

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

**CASE NUMBER: 18251/2015**

In the matter between:

**[B.....], [G.....]**

Applicant

And

**[B.....], [J.....]  
(formerly [M.....])**

Respondent

---

**JUDGMENT**

---

**OPPERMAN AJ**

## INTRODUCTION

[1] The Applicant (Mr B.....) and the Respondent (Mrs B.....) were married to each other on 27 February 2007 out of community of property with the exclusion of the Accrual System as provided for in terms of Chapter 1 of the Matrimonial Property Act 88 of 1984. It was a second marriage for both of the parties and they are still married. No children were born of this marriage. The marriage relationship between the parties has irretrievably broken down and a divorce action is pending.

[2] Mr B..... is a self-employed businessman, currently residing in B....., Gauteng. Mrs B..... is employed as a media strategist and resides at 6..... Fifth Street, H..... E....., Gauteng (**‘the former matrimonial home’**).

[3] Mr B..... vacated the former matrimonial home during April 2014. The former matrimonial home is co-owned by the parties in equal shares.

[4] This is an application by Mr B....., for the return of movable property allegedly belonging to him consisting mostly of furniture and artwork (**‘the goods’**). The goods are described in an annexure to the founding affidavit (**‘annexure A’**). By virtue of the nature of the defences raised, it is necessary to reproduce the content of such annexure:

### ‘ ANNEXURE “A”

The list of my assets/furniture is as follows:

#### 1. Entrance Hall

1x painting of Paris Bistro Restaurant;

1x rectangular Red Persian Carpet.

#### 2. Dining Room

1x wall clock;

1x painting/Litho print of Chassidic Rabbi;

1x dining room mirror/large/ hanging above the sideboard;

2x upholstered dining room chairs with armrests - either side of sideboard.

#### 3. Kitchen

1x large painting of Leopard in Gilt frame (Edmund Barton Cheetah study);

2 x small paintings of birds on south end wall of the kitchen;

1x large rectangular painting of birds in gilt frame (Edmund Barton);

1x round black granite table, including 6x black wrought iron chairs;

1x Caffè de Pino coffee machine (Juraena 9) with 1x milk container and 10x cappuccino cups and saucers;

1x Sunbeam bread maker;

1x LG Microwave oven;

50 % of the day to day white china crockery (purchased from Adams in Fourways) consisting of meat plates, fish plates, soup plates and dessert bowls;

7x various sizes Coastal Blue Le Creuset pots;

1x Water Purifier;

1x LG white refrigerator.

4. Wooden floor atrium

2 x M J de Beer / Tina paintings;

1x Oil painting of Tiger Lilies;

1x Oil painting of Rhododendrons which hangs to the rear of the coffee table;

1x round glass topped wooden based coffee table.

5. Top of staircase

1x painting called 'Emerald Eyes' by Otto Aguiar.

6. Main bedroom

small lilac hand-woven carpet lying next to the fridge cabinet;

1x wooden fridge cabinet;

1x mirror hanging on wall.

7. Downstairs passage

1x Perspex based rectangular table with glass top.

8. Godfrey's lounge (with all the wildlife pictures)

1x black leather lounge suite comprising a 3, 2 and 1 piece sofa's;

2 x upholstered orange wingback chairs;

1x Kim Hun oil painting called 'Lion Head Study';

1x Fuz Cafario oil painting called 'Snow Tiger';

1x Kim Hun oil painting called 'Leopard Study';

1x Kim Hun oil painting called 'Buffalo';

1x Fuz Cafario oil painting called 'Leopard Study';

1x medium print of a Lion's Head;

1x Scott Dawkins oil painting called 'Elephant Study';

1x Scott Dawkins oil painting called 'Leopard Study';

1x Wall clock in glassed wooden frame;

1x Brown rectangular carpet.

9. Second family room / lounge

1x G-Boys oil painting called 'Floral Study'.

10. Outside patio

1x leather grey patio suite consisting of 2x single chairs, 6 seater L-shaped extension with beige cushions;

1x glass topped coffee table;

1x wrought iron with glass top patio dining table with 12x chairs and orange cushions.

11. Bar Area:

1x ice Machine (Scotsman);

1x water purifier.'

