2012 Journal for Juridical Science 37(1):97-103

*M Forere & L Lotz*

# Sterility as a ground for nullifying the marriage: Can *Venter* and *Van Niekerk* be reconciled?

## 1. Introduction

For a marriage to be valid, all the statutory and common law requirements must be satisfied.[1] In a case where all the requirements of marriage are *prima facie* present, but one or more of the requirements is defective because of, relevant to this work, material misrepresentation, such marriage is regarded as voidable. With material misrepresentation, the question is whether a person in the position of the innocent party would not have entered into the marriage had s/he been aware of the true nature of things.[2] Of course, not every aspect of misrepresentation can lead to material misrepresentation; the misrepresentation must relate to the material aspect of marriage, and those include serious diseases, impotence and others, but this paper deals only with sterility. Sterility has thus been defined as infertility, that is, "the ability to have sexual intercourse but unable to procreate children".[3]

There are two decisions in South Africa dealing with premarital sterility as a ground for setting the marriage aside, and they are *Venter v Venter*[4] and *Van Niekerk v Van Niekerk.*[5] In the *Venter* decision, the court held that sterility alone does not render the marriage voidable, but fraudulent concealment of sterility does. A decade later, the court in *Van Niekerk* held *in obiter* that sterility alone that existed at the conclusion of marriage renders the marriage voidable provided the parties intended to have children and that the woman is at least of child-bearing age.[6]

Many authors have, to this day, viewed these two decisions as being at loggerheads and argued that, should the issue of sterility go to the Constitutional Court, the Court is likely to uphold the *Venter* decision

1 For common law requirements, see Heaton 2010:38.
2 *Leighton v Roos NO and Another* 1955 4 SA 134 (N) 138. It is important to note that, despite the decision in Leighton, this test is usually phrased subjectively, thereby calling the innocent party to prove that he would not have entered into the marriage had h/she been aware of the true nature of things. See Skelton & Carnelley 2010:46.
3 Heaton 2010:38.
4 1949 (4) SA 123 (WLD).
5 1959 (4) SA 658 (GWLD).
6 *Van Niekerk v Van Niekerk*:675.

*M Forere, Lecturer of Law, University of KwaZulu-Natal.*
*L Lotz, Lecturer of Law, University of KwaZulu-Natal.*

over the *Van Niekerk* decision.[7] The protagonists of the *Venter* decision based their argument on the Supreme Court of Appeal decision in *Fourie v Minister of Home Affairs.*[8] In particular, the argument is based on the court decision that procreative potential is not a defining characteristic of conjugal relationships and that the suggestion that gays and lesbians cannot procreate should be rejected as a mistaken stereotype. This viewpoint was also expressed by the Constitutional Court in the *National Coalition for Gays and Lesbian Equality and Others v Minister of Home Affairs.*[9]

The *proviso* that the Court in *Van Niekerk* attached to its decision that sterility renders the marriage voidable if the parties have intended to have children and are of child-bearing age influenced the authors, in this note, to analyse whether or not *Venter* and *Van Niekerk* are antagonist or mutually reinforcing. The note does not seek to determine which between *Venter* and *Van Niekerk* correctly interpreted the Roman-Dutch authorities to arrive at the conclusion that sterility is or is not a ground for setting the marriage aside.

## 2. Facts and judgments of *Venter v Venter* and *Van Niekerk v Van Niekerk*

The *Venter* case involved a husband wanting to nullify the marriage on the ground that, at the time of the marriage and without his knowledge or suspicion, the wife was permanently incapable of procreation. The inability was caused by the operation that was performed on the wife before the marriage. The court had to determine whether premarital sterility is a ground for setting the marriage aside. The court then considered that, should there be a rule that a decree of nullity be granted because of premarital sterility, the effect of such rule will be that any marriage by persons who are past the child-bearing age may be set aside. The court, therefore, indicated that such cases could be dealt with by the exception to the application of the general rule, and that this warrants some reason to apply the rule in one case and not in the other. The court went further to consider the objects of marriage as enunciated by the Roman-Dutch authorities, and concluded that procreation of children is not so essential an element of marriage that, where it cannot come about, there is no marriage because other people marry for different reasons. Therefore, the court held that a person who knows of his or her incapacity to procreate but does not disclose it at the time of marriage is contracting that marriage fraudulently, and that is the basis for relief. As a result, the court did not grant the plaintiff relief because there was no allegation of fraud.

