IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. **CCT293/2022**

In the matter between:

DAVID HERCULES BOTHA Applicant

and

CICILIA SUSANNA BOTHA Respondent

FILING NOTICE FOR RESPONDENT'S WRITTEN SUBMISSIONS

Document for filing: **RESPONDENT'S WRITTEN SUBMISSIONS**

DATED AT NIGEL ON THIS THE 13TH DAY OF FEBRUARY 2023.

J OKES
KRUGER & OKES INC
ATTORNEYS FOR RESPONDENT
23 KINGSWAY, P O BOX 1636
NIGEL, 1491
TEL: 011 814 3444
E-MAIL: betsie@krugerokes.co.za
REF: J OKES / MAT16231
C/O SWANEPOEL ATTORNEYS
94 PRITCHARD STREET

SCHREINER CHAMBERS
17TH FLOOR
JOHANNESBURG
TEL: 011 333 1715
REF: J SWANEPOEL

TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT
CONSTITUTIONAL HILL
BRAAMFONTEIN

CHRIS LIEBENBERG PROKUREURS / ATTORNEYS
84 BREYTENBACH ST NIGEL 1490
TEL: (011) 814-4042
FAX: (011) 814-4043
"SONDER BENADELING VAN REGTE"
"WITHOUT PREJUDICE OF RIGHTS"

13/2/2023
11:00

AND TO: **LIEBENBERG ATTORNEYS**
ATTORNEYS FOR APPELLANT
84 BREYTENBACH STREET
NIGEL
TEL: 011 814 4042
E-MAIL: admin@chrisliebenberg.co.za
REF: CJ LIEBENBERG / B15688/ee
C/O STEINERT MOODLEY ATTORNEYS
63 BRAM FISHER DRIVE
ROBINDALE
E-MAIL: admin@steinertmoodley.co.za

RECEIVED A COPY HEREOF ON THIS THE _____ DAY OF _____
2023 AT ___H___

_____

ATTORNEY FOR APPELLANT

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.**CCT293/2022**

In the matter between:

DAVID HERCULES BOTHA Applicant

and

CICILIA SUSANNA BOTHA Respondent

RESPONDENT'S WRITTEN SUBMISSIONS IN RESPONSE TO CONSTITUTIONAL COURT DIRECTIVE

INTRODUCTION

These written submissions are filed in accordance with the Court's directive calling for written submissions in regard to two questions posed by the Court. Each question is dealt with separately below.

(a) To what extent it is open to the applicant to pursue the defences he has raised in this Court to the enforcement of the prenuptial agreement concluded on 20 February 2015, having regard to the terms of his plea to the respondent's counterclaim.

1. It behoves repeating that the respondent, in the pending divorce action, has instituted a counterclaim for specific performance by the applicant of his

obligations in terms of the said agreement.[1] The defence raised by the applicant in his plea to the respondent's counterclaim, having admitted the conclusion of the agreement, is as follows;

8.2 The (applicant) pleads the parties did so under emotional circumstances and upon insistence of the (respondent);

8.3 After signing the agreement the parties abandoned the terms thereof by entering into marriage and having the ante-nuptial contract as originally agreed upon registered as pleaded by the (applicant);

2. The respondent does not seek an order to have the agreement made an order of court as incorrectly submitted by the applicant.

3. The applicant "*raises four points of law of general public importance*" in support of his application for leave to appeal to this Court. Each of the 'four points of law' will be dealt with separately below insofar as they purport to constitute a 'new' defence to the enforcement of the prenuptial agreement.

4. Before the applicant's points of law of general public importance are dealt with, it must be borne in mind that this matter has its genesis in a point in *limine* raised by the applicant at the very outset "*as to whether the agreement was valid and enforceable vis-à-vis the ANC*". The learned Magistrate Hoosen alluded to the submission by applicant's counsel that "*she will ask the Court to*

---

1 *Ibid.*

find that the agreement is not enforceable due to the existence of a valid registered ante-nuptial contract".[2]

FIRST POINT OF LAW: CONFLICTING LEGAL PRINCIPLES

5. The applicant contends that conflicting legal principles arise from the judgment of the Supreme Court of Appeal ("SCA") in **HM v AM**[3] and the judgment of the SCA in the present matter and that the "*effect of the judgment in casu is in contradiction to that of **HM v AM** in that both agreements pertained to the patrimonial aspects of marriage, upon dissolution thereof*", and that "*these contradictory judgments create a confusion in application of the case law, creates a state which is highly prejudicial to the general public, and does not promote the interests of justice*".

6. For obvious reasons this purported defence, clothed as a point of law, is now raised for the first time by the applicant.

7. This 'defence' is bereft of any merit and has already been addressed by the respondent in her answering affidavit.[4]

---

2 *vide* line 1-4, pg 4 of the judgment by Magistrate Hoosen in the Regionl Court.

3 JDR 0501 (SCA).

4 Cf. par 31 – 40.

SECOND POINT OF LAW: DISTINGUISHABLE CASE LAW APPLIED

8. The applicant seeks to distinguish the judgment of the SCA in **Odgers v De Gersigny**[5] from the finding of the SCA in the present matter "*as the spouse having to make the payment of maintenance, (in the Odger's matter) concluded the agreement in contemplation of a divorce, whilst having had all the facts and circumstances relevant to such obligation within his knowledge at the time when the divorce action was pending, and would have agreed to be bound thereto in light of the relevant information*".

9. This defence is likewise for obvious reasons raised for the first time in this Court.

10. This purported distinction by the applicant loses sight of the primary objective of the prenuptial agreement and the parties' ante-nuptial contract,[6] namely that "*the primary objective of the ANC is not to create obligations, but to determine the matrimonial property system between spouses by excluding or varying the normal patrimonial consequences of the marriage*". The ANC is therefore by no means a contract whereas the prenuptial agreement, insofar as it constitutes a donation, is defined as "*an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality whereby a person under no legal obligation undertakes to give something (this includes the gratuitous release or waiver of a right) to another person, called "the donee",*

---

5 2007 (2) SA 305 (SCA).

6 *vide* par [8], judgment by the Supreme Court of Appeal in the present matter.

with the intention of enriching the donee, in return for which the donor receives no consideration or expects any future advantage".

11. Moreover, it is not necessary for a donation between spouses to be made in an ANC.[7]

12. The purported distinction between the two cases is accordingly more a perception than a reality.

THIRD POINT OF LAW: SECTION 7 OF ACT 70 OF 1979

13. The applicant places no reliance on the provisions of section 7 of the Divorce Act 70 of 1979 in his plea to the respondent's counterclaim.

14. Reference was indeed made during argument in the Regional Court to the provisions of section 7 of the Divorce Act "*that a divorce action cannot be settled before parties are married and this is what the agreement proposed to do*".[8]

15. A similar argument was pursued by the applicant in the SCA with the applicant invoking the provisions of both section 7(1) and (2) of the Divorce Act in argument.

---

7 *Ibid.*

8 *vide* line 16-18, pg 5 of the judgment by Magistrate Hoosen in the regional Court.

16. However, the assertion by the applicant in his application for leave to appeal this Court that "*the divorce court is cloaked with a discretion to consider unfair discrimination and to make an order that is just and equitable under the circumstances, regardless of what the parties have agreed thereto*" was neither raised by the applicant in his plea to the respondent's counterclaim nor was it was it foreshadowed in argument in previous hearings.

17. It is not clear what is meant by the applicant with reference to 'unfair discrimination' and an order that is 'just and equitable'. These phrases do however suggest reliance on constitutional values which will be dealt with under the applicant's fourth and last point of law.

FOURTH POINT OF LAW: *CONTRA BONIS MORES*

18. The applicant contends that "*the SCA omitted to deal with the issue of the agreement being contra bonis mores by virtue of the fact that the so-called donation agreement only comes into effect on "dissolution of the marriage".*" This is not correct.

19. The SCA declined to hear argument by the applicant that the prenuptial agreement affects public policy on the basis that this argument was neither raised by the applicant in his heads of argument, nor was it raised by the applicant in his plea to the respondent's counterclaim.

20. The issue regarding whether the enforcement of the agreement would be contrary to public policy was accordingly not debated in the SCA. The SCA accordingly did not address the issue of enforceability of the agreement on the grounds of *contra bonis mores* in its judgment and nor was it required to deal therewith.