[5] Mrs Burstein resists the application on the following grounds:

5.1. She contends that an agreement was concluded in terms of which the goods would remain in the former matrimonial home until such property has been sold;

5.2. Mr Burstein does not need the goods;

5.3. In respect of a Juraena 9 coffee machine, with 10 cups and saucers and a milk container ('**the coffee machine**'), she contends it was donated to her;

5.4. In respect of the LG Microwave oven ('**the LG Microwave**'), she claims that it was purchased as a replacement to the one she previously owned;

5.5. In respect of an ice machine ('**the ice machine**') and a coffee table under the chandelier ('**coffee table**'), she alleges that it was purchased jointly;

5.6. By removing the goods, Mr Burstein would be stripping the former matrimonial home and thus nullifying her right to remain there so long as Mr Burstein does not offer suitable accommodation elsewhere or the means of obtaining this;

5.7. The true motivation of the application is not to obtain the return of the goods, but rather to reduce the value of the former matrimonial home and to ensure Mrs Burstein's discomfort *pendente lite* in an attempt to coerce her into an unfavourable settlement of the pending divorce action.

### COMMON CAUSE FACTS

[6] Commencing September 2013, the former matrimonial home was, by agreement between the parties, marketed for a period of 3 months for R13 200 000. They had decided that it had become too big for them.

[7] The former matrimonial home has, amongst other things, two formal lounges, a study, a dining room and a kitchen. Such rooms, with the exception of Mr

Burstein's lounge, are all furnished with Mrs Burstein's furniture, which furniture is to remain in the house. Mrs Burstein has, and to which Mr Burstein is not laying claim, a full lounge suite (with a coffee table), a ten seater dining room table, chairs and a sideboard, a large gunmetal Hitachi refrigerator, half of all crockery, cutlery and stemware, other kitchen utensils including pots and pans, a Kenwood Chef, a desk and drawers in the study, a washing machine and tumble dryer, two dishwashers, all of the pewter gifts, her own artwork in the dining room, passage, stair case and guest toilet, and four bedroom suites.

[8] After vacating the former matrimonial home and on or about 2 May 2014, Mr Burstein collected his personal belongings, his son's towel, a blanket, his koi fish, the DSTV decoder, speakers, the contents of the lounge cupboard, a television from the lounge, two passports and a Krugerrand coin. These items were all listed in a mail sent by Mrs Burstein to Mr Burstein on 2 May 2014 recording that these goods had been removed without notification to Mrs Burstein and without her consent. She further recorded that the big truck which had been despatched to the former matrimonial home to collect other items belonging to Mr Burstein, would not be allowed access to the property. She concluded the mail with the following : 'Please submit a list of any further items that are required and I will revert to you as to when any agreed items should be collected'.

[9] Mr Burstein responded to such mail and advised that he still needed to collect the following items: his lounge furniture, all his paintings, the outside bar fridge with ice machine, the cabinet fridge in the bedroom, the patio lounge suite with small glass table, his three wall safes, the coffee machine, his bronze elephant statue, odds and ends in the swimming pool filter room, two Persian carpets ie a large red carpet in the entrance hall and a blue Persian outside his son's bedroom, his dinner set, the white large LG fridge, the freezer in the domestic worker's room, odds and ends in the storeroom, some white chairs for the garden and a tresses table.

[10] Mrs Burstein agreed that some, but not all, could be taken. She created two categories of goods:

10.1 She stated that the furniture in the lounge and all Mr Burstein's paintings were to remain until they had received and accepted an offer on the former matrimonial home.

10.2 She announced that a dispute (the nature of which was not disclosed) existed in respect of the ice machine, the outside patio lounge furniture, the coffee machine and the red Persian carpet, which dispute would have to be resolved in the divorce proceedings.

[11] Other than the large white LG fridge in the kitchen and his furniture in the lounge and paintings, Mr Burstein collected everything.

[12] On 4 August 2014, Mr Gavin Hartog, of Gavin Hartog Attorneys ('**Mr Hartog**'), representing Mr Burstein, addressed correspondence to Ms Deanne Kahn, of Deanne Kahn Attorneys ('**Ms Kahn**'), representing Mrs Burstein, requesting a convenient time for Mr Burstein to collect Mr Burstein's lounge suite, coffee table, all his paintings, fridge and Persian carpets. No response was received. The request was repeated on 8 August 2014.

