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## **Misapplied and misunderstood: The disparities in the use of prodigality and its limits**

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### **Abstract**

*Due to the fact that people have subjective existence, it is difficult to determine the extent to which they should allow legal concepts to influence or govern their innermost personal lives. It may be inferred from the Bill of Rights in the Constitution of the Republic of South Africa that South Africans have the right to autonomy over themselves and how they choose to lead their lives, including how they manage their own estates. A pressing issue in this regard is whether the declaration of prodigality invasively strips the prodigal of the ability to exercise his or her commercial rights and what implications this has for his or her human dignity. The state has the duty to protect all citizens, especially children (as per section 28 of the Constitution as well as the Children's Act), and, through reasonable means, intervene when individuals fail to protect themselves. There is, however, the question of whether the state, in granting an interdict to limit a prodigal's capacity to act*

*and in appointing a curator bonis to administer the estate, is employing reasonable means and whether, or to what extent, individuals should allow the state to govern their personal habits. Some believe that the appointment of a curator bonis is invasive of one's dignity, freedom, and control of one's life. Indeed, this article argues that the law of prodigality is outdated and needs to be developed such that its application does not infringe on a person's right to human dignity and yet is efficacious in protecting the interests of children.*

**Keywords:** prodigal; contract; human dignity; children; marriage; interdict; capacity to act; estate; *curator bonis*; parental responsibilities and rights\*

## 1 INTRODUCTION

Squandering all one's money is fun and games ... until it isn't. Financial irresponsibility has not only personal but legal implications. This article seeks to discuss, first, the regulation of prodigality in South Africa and how it is applied in the case of marriage, a legally binding contract; secondly, how the application of prodigality may impair the dignity of a minor; and, thirdly, the nature of its implications for the dignity of prodigals. To this end, the article draws on the Constitution of the Republic of South Africa, 1996, as well as relevant legislation and case law.

## 2 PRODIGALITY: ITS DEFINITION AND APPLICATION PROCESS

A person who is declared a prodigal is one who has normal mental ability but is incapable of managing his affairs: he squanders his assets irresponsibly and recklessly due to some defect of power or character.<sup>1</sup> Prodigality is typically associated with gambling and alcoholism.<sup>2</sup> The declaration of prodigality is accomplished through an application submitted to the High Court for an order declaring a person a prodigal and the appointment of a *curator bonis* to administer the estate of the prodigal. This application can be submitted by the prodigal himself or an interested person, for instance a spouse, acting on behalf of the prodigal.<sup>3</sup> A *curator bonis* is a person who is

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<sup>1</sup> Kruger H, Skelton N & Carnelly M *et al.* "Curatorship, prodigality, and insolvency" in Kruger H, Skelton N & Carnelly M (eds) *The law of persons in South Africa* 2<sup>nd</sup> Cape Town: Oxford University Press Southern Africa (2018) at 155.

<sup>2</sup> Kruger, Skelton & Carnelly *et al.* (2018) at 155.

<sup>3</sup> Kruger, Skelton & Carnelly *et al.* (2018) at 155.

appointed by the High Court to manage the estate and finances of another person who cannot do so as a result of the person's mental or physical incapacity; the *curator bonis* also protects the interests of the minor.<sup>4</sup> The powers and functions of a *curator bonis* are limited to those that are granted by the court, and such a person is not free to make any decision that he or she so wishes.<sup>5</sup>

The regulations of prodigality are contained in common law, meaning they are not contained in statute or legislation.<sup>6</sup> Prodigality does not affect a person's ability to perform a valid juristic act; however, the declaration of prodigality, together with the accompanying interdicts, limits a person's capacity to act. In essence, when a court receives an application for an order of prodigality, it will consider the evidence submitted. If the court is satisfied with the facts presented, it will make a declaration of prodigality, issue an order restricting the prodigal's ability to manage his assets and appoint a *curator bonis* to administer the prodigal's assets.<sup>7</sup>

### 3 GROUNDS FOR GRANTING AN INTERDICT AND ITS IMPLICATIONS

An interdict is a court order that serves to enforce or protect rights.<sup>8</sup> For an interdict to be granted, specific legal requirements have to be met. According to *Setlogelo v Setlogelo* 1914 AD 221, the grounds for granting an interdict are '[a] clear right, injury committed or reasonably apprehended and absence of similar protection by any other means'.<sup>9</sup> In other words, there must be a *prima facie* violation of a right, one resulting in the injury or potential injury of the person in question, and all alternative measures to resolve the matter must have been exhausted.

If the presiding officer is satisfied that the grounds for granting an interdict are met, then an interdict will be granted along with a declaration-of-prodigality order, thus limiting the prodigal's capacity to act.<sup>10</sup> This will result in the limitation of the contractual capacity of prodigals so as to protect them from making financially detrimental decisions.<sup>11</sup> This is aimed at preventing them

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<sup>4</sup> Department of Justice and Constitutional Development "Legal positions of persons incapable of managing their own affairs" (2016) available at <https://www.justice.gov.za/juscol/docs/note-MOH01.pdf> (accessed 16 September 2024) at 14.