21. It is accordingly submitted that it is not open to the applicant to pursue this defence in this Court.

22. The question of how public policy, the basis upon which a court may refuse to enforce the terms of a contract, should be determined, requires an enquiry into the social policy and normative content behind the common-law rules that inform judicial control of contractual terms on the basis of public policy.[9]

23. In **Barkhuizen v Napier**[10] this Court dealt with the enforcement of a contract and the constitutionality of a time limitation clause in a short-term insurance contract. The insured contended that the time limitation clause was contrary to public policy. The parties agreed to a statement of facts which did not address any of the applicant's particular circumstances or provide an explanation as to why he had not instituted his claim within a contractually agreed 90-day period.

24. This majority in this Court in **Barkhuizen** held that "*the proper approach to the constitutional challenges to contractual terms is to determine whether the term*

---

9 **Beadica 231 CC v Trustees, Oregon Trust** 2020 (5) SA 247 (CC) at par [60].

10 2007 (5) SA 323 (CC).

challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights".[11]

25. It is trite that the onus is on the party seeking to avoid the enforcement of the clause to 'demonstrate' why its enforcement would be unfair and unreasonable in the given circumstances.[12] Although the majority judgment held that the time limitation clause itself was reasonable, it was however, unable to determine whether the enforcement of the clause was unfair in the circumstances because of the limited nature of the agreed statement of facts which did not disclose the reason for non-compliance with the clause. The majority found that 'without those facts it is impossible to say whether the enforcement of the clause against the applicant would be unfair and thus contrary to public policy'.[13]

26. This gives rise to the e question whether this is indeed a question of law or a question of fact. If the answer to the question concerning the enforceability of the prenuptial agreement in accordance with public policy and the onus thereof requires the leading of evidence, then it is not a point of law.

27. In **Bredenkamp v Standard Bank of SA Limited**[14] the SCA dismissed an appeal by an appellant who argued that the Constitution poses a reasonableness requirement on all contractual provisions and their

---

11 **Barkhuizen** *supra*, par 30.

12 **Barkhuizen** *supra*, par 69.

13 **Beadica** *supra*, par [38].

14 2010 (4) SA 468 (SCA).

enforcement on the basis that the appellant "*did not suggest that any constitutional value was implicated by the bank's exercise of its right to terminate the banking contracts*".[15]

28. Pursuant to a number of apparent diverging decisions in both the SCA and this Court, based on the judgment of this Court in **Botha v Rich *N.O***[16] this Court held that "*There is agreement between this Court and the Supreme Court of Appeal that abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships*".[17]

29. The applicant has simply failed to make out a case that the enforcement of the prenuptial agreement would be *contra bonis mores* and therefore inimical to public policy at any stage of the proceedings. It follows that the applicant is unable to discharge the onus of demonstrating that the enforcement of the prenuptial contract would be contrary to public policy in the particular circumstances of this case.[18]

30. It is accordingly not open to the applicant to pursue the defence that the agreement is *contra bonos mores* in this Court.

---

15 **Beadica** *supra*, par [40].

16 2014 (4) SA 124 (CC).

17 **Beadica** *supra*, par [79].

18 **Barkhuizen** *supra*, par 58 and 69; **Beadica** *supra*, par [91] to [95] and [102].

(b) The implications, if any, of the majority and minority judgments in ST v CT [2018] ZASCA 73; 2018 (5) SA 479 (SCA); [2018] 3 All SA 408 (SCA) for the validity or enforcement of the prenuptial agreement.

31. In **ST v CT** the SCA was confronted *inter alia* with the enforcement of a waiver by a respondent in her ante-nuptial contract to seek maintenance from her husband upon divorce. The respondent challenged the validity and enforceability of the waiver clause on four broad grounds;

(a) That the clause is *per se* as a matter of legal principle inconsistent with public policy;

(b) That the effect of the clause is unreasonable, unfair, unjust and thus against public policy;

(c) That the enforcement of the clause would be unreasonable and against public policy; and

(d) That the court has an 'overriding discretion' to award maintenance, notwithstanding the waiver provisions.

32. The High Court held that the clause is per se invalid and unenforceable.

33. The matter of **ST v CT** is distinguishable from the present matter on *inter alia* the following grounds;

33.1. In **ST v CT** the parties were concerned with the enforceability of a term of an ante-nuptial contract upon divorce. In the present matter the parties are concerned with a prenuptial contract which is unrelated to the the ANC;

33.2. In **ST v CT** the enforceability of the waiver clause in the ANC arose upon termination of the marriage by way of divorce whereas in the present matter the prenuptial contract pertains to the dissolution of the marriage either by way of divorce or the death of the applicant. In the event of the death of the applicant the provisions of the Divorce Act would have no bearing on the matter;

33.3. In the present matter the respondent seeks specific performance of the applicant's obligations in terms thereof which may be described as maintenance, whereas in **ST v CT** the respondent challenged the validity and enforceability of a waiver clause concerning spousal maintenance upon divorce;

33.4. In **ST v CT** the respondent expressly raised the issue of public policy with regard to the enforceability of the waiver clause, whereas the issue of public policy has not been raised by the applicant in his pleadings, nor was it canvassed in earlier proceedings.

THE MAJORITY JUDGMENT

34. In the majority judgment,[19] Majiedt JA held that the waiver clause *per se* offends public policy, more particularly legal policy in the form of section 7 of the Divorce Act.[20]

35. Insightful in this regard, Majiedt JA wrote that "*There appeared to be no decided cased on whether the prenuptial waiver of the right to maintenance upon dissolution of a marriage offends public policy. Professor Hahlo expressed the view that in common law such a waiver is contrary to public policy*". However, the controversy and conflicting decisions on waiver at the time of divorce of the right to apply for the rescission, suspension or variation of maintenance orders was finally settled in **Schutte v Schutte**.[21] In **ST v CT** the SCA considered it helpful to consider this aspect and to contrast it with the prenuptial waiver of maintenance according to Majiedt JA.

36. Although Majiedt JA held that there is a stark difference between waiver upon divorce of a right of a spouse to seek variation of the maintenance order as envisaged in section 8(1) and a prenuptial waiver of maintenance, the main, compelling, difference being that at the time of divorce both spouses have full knowledge of their respective financial means and needs and that that is not the case before the parties have married.

---

19 par [170] to [182].

20 par [171].

21 1986 (1) SA 872 (A) at 883-884 - Where the Court held that the waiver by a spouse of the right to seek variation of the maintenance order in terms of section 8(1) of the Divorce Act is *not* against public policy.

37. This finding by Majiedt JA has no implication in the present matter for the following reasons;

37.1. In the present matter the parties are concerned with a claim for specific performance and in particular fulfillment of the applicant's contractual obligations in terms thereof albeit that they resemble 'maintenance obligations';[22]

37.2. The respondent would be entitled to enforce the applicant's obligations in terms of the prenuptial contract not only in the event of divorce, but also upon the death of the applicant in which instance the provisions of the Divorce Act would have no bearing on the matter;

37.3. The parties in the present matter are not concerned with the issue of waiver of rights, but with the enforcement of contractual obligations freely entered into by the parties.

38. In conclusion Majiedt JA held that the impugned clause offends public policy as it is inimical to the legal policy regarding maintenance encapsulated in section 7 of the Divorce Act. For reasons previously mentioned,[23] the provisions of section 7 of the Divorce Act are not applicable in the present matter and nor would they have any bearing on the matter should the parties' marriage be dissolved by the death of the applicant.

---

22 **Odgers v De Gersigny** 2007 (2) SA 305 (SCA).

23 Cf. respondent's AA.

THE MINORITY JUDGMENT

39. In the minority judgment Rogers AJA agreed with Majiedt JA that the maintenance waiver is not enforceable for different reasons.

40. Rogers AJA held that read together section 7(1) and (2) do not prohibit an agreement by which a spouse waives her right to maintenance in return for gifts, but they do explicitly accord to the court a discretion either to give effect to the agreement in terms of section 7(1) or to award maintenance in terms of section 7(2).[24] Rogers AJA however went on to state that the fact that the overriding statutory power cannot be ousted by contract does not allude to the conclusion that the parties' endeavour at the contractual ordering of maintenance is contrary to public policy.