[13] In response, and on 11 August 2014, Ms Kahn indicated that Mrs Burstein would not agree to the removal of such items until such time as the former matrimonial home had been sold. Ms Kahn concluded her correspondence as follows "As your client is aware, it is in the interests of both parties that the maximum purchase price be received in respect of the matrimonial home. In such circumstances, and particularly given that your client's fully furnished property in Benmore and his financial position, your client's request appears to be punitively motivated and your client is again respectfully requested to desist from such conduct".

[14] Mr Hartog responded on 13 August 2014, *inter alia* contending that "Our client's request is not unreasonable in that our client is mindful of the fact that an empty house does not sell as easily and for that reason notwithstanding that he is legally entitled to remove all his furniture he has only requested a few pertinent items." He also advised that Mr Burstein's house in Benmore was not fully furnished and that 'our client does not even have a lounge suite'. Mr Hartog discussed the situation with Ms Kahn on 18 August 2014 who had suggested that Mr Burstein request specific items.

[15] On 12 September 2014 Mr Burstein requested the following paintings: Eve of Creation, Colours of Paradise, Touched by Heaven, Horse Study, Leopard study, Buffalo, Snow Tiger and Floral Study. He also requested the lounge suite, coffee

table, fridge and Persian carpets, thus essentially the same items he had requested on 4 August 2014 except that he was seeking fewer paintings. Mr Hartog recorded that 'Our client is mindful of the fact that not all his furniture can be removed at this stage as selling the house is paramount'.

[16] In response thereto and on 19 September 2014, Mrs Burstein permitted Mr Burstein to remove four of his paintings (Eve of Creation, Colour of Paradise, Touched by Heaven and Horse Study), the blue Persian carpet and the coffee table but only after a show day, which was scheduled for 5 October 2015. Mr Burstein collected the items tendered on 14 October 2014.

[17] On 23 October 2014 Mr Burstein, through Mr Hartog, requested 50% of the cutlery and crockery which Mr Burstein had purchased from Adams in Fourways, the microwave oven, the coffee machine, the red Persian carpet, the coffee table standing under the chandelier and 50% of the pewter gifts.

[18] Ms Kahn, in her response on 24 October 2014, indicated that, with the exception of a portion of the crockery and cutlery, Mr Burstein was not entitled to remove the balance of items requested as:

18.1 the microwave was purchased to replace Mrs Burstein's microwave;

18.2 the coffee machine was a gift from Mr Burstein to Mrs Burstein;

18.3 the red Persian carpet would be given to Mr Burstein after the sale of the former matrimonial home;

18.4 the coffee table formed part of the furniture and household effects purchased during the marriage to be taken into account in discussions pertaining to the division of movables;

18.5 the Pewter gifts belonged exclusively to Mrs Burstein.

[19] On 27 October 2014, Mr Hartog addressed a further letter to Ms Kahn giving an undertaking on behalf of Mr Burstein that he would not enter the former matrimonial home and that Mrs Burstein could place the following items in the garage for collection by Mr Burstein: 50% of the cutlery and crockery which Mr Burstein had purchased from Adams in Fourways, the microwave oven, the coffee machine, the red Persian carpet, the coffee table standing under the chandelier and 50% of the pewter gifts, Mr Burstein's Le Creuset pots and pans, Mr Burstein's white LG fridge, a passage table and large mirror. No response was received.

[20] At the end of February 2015 an offer to purchase the property at R6 000 000 was received which Mrs Burstein rejected.

[21] On 13 March 2015 Mr Burstein, through Mr Hartog, addressed a further letter recording in paragraphs 3 and 4 the following:

‘2. The reason for this request is that the immovable property and formal (sic) matrimonial home of the parties has been on the market for the past 16 months, namely November 2013. It has become clear that the aforesaid property will not be sold pending the finalisation of the divorce action as your client refused the only viable offer made on the property about 3 weeks ago. The issue is further exacerbated by the fact that the property has not been properly maintained resulting in the declining value thereof.

3. It is indeed so that our client thought it prudent to leave the bulk of his movable assets at the property, as set out in annexure ‘A’, in order for the property to sell faster as it was thought that having an empty home would make the property unappealing.’

