLATE DIVISION.)

In the matter between:

SOUTH AFRICAN MUTUAL FIRE AND
GENERAL INSURANCE COMPANY
LIMITED.

.....APPELLANT.

AND

GOLIATH BALI in his personal
capacity and his capacity as
husband and legal guardian of
his wife NOMAXHOSE MILLICENT
BALI.

.....RESPONDENT.

Coram: Steyn, C.J., Van Blerk, Botha, Trollip, JJ.A
et Miller, A.J.A.

Heard: 27 February, 1970. Delivered: 19th March, '70.

J U D G M E N T.

BOTHA, J.A.

In the East London Circuit Local Division the respondent instituted action against the appellant for damages in respect of personal injuries sustained by his wife in a collision with a motor vehicle insured by the appellant under the provisions of the Motor Vehicle Insurance Act, 1942. I shall refer to the parties as plaintiff and defendant respectively. In his particulars of claim the plaintiff...../2.

plaintiff, a Bantu, is cited as suing "in his capacity as husband and legal guardian of his wife....to whom he is married in terms of the provisions of section 22 of Act 38 of 1927". According to further particulars it appears that the marriage took place in 1961 and that no ante-nuptial contract was entered into by the parties prior to the marriage. It seems to have been assumed by the Court a quo, and it was common cause between counsel, that the parties also had not prior to their marriage made the declaration referred to in section 22(6) of Act 38 of 1927. It appears therefore that the marriage was out of community of property in terms of the said section 22(6), but without exclusion of the husband's marital power over his wife and her property. (Ex parte Minister of Justice in re Molefe vs. Molefe, 1946 A.D. 315 at p.320; and Estate Sayle vs. Commissioner for Inland Revenue, 1945 A.D. 389 at p.397). It also appears from the further particulars that plaintiff had not obtained from his wife the written consent contemplated in...../3.

in section 2(1)(b) of the Matrimonial Affairs Act 37 of 1953 to "receive any compensation awarded to the wife in respect of personal injuries sustained by her....". Plaintiff claimed payment of the damages suffered by his wife either to himself or, alternatively, to his wife by virtue of the provisions of section 2(1)(b) of the Matrimonial Affairs Act, 1953.

The defendant filed a special plea contending that by reason of the fact that the plaintiff had not obtained the written consent of his wife to institute the action on her behalf, and^{of} the fact that the claim is for compensation in respect of personal injuries alleged to have been sustained by her, the plaintiff is, by virtue of the provisions of the said section 2(1)(b) of Act 37 of 1953, not in law entitled to claim such compensation on behalf of his wife.

The special plea implies that a wife may by her written consent invest the husband with locus standi to institute proceedings on her behalf, which he does not

otherwise...../4.

otherwise possess by law. I know of no legal principle upon which such an implication can be based, and none was suggested to us. The written consent referred to is, of course, the written consent contemplated in section 2(1) (b) of Act 37 of 1953 entitling the husband "to receive any compensation awarded to the wife in respect of personal injuries sustained by her". If the husband has no locus standi to sue for such compensation on behalf of his wife, it is not clear how the latter's written consent entitling the husband to receive the compensation after it has been awarded to the wife, could clothe him with the necessary locus standi to claim it on her behalf.

Counsel for the defendant contended, however, that the terms of the special plea were sufficiently wide to enable him to argue that plaintiff has no locus standi to claim the compensation on behalf of his wife, either by reason of the fact that he had not obtained his wife's written consent in terms of section 2(1) of the Act or, alternatively, that any right he may have had under

common law to sue on behalf of his wife by virtue of his marital power has, in relation to the matters enumerated in section 2(1), been withdrawn by ^{the} provisions of section 2, and that the wife's written consent in terms of section 2(1) was irrelevant. Both counsel in the end confined themselves to the alternative argument.

Plaintiff filed an exception to the defendant's special plea on the ground that it disclosed no defence in that it was competent for the plaintiff as the husband and legal guardian of his wife to claim the compensation on her behalf notwithstanding the provisions of section 2(1) (b) of Act 37 of 1953.