41. Rogers AJA, with reference to our law in the modern era and the approach which currently prevails in England, Canada and elsewhere, in similar matters, held that section 7(1) and (2) lend themselves admirably to an interpretation allowing the court to follow the nuanced and enlightened approach prevailing in England, Canada and elsewhere that a court, considering a claim for maintenance in the face of a prenuptial or post-nuptial agreement containing a maintenance waiver (or other maintenance provisions inconsistent with a claim advanced by a spouse at the divorce hearing), should consider a range of factors in deciding whether to award maintenance or to hold the parties to the contract. The competing considerations which are engaged in assessing

---

24 At par [187].

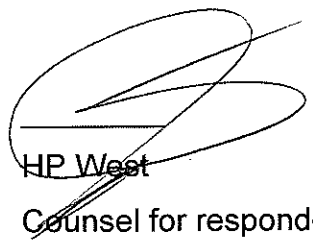
prenuptial contracts relating to post-division divorce of property and spousal support are autonomy and protection. The approach by Rogers AJA allows both considerations to play a role in a careful, fact-specific enquiry.

42. It however behoves repeating that the respondent does not seek maintenance from the applicant in terms of her counterclaim in terms of section 7(2), and nor does she seek an order to have the prenuptial contract made an order of court in terms of section 7(1).

CONCLUSION

43. It is respectfully submitted that based on the distinguishing features of the matter in **ST v CT** and the present matter, the majority judgment and minority judgment find no application in the present matter by virtue of the contrasting nature of the legal principles concerned.

44. The respondent will accordingly persist therewith that the application for leave to appeal to this Court be dismissed with costs.



HP West
Counsel for respondent
12 February 2023

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Constitutional Court Case number: CCT 293/22

SCA Case number: 820/2021

High Court Case number: A135/2020

Regional Court Case number: GP/SPR/RC352/2018

In the application for leave to appeal between:

DAVID HERCULES BOTHA Appellant

and

CICILIA SUSANNA BOTHA Respondent

APPELLANT'S WRITTEN SUBMISSIONS

These written submissions are filed in accordance with the above Honourable Court's directive, on two specific aspects, as set out hereinbelow. For purposes hereof reference to the agreement refers to the ante nuptial agreement dated 20 February 2015, unless otherwise indicated. The emphasis such as underlining is in each event, counsels' own.

(A) <u>TO WHAT EXTENT IT IS OPEN TO THE APPLICANT TO PURSUE THE DEFENCES RAISED IN THIS COURT TO THE ENFORCEMENT OF THE</u>

PRENUPTIAL AGREEMENT CONCLUDED ON 20 FEBRUARY 2015 HAVING REGARD TO THE TERMS OF HIS PLEA TO THE RESPONDENTS COUNTERCLAIM.

1. The defences that have been raised, in the application before this Court include the following:

   1.1. Conflicting legal principles in that the judgment of the Court *a quo* conflicts with that of ***HM v AM 2019 JDR 0501 (SCA)***.

   1.2. The caselaw applied by the Court *a quo* is distinguishable from the facts of this matter.

   1.3. The Court *a quo* found that the agreement is enforceable through a simple claim of specific performance, without regard to the substance and content of the agreement. The court *a quo* failed to consider that spousal maintenance is an invariable consequence of marriage, incapable of donation, and post-divorce awards of maintenance are founded in statute, specifically Section 7 of Act 70 of 1979, (hereinafter the “Divorce Act”).

   1.4. The Court *a quo* omitted to deal with the issue of the agreement being *contra bones mores* despite same overriding Section 7 of the Divorce Act, thereby depriving the divorce trial court from exercising judicial discretion, as well as having the unintended consequence that an agreement of this nature provides a continuous financial contractual benefit, possibly creating the situation whereby divorce is beneficial to the receiving spouse.

2. The Applicant, as Plaintiff in the divorce action, pleaded in the Plaintiff's plea to the Defendant's counterclaim that:

   "After signing the agreement the parties abandoned the terms thereof by entering into marriage and having the ante-nuptial contract as originally agreed upon registered as pleaded by the Plaintiff."

3. The Defendant did not replicate to the Plaintiff's plea to the Defendant's counterclaim.

4. From the outset this Honourable Court's attention is directed to the following:

   4.1. The issue of Section 7 of the Divorce Act, 70 of 1979, finding application in this matter, was infact already raised in the Regional Court, by the Respondent, as can be established by the Regional Court's written judgment:

   "He [referring to the Respondent's legal representative] *argues the parties in divorce actions decide the patrimonial consequences upon divorce all the time by entering into settlement agreements that often differ from the matrimonial regime applicable to the marriage."*[1]

   4.2. The Regional Court specifically confirmed that Section 7 of the Divorce Act, 70 of 1979, is applicable in this matter, where it found that:

   "The divorce act allows the spousal maintenance and also provides the parties to arrive to an agreement regarding their patrimonial consequences. See section 7 of the divorce act."[2] [sic]

---

[1] Line 8 – 11 of the Regional Court transcript.
[2] Line 20 – 22 of the Regional Court transcript.

4.3. The Plaintiff, in accordance with the caselaw authority of ***HM v AM 2019 JDR 0501 (SCA)***, specifically argued that:

"…a divorce action cannot be settled before parties are married and this is what the agreement proposed to do."

4.4. Therefore, the issue of Section 7 of the Divorce Act, 70 of 1979, was raised in the Regional Court, albeit by the Respondent, which argument and findings were then taken on appeal to the High Court.

4.5. This Honourable Court is specifically directed to the Amended Notice of Appeal to the High Court, Pretoria, wherein the Applicant herein specifically pleaded that:

"It would therefore be 'contra bones mores' to hold that an agreement entered into by the parties, prior to their marriage, including provisions of division of assets and maintenance of one of the parties, can be enforceable and thereby ousting a divorce court's discretion in terms of the provisions of Section 7 (1) and (2) as well as (9) [sic] *of the Divorce Act."*[3]

4.6. The aforementioned entails that, although the defences of *"contra bones mores"* and Section 7 of the Divorce Act, were not pleaded in the Plaintiff's plea to the Defendant's counterclaim, the issues arose during argument of the point in limine, as the Respondent herein placed reliance on Section 7 (1) of the Divorce Act, which the learned Magistrate found credence in. This was, despite the issues not having been pleaded, but as a result of the issues having been ventilated during the first hearing. It was on the strength of the

[3] Para 14.3 of the Amended Notice of Appeal.

Respondent's argument before the Regional Court, that the issue of Section 7 (1) was *inter alia* the subject of the appeal to the High Court.

5. Therefore, the raising of Section 7 of the Divorce Act, 70 of 1979, together with the defence of *contra bones mores*, as stated in the Amended Notice of Appeal, to the High Court, Pretoria, is as a direct correlation to the defences ventilated during the hearing of the point in limine.

6. Respectfully, the Supreme Court of Appeal misdirected itself in alleging that the Plaintiff introduced new arguments, on appeal in the High Court, which related to the agreement not being enforceable under Section 7 (1) of the Divorce Act, 70 of 1979 and which deprives the trial court of its discretion in terms of s 7 (2) of the Divorce Act. [4]

7. Furthermore, the Respondent then also raised the application of Section 7 (1) and Section 7 (2) of the Divorce Act, 70 of 1979, as well as the issue of ousting the court's discretion, in the Notice of Appeal to the Supreme Court of Appeal, thereby entailing that the Respondent placed such argument before the Court *a quo*, which was fully ventilated in the papers filed.

8. In the Notice of Appeal to the Supreme Court of Appeal, the Respondent only raised the issue of Section 7 of Act 70 of 1979, as set out hereinbefore, without taking any issue with the pleadings serving before the Court.

[4] Para 5 of the Supreme Court of Appeal Judgment.

9. The Respondent only and for the first time mentioned the issue of certain defence, therefore these points of law as not being pleaded, in her replying affidavit filed before the Supreme Court of Appeal.

10. It is therefore respectfully submitted that the defences now serving before the above honourable court are not new and cannot surprise the Respondent, despite same not specifically being pleaded.

11. The honourable court is referred to the matter of ***P A F v S C F (788/2020) [2022] ZASCA 101; 2022 (6) SA 162 (SCA)*** at para 31:

"It must be borne in mind that this Court has inherent jurisdiction to decide a matter even where it has not been pleaded, provided that such matter was ventilated before it."