In the *Van Niekerk* case, the court was confronted with a similar task – to determine whether or not premarital sterility is a ground for setting

7 Heaton 2010:38; Skelton & Carnelley 2010:48.
8 2005 (3) SA 427 (SCA).
9 2000 (2) SA 1 (CC); 2000 (1) BCLR 39:51.

the marriage aside. The facts of the case are the following: the applicant married the respondent in 1957 during which time the respondent had two children from the previous marriage. At the time of the marriage to the applicant, the respondent was incapable of having more children as a result of an operation performed on her with her consent. The respondent's incapacity to have children was not made known to the applicant, and the applicant applied to the court seeking to annul the marriage. Specifically, the applicant sought an order setting the marriage aside on the grounds of the respondent's premarital sterility and her fraudulent conduct in not disclosing her condition to the applicant before the marriage. In arriving at its decision, the court considered a determination of ends of marriage (*causae finales*), and started off with the discussion of the decision in the *Venter* case. With regard to the point made in *Venter* that procreation is not so essential an element of marriage that where it cannot come about there is no marriage, the Court in *Van Niekerk,* relying on the Roman-Dutch authorities, held to the contrary. In particular, the court noted that, while procreation is not the only purpose of marriage, procreation and rearing of children is an end of marriage. To this end, the court held *in obiter* that premarital sterility should be confined to those cases in which procreation of children is an explicit or implied object of the marriage and in which a woman is of child-bearing age. Regarding fraud, the court in *Van Niekerk* agreed with the decision in *Venter* that fraud in relation to premarital sterility provides a basis for relief.

## 3. Comment: Can *Venter* and *Van Niekerk* be reconciled?

In trying to reconcile the two decisions, three underlying issues will be brought into play, namely whether or not fraudulent concealment of premarital sterility is a ground for setting the marriage aside; whether or not premarital sterility alone qualifies a reason to annul the marriage, and whether or not premarital sterility is a ground for avoiding the marriage where parties have intended procreation to be central to the marriage. These three issues are discussed below.

### 3.1 Is fraudulent concealment of premarital sterility a ground for setting the marriage aside?

Both the decisions unanimously agreed that fraudulent concealment of premarital sterility is a ground for annulling the marriage. While the Court in *Van Niekerk prima facie* seemed not agreeable with *Venter*, the decisions are similar as far as fraud is concerned. The authors of several family law texts overlooked the details of the decision in *Van Niekerk* (see, for example, Heaton 2010:38; Skelton & Carnelley 2010:48). To them, it is as if the issue of fraud is only addressed by *Venter* and not *Van Niekerk* or that perhaps *Van Niekerk* objected to fraud, hence they prefer *Venter* over *Van Niekerk*. There is no mention whatsoever from the abovementioned textbooks that

the Court in *Van Niekerk* concurred with the decision in *Venter* on the point that fraudulent concealment of premarital sterility is a ground for nullifying the marriage.[10] Far from being antagonist, the two decisions are similar to the extent that they agree that fraudulent concealment of premarital sterility is a ground for setting aside the marriage.

## 3.2 Can premarital sterility alone suffice to be a ground for setting aside the marriage?

From the respective decisions of the two courts in *Venter* and *Van Niekerk*, sterility on its own is not a reason for setting aside the marriage. To this end, while the court in *Van Niekerk* limited the rule that premarital sterility alone is a ground for nullifying the marriage to situations where parties are of child-bearing age and have intended to have children, the Court in *Venter* went straight to the exception (fraudulent concealment) without stating the general rule. Thus, the Court in *Venter* simply stated that fraudulent concealment of premarital sterility is a ground for nullifying the marriage. Indeed, Hugo J in *Van Niekerk* correctly noted that "Clayden J [in *Venter* case] was reluctant to accept the conclusion that pre-marital inability to procreate is a ground for annulment as the rule, if stated without qualification …",[11] because that would impact on certain other marriages, for instance, for the couples who wish to marry but are past the child-bearing age or those wishing to marry for any reason other than procreation. While in *Venter* it is a fraudulent concealment thereof (a position accepted in *Van Niekerk*) that is a ground for relief, *Van Niekerk* further adds intention to procreate thereof where the parties are of child-bearing age. In sum, for both decisions, premarital sterility on its own is not a ground for setting aside the marriage. The decision in *Van Niekerk* simply added intention to procreate as a ground for setting aside the marriage. This takes the reader to consider if premarital sterility is a ground for relief in a case where the parties have intended to procreate.

## 3.3 Whether or not premarital sterility is a ground for setting aside the marriage where the parties have expressed or implied procreation to be the primary aim of the marriage

This point is only enunciated in the *Van Niekerk* decision and not in *Venter*. The Court in *Venter* categorically ruled that "procreation of children is [not] so essential an element of marriage that, where it cannot come about, there is no marriage".[12] It is against this conclusion that Clayden J in *Venter* prescribed circumstances under which sterility can be a ground for setting aside the marriage. Specifically, Clayden J ruled that it is a fraudulent concealment of premarital sterility that renders the

10 *Van Niekerk v Van Niekerk*:672.
11 *Van Niekerk v Van Niekerk*:675.
12 *Venter v Venter:*128.

