



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case No: **13122/2019**

Related Case No: **8222/2020**

In the matter between:

S[...] M[...] W[...] N.O.

Plaintiff

(In his capacity as Executor of the Estate Late

Mr R[...] W[...] S[...] W[...])

And

J[...] J[...] W[...] [NÉE A[...]]

First Defendant

(ID No: 6[...])

PATRICIA LUCETTE LINDGREN N.O.

Second Defendant

(In her capacity as Curator ad Personam

to Mr R[...] W[...] S[...] W[...])

**DIRECTOR-GENERAL OF THE DEPARTMENT
OF HOME AFFAIRS**

Third Defendant

MASTER OF THE HIGH COURT, CAPE TOWN

Fourth Defendant

Coram: NJOKWENI AJ
Heard on: 12 June 2025; 3, 4, 8 September 2025; 18 October 2025
Delivered on: 10 December 2025

Summary: Civil Trial – executor of the deceased estate – marriage concluded when person is of unsound mind and under curatorship - onus shifts to the defendant – medical expert evidence – declaration of invalidity of marriage – costs – Marriage declared null and void *ab initio*.

ORDER

1. The marriage agreement concluded on 8 June 2018 between the late R[...] W[...] S[...] W[...] and the First Defendant is declared null and void *ab initio*.
2. The First Defendant is ordered to pay the costs of the action.
3. The First Defendant is ordered to pay the costs in respect of the two urgent applications instituted under case number 8222/2020 on 2 July 2020 and 25 May 2021.

JUDGMENT

NJOKWENI AJ

INTRODUCTION

[1] Decision-making is a key part of life. People make choices about where to live, health care, education, work, relationships, and finances¹. Making these choices shows our individuality, and when others respect our decisions, we have control over our lives.²

¹ SALRC Discussion Paper 105 on *Assisted Decision-Making: Adults with Impaired Decision-Making Capacity* (January 2004) on 6.

² SALRC Discussion Paper 105 *supra*, on 6, footnote 14 with reference to Ashton and Ward 3-7; Queensland Law Reform Commission Draft Report 1995 1.

[2] This action concerns the validity of a marriage between the late R[...] W[...] (“the Deceased”) and the First Defendant, J[...] J[...] W[...]. The Plaintiff, as executor of the Deceased’s estate, seeks to have the marriage declared null and void ab initio, arguing that the Deceased was of unsound mind at the time due to severe cognitive and behavioural impairments from a stroke and vascular dementia. The First Defendant contests this, asserting the Deceased was of sound mind when the marriage was concluded. At trial, the First Defendant represented herself.

RELEVANT FACTS

[3] The facts relevant to this case are set out below.

[4] R[...] W[...] had a severe stroke in May 2017, which caused major cognitive and behavioral problems, including vascular dementia. Because of his condition, a curator bonis was appointed to manage his affairs on 5 September 2017. He and the First Defendant married in community of property on 8 June 2018, while he was still under curatorship.

[5] The First Defendant claims the Deceased was of sound mind when they married. However, she did not provide expert evidence to support this, even though the court gave her several chances.

[6] The Plaintiff brought expert evidence from Prof Niehaus, a psychiatrist, who said the Deceased was of unsound mind and could not enter into a marriage contract at the time. The First Defendant called two experts, Dr. Burger and Dr. Mason, but their evidence also supported the Plaintiff’s claim that the Deceased was of unsound mind.

[7] The curator bonis, who acted before the Plaintiff, filed two urgent applications against the First Defendant to manage the joint estate and arrange the Deceased’s medical care and accommodation. The First Defendant at first refused to cooperate but agreed to the relief requested in both cases on the day of the hearings. The question of who should pay for these applications remains unresolved.

[8] The Plaintiff argued that the First Defendant did not prove the Deceased was of sound mind. The Plaintiff asks the court to declare the marriage null and void and to award costs for this case and the urgent applications.

ISSUES

[9] The issues the court must decide in this case are:

- a. whether the Deceased had the mental capacity to understand and consent to the marriage agreement.
- b. Costs, including whether the First Defendant should bear the costs of the action and two prior urgent applications filed by the Plaintiff's predecessor to manage the joint estate and provide for the Deceased's care.

Summary of Expert Evidence

Dr. Burger (Neurologist)

[10] According to Dr Burger, the Deceased suffered an acute MCA stroke in May 2017, leading to global aphasia, mild right-hand apraxia, and severe cardiac morbidity. He was re-admitted to care due to confusion and aggression.