12. Further to the above, if the introduction of the argument on Section 7 of the Divorce Act, as well as the defence of the agreement being *contra bones mores,* is deemed as an introduction of a new legal argument, for want of being pleaded, then in such circumstance, this Honourable Court is to consider the following:

    12.1. Both these arguments and defences pertains purely to a point of law.

    12.2. The points of law which have been raised are unrelated to the material facts of the matter.

    12.3. There is no prejudice to the Respondent, who was timeously informed that such a point of law would be taken, by virtue of the Amended Notice of Appeal, to the High Court.

12.4. The point pertaining to Section 7, was in fact first raised by the Respondent, already in the Regional Court, as set out hereinbefore. It was only later, during the High Court appeal, abandoned by the Respondent. The Respondent changed her stance and labelled the specific agreement differently and then indicated that:

"…the B agreement was not a settlement agreement as envisaged in section 7 (1) of the divorce act but an executory donation. He added that the Respondent does not content that the donation agreement was concluded in anticipation of a divorce, nor does she seek to enforce the agreement in settlement of any dispute or a lis between the parties."[5]

12.5. This argument is in direct contradiction, of the Respondent's previous submissions, insofar as the Respondent relied upon Section 7 (1) of the Divorce Act, in the Regional Court.

12.6. The purpose of pleadings is to give notice to the opposing party of the issues to be placed into dispute, at the hearing, which purpose was served by virtue of the Notices of Appeal, as well as the filing of affidavits and heads of arguments, in relation to the different appeals.

13. With reference to the matter of ***BARKHUIZEN v NAPIER 2007 (5) SA 323 (CC)*** the above honourable Court held that:

"[39] The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party

[5] Para 8 of the High Court Judgement.

against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial."

14. With reference to the matter of ***MOIPONE MOROKA v PREMIER OF THE FREE STATE PROVINCE AND OTHERS (295/2020) [2022] ZASCA 34 (31 MARCH 2022)*** the following was held in the majority judgment:

"[8] Regarding the argument raised for the first time on appeal, the most common situation when an appeal court may consider an argument raised for the first time on appeal is where the argument involves a question of law. Such argument must be apparent from the record, which could not have been avoided if raised at the proper juncture. In the context of the facts of this case, both the timing of the referral of the dispute to the Commission by the Premier and the date of commencement of chapter 6 of the Act are not only sufficiently canvassed on the papers but are, most importantly, also common cause. The attack on the Commission's authority is a point of law and this court can deal with it. Furthermore, this court's consideration of the new point of law will not occasion unfairness to the parties. Thus, the interests of justice do not militate against the consideration of the new argument raised by the appellant for the first time on appeal. I now turn to deal with the merits of the appeal."

15. The court *a quo* held in the matter of ***NAUDE AND ANOTHER v FRASER 1998 (4) SA 539 (SCA)*** at para 558A to G:

"It has often been held that it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness to the other party and raises no new factual issues (see Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) at 24BG and Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) SA 276 (A) at 290EI). Indeed, as Jansen JA said in the Paddock Motors case at 23FG:

'. . . (I)t would create an intolerable situation if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part . . .'.

There appears to me to be no sound reason why the aforesaid principles should not apply to review proceedings. Different considerations arise where a party, whether on review or appeal, raises a point for the first time which is dependent upon factual considerations that were not fully explored in the court of first instance. This is the situation that arose in Government of the Province of KwaZulu/Natal and Another v Ngwane 1996 (4) SA 943 (A) at 949C950A. The decision in Administrator, Transvaal and Others v Theletsane and Others D 1991 (2) SA 192 (A) at 195F196D does not detract from the principle that a court may take cognisance of a point raised for the first time on appeal provided that it results in no unfairness and causes no prejudice. Where the issue raised for the first time on appeal is purely a legal one, there would normally be no unfairness or prejudice to the other party provided that due notice was given of the intention to rely upon it. In the present matter, counsel for Mr Fraser explicitly submitted in their heads of argument that the decision to grant the adoption

application was irregular in terms of reg 4(1). The appellants counsel were not taken by surprise…"

16. The honourable court is also respectfully referred to the matter of ***BANK OF LISBON AND SOUTH AFRICA LTD v THE MASTER AND OTHERS 1987 (1) SA 276 (A)*** at p290E

"It is the duty of an appellate tribunal to ascertain whether the Court below came to a correct conclusion on the case submitted to it. For this reason, the raising of a new point of law on appeal is not precluded provided that certain requirements are met. If the point is covered by the pleadings and if its consideration on appeal involves no unfairness to the party against whom it is directed, a Court, in an appeal, can deal with it. See Paddock Motors (Pty) Ltd v Igesund (supra at 23D). The new point was not raised in the notice of motion or in the founding affidavit; the first cession had not been placed before the Court of first instance; the third, fourth and fifth respondents were not notified that the new point would be argued in the appeal to the Court a quo. Hence, as already emphasised, it should not have been dealt with by that Court. The position in this Court, as already stated, is different. The third, fourth and fifth respondents were well aware that the new point was to be argued before this Court. As far as one can judge, its consideration in this Court involves no unfairness to the liquidator or to the third, fourth and fifth respondents or to the Master (who has intimated that he does not wish to appear in this Court). The facts upon which the new point is to be decided are clear; there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset of the proceedings; cf the Paddock Motors case sup cit at 23E. Having

regard to the particular facts of this case it seems clear that unnecessary duplication of proceedings can be avoided by this Court deciding the new point. It is for all the above reasons that I have come to the conclusion, although after some hesitation, that this Court should deal with the new point."

17. The honourable court should also consider the matter of ***MIYA v MATLEKO-SEIFERT 2023 (1) SA 208 (GJ)*** at para 51:

"Accordingly the object of the notice of appeal, to inform the respondent of the case the respondent must meet on appeal and the appeal court of the points to be raised on appeal, is now also achieved by the heads of argument. In the present instance, the appellant does expressly raise the challenge to the magistrates' court's jurisdiction in her heads of argument on appeal.

Further, the Supreme Court of Appeal had the following to say in Quartermark Investments (Pty) Ltd v Mkhwanazi and Another 2014 (3) SA 96 (SCA):

'[20] In considering the role of the court, it is appropriate to have regard to the well-known dictum of Curlew is JA in R v Hepworth to the effect that a criminal trial is not a game and a judge's position is not merely that of an umpire to ensure that the rules of the game are observed by both sides. The learned judge added that a judge is an administrator of justice who has to see that justice is done. While these remarks were made in the context of a criminal trial, they are equally applicable in civil proceedings and, in my view, accord with the principle of legality. The essential function of an appeal court is to determine whether the court below came to a correct

conclusion. For this reason, the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed. In fact, in such a situation the appeal court is bound to deal with it as to ignore it may amount to the confirmation by it of a decision that is clearly wrong", and not performing its essential function.'

[53] Accordingly, I do not decline to consider the challenge to the jurisdiction, because it was not raised in the notice of appeal. This is particularly so, given that a court is enjoined in terms of s 4 of PIE to consider whether the granting of an eviction order would be just and equitable, which allows considerable latitude to the court when it comes to issues of procedural non-compliance. And further where the magistrate failed to furnish reasons for his judgment."

18. In the matter ***KAMFFER v VAN DEN HEEVER 1965 (2) SA 642 (T)*** at p644B, the court confirmed:

"There is ample authority for the proposition that it is the duty of a court mero motu to take cognisance of a provision, whether pleaded or not, if that is a provision grounded in public policy, and it is clear therefore that in the present case we cannot shut our eyes to the contention raised in the notice of appeal merely because it was not pleaded in the court a quo or because it was not fully investigated."

(B) THE IMPLICATIONS, IF ANY, OF THE MAJORITY AND MINORITY JUDGMENTS OF *ST v CT* [2018] ZASCA 73; 2018 (5) SA 479 (SCA); [2018] 3 ALL SA 408 (SCA) FOR THE VALIDITY OR ENFORCEMENT OF THE PRENUPTIAL AGREEMENT.

1. In the matter of ***ST v CT***, the Supreme Court of Appeal indicated that parties cannot override the discretion of the trial divorce court, in reaching agreements, on the issue of maintenance, unless same is done in contemplation of a divorce.

2. However, by virtue of the Court *a quo's* judgment in this matter, it has been decided that parties can reach an agreement, on the issue of maintenance, without same having been done in contemplation of divorce, thereby overriding the discretion of the trial divorce court.

