

1914. May 19, 20; June 29. DE VILLIERS, J.P., and
CURLEWIS, J.

Husband and wife.—Antenuptial contract.—Insolvency of husband.—Savings by wife out of household allowance.—Moderate amount.—Unpaid balance due under antenuptial contract.—Bona fide gift.—sec. 39, Law 13 of 1895.

L and his wife were married out of community of property in September, 1911.

L gave his wife £25 to £30 per month with which to defray household expenses and for a period of twelve months the wife kept a boarder in her husband's house who paid her £5 10s. per month. In July, 1913, the wife retained an unspent balance of these moneys of £110. In October, 1913, L's estate was sequestrated. In an action brought by the trustee in L's insolvent estate against the wife for the recovery of the said £110, *Held*, that in the absence of any evidence to enable the Court to judge whether the amount saved by the wife from the said moneys was, having regard to L's income and occupation a moderate amount, the said £110 remained part of L's estate.

In terms of the antenuptial contract L promised to give his wife on demand cash to the value of £1,200. Before marriage he gave her £200, but at the date of insolvency £1,000 remained owing. *Held*, that where money which purports to be given by an antenuptial contract is not paid over the person who relies upon the antenuptial contract must produce *prima facie* proof that the gift was made *bona fide* in order that it should not lose its effect under section 39 of the Insolvency Law.

Appeal against a judgment by the magistrate at Johannesburg.

The plaintiff was the trustee in the insolvent estate of Isaac Linde, which was sequestrated on the 30th October, 1913. The appellant was the wife of the insolvent to whom she was married out of community of property on the 10th September, 1911. The summons alleged that between September, 1911 and August, 1913, the insolvent paid to his wife from £25 to £30 per month to defray the expenditure of the household and that the wife kept a boarder in the insolvent's house for twelve months. The said boarder was kept at the husband's expense, who defrayed all the expenses of the boarder's food and board. The boarder paid to the wife the sum of £5 10s. per month for the said period of twelve months and it was alleged that these moneys were paid to her as the agent of her husband and for his benefit and which he allowed her to retain for household necessities.

Out of the money given by Isaac Linde to his wife in this way in or about July, 1913, a sum of £110 remained over and unspent by

Mrs. Linde, which amount was reduced to £100 to bring the claim within the magistrate's jurisdiction.

The defence was that this money was saved by the wife out of money paid to her by her husband to defray household expenses and that the said money became her own property.

The defendant also pleaded, as an alternative plea, that under the antenuptial contract her husband undertook to pay her £1,200 in cash, that he had only paid her £200, leaving a balance due of £1,000 and that any moneys paid to her by her husband subsequent to the marriage were paid in reduction of this indebtedness, or, alternatively, were set off against his indebtedness, or, as a further alternative, should be deducted from the amount owing to her in her antenuptial contract in terms of sec. 60 of the Insolvency Law.

The magistrate held that the wife in managing the affairs of the common household was merely the agent of the husband and that any unexpected balance of housekeeping moneys remained the property of the husband, that as the boarder was kept in the house provided by the husband and fed and provided for out of moneys supplied by the husband, the receipts from him were also the property of the husband, and the wife really received them as his agent. Judgment was accordingly given for the plaintiff with costs. The defendant appealed.

L. Greenberg, for the appellant: There was an independent contract between husband and wife to pay her so much a month to keep house for him, and she was entitled to keep the balance. Only a moderate amount was retained, which became the wife's property. See *Voet*, 24, 1, 11. There is no presumption as to donation between husband and wife, *Voet*, 24, 1, 16. The *onus* lay on the plaintiff to prove this was a donation. The amount due under the antenuptial contract was not paid owing to the wife's not pressing for payment, but, nevertheless, she could retain money due to her husband by her by way of set-off, Pothier on *Obligations* (Part III., ch. 4 sec. 2, par. 591); Insolvency makes the amounts payable under the antenuptial contract due and payable. Pothier (*ibid*), p. 118, secs, 2, 3, 3, subsec. 234; which was followed in *Hidding, N.O. v. Norden* (3 M. 288). Compensation can take place either at insolvency or at the date when pleaded; see *Hardy, N.O. and Mostert v. Harsant* (1913, T.P.D. 433). Under the antenuptial contract the £1,200 was payable on demand, *i.e.*, it was due at the time of the marriage, but

not payable until demanded. If it were never demanded it would be a gift to the husband, which is void in law: *Voet*, 24, 1, 11. See also sec. 39 of the Insolvency Law, which secures this benefit to the wife.