[22] The items requested were those forming the subject matter of this application as itemised and described in annexure A. On 20 March 2015 Ms Kahn, responded advising that Mr Burstein may remove: the painting of Paris Bistro Restaurant, the dining room wall clock, two small paintings of birds and a large painting of birds, a painting called Emerald Eyes, a perspex based regular table with glass top, a G-Boys painting Floral Study, some of the wildlife pictures in the lounge, the clock in the lounge and the painting of the Rabbi. No reason appears from the papers as to why these items were not collected.

[23] Prior to launching this application, and on 28 April 2015 Mr Burstein, through Mr Hartog, again requested the items contained in annexure A (the list attached to this request differed in minor respects from annexure A) and undertook to be responsible for the reasonable cost to repair any of the walls that might require a touch up as a consequence of the paintings being removed therefrom. No response was received.

### **THE PARTIES’ APPROACH TO THE FORMER MATRIMONIAL HOME IN THE DIVORCE ACTION**

[24] The main issue in dispute in the divorce action relates to Mr Burstein’s claim for rectification of the parties’ antenuptual agreement. In a nutshell, Mr Burstein contends that what had been agreed upon was that in the event of the dissolution of the marriage by way of divorce, the parties would each retain 50% of the net value

of the former matrimonial home. What Mrs Burstein is contending is that the parties had agree that in the event of the dissolution of the marriage by way of divorce, Mrs Burstein would receive 50% of the former matrimonial home by virtue of her joint ownership and 50% by virtue of the provisions of the antenuptual agreement ie Mr Burstein would be obliged to gift his 50% share to Mrs Burstein.

[25] Mrs Burstein is also claiming maintenance for herself.

### **THE TENDERED GOODS**

[26] Mrs Burstein agreed, from time to time as appears from the summary of the correspondence, that Mr Burstein could take certain of his goods. These concessions are contained in email correspondence between Mrs Burstein and Mr Burstein and letters addressed by Ms Kahn to Mr Hartog. During argument, Ms Segal, counsel representing Mrs Burstein, confirmed that these 'tenders' were still valid. Such tenders were made in respect of the following goods reflected in annexure A:

- 1x painting of Paris Bistro Restaurant;
- 1x rectangular Red Persian Carpet.
- 1x wall clock;
- 1x painting/Litho print of Chassidic Rabbi;
- 2 x small paintings of birds on south end wall of the kitchen;
- 1x large rectangular painting of birds in gilt frame (Edmund Barton);
- 50 % of the day to day white china crockery (purchased from Adams in Fourways) consisting of meat plates, fish plates, soup plates and dessert bowls;
- 1x LG white refrigerator.
- 1x painting called 'Emerald Eyes' by Otto Aguiar.
- 1x Perspex based rectangular table with glass top.
- 1x Kim Hun oil painting called 'Lion Head Study';
- 1x Fuz Cafario oil painting called 'Snow Tiger';
- 1x Kim Hun oil painting called 'Leopard Study';
- 1x Kim Hun oil painting called 'Buffalo';
- 1x Wall clock in glassed wooden frame;
- 1x G-Boys oil painting called 'Floral Study'.

(hereinafter '**the tendered goods**')

[27] Mrs Burstein had tendered 'some' wildlife pictures. There are eight. I have assumed that 'some' of eight, would equate to four and thus included the first four mentioned in annexure A.

[28] Mr Burstein is entitled to return of the tendered goods. No claim is made to them on any basis.

### **DISPUTES OF FACT**

[29] In assessing this matter this court is obliged to look at that which Mrs Burstein says and that which Mr Burstein says that Mrs Burstein cannot dispute, and make a finding on that set of facts, save for those which are manifestly far-fetched. (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)). In *Wightman t/a JW Construction v Headfour (Pty) Ltd*, 2008 (3) SA 371 (SCA) At para [13], Heher JA held as follows:

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter".

See too *Grancy Property Ltd v Manala and others*, 2015 (3) SA 313 (SCA) at paragraph [19].

[30] In respect of the coffee machine, the LG microwave, the ice machine and the coffee table, disputes exist, which in my view are incapable of resolution on paper.

[31] Mrs Burstein contends that the coffee machine and the LG microwave, were donated to her. She says that Mr Burstein's friends had cajoled him into purchasing this gift for her.

