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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 7846/2008

In the matter between:

A. G. First Plaintiff

A. E. G. Second Plaintiff

Z. G. Third Plaintiff

and

M. A. N. M. First Defendant

N. N. M. Second Defendant

N. N. M. Third Defendant

ORDER

[1] The first, second and third defendants are directed to return all the items of jewellery set out in schedule “B” to the plaintiffs particulars of claim forthwith.

[2] In the event of the defendants not being in a position to return any of the items set out in schedule “B”, the defendants are directed to pay the plaintiffs the value of such items that are not returned in the amount reflected for each non-returned item as set out in the expert report of Mr S., save that an updated value for the Kruger Rand ought to be used.

[3] The defendants are to pay interest on any unpaid amount referred to in paragraph 2 hereof

at the rate of 10.5% per annum from the date of judgment to the date of final payment.

[4] The defendants are directed to pay the plaintiffs' costs in the action on a party / party scale jointly and severally, the one paying the other to be absolved. Such costs are to include the travelling and accommodation costs of the plaintiffs, plaintiffs' counsel and the expert witnesses M. K. and Mr S., all of whom live in Cape Town, as well as the qualifying fees of the experts.

JUDGMENT

HENRIQUES J

Introduction

[1] The plaintiffs sued the defendants for breach of a marriage contract and the return of items of jewellery itemised in schedule "B" to the particulars of claim given in contemplation of the marriage. At the commencement of the trial, the parties' legal representatives informed me that the plaintiffs' claim for consequential damages and the defendants' counterclaim would not be pursued. The defendants disputed the receipt of the jewellery listed in schedule "B"; or that they were required to return any of the jewellery claimed in schedule "B" and the valuations provided by the plaintiffs and their expert, Mr K. S..

Issues

[2] The issues for determination in this trial are the following:

[2.1] whether the second defendant breached the marital contract;

[2.2] whether the second defendant was given all the items mentioned in schedule "B";

[2.3] whether the plaintiffs are entitled to the return of all the jewellery mentioned in schedule "B" save for the dowry, the mahr, being a Kruger coin;[\[1\]](#) and

[2.4] the value of the jewellery.

[3] Of relevance to the issue in paragraph 2.3 above, is whether the plaintiffs are entitled to the return of the jewellery, should they succeed in proving they were handed over, and the basis on which they are to be returned. Were they gifts given in contemplation of marriage and are to be returned on divorce in terms of the philosophy, traditions and customs of the Hanafi School of Islamic Law, alternatively as the jewellery constitutes family heirlooms, further alternatively are they to be returned based on the undertakings given by the first and third defendants to Dr. A. C. K. on 11 December 2006 and on 11 January 2007 in the presence of M. K. K. .

[4] The evidence presented during the trial is already part of the record and I do not propose to canvass it in detail, only to the extent that it is relevant to the issues which require determination. On the second day of the trial, 10 February 2015, the defendants sought to amend their plea to bring it in line with their defence and the evidence and cross examination presented at that stage of the proceedings. This amendment was not opposed by the plaintiffs and accordingly granted.

[5] Various exhibits were also handed in during the course of the trial and as reference will be made to these it is necessary to record the exhibits in this judgment. Exhibit "A" was a bundle of documents prepared to accord with the plaintiffs' discovery affidavit; exhibit "C" was a bundle of photographs numbered "C1" to "C5" respectively; exhibit "D" is the first defendant's manuscript document entitled "first defendant's questioning and stand points" and exhibit "E", a DVD recording of the first plaintiff's ("A.") and the second defendant's ("N.") engagement ceremony.

[6] The second and third plaintiffs testified and led the expert evidence of M. T. K., a Muslim Scholar and Mr K. A. S., a jeweller and that of a relative Dr A K.. No expert evidence was led

by the defendants to dispute the expert evidence of the M. or the valuations of the jewellery provided by Mr S. or M. S.I and only the first defendant testified at the trial.

The Evidence

The plaintiffs' case

[7] It is common cause that the first plaintiff and the second defendant were married to each other according to the traditions and customs of Indian Muslims belonging to the Hanafi School of Islamic Law. Such was an arranged married and the parties were divorced by means of a *Talaaq* (Muslim divorce) on 21 April 2008.^[2] The parties were married on 26 November 2006 at Durban and on 12 December 2006 N. left A. and did not resume the marital relationship, it being common cause that the marriage was never consummated.

[8] The marriage was concluded with the consent of both A. and N. and their respective parents. The second and third plaintiffs, Mr and Mrs G., A.'s parents, testified that N. breached the marriage contract as she undertook to establish a normal intimate marital relationship with A., however, never consummated the marriage and refused to be intimate with A.. N. was also openly rude, aggressive, dismissive and uncooperative towards A. and his family.