[11] Dr. Burger testified that the Deceased was not of sound mind and incapable of making major life decisions during his May 2017 examination. He could not confirm the Deceased's mental state at the time of the marriage, but stated that the Deceased was not in a state to contract a marriage during his examination. To Dr Burger, the Deceased suffered an acute MCA stroke in May 2017, leading to global aphasia, mild right-hand apraxia, and severe cardiac morbidity. He was re-admitted to care due to confusion and aggression.

Dr. Mason (Psychiatrist)

[12] Dr Mason found the Deceased suffered from vascular dementia and post-stroke sequelae, including aggression, aphasia, impaired comprehension, and behavioural changes. On 16 May 2018, less than a month before the marriage, Dr.

Mason found the Deceased's clinical state unchanged, with permanent neurocognitive and behavioural impairments.

[13] Dr. Mason testified that the Deceased's stroke caused frontal lobe impairment, leading to behavioural difficulties. He stated that the Deceased did not have the mental capacity to enter into a marriage contract at any point during his involvement.

Prof Niehaus (Psychiatrist, Plaintiff's Expert)

[14] On 26 June 2018, Prof Niehaus examined the Deceased and found him suffering from global aphasia, vascular dementia, and significant cognitive and behavioural impairments. The Deceased was unable to comprehend or express agreement/disagreement with the concept of marriage or its responsibilities. Prof Niehaus stated that the Deceased lacked the capacity to consent to or sign contracts, including a marriage agreement, due to his severe neurocognitive impairments.

THE LAW

[15] The general rule is that majors are presumed mentally and legally competent to manage their own affairs until the contrary is proved. The onus of proving that a transaction is invalid for want of mental capacity normally rests on the party alleging it.³ However, where the court has declared a person to be of unsound mind, and incapable of managing his or her own affairs, such certification creates a rebuttable presumption of incapacity, shifting the burden of proof to the party who wants to hold the certified person bound by the transaction.

[16] In terms of our Common Law the general principle is that if a person is not able to fully understand or interpret all the consequences of his actions due to a mental illness or intellectual disability, it is said that such person lacks capacity to perform a specific act and the act is consequently void. It makes no difference whether the person has not yet been declared mentally ill and a curator appointed to him or her,

³ *De Villiers v Espach* 1958 (3) SA 91 (T).

or that the other party to the transaction was unaware of the person's mental condition.⁴

[17] It is important to note that the mere fact that a person has been declared mentally ill and that a curator has been appointed to administer his or her estate does not mean that such person loses all capacity to act.⁵ In *Pienaar v Pienaar's Curator*⁶ Judge President De Villiers (as he then was) stated:

'The mere fact that such a person has been declared insane or incapable of managing his affairs, and that a curator is appointed to such person, does not deprive him of the right of administering his own property and entering into contracts and other legal dispositions to the extent of which he may de facto be capable, mentally and physically, of so doing. Such mental or physical capacity may vary from day to day, but at all times it remains a question of fact. The object of appointing a curator is merely to assist the person in question in performing legal acts to the extent of which such assistance is from day to day, in varying degrees, necessary. Thus even a person who has been declared insane and to whose estate a curator has been appointed can dispose of his property and enter into contract whenever he is mentally capable of doing so.'

[18] Accordingly, someone who has been placed under curatorship because of a mental illness and a subsequent inability to manage his or her own affairs, can enter into a valid legal transaction with its normal consequences if, at that particular moment, he or she was physically and mentally capable of doing so.⁷ Thus, for example, it has been held that such person may enter into a contract.⁸ However, the person who alleges that the person under curatorship had full capacity to enter into the legal transaction must prove that fact.

[19] However, if it is found that the person lacked the capacity to understand the nature or consequences of the transaction when he or she entered into it, as is the case in this matter - he or she is not bound by it⁹ and it is void for want of capacity.

⁴ Boberg's *Law of persons and the Family* 106; *Molyneux v Natal Land & Colonization Co Ltd* (1905) AC 555 (PC) at 561.

⁵ Cronjé & Heaton, *The South African Law of Persons*, 113.

⁶ 1930 OPD 171 at 174-175 1930.

⁷ Cronjé & Heaton 125.

⁸ *Ex parte De Bruin* 1946 OPD 110.

⁹ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA).

