SHOULD CAREER ASSETS BE CATERED FOR UPON DIVORCE?

The case for the inclusion of career assets as property in a spouse's marital estate.

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I INTRODUCTION

The Matrimonial Property Act[1] has been in place for nearly 40 years. Apart from ad hoc issues brought to the attention of the South African Law Reform Commission (SALRC), no significant review of the Act has taken place.[2] The number of social and legal changes since the Act came into operation on 1 November 1984 suggest that matrimonial property law requires review to ensure that it meets the current needs of South African society.[3] As part of the SALRC review of aspects of the Matrimonial Property Law[4] and the subsequent revision of their Issue Paper,[5] the SALRC has raised the question of whether to include "career assets" in a spouse's estate upon divorce.

This essay will consider whether it is appropriate to include career assets in the form of academic and professional qualifications as property upon divorce. To date, South Africa does not do so, but developments in other jurisdictions and progressive perspectives on the nature of property call this position into question.

Kelly defines career assets as "human skills, knowledge, and experience acquired or increased through investments of time, energy and money in an individual as a form of wealth enhancing future income".[6] Kelly built on the prior work by Charles Reich and Mary-Anne Glendon. Reich recognised in the 1960s the emergence of non-traditional assets in the form of employment and government entitlements. In Reich's view, these forms of "new property" were superseding the importance of traditional assets as a source of wealth.[7] Glendon recognising the importance and value of career assets to married couples was an early proponent of including career assets upon divorce.[8]

There has not been a South African decision dealing with career assets. However, recently the Malawian High Court was asked to consider the matter in *Tewesa v Tewesa*.[9] The case and the Court's final award illustrate the considerations a South African court

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[1] Act 88 of 1984.
[2] South African Law Reform Commission Issue Paper 41 (Project 100E) *Extension of the consultation process: revised Issue Paper 34* (2021) para 1.3
[3] Ibid.
[4] South African Law Reform Commission Issue Paper 34 (Project 100E): *Review of Aspects of Matrimonial Property Law* (2018) 21.
[5] South African Law Reform Commission Issue Paper 41 (Project 100E) *Extension of the consultation process: revised Issue Paper 34* (2021) para 9.14
[6] A Kelly "The Marital Partnership Pretence and Career Assets: The Ascendancy of Self over the Marital Community" (2001) 81 *Boston University Law* Review 59 at 77.
[7] C Reich "The New Property" (1964) 73 *The Yale Law Journal* 733 at 733.
[8] MA Glendon "New Family and New Property" (1978-1979) 53 *Tulane Law Review* 697.
[9] *Tewesa v Tewesa* (Matrimonial Case Number 9 of 2012) [2020] MWHC 28 (31 August 2020) available at https://malawilii.org/mw/judgment/high- Court-general-division/2020/28 (accessed 12 August 2021) (*Tewesa* hereinafter).

will need to weigh when considering a claim relating to career assets. Consequently, a brief review of *Tewesa* is necessary.

(a) Tewesa v Tewesa

Notably, *Tewesa* is the only case I could identify outside the United States that considered career assets. In *Tewesa*, a wife sought to include the husband's, a teacher, tertiary education within the marital estate.[10]

The Court followed the American decisions of *In re Marriage of Graham*[11] and *DeWitt v DeWitt*,[12] holding that the ability to divest oneself of an asset is a requirement *sine qua non* for a career asset to qualify as property that can be valued. By so doing, the Court concluded that career assets did not meet the definition of property.[13]

Applying s 24(1)(b)(i) of the Malawian Constitution, which protects the rights of women "to a fair disposition of property that is held jointly with a husband",[14] the Court concluded that the educated spouse had been unjustifiably enriched by the wife's financial and in-kind contributions towards her husband's acquisition of his career assets.[15]

Using the Malawian decision as a guide, this essay will consider three aspects: (1) do career assets meet the definition of "property"?; (2) would a spouse who contributes to their spouse's acquisition of career assets be able to claim for unjustified enrichment?; and (3) should fairness play an overarching role when considering career assets?

(b) Sam and Jane

To illustrate the dilemma caused by career assets, one should consider a fictional couple, Sam and Jane. They are married out of community of property with the accrual system and bring no assets to the marriage.