J. Brink, for the respondent: Donations *inter vivos* are absolutely prohibited between husband and wife, see Maasdorp's *Institutes of Cape Law*, Vol. I., p. 31. The passage in *Voet* quoted refers to the personal allowance made to the wife by the husband and not to a household allowance. It only refers to pin money. She cannot claim against her husband's estate at all for the £1,000, see Placaat of Charles V., which is translated and added as an appendix to Maasdorp's *Institutes*, Vol I. at p. 286. Sec. 39 of the Insolvency Law only protects payments actually made and where *traditio* has taken place. The *onus* is on the wife to show that the gift under the antenuptial contract was given *bona fide*. If it is *bona fide* made, it is unassailable after the lapse of two years under sec. 39 of the Insolvency Law, but if not made *bona fide* it is assailable always. In the present case the husband could not pay it. The Cape Act is different to the Transvaal. The corresponding section in England is similar to the Cape, see Williams on *Bankruptcy*, 9th ed., p. 259.

For compensation to operate both claims must be due and liquidated, see *Voet*, 16, 2, 17; Van Leeuwen's *Cens. For.*, 1, 4, 36, 3; *Hardy, N.O. & Mostert v. Harsant* (*supra.* at p. 445); Our claim was not liquidated until the magistrate gave judgment for it. Moreover, the money was only payable to the wife on a contingency, *i.e.*, on her demanding it. She has not proved for it in her husband's estate. It only became due on the filing of her plea, which was after insolvency. It was then too late to claim, see *Hardy, N.O.'s case* (*supra.* at pp. 447 and 448). Compensation is stopped by intervening insolvency.

The benefit of section 60 of the Insolvency Law cannot be claimed because the presiding official has not been called upon by the respondent to carry out the terms of that section. The magistrate is not the presiding officer within the meaning of the section. In *Hidding, N.O. v. Norden* (3 M. 288) no reasons are given for the decision. The cases do not decide that the benefit of section 60 can be claimed without proving in the estate.

Set-off does not apply in a case like this, where the wife is in possession of a fund given for a particular purpose. She must deliver up the money when claimed, see *Kuhne v. African Banking Corporation* (1910, E.D.L. 443).

Greenberg, in reply: A donation between husband and wife is not void but only voidable, *Breytenbach v. Frankel & Hochstadter* (1913, T.P.D. at p. 308); *Voet*, 24, 1, 3. There is no evidence that this was pin money. *Voet*, 24, 1, 11 does not refer to pin money. He there refers specifically to garments, trinkets and other ornaments for which pin money is given.

The defendant must prove *mala fides*. There is no presumption of *mala fides* on the part of the husband or wife.

Money payable on demand is not payable on a contingency; compare a promissory note payable on demand under definition of promissory note in the Bills of Exchange Proclamation.

This was not money paid to the wife in trust for the husband. The case the defendant had to meet was one of donation and not agency.

Cur. adv. vult.

Postea (June 29).

CURLEWIS, J.: The appellant was sued in the lower court by the respondent in his capacity as trustee of the insolvent estate of Isaac Linde for the sum of £100.

The summons after alleging that the estate of Isaac Linde was sequestrated on the 30th of October, 1913, and that the defendant (now appellant) is wife of the insolvent and was married to him on the 10th September, 1911, out of community of property, continues as follows: (3) That between the month of September, 1911, and the month of August, 1913, the said Isaac Linde paid to his wife, the defendant, £25 to £30 per month with which to defray the expenditure of their joint household, she acting as his agent in that behalf. (4) That the defendant also kept a boarder in her husband's house, one Celiner, for the period of twelve months at her husband's expense, the latter paying for the household and all expenses of the said boarder's food and board. The said Celiner paid to defendant the sum of £5 10s. per month for the period of twelve months aforesaid, which moneys were paid to her as the agent of her husband and for his benefit and which he allowed her to retain for household expenses. (5) That the amount given by the said Isaac Linde to his wife, the defendant in this way to meet household expenses was too large and extravagant and a sum amounting to £100 in or about the month of July remained over as a balance unspent by the defendant and which sum was the property of the

said Isaac Linde. (6) That in or about the month of July or August the said Isaac Linde gave the defendant (his wife), these moneys for the purpose of helping her to build a house for herself, which was void in law. (7) That the defendant has not paid the said amount of £100 to the insolvent and the trustee is entitled to claim the same for the benefit of the creditors, and which, notwithstanding proper and legal demand, the defendant neglects and refuses to pay.

The claim was reduced to £100 to bring it within the magistrate's jurisdiction.

After excepting to the summons on the ground that it disclosed no action and was vague, embarrassing, contradictory and bad in law, the defendant denied pars. 3, 4, 5 and 6 and pleaded that the money received by her from her husband in respect of the household expenses was given to her in payment of such expenses which were defrayed by herself and for which he was legally liable to pay, but that she did not act as the agent of her husband, and the moneys which were saved up by her became her own property.