[9] During the course of the trial, evidence was presented by the second and third plaintiffs regarding the jewellery in schedule “B”. The evidence dealt in detail with how the items of jewellery listed in schedule “B” had been acquired. Some were items that had been purchased over the years, some had been given to Mrs G. by her mother and grandmother and constituted family heirlooms and others were gifts. They testified that it was part of their tradition and custom, as Muslims belonging to the Hanafi School of Islamic law, to present jewellery to the prospective bride.

[10] The bride would be the custodian of the jewellery and would never become owner thereof as the jewellery would be handed down by her to her children from generation to generation. This is what occurred in respect of Mrs G. and her two (2) older sons who had married their wives in terms of Islamic rights according to the Hanafi School of Islamic Law. What was to be handed over to N. was A.'s share of the jewellery which remained.

[11] The third plaintiff, Mrs G., testified that the jewellery was given to N. on the basis that she was willing to become A.'s wife and would contract and consummate a valid Muslim marriage. Schedule “B” indicates various dates and times at which the jewellery was given, i.e. handed over to N..

[12] It is common cause that when N. left the matrimonial home on 12 December 2006, she left with all the jewellery in her possession and on her return to Durban, the jewellery was locked in her father's, the first defendant's, safe. N.'s stance^[3] is that in terms of Memon custom she did not have to return any of the jewellery which she had received.

[13] In addition, all the defendants disputed that the items of jewellery listed in schedule “B” were ever handed over and received by them, more particularly N.. The defendants, specifically the second defendant, denied receipt of all the items of jewellery in schedule “B” and specifically placed in issue receipt of items 7, 10, 12, 13, 15, 19, 22, 23, 24 and 27 (“the disputed jewellery”).

[14] During the course of the trial, the court together with counsel for the plaintiffs and defendants viewed a DVD recording of A.'s and N.'s engagement. Certain of the jewellery disputed by the second defendant was visible in the photographs taken of the various parcels of jewellery that were handed to the family at the engagement party and in the DVD recording.

[15] The first and third plaintiffs testified that the third plaintiff and members of their family had

wrapped these parcels and presents which contained these items of jewellery in preparation for the engagement party where they would be handed over to N.. The third plaintiff specifically testified that as one of her daughters-in-law from England was not able to attend the engagement party, but had purchased certain gifts and sent these to be handed over at the engagement party, she took photographs of the parcels containing the jewellery and gifts to show her daughter-in-law. This was the explanation given for how exhibit “C” came into existence.

[16] After viewing the DVD recording, Mr *M.*, who appeared for the defendants, placed on record that certain of the jewellery disputed was visible in the DVD recording, being items 7, 10, 12, 19, 22, 23 and 24 and item 27 in the photographs in exhibit “C”. The DVD recording showed that item 2 was placed on N.’s neck at the engagement party. The concession made was only that these items were visible in the DVD recording and in certain of the photographs. The defendants did not concede that these were handed over.

[17] Nothing was specifically said in respect of items 13 and 15, the defendants merely disputed receipt thereof. The evidence of the second and third plaintiffs as to how they acquired these items was not disputed, and no explanation was proffered as to why these items would have been listed and mentioned had they not been handed over. In any event, both items are visible on exhibit “C”.

[18] The second plaintiff confirmed that having regard to the correspondence in exhibit “A”, undertakings were given by the defendants^[4] for the return of the jewellery. He testified that prior to N. returning to Durban, Dr K. held a meeting at his home in Durban with the first and third defendant, N.’s parents. At the time the first defendant wanted N. to return to Durban and both he and his wife who had accompanied him seemed very emotional and upset and blamed themselves for ‘forcing N. into the marriage’.

[19] They asked Dr K. to contact the second and third plaintiffs in Cape Town to send N. home. An undertaking was allegedly given to Dr K. by the first and third defendant that upon N.'s return to Durban, they would return the jewellery as the marriage was over and they appreciated that as a consequence thereof, the jewellery would have to be returned as it had been in the plaintiffs' family for a number of generations. The second and third plaintiffs undertook to send N. home the following day and did do so. The jewellery was never returned despite the undertaking.

[20] Subsequently, Dr K. telephoned the defendants to request the return of the jewellery. At the time he spoke to the third defendant who was extremely rude and aggressive and refused to return the jewellery.

[21] The second plaintiff then sought the intervention of M. K. K. . The first defendant gave undertakings to M. K. K. that he would return the jewellery. He also sought the assistance of Muslim scholars^[5] and the correspondence exchanged between himself and their responses he testified to are in exhibit "A". The legal opinions (*fatwas*) which he obtained indicated that the jewellery ought to be returned.