The Eastern Cape Division upheld the exception with costs. (The judgment is reported at 1970(1) S.A. 187). It is against this order that the defendant now appeals to this Court.

It is clear that under common law a married woman, who is subject to the marital power of her husband, has, subject to certain exceptions not relevant to this

appeal...../6.

appeal, as for example in matrimonial actions, no locus standi in judicio. That means that actions involving the wife can only be brought by or against the husband in his capacity as her legal guardian, or she may in certain circumstances, where the claim in dispute is enforceable by or against the wife, herself sue or be sued assisted by her husband. (See the authorities cited in Hahlo, Husband and Wife, 3rd. Ed. Chapter 13, p.194 et seq.) The question to be determined in this appeal is how far the common law has in this respect been varied by the provisions of the Matrimonial Affairs Act 37 of 1953. In so far as the wife's legal capacity to sue is concerned, the matter is clear, for every wife is by section 2(6) of the Act expressly authorised, without the assistance of her husband, inter alia:-

- "(a) to receive or sue for remuneration due from her employer for services rendered by her;
- (b) to receive or sue for any compensation, deposit, dividend or proceeds referred to in paragraph (b), (c) or (d) of sub-section (1)....".

What...../7.

What is not clear and is in dispute in this appeal is whether in respect of those claims for which the wife has in terms of section 2(6) been expressly authorised to sue unassisted by her husband, the latter retains his common law powers to sue as his wife's legal guardian and on her behalf by virtue of his marital power. The contention on behalf of the appellant is that the husband has been deprived of his common law powers in that regard by the provisions of section 2(6) as read with section 2(1) of the Act, in terms of which, inter alia:-

"(1) No husband shall be entitled, without his wife's written consent-

- (a) to receive any remuneration due or accruing from his wife's employer for services rendered by her, or to take possession of any such remuneration received by her; or
- (b) to receive any compensation awarded to the wife in respect of personal injuries sustained by her or to take possession of any such compensation received by her....".

The question in issue in this appeal has been the subject of conflicting decisions in some of our

provincial and local divisions. In Goetz vs. Royal Insurance Co. Ltd., 1957(3) S.A. 365(W), in which the husband sued for compensation in respect of personal injuries sustained by his wife, and in which the point was taken that the declaration was fatally defective in the absence of an allegation that the husband has the written consent of his wife to claim such compensation, Ludorf, J., held that the husband was not by the relevant provisions of the Act debarred from claiming such compensation on behalf of his wife and without her consent.

After Goetz's case came de Beer vs. Haagman N.O. 1963(1) S.A. 582(T), in which a full Court of the Transvaal Provincial Division came to the conclusion that it was incompetent for the husband to settle his wife's claim for compensation for personal injuries suffered by her as he had been deprived by the Legislature of the right to sue for such compensation on behalf of his wife.

Two years later a full Court of the Eastern Cape Division in de Goede vs. Spies and Others, 1965(1)S.A. 23(E)

followed...../9.

followed the decision in Goetz's case, and held that the husband has not been deprived of his right to claim compensation on behalf of his wife in respect of personal injuries suffered by her.

The judgment in Goetz's case was criticised by Professor Hahlo in an article in 75(1958) S.A.L.J. pp.202-204, but for reasons given later in this judgment, the criticism of the learned author does not appear to be well-founded.

Counsel for the defendant in an interesting argument sought to find some guidance as to the intention of the Legislature in enacting sections 1 and 2 of Act 37 of 1953, in the development of the law relating to the marital power of the husband and the institution of community of property between spouses. The principle he sought to extract from the development of the law in this regard was that as property was in the course of time either by ante-nuptial contract or in some other manner excluded from the administration and control and hence

the...../10.

the marital power of the husband, and placed under the exclusive control and administration of the wife, the latter obtained exclusive locus standi in judicio in respect of such property. Hence, so the argument continued as I understand it, the Legislature, because it has excluded from the administration and control and hence the marital power of the husband, the property referred to in section 2(1) of the Act, it must have intended also to have deprived the husband of the power to sue in respect thereof, which power is by section 2(6) now conferred upon the wife.