innocent spouse to set aside the marriage. The Court in *Venter* did not address sterility, unaccompanied by fraud, in a case where the parties have expressed or implied procreation to be an essential element of their marriage. As a result, the *Van Niekerk* decision filled the *lacuna* which existed in the *Venter* decision regarding parties who expressed or implied procreation to be central to their marriage. Therefore, the Court in *Van Niekerk* simply provides a relief to people who want to have children but object to adoptions, surrogacy or in *vitro* fertilisation. The *Fourie* case, as invoked by Skelton and Carnelley,[13] cannot be used to suggest that people who primarily want to have offspring should be compelled to stay in marriages and adopt children or to have children through assisted fertilisation, especially if they object to such practices for whatever reason, be it culture, religion or moral convictions. Indeed, the qualification to the general rule introduced in *Van Niekerk* enables parties who have intended to have children and otherwise do not want to adopt children or have children through assisted fertilisation to opt out of marriage. In fact, relying on the *National Coalition for Gay and Lesbian Equality* case to support a view that the decision in *Venter* is much more preferred over the decision in *Van Niekerk,* Heaton indicates that:

> [f]rom a legal and constitutional point of view procreative potential is not the defining characteristic of conjugal relationships and that insisting on procreative potential would be demeaning to couples (whether married or not) who, for whatever reason are incapable of procreating when they commence such relationship or become so at any stage thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations … [and to] a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.[14]

All the concerns expressed above by Heaton have been adequately covered in the *Van Niekerk* decision. As such, this quotation cannot be regarded to support *Venter* as against *Van Niekerk*. Specifically, the Court in *Van Niekerk* agreed with the decision in *Venter* that couples who are past the age of procreation can contract a valid marriage as well as those who choose not to have children.[15] What is important to the authors in this work is that much as the decision not to have children is "entirely within [couple's] protected sphere of freedom and privacy",[16] so is the decision to have children. Put differently, much as the decision to adopt children and to have children through assisted fertilisation is within the couple's protected sphere of freedom and privacy, so is the decision to have children in a natural way. What the Constitutional Court viewed as a

13 Skelton & Carnelley 2010:48.
14 Heaton 2010:39.
15 *Van Niekerk v Van Niekerk:*659 & 675.
16 *National Coalition for Gays and Lesbian Equality and Others v Minister of Home Affairs:*paragraph 51.

stereotype in the *Fourie* case was the objections *coming from members of the public - third parties to private relationships* that gays and lesbians are not able to procreate, hence could not marry. The authors in this work do not think that the Constitutional Court would force parties who do not want to adopt children or to have children through assisted fertilisation into doing so, because the Constitutional Court is likely to respect the choices that parties make to have children in a natural way. Adoptions and assisted fertilisation cannot be forced on people who object to them for whatever reason; hence, the *Van Niekerk* decision becomes important in this respect – that is, *Van Nierkerk* takes *Venter* one step further thereby being mutually reinforcing.

In summary, both cases, while in a process of determining whether premarital sterility is a ground for nullifying the marriage, emphasised that some people marry for reasons other than procreation. As a result, both decisions have unanimously reiterated the long-standing position of law that couples past child-bearing age and those that simply marry for companionship, love, mutual assistance or whatever the case may be, are capable of concluding a valid marriage. Likewise, *Van Niekerk* provides an avenue for those who primarily married for procreation to opt out of marriage where such procreation cannot occur, especially if adoption or assisted fertilisation is not an option and fraud is absent.

## 4. Conclusion

From the discussion of both the *Venter* and *Van Niekerk* decisions, sterility on its own is not a ground for setting the marriage aside; rather, fraudulent concealment of sterility is. *Van Niekerk* then took the decision in *Venter* a step further to provide a relief for those couples who marry for procreation because, no doubt, procreation is an important element of marriage. To this end, there has been an error over the years in interpreting the decision in *Van Niekerk*. Often authors (for example, Heaton & Skelton and Carnelley) do not emphasise the *proviso* attached to the rule that premarital sterility is a ground for avoiding the marriage in the *Van Niekerk* decision.[17] By omitting to mention this *proviso*, the implication is that, according to *Van Niekerk*, premarital sterility alone is a basis for relief, and that is not correct. In addition, the books on family law, mentioned above, ignored part of the decision in *Van Niekerk*, which agrees with the decision in *Venter* that fraudulent concealment of premarital sterility is a ground for avoiding the marriage. As a result, the decision in *Van Niekerk* is viewed as a somewhat bad decision that warrants rejection; yet a closer scrutiny of *Van Niekerk* indicates that the two cases hold similar positions with an addition from *Van Niekerk*. In conclusion, the decisions in *Venter* and *Van Niekerk* are viewed by the authors in this work as complementary and not antagonistic.

17 *Van Niekerk v Van Niekerk:*675.

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