[22] When the jewellery was not forthcoming from the defendants, the second plaintiff sought the assistance of his legal representatives. Letters were sent by registered post to the defendants requesting the return of the jewellery. The response from the first defendant was that the jewellery would be returned subject to certain conditions. This is recorded in exhibit "A".^[6]

[23] The second plaintiff's evidence regarding the undertakings given by the first and third defendant to return the jewellery was corroborated by Dr A. C. K. when he testified. He confirmed that the third plaintiff was his sister and the third defendant, N.'s mother, was his sister-in-law. He further confirmed that after the wedding he negotiated between the parties

for the return of N. to Durban. The subject of the jewellery was raised and both the first and third defendants undertook to return all the jewellery they received. He had no reason to doubt them.

[24] Dr K.'s evidence was that both the first and third defendants sat in his lounge at his home and in his presence and that of Mrs K. undertook to return all the jewellery to the plaintiffs on N.'s return to Durban. He did not have any reason to doubt this undertaking and even said:

‘He is a H. Z.I don’t expect him to lie.’

[25] Dr K. therefore disputed the first and third defendants’ version that there was no undertaking given by them or that the undertaking was subject to the condition that the first defendant wanted a legal opinion from the M., and specifically the Muslim Judicial Council, which opinion he would abide by.

[26] Mr K. A. S., a jeweller since 1987 also testified and confirmed that he had provided the valuations for the jewellery items set out in schedule “B”. He had also provided an updated valuation of these items.

[27] He testified that he had personally examined all the items of jewellery except for items 1, 2, 28 and 29. Items 1 and 2 were valued by M. S.I (Pty) Ltd. Item 28 is a Kruger Rand which he did not examine but is a standard item which has a valuation. Item 29 which is an 18 karat white gold wedding band is three millimetres (3mm) wide with a mass of 4.4 grams. It is a standard item and he is able to provide a valuation based on the prevailing price per gram.

[28] Mr S.’s expertise was not questioned. He confirmed that the certificates of M. S.I were reliable as he purchased from them from time-to-time and knows their reputation. He did not make enquiries regarding the costume jewellery as it would cost more to make the enquiries as opposed to replacing them. He testified that some of the valuations are dependent on the

Rand / Dollar exchange rate as certain of the items are imported and the rate will increase or decrease depending on the time one purchased. He also testified that he was familiar with the items of jewellery as he also sold these in his jewellery business.

[29] The plaintiffs also led the evidence of M. T. K. [7] whose expertise was not questioned or challenged especially during cross-examination. He considered the pleadings and the various Islamic legal opinions (*fatwas*) presented to the court. [8] The crux of his evidence can be summarised as follows: There are two (2) branches of Islam namely, the Sunni and Shi'ite. The parties hereto all belong to the Sunni denomination of Islam. Within the Sunni denomination there are four (4) schools of Islamic law being the Hanafi School, the Maliki School, the Shafi'i School and the Hanbali School. Despite the denial in the defendants' plea, all the parties belong to the Hanafi School of Islamic Law and have only followed same. Where a marriage is terminated, the consequences after the marriage and the settling of disputes is determined by the school of Islamic Law to which the parties belong, in this instance the Hanafi School of Islamic Law.

[30] In this matter, because the parties have followed the Hanafi School of Islamic Law, it is the philosophy and traditions of this school that one must resort to in settling the dispute. The various *fatwas* obtained in exhibit "A", specifically those relied on by the defendants, do not cite any authority from the Hanafi School of Islamic Law. Although there is a physical change of hands with the jewellery, the Hanafi custom requires that the givers, being the bride groom's family, expect the bride to continue the family tradition of passing on the jewellery. Even though the jewellery was physically handed over to her, the bride does not become the owner thereof but merely the custodian thereof.

[31] If there is a specific utterance at the time the gifts are handed over as to the basis on which they are handed over, then, at the end of the marriage, that utterance takes

precedence. When nothing is said at the time of the handing over of the jewellery, then custom will apply. In the event of a dispute between the parties as to which customs to apply, the M. T. K. testified that one reverts to the 17th Century Moghul codification of Hanafi law which he quoted in his expert summary.[\[9\]](#) The translation quoted reads as follows:

‘A man marries a woman, having sent gifts to her, which gifts she reciprocated. Then she was conveyed unto him. Then he parted from her and said “What I sent was merely lent to you” wishing to reclaim it. The woman too, wants to reclaim what she gave in return. Judgment will follow his word. Should he reclaim it from her, she is entitled to reclaim from him what she gave in return.’