The couple considers two options: Either they invest in Jane's education to become a medical doctor, or Sam starts and builds a general contracting business. Either option will generate the same income. However, the current consequences upon divorce will be significantly different. They divorce after five years once Jane completes her qualification, or alternatively, Sam's business has become successful.

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[10] *Tewesa* 2.
[11] 574 P. 2d 75 - Colo: Supreme Court 1978 (*Graham* hereinafter).
[12] 296 NW 2d 761 - Wis: Court of Appeals 1980 (*DeWitt* hereinafter).
[13] *Tewesa* 8–9.
[14] *Tewesa* 2.
[15] *Tewesa* 11 and 13.

(i) Jane becomes a doctor

While Jane studies, Sam provides financial assistance in paying Jane's fees and sees to the couple's household needs. While Jane studies, no traditional assets are accumulated by either spouse. Our current marital property regime would only include traditional property in a spouse's estate. Even though Jane will be a qualified doctor, Sam will receive no compensation for his efforts that allowed Jane to study.

(ii) Sam opens a general contracting business

Jane plays no role in Sam's business. Assuming that Jane has no accrual of her own, Jane would share equally in Sam's accrual, half of the value of Sam's business, his only traditional property on divorce.

The decision to invest in Jane's education to achieve their goals as a couple comes with substantial risk to Sam. Until our courts or legislature addresses the status of career assets on divorce, the risk that Sam's contributions, both financial and in-kind, go unrecognised and uncompensated remains.

II PROPERTY

The central question foreign courts have wrestled with is whether career assets can be considered property on divorce. *Tewesa* concluded that career assets did not meet the definition of property.[16] Considering the reliance of *Tewesa* on American jurisprudence and recognising the absence of South African cases dealing with career assets, it is appropriate to review a selection of American State Court decisions that demonstrate the divide within the United States as to whether career assets are property. Two distinct views become apparent. The narrow view considers the asset to be the physical degree or professional licence. In contrast, the broad view identifies the career asset as the enhanced earning capacity acquired through a qualification or professional licence.

(a) In re Marriage of Graham

This case was relied on in *Tewesa*,[17] making it appropriate to consider the decision that saw a sharply divided bench.[18] The majority decision held that a career asset, in the form

[16] *Tewesa* 8–9.
[17] *Tewesa* 7- 8.
[18] The Court was divided four to three.

of a Master of Business Administration (MBA) qualification, should not be included as property susceptible for division. However, it is notable that the Court in *Tewesa* did not consider the minority judgment in *Graham* which had little difficulty concluding that career assets were property and should be included.

The majority considered that the essential elements of property were its cash surrender value, loan value, redemption value or value realisable after death.[19] Applying these to an MBA, the Court held that it had no objective transferable value on the open market, being personal to the holder.[20] Further, the Court opined that degrees were the cumulative product of previous education and diligence being the sole intellectual achievement of the individual.[21]

The majority took a narrow view of the property in question, focussing on the MBA itself and not the enhanced earning capacity of the holder. While I acknowledge that a degree cannot be sold or bequeathed on death, I would argue that those attributes do not rob it of value. As can be seen from the Court's observation that the MBA "may" assist in the future acquisition of property,[22] the majority recognised that the husband's earning capacity had been enhanced by the MBA. I would argue further that the reference to diligence and hard work required in acquiring a degree is not peculiar to academic endeavours nor central to the division of property upon divorce. The example of Sam and Jane illustrates that, in South Africa, the diligence and hard work Sam applied to build his business is not a consideration upon divorce when awarding Jane a share in Sam's business.

The minority had no trouble identifying the actual property in question, the enhanced earning power of the husband and not the degree itself.[23] They further noted that the law recognises future earning capacity as an asset in other contexts, notably in the law of torts (delict).[24]

(b) DeWitt v DeWitt

Another decision relied upon in the *Tewesa*[25] judgment was the Wisconsin Court of Appeals decision that held that a professional degree was not property, citing the majority

[19] *Graham* 77.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] *Graham* 79.
[24] *Graham* 78–79.
[25] *Tewesa* 8 – 9.

decision in *Graham* with approval.[26] The Court advanced a further reason to preclude career assets: A professional degree would require a division of post-divorce earnings and "efforts of the degree-holder".[27] I would argue that the Court misdirected itself in this observation. While the expected post-divorce earnings would inform the valuation of the career asset at the date of divorce, it is not the case that future earnings are shared.