<sup>5</sup> Department of Justice and Constitutional Development (2016) at 14, 17, 22-23.

<sup>6</sup> Department of Justice and Constitutional Development (2016) at 5, 9-10.

<sup>7</sup> Kruger, Skeleton & Carnelly *et al.* (2018) at 155.

<sup>8</sup> *Letsoalo and 2 Others v Tepanyekga and 11 Others* 2020 ZALMPPHC 74 para 11.

<sup>9</sup> *Setlogelo v Setlogelo* 1914 AD 221 para 227.

<sup>10</sup> Kruger, Skeleton & Carnelly *et al.* (2018) at 155.

<sup>11</sup> Cockrell A, Keightley R & Van Heerden B (eds) *Boberg's law of persons and family* Cape Town: Juta (1999) at 152-153.

from entering into contracts that they may not fully understand or that could further impair their financial situation.<sup>12</sup>

Thus, the contracts entered into with prodigals are problematic since the prodigal's contractual capacity is comparable to a minor's.<sup>13</sup> In terms of section 17 of the Children's Act 38 of 2005 (the Children's Act), minors are children aged between 7–18 years.<sup>14</sup> It is accepted that the justification for the limited capacity is the inability of the minor to comprehend fully the effects of contracting with other parties.<sup>15</sup> Under South African law, contracts entered into by minors are not enforceable by the law and, as a result, an unassisted contract by a minor is unenforceable against the minor.<sup>16</sup>

Additionally, the prodigals will be prohibited from administering their respective estates; however, they will be able to administer their children's estates.<sup>17</sup>

#### **4 PRODIGALITY IN MARRIAGES: DIGNITY AND INCONSISTENCIES**

In the case of *Phil Morkel Bpk v Niemand*,<sup>18</sup> it is stated that a prodigal's capacity is curtailed because the person lacks the necessary judgement to know which transactions she should be a party to, and not because she cannot take part normally in the creation of an obligation.<sup>19</sup> Thus, in regard to the capacity to perform a valid juristic act, a prodigal can enter into a marriage relationship without the curator's consent but is unable to enter any other contract, otherwise she will be found to be in contempt of court and the contract can be void.<sup>20</sup>

A marriage is as much a legally binding contract as any other contract and should be treated as such; hence, when imposing limitations on prodigals, there should be no inconsistency in this regard.<sup>21</sup> In *Mayelane v Ngwenyama and Another*,<sup>22</sup> it was highlighted that a marriage is a highly personal and private contract.<sup>23</sup> The limitations placed on a prodigal's ability to perform a valid

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<sup>12</sup> Cockrell, Keightley & Van Heerden (1999) at 152–153.

<sup>13</sup> Cockrell, Keightley & Van Heerden (1999) at 152–153.

<sup>14</sup> Section 17 of the Children's Act 38 of 2005.

<sup>15</sup> Wessels JW *The law of contract in South Africa* 2<sup>nd</sup> ed Durban: Butterworth (1951) at 246.

<sup>16</sup> Watt I *Consequences of contract concluded by unassisted minors: A comparative evaluation* (LLM thesis, Stellenbosch University, 2012) at 1, 15.

<sup>17</sup> Kruger, Skeleton & Carnelly *et al.* (2018) at 155.

<sup>18</sup> *Phil Morkel v Niemand* 1970 (3) SA 455 (C).

<sup>19</sup> Kruger, Skeleton & Carnelly *et al.* (2018) at 156.

<sup>20</sup> Kruger, Skeleton & Carnelly *et al.* (2018) at 155–157.

<sup>21</sup> *Mayelane v Ngwenyama and Another* 2013 (4) SA 415 (CC) para 74.

<sup>22</sup> *Mayelane v Ngwenyama and Another* 2013 (4) SA 415 (CC) para 74.

<sup>23</sup> *Mayelane v Ngwenyama and Another* 2013 (4) SA 415 (CC) para 74.

juristic act are not consistent in that they disregard marriages, which are equally legal contracts, by allowing the prodigal to enter into a marriage contract without consulting the *curator bonis*. A prodigal cannot be seen to be fit to make decisions about whether he or she gets married, considering that if the community of property matrimonial system applies, this will have implications for the assets over which the prodigal does not have control.<sup>24</sup>