[32] M. K. also referred to a 20th century Hanafi jurist in answer to a question on ownership of the jewellery given by a prospective groom to a bride.[\[10\]](#) Such reads as follows:

‘If, at the time of conferring the jewelry, it was explicitly stated that it would be the property of the boy or the girl, then ownership shall be considered in accordance with that explicit declaration. Where no explicit statement was made, custom shall be considered. In families where the custom is that ownership is vested in the girl, the girl will be the owner; whereas with families where custom confers ownership upon the boy, it will belong to the boy.’

[33] He testified that in this matter, as a consequence of the dispute between the parties and an apparent difference in custom, one must revert to the giver’s intention. When he was asked to comment as to the defendants’ argument that the Memon community, of which the parties are members, tradition is for the wife to retain the items of jewellery, he indicated that he knew of no Memon custom which says that or which differs from the Hanafi School of Islamic Law. He indicated that in this regard he had made enquiries with Muslim scholars

whom he served with on the Muslim Judicial Council and they indicated they were also not aware of this Memon custom. In fact his inquiries revealed that the Memon customs do not differ from Hanafi customs in any significant way. He testified that with the exception of one (1), the Islamic legal opinions that have been sourced, none of them cite authorities from the Hanafi School.

[34] Although M. K. did not specifically testify about all the *fatwas* introduced into evidence, his expert summary refers thereto,[\[11\]](#) and deals with why in his expert opinion these do not impact on his findings and why they cannot be relied on by the first defendant.

[35] His conclusions in regard to the *fatwas* can be summarised as follows:

- ‘1. The fatwa dated 14 November 2007 from the Muslim Assembly cites and comments upon Qur’anic verses that are irrelevant to the point in question. It misrepresents the positions of the four schools and states without substantiation or qualification that verbal agreements are binding. All of this is open to challenge.
2. The fatwa dated 25 October 2007 from Majlisush Shura al-Islami was written 6 months prior to termination of the marriage. It fails to provide any substantiation from the Hanafi or any other school. It raises the issue of coercion into marriage, but since the Defendants do not dwell upon the issue anywhere, it would seem reasonable to assume that they accept the marriage to have been by consent of the bride.
3. The fatwa dated 14 November 2007 from the Muslim Judicial Council correctly characterises the jewelry as a gift in terms of custom. However it fails to provide substantiation, especially from the Hanafi School.
4. The fatwa dated 11 December 2007 from the Jamiatul Ulama KwaZulu-Natal does cite authority, but only as references. It initially applies the correct Hanafi

approach of seeing this particular gift not as an ordinary gift but gifts-in contemplation-of-marriage, and accordingly differentiates between giving and lending. But then it goes on to treat the gift of jewellery here as no different from ordinary gifts except that certain conditions were attached to it. There is an obvious contradiction.'

[36] The crux of M. K.'s evidence was that given the facts of this matter it is the giver's attention which is of paramount importance and takes precedence. The plaintiffs expected N. to join their family through marriage and also expected her to carry on the family tradition of passing on the jewellery. Even though they physically handed the jewellery to her they did not intend for it to become her personal and exclusive property.

[37] In this situation, despite the physical exchange of hands it constitutes nothing more than lending. N. is merely the custodian thereof and is therefore not entitled to keep the jewellery. The Hanafi jurists speak of gifts being lent to the bride. The family giving the gifts are in reality not severing or terminating their ownership but are merely introducing a new custodian into the family of the jewellery.

[38] Insofar as the issue in relation to heirlooms is concerned, M. K. did not agree with the legal opinion from the Jamiatul Ulama KwaZulu-Natal. Heirlooms in his view, belong to someone. They are the collective property of the family whose custodians are the women of the family. Therefore, it is incorrect to say the concept of heirlooms does not exist.

[39] In his view the second defendant is merely the custodian of the family jewellery and is entitled to keep it as the wife and widow of the first plaintiff until she hands it on to a member of the family. In light of the fact that the marriage in this matter was never consummated and the second defendant never became the wife of the first plaintiff in the true sense, the M. was of the view that the second defendant was not entitled to keep the jewellery and must return it. Consequently in his view, the plaintiffs were entitled to the return of all the jewellery

reflected in schedule “B” of the particulars of claim, save the dowry which was not being claimed by the plaintiffs.

[40] M. K. did not have regard to the evidence in relation to the undertakings given by the first and third defendants to return the jewellery. He was of the view that any undertaking must be decided upon in terms of general legal principles.

[41] That then was the case for the plaintiffs. Mr *M.* applied for absolution from the instance.

Absolution from the Instance

[42] The test for absolution from the instance at the end of the plaintiffs’ case is well known and need not be repeated. It must be remembered that one is not concerned with the credibility of the witnesses at this stage but rather, whether the defendants have a case to answer. In other words, is there a reasonable possibility the court may find for the plaintiffs?