I find the argument unhelpful mainly because it is by no means clear that the property rights mentioned in section 2(1) are excluded from the husband's marital power. The Legislature must have been aware of the fact that the limitations imposed upon the powers of the husband in relation to the property mentioned in section 2(1) could operate only in those cases where such property was under the marital power of the husband. Nothing could

have been simpler, therefore, ^{than} for the Legislature to have excluded such property from the husband's marital power. Yet it did not do so. It merely imposed some practical limitations on the husband's marital power in regard to such property, and then only where he has not obtained his wife's written consent. The language of section 2(1) contrasts strangely with the language of section 2(4) in terms of which a wife may in certain circumstances obtain a court order declaring certain property "to be free from the control of her husband, and prohibiting the husband from dealing in any manner with the property". It may be that the wording of section 2(4) supports an argument that a court order in terms thereof would, for so long as it remains in force, have the effect of suspending the husband's marital power in respect of the property to which it relates, albeit that it is not clear that such an order would have the effect of excluding altogether such property from the community estate. (See section 2(3)(b)). The section however goes very much further than does

section 2(1). In the latter section the Legislature has quite clearly not, in the case of a marriage with community of property, excluded the property therein mentioned from the joint estate (Tomlin vs. London and Lancashire Insurance Co. Ltd., 1962(2) S.A. 30 (D and C) at p.33), nor has it, unlike in the case of section 2(4), expressly excluded from the control of the husband the property therein enumerated.

The decision of this Court in Erasmus vs. Erasmus 1942 A.D. 265, to which we have been referred, is of no assistance in the present enquiry. In that case it was held that a testator in making a bequest of immovable property to a woman married in community of property, subject to the condition that it shall be her exclusive property and be excluded from the community of property existing between her and her husband, prima facie intends thereby to exclude the husband's marital power in regard to such property. Section 2(1) of Act 37 of 1953 applies in respect of both marriages with and without community of property...../13.

property. Where the marriage is without community of property, the property rights referred to in section 2(1) are already the exclusive property of the wife but, where the marital power of the husband has not been excluded, they would be subject to the husband's marital power. All that the section does in such a case is to place limitations upon the marital power of the husband in regard to such property rights. In the case of a marriage with community of property, the property rights enumerated in section 2(1) are not declared to be the exclusive property of the wife, nor are they excluded from the community estate. Also in such a case the section does no more than place limitations upon the marital power of the husband in regard to those property rights.

The fact that section 2(1) only prohibits the husband from receiving or taking possession of the property therein mentioned without the written consent of the wife, seems to contemplate the continued existence of the husband's marital power over that property, for with his wife's

consent...../14.

consent he would be entitled to receive or take possession thereof and exercise complete control over it. If the prohibition contained in section 2(1) had the effect of excluding that property from the marital power of the husband, it is not clear how the wife's mere consent could in law have the effect of including it within his marital power. A further indication that the property mentioned is not excluded from the husband's marital power is the fact that, in contrast to the provisions of section 1(1) in relation to immovable property, there is no provision in section 2(1) which in any way inhibits the husband's control and administration over movables purchased by the wife with the remuneration, compensation or other monies referred to in section 2(1).

Once the conclusion is arrived at, as I think it must be, that the effect of section 2(1) is not to exclude the property therein mentioned from the marital power of the husband, unambiguous language is required effectively to deprive the husband of his common law powers

to sue in respect thereof on behalf of his wife, because of the general rule that a statute, ^{Should} be construed in conformity with the common law rather than against it. I cannot find such unequivocal language in section 2. Indeed a contrary intention appears from the express reference in paragraphs (a), (b) and (c) of section 2(6) to the right of the wife "to receive or sue for" the property therein mentioned, while paragraphs (a), (b) and (e) of section 2(1), which prohibits the husband from receiving, without his wife's consent, the property therein mentioned, are significantly silent about the husband's common law powers to sue in respect thereof on behalf of his wife.