Peculiarly, the Court in *Tewesa* did not consider any American case law that recognised career assets as property. However, two cases did precisely this, decided after *Graham* and *DeWitt*, being *Woodworth v Woodworth* decided by the Michigan Court of Appeals[28] , and *O'Brien v O'Brien* decided by the New York Court of Appeals.[29] These cases are discussed below.

(c)Woodworth v Woodworth

The Court found that the enquiry as to whether an advanced degree could be defined as property is secondary to an appropriate focus to find an equitable solution to dissolve the marriage.[30]

Regarding how to value a career asset, the Court noted two options available: a percentage share of the present value of the future earnings attributable to the degree or restitution of the contribution made.[31] The Court held that restricting the award to restitution would give the spouse who provided support to the studying spouse "no realisation of [his or] her expectation of economic benefit from the career for with the education laid the foundation".[32] The Court suggested that the method of calculation focus on establishing the spouse's enhanced earning capacity: the present value of what the husband was likely to earn in the legal job market and subtract what he would have earned without the degree.[33] I would argue that this calculation is appropriate as it encapsulates the meaning of "enhanced earning capacity" gained from the husband's education while married. I would, however, question the need to consider the factors such as length of marriage and extent of support that the Court listed before making an award.[34] The factors the Court believed relevant imply that a court should consider if the claimant

[26] *DeWitt* 54
[27] *DeWitt* 54.
[28] 337 NW 2d 332 - Mich: Court of Appeals 1983. (*Woodworth* hereinafter).
[29] 66 NY 2d 576 - NY: Court of Appeals 1985 (*O'Brien* hereinafter).
[30] *Woodworth* 263.
[31] *Woodworth* 268.
[32] Ibid.
[33] *Woodworth* 269.
[34] Ibid.

spouse is "worthy" of compensation. By placing a "worthiness" requirement, the Michigan Court perhaps inadvertently acknowledged that career assets were not property *per se* but rather a *sui generis* category that required its own set of rules.

(d) O'Brien v O'Brien

The Court based its conclusion that the husband's medical qualification as a surgeon was marital property on the New York Statues: the Domestic Relations Law and the Equitable Distribution Law that provided for a broad definition of marital property that would include a "profession".[35] The foresight of the New York Legislature to include "professions" within the ambit of "property" made an exhaustive analysis of career assets compared to traditional property unnecessary.

The dissenting opinion in the New York decision attacked the valuation as too speculative, asking whether the husband would earn more or less than an average surgeon? Further, whether he would practise as a surgeon in the first place, and whether he would even live to 65 years of age?[36] There is certainly merit in the argument that the Court should have tailored the valuation to the actual person instead of an imaginary "average surgeon". The exact valuation method appropriate for awards concerning career assets would require further research and is beyond the scope of this essay. However, the argument that a nuanced valuation method would be necessary does not detract from the principle that career assets are property and are capable of being valued.

(e) Career assets as property within the South African context

Acknowledging that no South African Court has considered career assets, it is worth considering those forms of property that do fall within the definition of property upon divorce.

Heaton states that upon divorce, the spouse's estate comprises all the spouse's assets and liabilities (with exceptions).[37] An asset is any corporeal or incorporeal thing with monetary value for the person who holds a right, title, or interest in it.[38] This description would fit broadly with traditional property, where the asset can be disposed of for money.

[35] *O'Brien* 584.
[36] *O'Brien* 591–592.
[37] J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 70.
[38] Heaton *The Law of Divorce* 70.

Somewhat analogous to career assets is goodwill relating to businesses. In broad terms, this species of goodwill, "enterprise goodwill", is an intangible asset consisting of a collection of advantages that a business entity possesses, which may be used to enhance the value of the business.[39] Examples of factors contributing to enterprise goodwill include a favourable reputation, location, and other factors that place the enterprise ahead of its competitors. Where Sam (in the hypothetical above) established a general contracting business when valuing the business for divorce, a valuer would include the appropriate premium, being the enterprise goodwill, that they expect the business to command on sale, over and above the value of its assets less liabilities.