3. The difference between the matter of ***ST v CT*** *supra*, and the matter in *casu*, is that the SCA in this matter stated, contrary to the finding of ***ST v CT***, that:
   3.1. Section 7 of Act 70 of 1979 does not find application.
   3.2. That the agreement is purely contractual in nature.
   3.3. That the Court does not have an overriding discretion, nor a duty to serve the interests of the parties, in a divorce action.

4. Whilst the similarities in the matter of ***ST v CT***, and the matter at hand are that:
   4.1. Both agreements were concluded prior to the parties entering into the marriage.
   4.2. Both agreements governed the financial consequences of the parties, upon dissolution of the marriage.

4.3. Both agreements dealt with the aspect of maintenance, upon dissolution of the marriage.

4.4. Both agreements were concluded without the parties contemplating a divorce action at the time of entering into the agreements.

5. There are therefore strong similarities between the judgment of ***ST v CT*** and the judgment of the Supreme Court of Appeal in the matter *in casu*.

6. However, the difference turns on the fact that the Court *a quo* termed the agreement in casu as an executory donation, as opposed to an ante nuptial agreement *inter alia* pertaining to maintenance in the event of dissolution of the marriage, and did so without regard to the substance of the agreement.

7. The court *a quo* labelled the specific ante nuptial agreement as a commercial contract to which specific performance may be claimed and therefore the Divorce Act is not applicable.

8. With reference to ***ST v CT*** cited *supra* the Court stated that:

[193] The court proceeded to formulate a two-stage process in assessing whether to give effect to the pre-existing spousal-support agreement. At stage 1 the court considers the circumstances prevailing when the agreement was negotiated to determine whether there is any reason to discount it (a power imbalance, oppression, other conduct falling short of unconscionability, the duration of negotiations, the presence or absence of professional advice, the extent to which the agreement at the time of its conclusion was in substantial compliance with the

objectives of the Divorce Act). At stage 2 the court assesses the extent to which the agreement still reflects the original intention of the parties and the extent to which it is still in compliance with the objectives of the Divorce Act. A certain degree of change is always foreseeable by spouses when they conclude an agreement, leading the majority to say the following

'Although we recognise the unique nature of separation agreements and their differences from commercial contracts, they are contracts, nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight.'"

9. In considering the nature of the agreement, the honourable court is referred to the matter of ***AUDITOR-GENERAL v MEC FOR ECONOMIC OPPORTUNITIES, WESTERN CAPE AND ANOTHER 2022 (5) SA 44 (SCA)*** at para 22

"In answering the question that I have posed, substance must prevail over form and proper regard must be had to context. Labels used by the parties are not decisive."

10. The majority judgment in the matter of ***ST v CT*** upheld the High Court's finding that the waiver of maintenance, as contained in the ante-nuptial contract, is invalid and unenforceable, on the strength of the reasons encapsulated in the written judgment reported as ***W v H 2017 (2) SA 196 (WCC).***

11. This entails that the basis that generally any purported ouster of the jurisdiction of the court which deprives a party of a legal right or remedy is *per se* against public policy.

12. However, despite the findings of ***W v H*** *supra*, and the confirmation thereof in the Supreme Court of Appeal in ***ST v CT***, the Court *a quo* in the matter at hand, indicated that:

"Their estates remain separate. Thus, the provisions of the ANC will remain intact and will be applicable upon their divorce despite the Appellant's entitlement to enforce the terms of the agreement. The legal effect of this is that a portion of the patrimonial consequences upon divorce or death will flow from the agreement and not from the matrimonial regime. Neither party will have any claim against the other based either on the provisions of the Divorce Act or the Matrimonial Property Act 88 of 1984 (the Matrimonial Property Act)." [6]

13. However, with reference to Section 7, the very circumstance that the court has a statutory power to override the agreement shows that an agreement cannot override the statutory power.

14. It was further stated in the matter of ***W v H***, with reference to the decision in ***SCHIERHOUT v MINISTER OF JUSTICE 1925 AD 417***, wherein it was held that if the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the courts of justice for any

[6] Para 9 of the Court *a quo*'s judgment.

future injury of wrong committed against him, there would be a good ground for holding that such an undertaking is against the public law of the land.

15. This finding was not followed by the court *a quo*, as the court *a quo* stated that it: "*owes no such duty to the parties*"[7], therefore a duty to ensure that their best interests are served during divorce proceedings.

16. This aspect is to be considered in the context of Section 7 (2), and the essential nature of a marriage, in that ordinarily the divorce trial court should ensure equality and fairness, by taking into consideration important aspects such as *inter alia:*

    16.1. The existing or prospective means of each of the parties, at the time when the need for maintenance may arise.

    16.2. Their respective earning capacities.

    16.3. Their individual financial needs and obligations.

    16.4. Their conduct insofar as it may be relevant to the breakdown of the marriage, as should the court not take the parties conduct into consideration, both parties are exempted from the consequences of any and all misconduct.

17. Furthermore, with reference to Section 8 of the Divorce Act, a variation of such maintenance order, on the grounds of sufficient reason, is negated as despite the agreement containing aspects relating to maintenance, same is, should the judgement of the court *a quo* stand, enforceable in terms of the law of contract, and not founded in terms of the prevailing legislation on divorces.

---

[7] Para 12 of the Court *a quo*'s judgment.

18. The implications of the order granted by the Supreme Court of Appeal, is to deprive the Applicant of his legal right or remedies in terms of *inter alia* Section 7 of the Divorce Act. If the court *a quo's* judgment was to stand, the Applicant would have no right of recourse, whilst if the judgment of the Supreme Court of Appeal was to be overturned, the Applicant (and the Respondent) would still be entitled to the rights and remedies provided for in the Divorce Act, 70 of 1979.

19. This entails that the agreement purports immutability to the patrimonial rights of the parties, at a time when neither of the parties would have known what their positions would be upon dissolution of the marriage, contrary to the terms of the antenuptial contract.

20. Wherefore it is submitted that in finding that the antenuptial agreement concluded on 20 February 2015 is an executory donation, and that the Respondent's claim for maintenance is to be regarded as a claim for specific performance, would offend the rights of the parties in this matter, and would also offend against public policy, in that, *inter alia*:

    20.1. It excludes the statutory powers of the court.

    20.2. It excludes the parties' rights to implement the provisions of the Maintenance Act, 99 of 1998.

    20.3. It exempts the parties, and in this case specifically the Respondent, from the consequences of any misconduct, which is normally considered at dissolution of the marriage.

20.4. The possibility of settling financial and maintenance issues, separately to their antenuptial contract, prior to entering into marriage, is going to create confusion, and allow parties to effectively side-step the legislation by arranging their financial affairs without the intervention of the divorce Court, in circumstances whereby the dissolution of a marriage remains a status matter.

20.5. It would lead to anarchy, and uncertainty in law, in matters whereby parties can agree to financial consequences of their divorce, prior to marriage, whether there is a registered ante nuptial contract or not, and thereby ousting the protective eye of the divorce court, as long as it can be labelled a commercial contract.

21. In conclusion, with reference to the matter of ***W v H*** cited *supra*, it is submitted that the following needs to be taken cognisance of:

[155] As far as pacta sunt servanda is concerned, I am fully aware of this principle and I accept that it is one which is I frequently applied in commercial contracts and contracts of service, etc. However, as I have indicated, an ANC is a contract which is sui generis. Any pacta that finds its way into an ANC will always be subject to the test of public policy because ANCs are unique in the sense that they can only be executed in a prescribed manner and in a prescribed form because this is the very foundation of a contract of marriage. The legislator and our courts have consistently monitored contracts of this nature. It is not helpful to refer to commercial contracts or to import the findings of the courts in those cases into ANCs as if ANCs stand on the same footing."

22. Wherefore, it is submitted that the Applicant should be granted leave, to the above Honourable Court, against the whole of the judgment and order of the Supreme Court of Appeal.

DATED AT PRETORIA ON THIS THE 5TH DAY OF FEBRUARY 2023.

Adv. R. Ferreira

Adv. A. Koekemoer

Counsel for the Applicant

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Constitutional Court Case No. **CCT293/2022**

The Court *a quo* SCA Case no: **820/2021**

High Court Case no: **A135/2020**

Regional Court Case no: **GP / SPR / RC 352/2018**

In the matter between:

DAVID HERCULES BOTHA Applicant

and

CICILIA SUSANNA BOTHA Respondent

FILING NOTICE: RESPONDENT'S HEADS OF ARGUMENT

Document for filing: **RESPONDENT'S HEADS OF ARGUMENT**

DATED AT NIGEL ON THIS THE 25TH DAY OF APRIL 2023.