In the alternative the defendant pleaded:—

(a) That prior to the said marriage she entered into an antenuptial contract with the insolvent whereby he undertook to pay her the sum of £1,200 in cash, a copy of which contract is hereto annexed marked "A" and which the defendant prays may be considered as herein inserted.

(b) The defendant only received from her husband the sum of £200 and he thus remained indebted to her in the balance of £1,000.

(c) Any moneys which the defendant may have received from her husband subsequent to the marriage were paid to her in reduction of the amount owing to her under the said contract.

(d) In the alternative to sub-paragraph (c) the defendant says that any moneys paid to her by her husband were set-off against the amount of his indebtedness to her under the said contract prior to the insolvency.

(e) In the further alternatives the defendant says that any amount which she may have received from the insolvent is to be deducted from the amount owing to her under her contract in terms of section 60 of the Insolvency Law.

The only evidence laid before the magistrate was the statement of the defendant made at her examination before a commission appointed by this Court under the Insolvency Law, and the antenuptial contract between defendant and her husband.

The magistrate dismissed the exception and gave judgment against the defendant for £100 and costs.

As regards the exception it was urged on behalf of the appellant that the magistrate should have allowed the exception inasmuch as it was impossible from the summons to say whether the respondent claimed on the ground that appellant had money in her possession as agent of her husband, or on the ground that her husband had donated the money to her.

The summons is not elegantly drafted, but it seems fairly clear that the plaintiff did not intend to rely only on the ground of the invalidity of the gift of the husband to the wife, but also on the ground that the wife had obtained certain money as the agent of her husband for household expenses and that the unspent balance belonged to his estate.

Paragraph 6 of the summons should have been set out as an alternative claim, but I do not think that the defendant was prejudiced by the form of the summons, and the magistrate was therefore justified in dismissing the exception.

From the evidence of the defendant it appeared that she was married to the insolvent on the 10th September, 1911. An antenuptial contract had been executed by them on the 15th August, 1911, excluding community of property and the contract contained the following donation in consideration of the intended marriage, viz, "Isaac Linde hereby promises to give on demand, to the said Mary Tocher, furniture to the value of £200, and cash to the value of £1,200, all wedding presents that may be received by the said intended consorts, and to be delivered by the said Linde to the said Tocher before or immediately after the said intended marriage."

In her evidence which was put in, the defendant stated before her marriage she had no money other than £200 which she received from her husband a few days before the marriage, that this was part of the £1,200 promised to her under the antenuptial contract, that after her confinement her husband gave her £40 in terms of the antenuptial contract that he gave her between £26 and £30 a month for household expenses and that she had a boarder for eleven or twelve months who paid her £5 10s. a month. Out of this she saved sometimes £5 a month, sometimes £10 a month and sometimes nothing.

The £200 she kept, so she alleged, on her person till she married and after her marriage in a drawer in her dressing table all the time until she had accumulated altogether £350, made up of the

£200, the £40, and the £110 which she had saved from what the boarder had paid her, and when her husband bought a stand for her and built a house on it for her (the date of this does not appear from her evidence), she took the £350 out of the drawer and used it for the payment of the stand and the building of the house. She stated that she did not tell her husband she was saving out of the housekeeping money, he did not ask her, and she did not want the insolvent or anyone else to know about these savings, and that she never rendered him any account of the housekeeping expenses.

The magistrate held that the wife in managing the affairs of the common household was merely the agent of the husband and that therefore any unexpended balance of money provided by him for the maintenance of the household remained the property of the husband; that as the boarder was kept in the house provided by the husband and was fed and provided for out of moneys supplied by the husband the receipts from him were also the property of the husband and were received by the wife merely as his agent.

It was urged on behalf of the appellant that the evidence showed an independent contract between the husband and the wife to pay her so much a month to keep house and that she was entitled to keep what she made out of it, and that the magistrate was wrong in regarding her as the husband's agent in disbursing and saving the money.

I cannot agree with this contention; there is nothing to show any such independent contract, and the only conclusion we can draw from the evidence is that the husband gave her money, as she required and asked for it from time to time for household expenses, to disburse on his behalf.

It was next urged that the wife was entitled to keep any unexpended balance and that the retention of the unexpended balance to such a moderate amount was not invalid on the authority of the passage in *Voet*, 24, 1, 11.

Whether this was, or was not, a moderate amount depends on circumstances of which we have no evidence.

What might be regarded as a not immoderate amount in the case of one person or couple might be very immoderate in the case of another.

Much would depend on the condition in life of the parties and the income or financial position of the husband.

No evidence was led by the appellant, defendant in the lower court.

There is nothing before us to show what was the occupation of the husband, what means he had or what income he earned.