The second species of goodwill that exists is "personal goodwill". Personal goodwill consists of the excess earnings attached to an individual and cannot be separated from the person.[40] Taking the example of a doctor's practice, while certainly, location and the general reputation of the practice play a role in patient loyalty, the personal attributes and skills of the doctor, the personal goodwill, cannot easily be separated from the enterprise goodwill as a whole. Career assets or the enhanced earning capacity attributable to a person are best suited to this classification.

Those who would exclude personal goodwill from the definition of property argue that it is distinct from enterprise goodwill. As argued in *Graham,* it cannot be separated from the person and cannot be sold. Personal goodwill can only be realised as an asset through future earnings. In contrast, the business owner disposes of the enterprise goodwill and the rest of the business on sale.[41]

Should the failure to be able to dispose of personal goodwill necessarily disqualify personal goodwill from the definition of property? It is helpful to consider how international financial accounting defines an asset to answer this question. An asset is "a present economic resource controlled by the entity as a result of past events. An economic resource is a right that has the potential to produce economic benefits."[42] Applying this definition, it is immediately apparent that the ability to dispose of the asset is not a listed requirement for recognition. The person who possesses the career asset has absolute control over whether and how the career asset is used. The earlier acquisition of the career

[39] Kelly 2001 *Boston University Law Review* 78.
[40] A Kelly "Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill" (1999) 51 *Rutgers Law Review* 569 at 588.
[41] Ibid.
[42] International Financial Reporting Standards *Conceptual Framework for Financial Reporting* 2018 paragraph F4.4(a). Available at https://www.iasplus.com/en/standards/other/framework (accessed 15 July 2021).

assets meets the "as a result of past events" requirement with ease. Future economic benefits flow in the form of salaries and other professional earnings.

Employment viewed as an enterprise is also not alien to South African law. For example, the Income Tax Act[43] defines "trade" to include both "professions" and "employment".

Therefore, by recognising the enhanced earning capacity of career assets as assets and recognising that even employment is a business or trade, it is submitted that to emphasise a distinction between personal goodwill and enterprise goodwill is misplaced and that the value of personal goodwill, in the form of a career asset, cannot simply be ignored when calculating the marital property.

III UNJUSTIFIED ENRICHMENT

Many American State Courts and the Malawian High Court in *Tewesa* were not persuaded to recognise career assets as property. However, in *Tewesa,* compensation was awarded to the plaintiff fulfilling the Malawian Constitutional imperative of a fair division of assets upon divorce. The justification given in *Tewesa* was that the educated spouse had been unjustly enriched through the efforts, be they financial or supportive, of the plaintiff spouse.[44]

The Court quoted[45] the trial court in the New Jersey case, *Mahoney v Mahoney*[46] where it stated:

> "To ignore the contributions of the sacrificing spouse would be to work an injustice, an unfair advantage to the spouse who has gained the education and degree without obligation. There would be an unjust enrichment of the educated spouse".

The Court in *Tewesa* failed to note that, on appeal, the New Jersey Appellate Division[47] rejected the award of unjustified enrichment, citing *Wisner v Wisner*.[48] The Court in *Wisner* held that in the absence of a specific agreement, an argument of unjustified enrichment did not fit within the context of marriage, finding it improper to treat marriage as an arm's length transaction.[49]

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[43] Act 58 of 1962 section 1.
[44] *Tewesa* 13.
[45] *Tewesa* 10–11.
[46] 175 N.J. Super. 443 (N.J. Super. Ch. Div. 1980) 444 at 446 (*Mahoney* (Trial Court) hereinafter); *Tewesa* 10–11.
[47] 182 N.J. Super. 598 (1982) 442 A.2d 1062 at 641 (*Mahoney* Appellate Division hereinafter).
[48] 129 Ariz. 333 (1981) 631 P.2d 115 (*Wisner* hereinafter).
[49] *Wisner* 341.

The Malawian decision leads one to consider whether the avenue of an unjustified enrichment claim against the educated spouse would be successful under South African law?