[32] The ice machine and coffee table, Mrs Burstein contends were bought for them jointly. Ms Feinstein, counsel for Mr Burstein, argued that this version ought to be rejected as it is legally incompetent, the parties being married out of community of property. The former matrimonial home is owned jointly by Mr and Mrs Burstein. It is unclear why it should be legally competent to own immovable property jointly but not movable property. No authority for this proposition was advanced. I can find nothing legally objectionable in the defence itself.

[33] Ms Feinstein requested that, in the event that I find that a dispute of fact exists in respect of some of the items, I was not to refer such disputes to the hearing of oral evidence. Should Mr Burstein be so advised, the pleadings in the pending divorce action could be amended to include a claim for such items. Ms Segal did not object to the proposed procedure.

[34] Much reliance was placed on the purchase receipts of the disputed goods. In my view, such receipts do not take the resolution of these disputes much further as the parties appear to be in agreement that the disputed goods were purchased by Mr Burstein. The dispute exists in respect of Mr Burstein's intention at the time of the acquisition of the goods and shortly thereafter ie were the coffee machine and LG microwave purchased as gifts for his wife? Was the ice machine and coffee table bought as joint assets (ie 50% gifted to Mrs Burstein)?

[35] The order I intend granting will accordingly omit the coffee machine, the LG microwave, the ice machine and "the coffee table under the chandelier" (collectively referred to as '**the disputed items**') and they will have to be determined by the Court hearing the divorce action.

**THE AGREEMENT NOT TO SELL UNTIL PROPERTY SOLD**

[36] Mrs Burstein contends that the remainder of the goods, ie Annexure A minus the tendered goods and the disputed items, are governed by an agreement between her and Mr Burstein in terms of which such goods would remain in the former matrimonial home until the sale of it. She does thus not dispute his title to the goods, but his right to immediate possession of same. Her defence in respect of the goods that she admits are his is that he agreed not to take his goods until the occurrence of a future uncertain event, the sale of the former matrimonial home.

[37] It is unclear when such agreement was concluded or, for that matter, what the terms were including for how long it would endure. Would the sale of the matrimonial home take place on the acceptance of an offer to purchase? Would it take place on transfer? Such details are of some consequence but not dealt with in the alleged agreement. What price would the matrimonial home have to be sold for so that Mr Burstein could insist that the sale take place? That too seems to me to be a troubling uncertainty in the alleged agreement.

[38] Having regard to the letters written, in particular, from June 2014 to October 2014, there appears to have been an understanding that it would be easier to sell the former matrimonial home fully furnished, and to this end Mr Burstein would leave some of his possessions in the former matrimonial home. What is similarly clear is that Mr Burstein did not undertake to do this indefinitely. From Mrs Burstein's perspective as reflected in her pleadings in the divorce she would get 100% of the former matrimonial home, why then would Mr Burstein want to assist her in increasing the value? It seems highly improbable on Mrs Burstein's version that he would have concluded such agreement. Why too would he have concluded an agreement which may endure beyond the divorce - if the property is sold after the dissolution of the marriage?

[39] It is further not at all clear that Mrs Burstein intends selling the former matrimonial home with any alacrity, if at all. She says 'In the event that the Applicant launches an application in terms of the *actio communi dividundo*, this action will be opposed.' This contention seems to undermine the statements that she is desirous of selling the former matrimonial home. Mr Burstein, as at 30 July 2015 when he deposed to the replying affidavit stated that: 'The respondent has not held a show day

for a period in excess of 3 months'. Thus, from April 2015 there have been no show days.

[40] Even if I am wrong that there was no such agreement concluded as contended for by Mrs Burstein, if it were, such agreement was cancelled on 13 March 2015, in writing, when Mr Hartog communicated with Ms Kahn and advised her that Mrs Burstein had failed to accept the only viable offer to purchase the former matrimonial home and that Mr Burstein now wanted the goods as per annexure A. If such letter does not constitute cancellation of the agreement then service of this application certainly constitutes communication of cancellation and in those circumstances the owner of the goods is entitled, as an incident of his right of ownership, to be restored to the possession of his goods.

[41] I therefore find that, insofar as such agreement was concluded, and of course my principal finding on this issue is that there was no such agreement but if I am wrong in this, I find that it was cancelled.