J OKES

KRUGER & OKES INC

ATTORNEYS FOR RESPONDENT

23 KINGSWAY, P O BOX 1636

NIGEL, 1491

TEL: 011 814 3444

E-MAIL: betsie@krugerokes.co.za

REF: J OKES / MAT16231

C/O SWANEPOEL ATTORNEYS

94 PRITCHARD STREET

SCHREINER CHAMBERS

17TH FLOOR

JOHANNESBURG

TEL: 011 333 1715

REF: J SWANEPOEL

TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT

CONSTITUTIONAL HILL

BRAAMFONTEIN

AND TO: **LIEBENBERG ATTORNEYS**

ATTORNEYS FOR APPLICANT

84 BREYTENBACH STREET

NIGEL

TEL: 011 814 4042

E-MAIL: admin@chrisliebenberg.co.za

REF: CJ LIEBENBERG / B15688/ee

C/O STEINERT MOODLEY ATTORNEYS

63 BRAM FISHER DRIVE

ROBINDALE

E-MAIL: admin@steinertmoodley.co.za

CHRIS LIEBENBERG PROKUREURS / ATTORNEYS
84 BREYTENBACH ST NIGEL 1490
TEL: (011) 814-4042
FAX: (011) 814-4043
"SONDER BENADELING VAN REGTE"
"WITHOUT PREJUDICE OF RIGHTS"

25/4/2023
11:55

RECEIVED A COPY HEREOF ON THIS THE _____ DAY OF _____ 2023 AT ___H___

_____

ATTORNEY FOR APPLICANT

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.**CCT293/2022**

In the application between:

DAVID HERCULES BOTHA Applicant

and

CICILIA SUSANNA BOTHA Respondent

RESPONDENT'S HEADS OF ARGUMENT

CONTENTS Page

INTRODUCTION

1. This is an application for leave to appeal in terms of section 167(3)(b)(ii) of the Constitution. No Constitutional matter is raised. The applicant contends that the "*matter raises an arguable point of law of general public importance which ought to be considered*" by this Court

2. The parties have been invited by the Court to lodge written argument, including arguments on the merits[1] of the appeal.[2] This is the respondent's written argument.

BACKGROUND

3. The issue for determination was initially argued in a (pending) divorce action in the Regional Court for Springs in *limine* as a point in law in terms of rule 29(4) (of the Magistrate's Court rules.[3] It is that same point of law which the applicant requests this Court to adjudicate upon.

4. A brief background of the events germane to the matter are set out below.

5. On 9 January 2015 the applicant and the respondent concluded an ante-nuptial contract[4] ("the ANC") which was duly registered on 22 January 2015 in

---

1 In terms of rule 19(6)(c) of the Constitutional Court Rules.

2 Vol 2, pg 162, Directive from Constitutional Court dated 7 March 2023.

3 Vol 1, pg 37, Regional Court judgment, line 6-8 and 19-26.

4 Vol 1, pg 7, ANC, annexure "A" to applicant's particulars of claim.

the Deeds Registry, Pretoria[5] in anticipation of their marriage. The ANC stipulates that;

5.1. there shall be no community of property between them;

5.2. there shall be no community of property or loss between them;

5.3. the accrual system as provided for in Chapter C1 of the Matrimonial Property Act 88 of 1984 ("MPA") is expressly excluded from the parties' marriage.

6. On 20 February 2015 the applicant executed a donation[6] in writing ("the agreement")[7] in terms of which the applicant and the respondent acknowledged *inter alia* that "*We intend to marry each other, which marriage shall be out of community of property, and whereas we have already entered into an ante-nuptial contract, we are desirous that the following agreement should be read together with the ante-nuptial contract…*" (my translation).

---

5 See Registrar's date stamp dated 22 January 2015 on the ANC.

6 Section 5 of the General Law Amendment Act 50 of 1956

"***5. Formalities in respect of donations.***

No donation concluded after the commencement of this Act shall be invalid merely by reason of the fact that it is not registered or notarially executed: Provided that no executory contract of donation entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses."

7 Vol 1, pg 26, agreement, annexure "CC1" to respondent's counterclaim.

7. The applicant agreed to make the following donations to the respondent in the event of the dissolution of their anticipated marriage either by way of the applicant's death or upon divorce;

7.1. A residential dwelling to the value of R1 500 000.00, as identified by the respondent, for which the costs of transfer into the respondent's name are to be paid by the applicant;

7.2. A motor vehicle to the value of R250 000.00 as identified by the respondent;

7.3. Payment of the premium in regard to the respondent's lifelong membership of a medical aid or similar to the medical aid fund of which the respondent was a member on the date of signing of the agreement;

7.4. Payment of an amount of R20 000.00 per month as lifelong maintenance;

7.5. Payment of the premiums in regard to a Momentum Life Policy with number 2114481446 for the respondent's lifetime.

8. On 19 May 2015 the applicant and the respondent were married to each other.[8]

---

8 Vol 1, pg 4, par 4 of the applicant's particulars of claim.

9. On 8 August 2018 the applicant instituted an action for divorce in the Regional Court for Springs.[9]

10. The respondent filed a plea and counterclaim in the divorce action wherein she claims specific performance by the applicant of his obligations in terms of the agreement.[10]

11. The applicant filed a plea to the respondent's counterclaim wherein he admits the conclusion of the agreement, but pleads that it is unenforceable for the following reasons;[11]

> *8.1* *The (applicant) admits the parties entered into an agreement, after signing an ante-nuptial contract and entering into marriage.*
>
> *8.2* *The (applicant) pleads the parties did so under emotional circumstances and upon insistence of the (respondent).*
>
> *8.3* *After signing the agreement the parties abandoned the terms thereof by entering into marriage and having the ante-nuptial contract as originally agreed upon registered as pleaded by the (applicant).*

---

9 Vol 1, pg 1, combined summons, see Registrar's date stamp dated 8 August 2018.

10 Vol 1, pg 21-23, par 4-7, respondent's counterclaim.

11 Vol 1, pg 1, par 8 and 9, applicant's plea to respondent's counterclaim.

9.

9.1 The (applicant) admits the terms of the agreement as pleaded by the (respondent) insofar as it corresponds to the written document.

9.2 The (applicant) denies that the terms are enforceable for the reasons as pleaded supra.

12. The applicant further pleaded in the alternative that if the agreement were to be "enforced", that the respondent "*made herself guilty of gross ingratitude and in the premise the (applicant) was entitled to revoke the donations*".[12] [13]

PROCEEDINGS IN THE REGIONAL COURT

13. The applicant filed a "*Notice of Point "in Limine*"" and gave notice of his intention to argue the point in *limine* before the leading of any evidence in the action.[14]

14. At the hearing of the matter in the Regional Court, the parties agreed to argue the legal point "*(on) whether the agreement was valid and enforceable vis-à-*

---

12 Vol 1, pg 32, par 93, applicant's plea to respondent's counterclaim.

13 Although the agreement itself refers to a donation and both parties refer thereto as a donation in their pleadings (cf. in the introduction to the agreement, par 6 of the respondent's counterclaim and par 9.3.2 and 9.3.3 of the applicant's plea to the respondent's counterclaim).

14 Vol 1, pg 34, applicant's notice of point "*in limine*".

vis the ANC".[15] And it is this issue which the applicant now requests this Court to determine.

15. It behoves mentioning that the point in *limine* was determined solely on the pleadings. No evidence was led by either party in regard thereto. All remaining issues in the divorce action were postponed *sine die* by the Regional Court.