[43] At the end of the evidence, the plaintiffs had established that the disputed jewellery had been handed over to the second defendant and members of her family. Evidence had been presented as to how the family had acquired the jewellery and the photographs in exhibit “C” and the DVD recording of the engagement corroborated the plaintiffs’ version that all the jewellery had been handed over despite the limited concession by the defendants.

[44] The plaintiffs testified about what their intention was at the time the jewellery was handed over and presented expert evidence to corroborate this. This was confirmed by M. K. when he testified. For Indian Muslims belonging to the Hanafi school of Islam, the wife is the custodian of the jewellery and never becomes the owner thereof. He also testified that he knew of no custom or tradition among Muslims of the Memon community which differed from this practice. In fact, his evidence was that there was no difference and the practice was the same.

[45] Lastly, there was also evidence of the undertakings given by the first and third defendants to Dr K. and the second plaintiff. This was also corroborated having regard to the various documents in exhibit “A”. During cross-examination by Mr M., despite initially suggesting to Dr K. the defendants denied giving any undertakings, it became apparent that the defendants acknowledged undertakings may have been given subject to conditions as recorded in the documents in exhibit “A”.

[46] It was for these reasons that the application for absolution was dismissed with costs.

Defendants’ Case

[47] During the course of his evidence, the first defendant acknowledged that upon N.’s return to Durban, the jewellery was locked in his safe and that he had held on to it as he was awaiting N.’s decision. He also seemed to accept that both N. and A. were ambivalent about the marriage but went ahead with it.

[48] The first defendant emphatically denied the evidence of Dr K., that he and the third defendant had given an undertaking in his and Mrs K.’s presence to return the jewellery on 11 December 2006. He maintained that even though subsequent meetings were held with M. K. and a letter of undertaking was submitted by himself^[12] agreeing to return the jewellery on certain conditions being met, his stance throughout was that he required the issue of the return of the jewellery to be mediated upon and for Muslim jurists to make a decision which he would be bound by.

[49] The first defendant indicated in exhibit “D” and also during his evidence that he did not give any undertakings and all “undertakings” were discussions on a “without prejudice” basis subject to the findings and rulings of the Shariah scholars. He constantly referred to Memon custom and was of the view that as the plaintiffs did not adhere to Memon custom they wanted the jewellery returned. The Muslim scholars who provided the *fatwas* and who

referred to Memon customs were correct. He reiterated specifically in exhibit “D” that the statements from the Quran and Hadith were clear, that in the event of a dispute, the issues were not subject to customs and traditions and were contrary to Islamic law.

[50] He was of the view that as M. K. was the plaintiffs’ expert, he was biased and one could not rely on his view as it was “obvious” that he would find in favour of the plaintiffs.

[51] In addition, he submitted that he could not give any undertaking on behalf of the second defendant without her consent and he and his wife, the third defendant, could not provide any undertakings for the return of the jewellery as such jewellery was not handed over to them.

Analysis

[52] Although the defendants disputed receipt of the disputed jewellery, exhibits “C” and “D” indicated the contrary, as well as the evidence of the second and third plaintiffs’. The plaintiffs’ evidence dealt in some detail with which items were purchased specifically for the marriage, such as the wedding band for N. and the expenses incurred for both the wedding and the engagement, which evidence is not relevant as the claim for consequential damages is not being pursued nor is the claim for return of the mahr, the dowry.

[53] Although the concession by the defendants was a limited one, on the probabilities, I am of the view that all the jewellery in schedule “B” was handed over to and received by the defendants, specifically the second defendant. No evidence was presented to the contrary by the defendants and on the probabilities, in keeping with the traditions and customs of the Hanafi School of Islamic Law, the evidence of the second and third plaintiffs as corroborated by exhibits “C” and “D” must be accepted.

[54] It is also highly improbable that if item 2 was placed on N.’s neck at the engagement party, the jewellery which was wrapped by the plaintiffs and their family for handing over at the

engagement party would also not have been handed over as the wrapping of the gifts of jewellery was done in anticipation of the engagement party.

[55] In addition, the evidence of the second and third plaintiffs regarding the preparations for the *walima*, the engagement and the wedding, which they both participated in, [\[13\]](#) lends further corroboration that the items of jewellery disputed must have been amongst those handed over. It was also not disputed that most of the items of jewellery would have been wrapped with the intention of being handed over at the engagement party.

[56] Furthermore, the second plaintiff's evidence that he had the items of jewellery valued in preparation of being presented to the prospective bride was not disputed.

[57] All along the first defendant acknowledged that upon N.'s return, the jewellery was placed in his safe. It was only when asked to return the jewellery that a dispute arose in relation to it being handed over.