In South Africa, marriage in community of property involves the spouses sharing their pre-marital assets and obligations in a common estate.<sup>25</sup> Any assets, debts, and obligations acquired by either spouse after the marriage will also be included in this joint estate.<sup>26</sup> According to the Matrimonial Property Act 88 of 1984, a joint estate means the joint estate of a husband and wife married in community of property.<sup>27</sup> If a couple does not sign an antenuptial contract (ANC) before marriage, they will default to a community of property marriage under South African law.<sup>28</sup> However, if the couple decides to conclude an ANC, which means they are married out of community property, the two sub-regimes will apply, namely the with-accrual system as well as the without-accrual system.<sup>29</sup> An ANC with accrual entails that in the event of divorce or death the spouses get to keep what they acquired individually prior to the marriage and share the assets acquired during the marriage.<sup>30</sup> An ANC without accrual entails that the spouses assets are separate prior to and during the marriage and that in the case of divorce or death, each spouse keeps his or her own assets.<sup>31</sup>

The inconsistency above with regard to the application of limitations on prodigals undermines the significance of marriage.<sup>32</sup> In *Dawood v Minister of Home Affairs*,<sup>33</sup> which dealt with human dignity in the context of marriage and family life, it was stated that ‘the decision to enter into a marriage relationship and to sustain such a relationship [is] a matter of defining significance for many people’.<sup>34</sup> The declaration of prodigality, along with its accompanying interdict, is

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<sup>24</sup> Section 1 of the Matrimonial Property Act 88 of 1984.

<sup>25</sup> Section 1 of the Matrimonial Property Act 88 of 1984.

<sup>26</sup> Heaton J & Kruger H *South African Family Law* 4<sup>th</sup> ed Pietermaritzburg: LexisNexis (2015) at 62.

<sup>27</sup> Section 1 of the Matrimonial Property Act 88 of 1984.

<sup>28</sup> Heaton & Kruger (2015) at 62.

<sup>29</sup> Schulenburg P “Understanding the Matrimonial Property Act” (2024) available at <https://pagelschulenburg.co.za/Understanding-The-Matrimonial-Property-Act-a-guide-for-couples-in-south-africa/> (accessed 24 July 2024).

<sup>30</sup> Schulenburg (2024).

<sup>31</sup> Schulenburg (2024).

<sup>32</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 5.

<sup>33</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 5.

<sup>34</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 5.

problematic, as it undermines marriage regimes as legal contracts, thus diminishing the dignity of such relationships.<sup>35</sup>

The right to dignity of prodigals is further impaired due to the limitation of the prodigal's right to property.<sup>36</sup> In *Mayelane v Ngwenyama*, it was noted that

[t]he right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity.<sup>37</sup>

A person declared a prodigal accompanied by an interdict and an appointment of a *curator bonis* will have his right to dignity limited as he cannot assert control of his assets, which has implications for his personal circumstances.<sup>38</sup> The right to human dignity falls under the founding values of the Constitution; moreover, as noted in *S v Makwanyane and Another*,

[t]he rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three [of the Constitution]. By committing ourselves to a society founded on the recognition of human rights, we are required to value these two rights above all others.<sup>39</sup>

Furthermore, in regard to the rights to life and dignity, paragraph 84 of the same judgment states:

[T]he absolute nature of these two rights [must be] taken together. Together they are the source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity.<sup>40</sup>

Hence, it may be inferred from *S v Makwanyane* that the right to human dignity is absolute.<sup>41</sup>

Indeed, section 36 of the Constitution provides that

[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom ...<sup>42</sup>

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<sup>35</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 5. See also section 10 of the Constitution of the Republic of South Africa, 1996.

<sup>36</sup> Sections 10 and 23 of the Constitution of South Africa.

<sup>37</sup> *Mayelane v Ngwenyama and Another* 2013 (4) SA 415 (SA) para 73.

<sup>38</sup> *Kruger, Skeleton & Carnelly et al.* (2018) at 155. See also section 10 of the Constitution of South Africa.

<sup>39</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 144.

<sup>40</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 84.

<sup>41</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 84.

<sup>42</sup> Section 36(1) of the Constitution of South Africa.

The repercussions of the declaration of prodigality and the accompanying interdict have unjustified limitations which, as regards the centrality given to dignity, are in conflict with the Constitution.<sup>43</sup>

## **5 RIGHTS OF THE CHILD WHOSE PARENT HAS BEEN DECLARED A PRODICAL**

According to section 28 of the Constitution, the child's best interests are of paramount importance in every matter concerning the child.<sup>44</sup> The importance of the child's best interests is reiterated in section 9 of the Children's Act: 'In all matters concerning the care, protection and well-being of the child the standard that the child's best interest is of paramount importance, must be applied.'<sup>45</sup>

When an individual is declared a prodigal, they are given the ability to retain their parental responsibilities and rights and are still able to administer their children's interests.<sup>46</sup> However, this gives rise to concerns as to whether the best interests of the child are served, given that the prodigal cannot administer her own estate. In *Girdwood v Girdwood* 1995,<sup>47</sup> it was held that the High Court, as the upper guardian of all dependent and minor children, has an inalienable right to establish what is in the best interests of children. Additionally, the court has the jurisdiction to make orders to ensure that such interests are safeguarded – an authority upon which no agreement between the parties may encroach.<sup>48</sup>