16. It is necessary to mention the arguments raised by the applicant in the Regional Court in order to demonstrate how the argument has evolved to include 'new' defences along the way, and which were not raised by the applicant in his pleadings. The grounds were as follows (as extrapolated from the judgment of the Regional Court):

16.1. The purpose of an ANC is to provide certainty to the parties as to what the financial consequences of their marriage shall be and provide certainty to Court as to the terms of any dissolution.[16]

16.2. The failure by the respondent to plead rectification of the terms of the ANC can only mean that the respondent agreed to abide by it.[17]

---

15 Vol 1, pg 37, line 6-8 and 19-26, Regional Court judgment.

16 Vol 1, pg 38, line 4-7.

17 Vol 1, pg 38, line 9-11.

16.3. Although the agreement was valid when it was signed on 20 February 2015, but it became (legally impossible?) because the parties were only married after having signed the agreement, in May 2015.[18]

16.4. The respondent has not laid any basis for why the agreement should be enforced.[19]

16.5. The parties did not alter or amend the ANC by asking the Registrar of Deeds to incorporate the agreement with the already registered ANC and that implies that they abandoned the agreement.[20]

16.6. The ANC only comes into operation when the marriage is solemnised and it is the only existing contract between the parties.[21]

16.7. The respondent has created a difficulty by pleading that the applicant donated the items in the agreement to her upon divorce or the applicant's death, because the ANC does not make any reference to a donation.[22]

16.8. The respondent has created ambiguity by referring to the monthly allowance in the agreement as this will come from the applicant's profits which is contrary to the ANC as it was agreed in the ANC that

---

18 Vol 1, pg 38, line 11-13.

19 Vol 1, pg 38, line 16-17.

20 Vol 1, pg 38, line 17-21.

21 Vol 1, pg 38, line 21-24.

22 Vol 1, pg 38-39, line 24 on pg 38 to line 3 on pg 39.

there shall be no community of property and no community of property or loss, and so too with reference to the donation of a house and a car which contradict the terms of the ANC.[23]

16.9. The respondent cannot *ex post facto* rely on the agreement where the parties have not applied to a court to amend the ANC or request the Registrar of Deeds to register the agreement together with the ANC and by failure thereof, they effectively overruled the agreement in favour of the registered ANC.[24]

16.10. The divorce action cannot be settled before the parties are married and this is what the agreement proposed to do.[25]

16.11. The respondent is adding to and varying the contents of the ANC *via* the back door in that written amendments are to be submitted prior to registration together with the ANC and amendments after registration can only be effected in terms of section 21 of the MPA read with section 88 of the Deeds Registries Act 47 of 1937.[26]

16.12. In the ANC the parties expressly excluded the accrual and it can never be that the agreement as well as the ANC is valid as such a contention is not sustainable in law.[27]

---

23 Vol 1, pg 39, line 3-10.

24 Vol 1, pg 39, line 10-16.

25 Vol 1, pg 39, line 16-19.

26 Vol 1, pg 39, line 20, pg 40, line 2.

27 Vol 1, pg 40, line 2-9.

16.13. To find that the agreement is enforceable would be tantamount to amending the terms of the ANC and the ANC actually reflects the parties' true intention.[28]

17. The respondent's submissions in the Regional Court, and indeed throughout, have remained consistent. It was never and it is not the respondent's case that she seeks to rectify or amend the ANC. It is even less about wanting to change the parties matrimonial regime in terms of section 21 of the MPA or to incorporate the agreement into the ANC.[29]

18. The respondent's case is that the agreement and the ANC can co-exist together if regard is had to the definition and purpose of an ante-nuptial contract (as opposed to the donation/agreement).

19. In regard to whether the applicant has previously raised the argument of whether the enforcement of the agreement would be against public policy, the Regional Court noted that this argument was not raised by the applicant in argument before her.[30]

20. The Regional Court nonetheless held that the agreement "*is enforceable and can be read together with the ANC*".[31]

---

28 Vol 1, pg 40, line 10-14.

29 Vol 1, pg 40, line 18-24.

30 Vol 1, pg 50, line 3-6.

31 Vol 1, pg 51, line 20, Regional Court judgment.

APPLICANT'S APPEAL TO THE FULL COURT

21. The applicant thereafter appealed to the High Court of South Africa, Gauteng Division, Pretoria against the decision of the Regional Magistrate.[32]

22. In paragraph 10, 13 and 14 of the applicant's Amended Notice of Appeal, the applicant elaborated on the contention that the agreement impermissibly amounts to a settlement agreement entered into prior to their marriage in settlement of their divorce (ie. not in contemplation of a divorce). The provisions of section 7(1) of the Divorce Act 70 of 1979 are apposite in this regard.[33]

23. The applicant further relied on the provisions of section 7(2) of the Divorce Act on the basis that the agreement purports to impermissibly divest the Divorce Court of its discretion in regard to the determination of spousal maintenance.[34]

---

32 Vol 1, pg 55, applicant's amended notice of appeal dated 11 May 2020.

33 Section 7(1): "*A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.*"

34 Section 7(2): "*In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.*"

24. Although the applicant stated in the amended notice of appeal that "*it would therefore be "contra bonos mores" to hold that an agreement entered into by parties, prior to their marriage, including provisions of division of assets and maintenance of one of the parties, can be enforceable and thereby ousting a Divorce Court's discretion in terms of the provisions of section 7(1) and (2) as well as (9) of the Divorce Act*", this issue regarding the concept of public policy was not addressed by the Full Court in its judgement.

25. On 28 April 2021 the High Court, per Bam AJ thereafter, Collis J concurring, upheld the appeal and granted the following order;[35]

    1. *The appeal is upheld with costs.*

    2. *The court a quo's decision that the B agreement is enforceable and it is to be read together with the ante-nuptial contract is set aside and replaced with an order B agreement is found not to be enforceable, for the reasons set out in this judgment. (sic)*

26. The applicant's submissions on appeal are summarised by the Full Court as follows;[36]

    26.1. The respondent has not pleaded rectification of the ANC;

---

35 Vol 1, pg 63-76, judgment of the High Court; pg 78, Order of the High Court.

36 Vol 1, pg 66-67, par 4, judgment of the Full Court.

26.2. The parties did not follow legally recognised means of amending their ANC, therefore the terms of the B agreement which are antonymous to the ANC, cannot be enforced;

26.3. The B agreement is unenforceable because it is an (impermissible) attempt to settle a divorce before marriage (with reference to section 7(1) of the Divorce Act);

26.4. The enforcement of the B agreement alongside the ANC is an attempt at varying or amending the ANC which is legally impermissible.

27. The respondent's submissions were once again straightforward. The respondent does not seek rectification, variation or amendment of the ANC because of the agreement.[37] The two agreements are compatible and can co-exist with each other. The respondent further argued in the Full Court that the agreement was not a settlement agreement as envisaged in section 7(1) of the Divorce Act, but is an executory donation. And in particular the agreement was not concluded in anticipation of a divorce or the settlement of any dispute or *lis* between the parties. The agreement and the ANC can be read together.[38]

28. In upholding the appeal, the Full Court relied on the following grounds (my underlining);

---

37 Vol 1, pg 7, par 5, judgment of the Full Court.

38 Vol 1, pg 69-70, par 8, judgment of the Full Court.

28.1. Absent a settlement agreement envisaged in section 7(1) of the Divorce Act, the court retains a discretion to make the agreement an order of court where it deems it appropriate. The court retains the statutory power to enquire into the reasonable needs of the spouse who requires maintenance, the existing and prospect means of the spouses, their ages, to mention but a few, and make an order of court. "*In a word, in terms of section 7(1) and (2) the authority to make orders in respect of matters such as maintenance, even where the parties have agreed, vests with the court*".[39] Reliance for this finding was placed on the decision of the Supreme Court of Appeal in **ST v CT**.[40]

28.2. In order for a court to lend its imprimatur to an agreement and make it enforceable, it must, in the first place, relate to some litigation or some legal issue between the parties at the time of its making. This was not the case with the agreement and on this basis alone the agreement cannot be enforced.[41] Reliance for this finding was placed on the decision of the Supreme Court of Appeal in **HM v AM**.[42]

28.3. A further reason why the B agreement cannot be enforced with reliance on the legal principle of *pacta sunt servanda* is that it would be legally untenable in the face of the requirements of section 21 of the MPA. This is so because the B agreement introduces terms that

---

39 Vol 1, pg 70-71, par 10, judgment of the Full Court.

40 2018 (5) SA 479 (SCA).

41 Vol 1, pg 73-74, par 13, judgment of the Full Court.

42 2019 JDR 0501 (SCA).

are contradictory to the ante-nuptial contract. Before marrying each other, and by following the relevant provisions of the Deeds Registry Act, the parties could have effected changes to the ante-nuptial *via* registration with the Registrar. The only option for the parties to achieve what they now seek was to apply to court for an amendment of the terms of their ante-nuptial contract in terms of section 21 of the MPA.[43]

29. It behoves mentioning at this stage that the SCA in **ST v CT** was concerned with the waiver of a claim to maintenance by a spouse in terms of the parties pre-nuptial agreement. The SCA held that the term offends public policy as it is inimical to the legal policy regarding maintenance. The spouse who purported to waive her right to claim maintenance upon divorce had expressly pleaded that to enforce the waiver would be against public policy on several grounds. The matter was adjudicated on during a lengthy trial.