[58] If one considers the first defendant's evidence and specifically what transpired during cross-examination, it becomes apparent that he often contradicted himself. This is in relation to the issue of A.'s age, the denial that the jewellery had been handed over by the plaintiffs and the undertakings.

[59] When he raised the issue surrounding A.'s age, the first defendant indicated that the plaintiffs had lied and deceived him and his family about this. He did not in any way deal with the second plaintiff's evidence that this issue was canvassed prior to the *nikkah* (the Muslim marriage ceremony) and it was indicated that the age had been incorrectly stated. In addition, the first defendant, rather opportunistically in my view, did not deal in any way with the fact that his family was present at the *nikkah* ceremony and he had indicated to the plaintiffs and their family members that A.'s age was not an issue.

[60] The second plaintiff in his evidence explained that the day before the *nikkah* the error regarding A.'s age was brought to the defendants' attention, as the identity document was presented for the marriage certificate to be issued. He indicated that the first defendant informed him that A.'s age was not an issue.

[61] Despite a denial that the jewellery was handed over, exhibit "A" reveals the contrary. On 7th February 2009[14] the first defendant in a letter in his handwriting, records what his 'terms and conditions for the return of their jewellery is.' [15] He in addition indicates[16] that:

'On the engagement function held on 1 July 2006, expensive gifts particularly expensive jewellery has exchanged hands.'

[62] He further records the following:[17]

'Unlike the engagement, where great effort was taken in impressing us with gifts. . . .'

[63] A more telling feature of his evidence was the criticism of Dr K. and the denial that any undertakings were given. During cross examination when pressed about this and the documents shown to him indicating that both he and his wife were present when the return of the jewellery was raised in the discussion to facilitate the second defendant's return home, he changed tack and indicated that the undertakings for the return of the jewellery could not be provided by him and his wife as he required the consent of N.. However in exhibit "A" [18] he records:

'I phoned the boys uncle the next morning who agreed he will meet me at his house at night to discuss the problems. This gave him enough time to talk to his sister in Cape Town. When we met in the evening he sounded very friendly and felt very strongly that this marriage will not work out and I must get her back immediately. It is all once again, in my own interest and once again I must be a "good boy" and give all the jewellery

back otherwise “people will talk about how bad I am”.’

[64] In addition he acknowledges[19] that:

‘...I will leave in the hands of the respected Ulema after they hear both sides of the story and make a decision accordingly and I pledge to agree to the decision will be legally binding on both parties.’

[65] On receipt of the letter by attorney Matz Watermeyer,[20] the first defendant drafted a response dated 9 September 2007.[21] In such letter he records the following:

‘Kindly note that the marriage took place accordingly to Islamic Law and it should be resolved according to Islamic Law. The principles of Shariat quite emphatically state that when gifts are exchanged then ownership of such items belongs to the recipient. . . .However should your client wish they can negotiate a settlement with a Muslim Judicial Body in Durban called the Jamiatul Ulema – KZN.’

[66] If one has regard to the correspondence in exhibit “A”[22] it was clear that a meeting did occur with M. G. K. Kajee in 2007. M. K. records in such letter that the first defendant and his brother, Ismail, met with him and gave him an undertaking to return the jewellery to the G. family when he returned to South Africa from his trip to India and Pakistan. This corroborates the second plaintiff’s evidence and that of Dr K..

[67] As already mentioned, N. and her mother, the third defendant, chose not to testify at the trial. The only evidence adduced on behalf of the defendants was that of the first defendant, N.’s father Mr Mohamed. Mr Mohamed did not impress me as a witness. He was argumentative, unconvincing and his evidence was not corroborated or supported by any of the documentary evidence in exhibit “A” which he attempted to rely on.

[68] He was present at all times, especially when the plaintiffs’ expert M. K. testified. At no

stage during cross-examination was it ever suggested that the M. was not an expert and that his evidence was disputed in any way. I have no doubt in my mind that had the first defendant provided instructions to Mr M. in this regard, Mr M. as an officer of the court would have raised these issues with the M..

[69] Yet when the first defendant testified, he indicated that he did not respect the M. as a Muslim scholar or his evidence and expertise. All along he was emphatic that his version was never considered by the various Muslim scholars who provided the *fatwas* or by anyone who was attempting to mediate the dispute. This was not borne out by any of the documentary evidence presented. More importantly, M. K. considered the defendants' views and canvassed these in his evidence.

[70] The first defendant subsequently conceded that he had put his version and interpretation of the customs to these scholars, but the *fatwas* indicated that the items of jewellery had to be returned. Despite this, he refused to agree with these rulings even though he gave an undertaking in writing to do so and chose to ignore the correspondence which had been exchanged between him and Muslim scholars.