(a) South African law of unjustified enrichment and career assets

It would be wrong to assume that an unjustified enrichment claim might be a panacea to Sam's unfortunate predicament. In *McCarthy Retail Ltd v Shortdistance Carriers CC*, Harms JA, while suggesting that there may be scope to develop the law of unjustified enrichment to include a general enrichment claim, cautioned that unjustified enrichment is an area of law that courts "should develop incrementally and not in leaps and bounds".[50] When considering the application of an unjustified enrichment action, the South African Law Reform Commission, within the context of domestic partnerships, cautioned that reliance on general unjustified enrichment claim was still at the time, was "risky and unpredictable".[51]

The Constitutional Court provided a glimmer of hope in *Volks NO v Robinson*, albeit in the context of domestic partnerships.[52] However, the Court noted that the law had not yet been developed in this direction and failed to do so itself.[53]

Sonnekus defines unjustified enrichment as "an incident where an individual's estate gains some advantage at the cost of another's estate".[54] The advantage must be transferred and retained without any legal justification.[55]

Kudu Granite Operations (Pty) Ltd v Caterna Ltd[56] lists four general requirements for an enrichment liability to exist: (1) the defendant must have been enriched; (2) the plaintiff must have been impoverished; (3) enrichment of the defendant must be at the expense of the plaintiff; and (4) enrichment must be unjustified (*sine causa*).

Applying this four-part test to Jane's medical qualification: Jane has been enriched by (at least) Sam's payment of her university fees. Sam has been impoverished, having paid Jane's fees, Jane has been enriched at Sam's expense. The question is whether such enrichment was unjustified?

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[50] 2001 (3) SA 482 (SCA) 496 (*McCarthy Retail* hereinafter).
[51] South African Law Reform Commission Discussion Paper 104 (Project 118) *Domestic Partnerships* (2003) 85.
[52] 2005 (5) BCLR 446 (CC).para 126.
[53] Ibid.
[54] JC Sonnekus *Unjustified Enrichment in South African Law* (2008) 1.
[55] Ibid.
[56] 2013 (5) SA 193 (SCA) para 17, confirmed in *McCarthy Retail* para 15.

Despite calls for a general enrichment action to be legislated or developed by our courts,[57] no recognised general enrichment action exists. One is, therefore, currently left with the traditional forms of the enrichment action, inherited from Roman-Dutch Law.

Du Plessis, writing in the context of domestic partnerships, argues that the *condictio causa data causa non secuta* may apply in instances in an extra-contractual situation where a benefit is conferred with the expectation that parties will remain together and subsequently separate.[58] Du Plessis, however, does recognise that considerable complexity arises where cohabiting parties confer benefits on each other in the expectation that their relationship will endure.[59] While du Plessis referred to domestic partnerships, the expectation that the relationship will endure must surely be in place in a marriage.

Du Plessis postulates that transfers between spouses, similar to the situation where Sam has paid for Jane's university fees, could be seen as a donation. However, even if the donation is made with the unexpressed unilateral intention that the other spouse does not leave/desert the donor, should the donor fail to express this intention, it cannot affect the receiving spouse's contractual right to retain the property.[60] Considering the financial investment and duration of her studies in generating Jane's career asset, I would argue that even not expressly stated, there is at least the tacit understanding that the investment in Jane's education was for their mutual benefit.

In du Plessis's opinion, the claim for enrichment may be brought under the general category where there has been a failure to achieve a lawful purpose other than a valid obligation, the *condictio causa data causa non secuta*.[61] Applying this argument to Sam and Jane, while Sam could not force Jane to remain married, his goal, the continuation of the marriage, is not unlawful.