Counsel for the appellant conceded that a husband could only be held to have been deprived of his common law powers to sue on behalf of his wife where the marital power has not been excluded, if the words "to receive" in paragraphs (a), (b) and (e) of section 2(1) were construed as meaning "to receive or sue for". There is no warrant for so construing "to receive" in the said paragraphs,

and in paragraph (b) such a construction would be completely inept, for it would be meaningless to prohibit the husband from suing for "any compensation awarded to the wife in respect of personal injuries sustained by her". And if only the wife could claim compensation in respect of personal injuries sustained by her, the husband could hardly find himself in a position where he could receive such "compensation awarded to the wife" either by order of court or in terms of a settlement, and the purpose of the prohibition in paragraph (b) would then be difficult to appreciate. But its meaning and purpose becomes clear if the right of the husband to sue for such compensation on behalf of his wife is recognized.

A further contention in this regard was that as the right to sue for any property mentioned in section 2(1) is correlative to the right to receive such property, the Legislature must have intended, by prohibiting the husband from receiving such property without the consent of the wife, to have deprived the husband of the right to sue

therefore...../17.

therefor on behalf of his wife. I do not think that necessarily follows, for I can see no anomaly in the husband suing for payment to his wife, or to himself subject to his wife's written consent. The suggestion that the right to sue is dependent on the right to receive, would mean that the wife can, by giving her written consent to the husband to receive, confer upon him authority to sue therefor. How the wife can by her written consent to the husband to receive any property referred to in section 2(1), confer upon him locus standi in judicio in respect thereof which he otherwise does not possess by law, was left unexplained.

It was also contended that just as the husband's guardianship over his wife is generally the correlative of her legal incapacity, so his right to sue on her behalf as her guardian must be the correlative of her lack of locus standi in judicio. Therefore, so the argument proceeded, the husband's power to sue on her behalf as her guardian, must by implication be regarded as withdrawn in so far as

locus standi has by section 2(6) of the Act been conferred upon the wife. This was the approach in de Beer's case (supra) at page 585 where Kuper, J., also emphasised the undesirability "that two actions should be competent namely one by the husband as guardian of the wife, and the other by the wife untrammelled by any fetters of guardianship".

That would have been a forceful argument in favour of the construction contended for by the defendant if section 2(1)(b) had been, apart from its literal meaning, also capable of that construction. But, as I have attempted to show, it is not. The Legislature may have had good reasons for deciding that the husband should not be deprived of his right to sue on behalf of his wife, for instance where the wife has been incapacitated by her personal injuries, or where the relationship between the husband and wife is undisturbed and normal according to the standards of society and the wife considers that going to court is the man's business. The Legislature may also have been influenced by the consideration that if the husband were, for instance...../19.

instance, deprived of his power to sue on behalf of his wife for compensation in respect of personal injuries sustained by her, the latter would have to sue for the general damages suffered by her, while the husband would have to institute a separate action for the special damages suffered by him, such as expenses incurred in respect of medical treatment. (See Schnellen vs. Rondalia Assurance Corporation of S.A. Ltd., 1969(1) S.A. 31(W); and Abbot vs. Bergman, 1922 A.D. 53).

It may not be desirable that both husband and wife should be able to sue in respect of the same cause of action, and we have been referred to certain alleged anomalies which could arise if both husband and wife were to institute proceedings in respect of the same subject matter referred to in section 2(1). But such considerations cannot justify a construction of that section of which it is not capable. In any event it would only be where the relationship between husband and wife has become disturbed that the parties may be foolish enough each to institute

an independent action based on the same cause; a procedure which will of necessity rarely, if ever, occur, for litigation is not usually indulged in merely to satisfy a personal whim. There is, as far as I am aware, not a single reported case since the passing of the Act in 1953 where both husband and wife have instituted action on the same cause. The institution of two independent actions by husband and wife in respect of the same subject matter referred to in section 2(1) is therefore unlikely and would be so rare that anomalies that may arise therefrom cannot carry much weight in the construction of section 2 of the Act. (Aetna Insurance Co. vs. Minister of Justice, 1960(3) S.A. 273 (A.D.) at p. 278). It may in any event be questioned whether the Legislature would, without any apparent reason, have deprived the husband of his right to sue on behalf of his wife as her guardian where it was by their choice that the marital power over the person and property of the wife was not excluded, and the relationship between them has not become strained or disturbed in any way.