[71] A further difficulty related to the various undertakings given by the first defendant. He emphatically denied the fact that he and his wife had given this undertaking to Dr K. on 11 December 2006 when he asked him to intervene and request the G.s to send N. home. He indicated that the parties were no longer talking to each other even though they had been friends for a number of years and were related to each other. This, he said, was the reason why the court could not believe the evidence of Dr K. and his wife.

[72] In addition, he maintained that he had advised Dr K. that he would only return the jewellery once he had two (2) opinions from Muslim scholars. This was never put to Dr K. during the course of cross-examination. Of further relevance and what makes me doubt the

first defendant's evidence in regard to the various undertakings given, is that he admitted at various meetings held, that various Muslim scholars, family members and religious persons had attempted to mediate disputes between the parties. He maintained throughout that at all times he advised them that he required two (2) *fatwas* from independent persons yet the documents he relied on did not support his standpoint in any way.

[73] Even though M. K. did not testify,[\[23\]](#) the evidence presented by the plaintiffs regarding his involvement is corroborated by the *fatwas* and correspondence in exhibit "A".

[74] Whilst I do have sympathy for Mr Mohamed and accept that he carries a huge amount of guilt as a consequence of his daughter's failed marriage, it also became apparent during the course of his evidence and testimony that he harboured extreme anger towards the plaintiffs. He would not take any responsibility for his role in the arranged marriage nor for his failure to do anything to stop the marriage even though prior to the marriage both he and his wife were aware that both A. and N. were not happy. He wanted to lay the blame for the failed marriage solely at the door of the plaintiffs and not assume any responsibility in this regard.

[75] It is for these reasons that I am of the view that the plaintiffs have discharged the onus of proving their entitlement to the return of the jewellery. I am satisfied that all the jewellery was handed over. The plaintiffs have shown that in terms of the customs and traditions of the members of the Hanafi School of Islamic Law, they are entitled to the return of the jewellery based on the fact that it is the giver's intention which is of paramount importance and must prevail in the event of a dispute.

[76] Even if I am wrong in accepting the expert evidence of M. K., I am also satisfied that the defendants, specifically Mr Mohamed, the first defendant, also provided undertakings to return the jewellery.

[77] The evidence of Dr K. was clear and unambiguous. He intervened and sought to resolve

the issue on several occasions. I accept and reject the first and third defendant's version that they did not provide the undertaking to him to return the jewellery in November 2006.

[78] The first defendant's evidence was clear in this regard. He and his wife were desperate for N. to return. They sought Dr K.'s assistance in achieving this. The version of the discussions that ensued as testified to by Dr K. is more probable than that of the first defendant.

[79] It appears that the first defendant changed his mind insofar as the undertakings he gave to return the jewellery is concerned. This change of heart appears to have occurred once N. returned home.

[80] It was never disputed nor placed in issue that the plaintiffs' subscribed to the tradition and custom where the wife becomes a custodian of the jewellery and that these were to be handed down from generation to generation. Even though the defendants disputed this, no evidence was led to support this nor was M. K.'s evidence challenged in this regard. The crux of M. K.'s evidence was that on the facts of the matter the giver's intention is of paramount importance and takes precedence.

[81] Consequently, it will be for these reasons that the plaintiffs are entitled to the return of the jewellery reflected in schedule "B". The plaintiffs have established that as a consequence of the breach and in terms of the Hanafi School of Islamic Law, they are entitled to the return of the jewellery. The DVD and photographs handed in, as well as the evidence of the second and third plaintiffs, reflect the jewellery disputed by the second defendant as being handed over. The plaintiffs' evidence that the majority of these items of jewellery were handed over at the engagement ceremony which is reflected in the DVD recording and the photographs cannot and is not seriously disputed. In fact, in the correspondence in exhibit "A" the first defendant acknowledges that most of the expensive jewellery was handed over at the

engagement ceremony.

[82] During the course of argument Mr *M.* indicated that at the time of the marriage, the second defendant, N., was a minor. Consequently, no valid marriage was concluded, as at the time she was not assisted by her guardian and therefore she could not be compelled to hand over the jewellery. He submitted that as a consequence, in light of the fact that the contract falls to be set aside, N. could not be compelled to hand over the jewellery and is excused from performance.

[83] Mr *M.* submitted that no valid contract could ever have been concluded and N. could therefore not be held to be in breach of same and insofar as the undertakings given by her father, the first defendant was concerned, she could not be bound by these. This issue was a legal issue raised during the course of argument and was never raised on the pleadings. Despite this, I allowed the defendants to make submissions in this regard. However, this argument is without merit and the uncontroverted evidence of the parties is that a valid marriage contract was concluded.