Furthermore, it was highlighted in *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)*<sup>49</sup> that it is important that, where children have a stake in a matter before the court, the court take the interests of children fully into account so as to prevent any serious injustice from affecting them or, possibly, others. Where there is a risk of injustice towards those children, the court is obliged to appoint a curator to represent the interests of children.<sup>50</sup> This obligation is in conformity with section 28(1)(h) of the Constitution, which provides that 'every child has the right – (h) to have a legal

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<sup>43</sup> Sections 10 and 36 of the Constitution of South Africa.

<sup>44</sup> Section 28 of the Constitution of South Africa.

<sup>45</sup> Section of the Children's Act 38 of 2005.

<sup>46</sup> Section 18 of the Children's Act 38 of 2005.

<sup>47</sup> *Girdwood v Girdwood* 1995 (4) SA 698 (C).

<sup>48</sup> *Girdwood v Girdwood* 1995 (4) SA 698 (C) 708J-709A.

<sup>49</sup> *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2002 (10) BCLR 1006 (CC)

<sup>50</sup> *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2002 (10) BCLR 1006 (CC) para 3. See also section 9 of the Children's Act 38 of 2005.

practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result'.<sup>51</sup>

The fact that an interdicted prodigal is prohibited from administering his affairs but still preserves control of his children's estates highlights another inconsistency in the law. The best interests of the child are of paramount importance, and the High Court as the upper guardian of minors has the inherent power and duty to see to it that the best interests of the children are always prioritised. However, the failure of the courts to appoint curators to administer the estates of minors on their behalf and instead allow interdicted prodigals to administer these estates while they themselves are prohibited from administering their own affairs is in turn a failure to protect the interests of minors. This is a clear infringement of children's best interests as protected by section 28 of the Constitution.<sup>52</sup> Ultimately, the question is this: If the prodigal fails to administer his or her estate, how can one ensure that the prodigal will be equipped to administer the estate of the child in a way that it is beneficial to the child?

## 6 CONCLUSION AND RECOMMENDATIONS

This article has critiqued the inconsistencies that arise under South African law in the application of prodigality. A prodigal has been identified as a person of sound mind who, due to a character defect, squanders his or her assets irresponsibly. The application to declare a person a prodigal is submitted to the High Court by the prodigals themselves as interested persons. According to case law, grounds that need to be met for an interdict to be granted are 'a clear right, injury committed or reasonably apprehended and absence of similar protection by any other means'. Furthermore, in their capacity to act, prodigals are comparable to minors and able only to administer their children's estate. A *curator bonis* is hence appointed to manage the estate of the prodigal.

The first inconsistency this article identifies concerns the capacity to act of a prodigal entering into a marriage relationship. A marriage is a legally binding contract: allowing a prodigal to enter into a marriage contract without supervision is inconsistent with the limitations imposed on a prodigal. In particular, it is inconsistent to allow a prodigal to enter into a marriage without the consent of the *curator bonis*, considering that if the community of property matrimonial system is adopted, it

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<sup>51</sup> Section 28(1)(h) of the Constitution of South Africa.

<sup>52</sup> Section 28(2) of the Constitution of South Africa.



will have implications for assets over which the prodigal does not have control. This situation undermines the significance of marriages and diminishes the dignity of such relationships.

A declaration of prodigality on a person limits the prodigal's right to property, consequently impairing his or her right to dignity. The rights to life and dignity are identified as the most important of all human rights. Prodigality impairs a person's dignity in that, following the appointment of a *curator bonis* and the granting of an interdict, he or she cannot assert control over his or her assets, which has implications for the prodigal's personal circumstances.

The second inconsistency identified in this article is that prodigals are able to administer the estate of their children but not their own. It is argued that allowing interdicted prodigals to administer their children's estates does not uphold or safeguard the best interests of the child, which raises the question: If a prodigal fails in administering his or her own estate, how could he or she be entrusted with the administration the estate of a child in a way that benefits the child? Overall, the application of prodigality was found to be flawed and outdated, as a result of which the government needs to take proactive measures to address these flaws.

Provided that there is no legislation that strictly governs prodigality and that it is contained only in the common law, it is thus recommended that the government draft an Act where a clear outline of how prodigality is to be regulated is provided. The inconsistency in regard to prodigals' contractual capacity in marriages is a gap in the law that should be addressed in the proposed Act. It is imperative to specify that marriages are as equally legally binding as any other contract. Likewise, the High Court must uphold its responsibility as an upper guardian of minors and ensure that the rights and best interests of minors are protected in all instances.

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