Moreover...../21.

Moreover, cases where husband and wife may institute independent actions in relation to the same matter is not unknown in our law and practice. Thus a publica mercatrix has locus standi in judicio in all matters relating to her trade or business, and may sue or be sued in her own name without the assistance of her husband. But action may also in such matters be brought against the husband alone in his capacity as administrator of the joint estate. (Matson vs. Dettmar, 1917 E.D.L. 371; Ex parte Vally, 1930 C.P.D. 304, and Edges vs. Goldin, 1946 T.P.D. 98 at p.102). Similarly the husband may as administrator of the joint estate also himself sue in regard to such matters to protect the interests of that estate.

Counsel contended that if the husband could sue on behalf of his wife in relation to any matter referred to in section 2(1) he would be able to settle the claim without his wife's consent and thereby render nugatory the rights given to the wife by section 2 and so frustrate the objects of the Legislature. That he could do so is,

of course, possible. It happened in de Beer's case (supra).

It is a right the husband always enjoyed under common law by virtue of his marital power, and the right cannot, in the absence of clear indications to the contrary, be assumed to have been withdrawn by the Legislature. (Cf. Macduff vs. Chatsworth Estates (Pty.) Ltd., 1944 C.P.D. 392 at p.397). In any event why should the husband, where the marriage is in community of property, i.e. the kind of case to which these provisions would more often than not, apply, want to exercise that right deliberately and without good cause merely to prejudice the wife's rights if he thereby also prejudices the joint estate and through it himself? Though it is theoretically possible, therefore, that prejudice could in rare cases be caused to a wife by a recalcitrant husband, there is little, if any, danger that the objects of the Legislature will generally be frustrated if section 2 of the Act were to be construed as not affecting the husband's common law powers to sue on behalf of his wife.

I do not propose to deal with all the suggested anomalies which could arise if husband and wife were both to institute independent actions in relation to any matter referred to in section 2(1) of the Act, for I do not think that the possibility of such anomalies arising, unlikely and rare as they would be, justify a construction being placed upon section 2 of the Act of which it is not capable. That anomalies could possibly arise cannot be denied, but I am not satisfied that some of them would not be avoidable by an appropriate order of court, and, as was pointed out in de Goede's case (supra) at page 29, "it is not to be forgotten that the aid of the court can always be invoked by a wife who complains that her husband is acting in fraud of her rights". But even if section 2 were to be construed as depriving the husband of his common law powers to sue on behalf of his wife in respect of the matters referred to in section 2(1), anomalies would not be avoided. As I have already pointed out, such a construction would, inter alia, in the case of a claim in
respect...../24.

respect of personal injuries sustained by the wife, necessitate the institution of a separate action by the husband for medical expenses incurred by him, and a separate action by the wife for her general damages. Act 37 of 1953 no doubt creates many anomalies (Cf. Peter vs. Peter and others, 1959(2) S.A. 374(A) at p.351), anomalies which are almost inevitable in social legislation of its kind. The Act was clearly designed to remedy unsatisfactory situations that may arise where husband and wife are living at arm's length, or where the husband neglects or deserts his wife. To make adequate provision for all eventualities that may arise in such circumstances by means of legislation would, I imagine, be almost impossible.

In all the circumstances it seems to me that plaintiff's exception to defendant's special plea was correctly upheld.

The appeal accordingly fails and is dismissed with costs.

JH Botha
BOTHA, J. A.

Steyn, C.J.)
Van Blerk, J.A.) Concurring.
Trollip, J.A.)
Meyer, J.A.)

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