[84] The first defendant indicated as much and more importantly, the marriage certificate indicates that the second defendant was assisted by a guardian and the first defendant's brother, who was present during the *nikkah* ceremony. The first defendant confirmed he consented to the marriage. In addition, in *Ryland v Edros*^[24] Farlam J as he then was, concluded that a customary Muslim marriage is a legal contract.

[85] I have also carefully considered the written and oral submissions of Mr *M.* I find myself given the evidence presented, unable to accept them.

Costs

[86] It is trite that a successful party is entitled to costs. This trial was fought every step of the

way by the defendants. Even though the plaintiffs put up valuations of the jewellery, they were put to the expense of flying the expert witness, Mr S., specifically to confirm the present day value of the jewellery and the valuations of the jewellery that had been done. The defendants could have saved time and effort by agreeing to the valuations. In addition, even though Mr Mohamed indicated he had obtained his own valuations, none of these documents were discovered and none of his experts were called to testify. Nor was any indication of his intention to call his expert ever given to the plaintiffs in terms of the provisions of Rule 36(9) (a) or (b).

Litigation last resort

[87] The second plaintiff was at pains when he testified to point out that the plaintiffs made several attempts to resolve the matter before resorting to litigation. They initially sought the assistance of relatives to intervene, then Muslim scholars, a route suggested by the defendants, and when all else failed, sought legal assistance and instituted the action.

[88] The first defendant appears to have flouted all these attempts to resolve the matter. Even though he agreed to be bound by the legal opinions (*fatwas*) of Muslim scholars, it appears that this was when the *fatwas* were in his favour. When the opinions went against him, he then changed his mind.

[89] It is for these reasons that I am of the view that the plaintiffs are entitled to their costs. These costs must also include those incurred in respect of the expenses of the experts.

[90] In the result the order I make is the following:

[90.1] The first, second and third defendants are directed to return all the items of jewellery set out in schedule “B” to the plaintiffs particulars of claim forthwith.

[90.2] In the event of the defendants not being in a position to return any of the items

set out in schedule “B”, the defendants are directed to pay the plaintiffs the value of such items that are not returned in the amount reflected for each non-returned item as set out in the expert report of Mr S., save that an updated value for the Kruger Rand ought to be used.

[90.3] The defendants are to pay interest on any unpaid amount referred to in paragraph 90.2 hereof at the rate of 10.5% per annum from the date of judgment to the date of final payment.

[90.4] The defendants are directed to pay the plaintiffs’ costs in the action on a party / party scale jointly and severally, the one paying the other to be absolved. Such costs are to include travelling and accommodation costs of the plaintiffs, plaintiffs’ counsel and the expert witnesses M. K. and Mr S., all of whom live in Cape Town as well as the qualifying costs of the experts.

HENRIQUES J

Appearances

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Case Information

Dates of Hearing: 9, 10, 11 and 12 February 2015

Date of Judgment: 10 August 2016

[1] I was advised by Mr Bridgman that the plaintiffs did not seek the return of the dowry.

[2] Exhibit "A37".

[3] As testified to by the first defendant. This is also evident from the exhibits handed in.

[4] The first defendant has always acted on behalf of N. when it came to the discussions in relation to the return of the jewellery.

[5] This appears to be as a consequence of the first defendant indicating he wanted the issue of the return of the mediated upon by Muslim scholars whose opinions he would be bound by.

[6] Exhibit "A 23(a) and (b)".

[7] The notice in terms of Rule 36(9)(a) and (b) dated 29 December 2014 contains details of his expertise.

[8] These are contained in exhibit "A".

[9] Exhibit "B", para 10 of the expert summary, page 48.

[10] Exhibit "B", para 11 of the expert summary, page 49..

[11] He confirmed the correctness of the contents of his summary.

[12] Exhibit "A 23(b)".

[13] The second plaintiff testified that his wife took the lead and she and members of his family wrapped and prepared the gifts. He was present at the time and cut cellotape for them.

[14] Exhibit "A23(a) and (b)".

[15] Exhibit "A23(b)".

[16] Exhibit "A25(b)".

[17] Exhibit "A25(c)".

[\[18\]](#) Exhibit “A25(d)”.

[\[19\]](#) Exhibit “A25(d)”.

[\[20\]](#) Exhibit “A”, page 26, dated 22 August 2007.

[\[21\]](#) Exhibit “A27”.

[\[22\]](#) Exhibit “A29”, “A30”, “A31” and specifically “A38” dated 20 January 2009.

[\[23\]](#) It was recorded that the plaintiffs would have liked to call him to testify but he was old and not in good health and was thus unable to testify.

[\[24\]](#) 1997 (2) SA 690 (C).