## **NEW DEFENCE**

[42] Ms Segal raised on behalf of Mrs Burstein a defence in argument which had not been raised on the papers. It is the principle embodied in *Whittingham v Whittingham*, 1974 (2) SA 636 (RS) at 637 A – G where Macaulay J held as follows:

Relying upon *Cattle Breeders' Farm (Pvt.), Ltd. v Veldman*, 1974 (1) SA 169 (RAD), and the line of cases therein referred to, the respondent opposes the return of the applicant's movables, save for certain personal items, on the grounds that by removing the furniture he would be stripping the matrimonial home and thus nullifying her right to remain there so long as the applicant does not offer suitable accommodation elsewhere or the means of obtaining this. An order to deliver the furniture would, so the argument runs, be tantamount to evicting her or at least to a substantial reduction of her right. The applicant had made no such offer and in effect contends that the respondent's salary is sufficient for her to provide whatever she needs.

It seems to me that there is substance in Mr. Mercer's submission. The wife's right cannot be reduced to the empty shell of the matrimonial home, without reference to the husband's obligation and ability to support her in accordance with their social standing and mode of living. It must surely be measured, *inter alia*, by reference to the accommodation enjoyed in it at the time of separation. This is implicit in the husband's obligation - if he wishes her to leave - to offer suitable alternative accommodation. This is not to say that the conditions of living in that home - namely, the appurtenances and amenities surrounding her - are immutably fixed at the time of separation. The wife has no right to occupy any particular property owned or leased by her husband. As Lord UPJOHN remarked in *National Provincial Bank v Ainsworth*, (1965) 2 All E.R. 472 at p. 483E - H:

"But the law has never adjudicated between the parties where or how they are to

live. It is for the spouses to decide where and in what state they and the family are to live, be it in the Ritz or a caravan. The choice from time to time of the matrimonial home is entirely a matter for decision within the domestic forum; though, no doubt, as PILCHER, J., once pointed out (in *Dunn v Dunn*), where there is a difference of opinion between the spouses as to the place of the matrimonial home someone must have the casting vote. A wife on entering a matrimonial home, the property of her husband, has no rights even inchoate in that home which the law will recognise or protect: see *Lloyds Bank, Ltd. v Oliver's Trustee*. But, on the other hand, having regard to the duty of the spouses to live together the Court does not, during the subsistence of the marriage, merely give effect to the strict legal and equitable rights of a spouse *qua* owner of the property as though the spouses were strangers. Recognising the obligations of the spouses to live together, the Court will only make orders with regard to the occupation of the matrimonial home subject to those obligations."

I would, with respect, add to this the observation that since the obligation of the spouses to live together imports also the obligation of mutual support and contribution towards the upkeep of the matrimonial household, any decision on occupation of the matrimonial home and the conditions of that occupation must be governed by these obligations.

Consequently, whether the respondent is entitled to retain the furniture in a situation where the husband is not seeking her eviction from the matrimonial home owned or hired by him, is a matter which ultimately resolves itself into the question whether it is right and proper that his duty to support her should continue in this form, due regard being had to their social position and mode of living, his financial ability to allow her to continue in the use of the furniture in the matrimonial home and her own means of contributing to her maintenance in that home. It is on this principle I propose to decide the case."

[43] Ms Segal conceded that nowhere on the papers did Mrs Burstein contend that by seeking return of the goods, Mr Burstein was nullifying her right to remain there. The facts of the present case are manifestly distinguishable from the facts in *Whittingham* (supra). The former matrimonial home has, amongst other things, two formal lounges, a study, a dining room and a kitchen. Such rooms, with the exception of Mr Burstein's lounge, are all furnished with Mrs Burstein's furniture, which furniture is to remain in the house. Mrs Burstein has, and to which Mr Burstein is not laying claim, a full lounge suite (with a coffee table), a ten seater dining room table, chairs and a sideboard, a large gunmetal Hitachi refrigerator, half of all crockery, cutlery and stemware, other kitchen utensils including pots and pans, a Kenwood Chef, a desk and drawers in the study, a washing machine and tumble dryer, two dishwashers, all of the pewter gifts, her own artwork in the dining room, passage, stair case and guest toilet, and four bedroom suites.

[44] It can hardly be argued that the return of the goods would nullify Mrs Burstein's right to occupation. That this is not the case is also born out by the fact that the parties are both in second marriages. They both came into the marriage

with what might loosely be described as two complete sets of household furniture. In addition, almost half of the goods sought in this application has been tendered at some stage. On Mrs Burstein's own version, the return of such goods would not nullify her right to occupation because if that were so, she would clearly not have tendered the goods.