The appellant's evidence as regards the payment to her of the £200 by her husband a few days before their marriage does not afford any evidence as to his position or income; indeed her evidence on this point seems to me almost incredible, and I find it difficult to believe that she received this sum as stated by her.

The period during which she as alleged by her kept this amount of £200 in a drawer of the dressing table must have been over twelve months and probably very much longer. She looked after the money and saw it frequently and yet she was not able to state whether more than £5 of the £200 was in gold.

No reason whatever was assigned by her for keeping so large a sum of money for so long a period in her dressing table instead of depositing it in a bank or savings bank.

Appellant stated that in addition to the £200 and the £40 which her husband gave her on account of the £1,200 promised to her on demand under the antenuptial contract, he also deducted a sum of £60 from the £1,200 for the wedding expenses and that he still owed her £900.

I do not feel justified in deducing from appellant's statements the conclusion that her husband was a man of means.

If the amount that she saved from what she received monthly from her husband and the boarder was a moderate sum having regard to their condition and means, the appellant should have brought evidence to establish this.

On the evidence as it is, it is impossible for us to find whether the amount was, or was not, a moderate sum, and the contention of Mr. *Greenberg* on this point cannot therefore be upheld.

As regards the alternative pleas, the plea that any money which she may have received from her husband subsequent to her marriage was paid to her in reduction of the amount owing to her under the antenuptial contract, was neither argued on appeal nor established by the evidence.

On her own statement the money in question was clearly not paid to her in reduction of any debt under the antenuptial contract, but for the specific purpose set out in the summons.

The other alternative pleas were strenuously urged on behalf of the appellant, counsel contending that any moneys paid to appellant

by her husband were set-off prior to his insolvency against the amount of the indebtedness to her under the antenuptial contract, or must be deducted from that amount under section 60 of the Insolvency Law.

It was urged that the donation in the antenuptial contract, the promise to give to the appellant on demand, "cash to the value of £1,200," was a benefit given to the wife under section 39 of the Insolvency Law, that she thereby became a creditor of her husband for that amount, and that she could compensate or set-off either, prior to his insolvency or under section 60 of the Insolvency Law the balance due by him under the contract against the unspent balance of whatever moneys she may have received after the marriage for household expenses.

It was contended on behalf of respondent, that the mere promise to pay £1,200 on demand was not a "benefit" falling within the provisions of section 39 and that therefore under the Placaat of Charles V. of 4th October 1540 the appellant could not claim for any balance due as against the other creditors in her husband's estate, and that even if it were such a "benefit," it was not *bona fide* given, as required by the section; and that the *onus* was on appellant to prove that it was *bona fide*.

Section 39 of the Insolvency Law provides as follows:—No benefit *bona fide* conferred (gedaan), by any person under a duly registered antenuptial contract to his wife or children, shall lose its effect (kracht) by reason of the sequestration of his estate, save when the order of sequestration is granted within two years after the registration of the contract, and it is proved that at the moment of the execution thereof the said person was actually already insolvent, in which case benefit shall be void, and may be claimed by the trustee for the benefit of the sequestrated estate."

The use of the words "*bona fide*" cannot be ignored; it shows that a benefit *mala fide* conferred can never receive the protection of this section.

The mere registration of an antenuptial contract purporting to confer a benefit is not sufficient *per se* to protect the gift; that would not necessarily raise a presumption that the benefit was *bona fide* given.

That being so, where the money which purports to be given by the antenuptial contract is not paid over, the person who relies on

the antenuptial contract, must produce *prima facie* proof that the benefit was *bona fide* given.

That might not be necessary when from the nature of the benefit or from the circumstances under which it is granted, no suspicion can arise as to the *bona fides* of the transaction.

But in the circumstances of the present case the "promise to give on demand cash to the value of £1,200," the wife's incredible statement as to the payment of £200, the fact that no demand was ever made for the £1,200 and that it was never paid, do raise such a presumption against the *bona fides* of the transaction, that assuming the promise to be such a benefit as is contemplated by the provisions of section 39 of the Insolvency Law, the Court cannot, in the absence of any evidence whatsoever to support the *bona fides* of the transaction regard the promise as a benefit *bona fide* given.

If the matter were *bona fide*, the appellant could readily have produced evidence as to her husband's circumstances at the date of the antenuptial contract, but neither she herself nor her husband chose to give evidence at the trial.

In the absence therefore of proof that the promise to pay £1,200 on demand was a benefit *bona fide* granted, the appellant cannot rely on the antenuptial contract as against the trustee in her husband's insolvent estate, and no question of compensation or set-off prior, or subsequent, to the sequestration can arise.

The appeal must, in my opinion, be dismissed, with costs.

DE. VILLIERS, J.P., concurred.

Attorneys for appellants: *Wagner & Klagsbrun*.

[A.D.]