If our courts could be persuaded to apply unjustified enrichment in a marital context, the compensation would be the monetary support provided. Yet support is not limited to financial contributions. Often a spouse supports their partner's studies by assuming more than their "fair share" of domestic and child-rearing duties. In *Tewesa*, the Malawian Court ordered the registrar to consider both direct financial support and support in kind

[57] J-L Serfontein "What is wrong with modern undusted enrichment law in South Africa?"(2015) 48 *De Jure* 388 at 389–390.
[58] J du Plessis *The South African Law of Unjustified Enrichment* (2012) 185.
[59] Ibid.
[60] Ibid.
[61] Du Pleases *Unjustified Enrichment* 187.

when assessing the wife's contribution.[62] Du Plessis argues that there is no rational basis for restricting the action to the transfer of money and property that excludes providing a service.[63]

While courts have recognised the contribution made towards a marriage by way of domestic duties and child-rearing, they have shunned the opportunity to ascribe a monetary value to the contribution, instead opting to distribute the assets by way of a percentage between the spouses.[64] Indeed, the Supreme Court of Appeal in *Bezuidenhout v Bezuidenhout*[65] opined that the traditional role of housewife, mother and homemaker should not be undervalued, despite not being measurable in terms of money. Respectfully I must differ with the Court on the issue of valuation. Domestic and child-rearing services are readily available on the open market, and quantifying an amount is possible.

In *Tewesa*, the decision to award compensation to the wife, based on the unjustified enrichment of the husband, was firmly based on the principle of fairness. It is, therefore, necessary to consider whether South African courts should likewise hold fairness a central consideration should they be asked to make an award relating to career assets upon divorce.

IV FAIRNESS

The Court in *Tewesa* based its decision to compensate the wife for her contribution to her husband's career assets on the principle of fairness as espoused by the Malawian Constitution.

We also see fairness central to the *Woodworth* decision. *Woodworth* articulates the unfairness that often accompanies cases dealing with career assets. The Court viewed it as unconscionable not to include the husband's qualification upon divorce as it would mean that "[t]he student spouse will walk away with a degree and the supporting spouse will depart with little more than the knowledge that he or she has substantially contributed toward the attainment of that degree".[66]

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[62] *Tewesa* 13.
[63] Du Plessis *Unjustified Enrichment* 188.
[64] See: *Van Zummeren v Van Zummeren* [1997] 1 All SA 91 (E), *Katz v Katz* 1989 (3) SA 1 (A), *Jordaan v Jordaan* 001 (3) SA 288 (C), *Buttner v Buttner* 2006 (3) SA 23 (SCA), Childs v Childs 2003 (3) SA 138 (C), *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA), and *Kirkland v Kirkland* 2006 (6) SA 144 (C) cited by J Heaton and H Kruger *South African Family Law* 4 ed (2015) 144 fn 136.
[65] 2005 (2) 187 (SCA) para 28.
[66] *Woodworth* 263–264.

Save for s 7(3) of the Divorce Act, our current Divorce Act does not include an overarching fairness principle. Despite this, it is necessary to investigate whether the South African Constitution[67] requires that courts consider fairness following the maxim that when interpreting any legislation and developing the common law, every court must promote the Bill of Rights' spirit, purport, and objects.[68]

While addressing the values of the Constitution, in particular the right to dignity, Albertyn notes that fairness has no inherent or fixed content. Instead, it is the constitutional values that constitute the measure of fairness.[69] This part of the essay will investigate whether the right of dignity[70] imposes a fairness imperative that I would argue lies in the right to dignity.

While some may argue that the right to equality[71] should likewise be considered, "equality" does not fully encapsulate the unfairness that I believe should be ameliorated. It would be hard to argue that to refuse to include career assets in a spouse's estate would amount to discrimination, especially if a court were to find that career assets do not meet the definition of property.

(a) Fairness and South African Divorce Law

The Divorce Act does not include an overarching fairness principle when dividing assets upon divorce. The Court in *Wijker v Wijker*[72] rejected fairness as a criterion when interpreting s 9(1) of the Divorce Act.[73] The Court held that the court *a quo* was not justified in making a value judgement based on what the Court considered equitable, noting that no provision in s 9(1) provided for the application of such a principle.[74] In the constitutional era, the Supreme Court of Appeal confirmed this approach in *Botha v Botha,*[75] expressly holding that the application of fairness must be explicitly required in a section of the Divorce Act.