[45] A party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged (*Swissborough Diamond Mines v Government of the RSA*, 1999 (2) SA 279 (TPD) at 324I). The difficulty in this matter is that this defence does not arise from the facts. Quite the contrary is shown. The facts of this case do not support the argument that by taking the things that are admittedly his property Mr Burstein is nullifying Mrs Burstein's occupation of the matrimonial home pending the divorce, there is simply too much furniture and other household effects left in the house for this proposition to stand.

#### **BONA FIDES OF APPLICATION AND REQUIREMENT OF NEED**

[46] Ms Segal argued that Mr Burstein does not need the goods sought by him and that he is claiming it merely to reduce the purchase consideration of the former matrimonial home. Although showing 'a need' to one's own goods is not a requirement for the successful reliance on the *rei vindicatio*, Ms Segal argued that the absence of 'need' in these circumstances is indicative of the fact that this application is brought *mala fide* and in an attempt to secure a favourable settlement.

[47] It is true that in matrimonial matters a Court should not be too clinical about the application of the relevant legal principles and should, within their confines, temper those principles' harsher effects where justice demands it. However, if ownership is conceded, as has been in this matter, there is little scope for judicial indulgence. To demonstrate that Mr Burstein is abusing the process of this Court to achieve an illicit advantage in the divorce would require that the lack of *bona fides* should shine through the papers. A court is in a suitable case empowered to non-suit a litigant who abuses its process. This case, however, is not such a one.

[48] Mr Hartog wrote two letters of demand calling for the items forming the subject matter of this application (there were some minor differences). It does not

appear from the papers why a date and time for collection of the tendered goods was not set.

[49] I have very little doubt that there is much acrimony between the parties. They have been separated for almost two years with no attempts to sell the former matrimonial home having been made since April 2015. The allegation of mala fides might equally be made by Mr Burstein in the light of the delays in holding show days and the absence of any alacrity in effecting the sale of what is obviously a very comfortable home for Mrs Burstein to occupy. On Mr Burstein's version of the ante-nuptial agreement, he is to retain 50% of the former matrimonial home on dissolution of their marriage. It would thus be in Mr Burstein's interests to increase the value of the former matrimonial home. An application motivated by malice to diminish his own half share's value makes no commercial sense. To this Ms Segal responded that Mr Burstein is very wealthy and is doing this simply because he can. He can wield his economic power and thus secure a settlement to which he is not entitled.

[50] If this were the purpose of the application one wonders why, upon receipt of the final letter of demand, a date and time wasn't suggested as to where the tendered goods could be collected? Why were no attempts made to take the sting out of the allegedly underhanded purpose of this application? Why were certain items tendered on 2 May 2014 and 24 October 2014 but then omitted from the 20 March 2015 tender?

[51] I certainly do not have sufficient facts before me which could persuade me that the application was motivated by malice or constituted an abuse of the process of the Court.

### **COSTS**

[52] The issue of costs remains.

[53] The applicant has been successful and in my view no argument has been presented as to why the costs should not follow the result.

[54] Although a punitive costs order has been sought, I do not consider it appropriate to do so.

### **ORDER**

[55] I accordingly grant the following order:

55.1. Save for the coffee machine, ice machine, LG microwave and coffee table under the chandelier, the applicant is authorised to collect the movable property itemised in annexure “GB17 – A” to the founding affidavit, from the immovable property at 63A Fifth Street, Houghton Estate, Gauteng (**‘the property’**) at a time and date to be agreed upon between the parties but no later than 10 days from the date of the granting of this order, failing which the sheriff of this court is authorised and directed to remove such items from the property and to deliver same to the applicant.

55.2. The applicant will be responsible for the reasonable cost of repair to any of the walls which may require repair as a consequence of the applicants’ paintings being removed therefrom.

55.3. The respondent is to pay the costs of this application.

---

I OPPERMAN  
Acting Judge of the High Court  
Gauteng Local Division, Johannesburg

Heard: 8 February 2016  
Judgment delivered: 4 March 2016  
Appearances:  
For Applicant: Adv M Feinstein  
Instructed by: Gavin Hartog Attorneys  
For Respondent: Adv L Segal  
Instructed by: Deanne Kahn Attorneys