[20] In casu, the Deceased was already placed under curatorship of a curator *bonis* and *ad personam* at the date of conclusion of the marriage. The first defendant alleges that the Deceased was of sound mind when he concluded the marriage and could appreciate the consequences. As a result, the first defendant bore the onus to prove that the Deceased was of sound mind when the marriage was concluded and that he could appreciate the legal consequences thereof. In casu, both the plaintiff and the first defendant's experts agree that the Deceased lacked the necessary capacity to understand the nature or consequences of the marriage when he entered into it. As a result, the first defendant failed to discharge that onus.

COSTS

Costs of the Action

[21] The two basic rules in respect of costs are well summarized by the Court in ***Ferreira v Levin, Vryenhoek v Powell***¹⁰ wherein Ackerman J stated the following:

"[3] The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of cost, unless expressly otherwise in enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her cost."

[22] This discretion is to be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at.¹¹ The Plaintiff argues that the general rule should apply: the successful party is entitled to costs. The First Defendant had the onus to prove the Deceased was of sound mind but failed to present sufficient expert evidence despite being advised by the Court of the necessity to do so. The Plaintiff incurred substantial costs to safeguard the rights of the Deceased and his heirs, which would otherwise result in financial prejudice due to the First Defendant's unreasonable conduct.

Costs in the Urgent Applications

¹⁰ 1996 (2) SA 621 (CC) at 624.

¹¹ Bruwer v Smit 1971 (4) SA 164 (C) at 517

[23] The Plaintiff's predecessor (*curator bonis*) was forced to institute two urgent applications due to the First Defendant's refusal to cooperate in managing the joint estate, despite repeated requests and correspondence. In both applications, the First Defendant conceded to the relief sought only on the day of the hearing, leaving the issue of costs unresolved.

[24] The Plaintiff argues that the Applicant (estate of the Deceased) should be awarded costs as the First Defendant's conduct rendered the applications necessary and urgent. *Jenkins v SA Boiler Makers, Iron & Steel Workers & Ship Builders Society*¹² established that: where a case has been settled on a basis which disposes of the merits except in so far as costs are concerned, the court – while not required to hear evidence to decide the disputed facts in order to decide who is liable for costs – has to make a proper allocation of costs.¹³

[25] In *Ideal Trading 199 CC v Polokwane Local Municipality*¹⁴, where the Court quoted passages from *Ward v Sulzer*¹⁵ before stating at para [9] that:

‘Although this case was decided against the backdrop of a withdrawal, the reasoning still rings true. The Applicant cannot be deprived of its costs in as far as the conduct of the Respondent rendered the merits of the application moot.’

[26] In the Urgent Applications the only material to the disposal of the Honourable Court is the version of the Applicant therein - i.e. the estate of the Deceased, as presented now by the Plaintiff. In the action and during cross examination the First Defendant was expressly requested to provide reasons for her delay in providing her co-operation to the management of the common estate, to which she simply answered she was ‘unhappy with the way she was approached’, without providing any further particulars in that regard.

[27] The position is consequently that the Applicant has brought two applications of undisputed urgency, which was justified and well-founded, in order to address the First Respondent's refusal to provide her co-operation in the management of the joint estate, in order to care for the Deceased. Only after the institution of the Urgent

¹²1946 WLD 15.

¹³Cilliers, *Law of Costs* (3rd ed) (1997) at para 2.20.

¹⁴ 3087/2021) [2023] ZALMPPHC 75 (15 August 2023)
¹⁵ 1973 (3) SA 701 (A),

Applications and on the day of each respective hearing, did the First Respondent essentially concede to the relief sought. The usual rule in such circumstances is that an applicant should be awarded costs.¹⁶

CONCLUSION

[28] Considering the whole body of the evidence, this Court is satisfied that the plaintiff is entitled to relief sought in this action and has made out a case for all the relief sought.

[29] For these reasons, I make the following order:

1. The marriage agreement concluded on 8 June 2018 between the late R[...] W[...] S[...] W[...] and First Defendant is declared null and void ab initio.
2. The First Defendant is ordered to pay the costs of the action.
3. The First Defendant is ordered to pay the costs in respect of the two urgent applications instituted under case number 8222/2020 on 2 July 2020 and 25 May 2021.

P. NJOKWENI
ACTING JUDGE OF THE HIGH COURT

Appearances

For Appellant: Mr C Bosman
Instructed by: Visagie Vos Attorneys

First Respondent: In person.

¹⁶ See the Ward-matter *supra*