However, the Act does consider the principle of fairness in the concept of "equitable and just" in s 7. While the section is directed at marriages concluded before the commencement of the Matrimonial Property Act, it is informative how our courts have

[67] Constitution of the Republic of South Africa, 1996.
[68] Section 39(2) of the Constitution.
[69] E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (2007) 107.
[70] Section 10.
[71] Section 9.
[72] 1993 (4) SA 720 (A) 731 E, (*Wijker* hereinafter).
[73] Forfeiture of patrimonial benefits of marriage.
[74] *Wijker* 731 E.
[75] 2016 (4) SA 144 (SCA) para 8, (*Botha* hereinafter).

interpreted "equitable and just" as the term can easily be equated with the principle of fairness.

The section recognises two forms of contribution, a direct contribution that would include direct financial support and secondly an indirect contribution through the rendering of services, including maintaining the home and child care.[76] This interpretation is supported by the Appellate Division's decision in *Beaumont v Beaumont.*[77] While this principle has been consistently followed in subsequent cases, courts have not always attributed the same weight to domestic and child-rearing responsibilities.[78]

From *Wijker* and *Botha,* it is apparent that, outside s 7, the Divorce Act does not consider fairness a paramount concern. While courts may be reluctant to apply fairness, considering our no-fault divorce regime to the division of assets, I believe that our law should still address the unfairness created by excluding a whole category of property, in the form of career assets, from a spouse's estate.

(b) The right to dignity

The right to dignity is at the core of our political order and Constitution.[79] Writing *ex curia,* Chaskalson CJ, as he was then, described the right as a founding value of the South African Constitutional dispensation.[80]

While there is little argument that the right to dignity is a central tenant of our Constitution, frustratingly, the Constitutional Court has not ventured a comprehensive definition of the right. The Court has described dignity as having "a wide meaning which covers many different values".[81] Ackermann J held that the right to dignity requires acknowledgement of the value and worth of all individual members of society.[82] Dignity also entreats our law to treat people with respect and concern.[83]

The vagueness of what is meant by "dignity" has led it to be described as "a loose cannon, open to abuse and misinterpretation".[84] The Constitutional Court, itself, noted the difficulty in pinning down a definition where they referred to dignity in *Harksen v Lane*

[76] Heaton and Kruger *South African Family Law* 144.
[77] 1987 (1) SA 967 A 997 F-J.
[78] Heaton and Kruger *South African Family Law* 144.
[79] O'Regan J in *S v Makwanyane* 1995 (3) SA (CC) para 329 (*S v Makwanyane* hereinafter).
[80] A Chaskalson "Human Dignity as a Foundational Value of our Constitutional Order" (2000) 16 *SAJHR* 193 at 196.
[81] *Le Roux v Dey* 2011 (3) SA 274 (CCC) para 138.
[82] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 29.
[83] O'Regan J in *S v Makwanyane* para 328.
[84] Steinmann 2016 *PELJ* 10.

NO[85] as "… a notoriously difficult concept …". Writing *ex curia*, Davis J described the right to dignity as a "jurisprudential Legoland". [86] What Davis J regards as a weakness of the right, I would argue, is its strength. By resisting the temptation to lay finite boundaries to the right, the right is allowed to transcend cultural and social barriers, allowing courts to give the right a broad interpretation.

As discussed, the law is by no means settled whether, first, career assets are property, and secondly, whether an unjustified enrichment claim against the holder of the career asset would succeed. I would argue that, in applying the right to dignity broadly, courts would need to incorporate at least the consideration of fairness when deciding to include career assets as property or when upholding an unjustified enrichment claim.

It is not farfetched to view the right to be treated fairly as a subset of the right to dignity. To ignore a contribution (of whatever nature) made by a spouse to the acquisition of career assets by the other would be to denigrate the contributing spouse's involvement, undermining their dignity. Further, excluding career assets upon divorce while exclusively including traditional property creates an untenable unfairness in the distribution of assets.

However, the right to dignity could be a double-edged sword. The words of Ackermann J that "[h]uman beings are not commodities to which a price can be attached …"[87] may well support a position that to include careers assets, to monetise a person, assigning to them a Rands and cents value, denigrates their dignity. A detractor of the inclusion of careers assets may conjure spectres of chattel slavery to support their exclusion based on the right to dignity. Such a view suffers from a fair degree of hyperbole. We are not monetising the person. Instead, we value the career asset representing the enhanced earning capacity acquired during the marriage.

Returning to the case of Sam and Jane, instinctively, we see Sam as worthy of compensation for his financial and other contributions to Jane's studies. In contrast, Jane is far from "deserving" of a half share in the general contracting business that she did not contribute towards.

[85] 1998 (1) SA 300 (cc) para 51 quoting with approval the Canadian Court in *Egan v Canada* (1995) 29 CRR (2d) 79 at 106.
[86] D Davis "Equality: The Majesty of Legoland Jurisprudence" (1999) 116 *SALJ* 398 at 413.
[87] *S v Dodo* 1998 (1) SA 300 (CC) para 38.

Treating career assets any different from traditional property, apart from the substantial financial implications for Sam, diminishes his contribution to Jane's success and, by so doing, subjecting Sam to grossly unfair treatment, infringing his right to dignity.

V CONCLUSION

The cases reviewed as part of this essay play the same old song: one spouse sacrifices to assist the other to qualify, be it as a teacher, lawyer, or doctor. In so doing, the spouse assists in enhancing the other spouse's earning capacity, only to face the prospect of their partner divorcing them once they attain their degree. To paraphrase *Woodworth,* a spouse divorced by their career asset holding spouse will exit the marriage with little more than the knowledge that they had contributed to the spouse's success and enhanced earning capacity.

I believe careers assets should be regarded as property for divorce. While career assets do not share all the characteristics of "traditional property", they remain valuable assets in the hands of their holder. I believe that the United States judges overstate concerns regarding a court's ability to value career assets. To hold that career assets are not property is to deny economic reality favouring an artificial legal distinction between career and traditional assets.

I do not believe developing the law of unjustified enrichment to accommodate career assets would solve the problems faced by excluding career assets as property. An unjustified enrichment action would require the claimant spouse to demonstrate that they contributed towards acquiring the career asset and limit the amount claimable to the contribution, denying the spouse a share in the career assets true value.

I have argued that fairness is implicit in the right to dignity. When confronted with the issue of career assets, courts should hold true to their s 39(2) mandate and develop the common law to include career assets within the scope of marital property.

To end, I commend the South African Law Reform Commission for raising the issue of career assets. From their work, I hope that legislative reforms will eventually be enacted to include career assets as property upon divorce.

BIBLIOGRAPHY

Books

E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (2007) Juta: Cape Town.

J du Plessis *The South African Law of Unjustified Enrichment* (2012) Juta Cape Town.

J Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) Juta: Cape Town.

J Heaton and H Kruger *South African Family Law* 4 ed (2015) LexisNexis: Durban.

JC Sonnekus *Unjustified Enrichment in South African Law* (2008) LexisNexis: Durban.

Articles

A Chaskalson "Human Dignity as a Foundational Value of our Constitutional Order" (2000) 16 *SAJHR* 193.

D Davis "Equality: The Majesty of Legoland Jurisprudence" (1999) 116 *SALJ* 398.

MA Glendon "New Family and New Property" (1978-1979) 53 *Tulane Law Review* 697.

A Kelly "Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill" (1999) 51 *Rutgers Law Review* 569.

A Kelly "The Marital Partnership Pretence and Career Assets: The Ascendancy of Self over the Marital Community" (2001) 81 *Boston University Law* Review 59.

C Reich "The New Property" (1964) 73 *The Yale Law Journal* 733.

J-L Serfontein "What is wrong with modern undusted enrichment law in South Africa?"(2015) 48 *De Jure* 388.

AC Steinmann "The Core Meaning of Human Dignity" (2016) 19 *PELJ* 1.

Other

International Financial Reporting Standards *Conceptual Framework for Financial Reporting* (2018) https://www.iasplus.com/en/standards/other/framework (accessed 15 July 2021).

South African Law Reform Commission Discussion Paper 104 (Project 118) *Domestic Partnerships* (2003).

South African Law Reform Commission Issue Paper 34 (Project 100E): *Review of Aspects of Matrimonial Property Law* (2018).

South African Law Reform Commission Issue Paper 41 (Project 100E) *Extension of the consultation process: revised Issue Paper 34* (2021).