30. I respectfully point out that the judgment of the SCA in **HM v AM** was concerned with an agreement concluded by the parties during their marriage in terms of which they sought to amend their matrimonial regime as stipulated in their ANC at a time when there was no *lis* or even the contemplation of divorce proceedings between them. And for that reason, the SCA declined to make the agreement an order of court in terms of section 7(1) of the Divorce Act.[44]

---

43 Vol 1, pg 74-75, par 14, judgment of the High Court.

44 At par 9.

THE SUPREME COURT OF APPEAL

31. The respondent thereafter successfully petitioned[45] the SCA which granted the respondent leave to appeal,[46] and subsequently upheld the appeal.[47] It is against this Order which the applicant now seeks leave to appeal to this Court.

32. It behoves mentioning at the outset that the SCA did not deal with the issue of whether the agreement, or rather the enforcement thereof, would offend public policy. It was pointed out by the court in the SCA during argument to the applicant's counsel that such a defence was not raised by the applicant in the pleadings. Applicant's counsel did not persist with the point thereafter.

33. The respondent's case in the SCA remained the same. There is no conflict between the terms of the ANC and the agreement, they co-exist and remain valid and enforceable as two distinct and separate legal instruments, each serving a different purpose which do not infringe upon each other. Section 7(1) and (2) of the Divorce Act are not applicable to the matter. The respondent's counterclaim is a contractual claim based on donations in her favour which were made by the respondent with the full knowledge of the contents of their ANC.[48] The SCA placed reliance *inter alia* on the judgment of **Odgers v De Gersigny**[49] for the contention that the donation by the applicant in terms of which he undertook to pay the respondent lifelong maintenance is neither

---

45 Vol 2, pg 79, respondent's application for leave to appeal.

46 Vol 2, pg 134, Order by the SCA dated 16 July 2021.

47 Vol 2, pg 148-157, judgment of the SCA.

48 Vol 2, pg 152, par 7, judgment of the SCA.

49 2007 (2) SA 305 (SCA); See also par 12 of the SCA judgment.

unusual nor impermissible and that the principle of *pacta sunt servanda* is applicable.

34. These contentions found favour with the SCA which upheld the appeal and set aside the Order of the Full Court. It is against this Order which the applicant now seeks leave to appeal to this Court.

35. The SCA correctly held, with respect, having had regard to the definition and purpose, including the primary objective, of the two legal instruments,[50] that the two legal instruments can co-exist because an ANC regulates the matrimonial regime of the parties *stante matrimonio* only, whereas the agreement has no bearing at all on the nature of the matrimonial regime and the respective estates of the parties. Their estates remain separate. Thus, the provisions of the ANC will remain intact and will be applicable upon the divorce despite the (respondent's) entitlement to enforce the terms of the agreement.

36. The SCA further held that the finding by the Full Court "*ignores the clear intention of the parties as espoused in the agreement. The preamble of the agreement is clear and unambiguous. It was carefully crafted and indicated that 'it is agreed that the parties will be married out of community of property' and that 'the ANC will be registered'. An analysis of the text and the factual context in which the agreement was concluded including the clear purport of the agreement reveals that the parties never intended that the agreement should rectify or amend the ANC. The agreement records no reference to the*

---

50 Vol 2, pg 152, par 8, judgment of the SCA.

changing of the matrimonial regime. It is important to note that the agreement in this matter was made by the parties fully alive to their matrimonial regime. Had there been any intention on the parties to alter, vary or amend the terms of the ANC by the conclusion of this agreement, the parties would have expressed themselves in clear terms in this regard."[51]

37. The SCA further held, with respect, correctly, that section 7(1) of the Divorce Act is not applicable to the matter, nor is the matter of **HM v AM**.

38. As mentioned throughout, the respondent does not ask for the agreement to be made an order of court under section 7(1) of the Divorce Act. The respondent's counterclaim is a contractual claim for specific performance.[52]

39. Furthermore, reliance by the Full Court on the judgment of the SCA in **AM v HM** was properly contextualised by this Court in **HM v AM**[53] where this Court remarked as follows;[54]

In my view, the applicant's attack on the judgment of the Supreme Court of Appeal is misplaced. A proper interpretation and analysis of the judgment reveal that the Supreme Court of Appeal did not prescribe a bar on all agreements between spouses out of community of property. The finding only relates to this agreement, whose terms appear to have the effect of changing

---

51 Vol 2, pg 153, par 10, judgment.

52 Vol 2, pg 153, par 11, judgment.

53 2020 JDR 0852 (CC).

54 *Ibid*, par 32.

the parties' matrimonial regime without being sanctioned by a court order. It did not affect the parties' capacity to contract in respect of other agreements.

40. Moreover, the agreement does not fall within the ambit of the provisions of section 7(2) of the Divorce Act in that the respondent does not claim maintenance under section 7(2) from the applicant. The respondent merely seeks the enforcement of the terms of the agreement which is neither unusual nor impermissible. Accordingly, the court's discretionary power conferred by section 7(2) is not ousted.[55]

THE APPLICATION FOR LEAVE TO APPEAL AND MERITS

41. The application for leave to appeal in terms of section 167(3)(b)(ii) and the merits of the case are intertwined and will be dealt with jointly.

42. The applicant's case is premised on the submission that the matter raises arguable points of law of general public importance. Generally, a finding of jurisdiction must stand or fall on this basis. That is so because this Court has held that 'jurisdiction is determined on the basis of the pleadings...and not the substantive merits of the case'.[56]

43. This Court[57] previously stated that;

---

55 Vol 2, pg 155, par 15, judgment of the SCA.

56 **Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd** 2015 (3) SA 479 (CC) at par [14]; **Gcaba v Minister for Safety and Security and Others** 2010 (1) SA 238 (CC) at par [75].

57 Paulsen *supra* at par [16]

Reduced to bare essentials, section (167(3)(b)(ii)) provides for this Court to grant leave if:

(a) the matter raises an arguable point of law;

(b) the point is one of general public importance; and

(c) the point ought to be considered by this Court.

44. The point must be one of law and it must be arguable. The point must not be one of fact.[58] It is not the function of this Court to conduct an evaluative assessment of the issue that is factual.[59] What renders an issue legal as opposed to purely factual, is an enquiry into the social policy and normative context behind a rule.[60]

45. The applicant contends that the matter raises the following arguable points of law (ie. which are of general public importance) that should be considered by this Court;

45.1. conflicting legal principles;

45.2. distinguishable case law;

---

58 *Ibid.*

59 **Competition Commission of South Africa v Media 24 (Pty) Ltd** 2019 (5) SA 598 (CC) at par [134] and [135].

60 **K v Minister of Safety & Security** 2005 (6) SA 419 (CC) at par [22].

45.3. the ousting of the court's discretion provided for in section 7 of the Divorce Act 70 of 1979;

45.4. the enforceability of the agreement is *contra bonos mores*.

46. It is respectfully submitted that none of the points of law relied on by the applicant merit the attention of this Court;[61] and as such are not arguable, nor are they of general public importance. For a matter to be of general public importance it must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public. It will serve a litigant well to identify in clear language what it is that makes the point of law one of general public importance.[62]

47. Each of the points of law relied upon by the applicant will be dealt with keeping in mind the judgment of the SCA a *quo*, with which the respondent respectfully aligns herself.

CONFLICTING LEGAL PRINCIPLES

48. The applicant asserts that[63] "*The findings of the SCA entails that a prenuptial agreement, entered into prior to marriage, after the conclusion of an ANC, should be enforceable*".

---

61 Paulsen *supra*, par [22].

62 Paulsen *supra*, par [26].

63 Cf. par 12 of the applicant's heads of argument.

49. This assertion is not correct. The SCA held that, with specific reference to the judgment of this Court in **AM v HM** that the agreement does not offend the provisions of either section 7(1) or (2) of the Divorce Act[64] and that the requirement of a *lis* between the parties for an agreement to be made an order of court in terms of section 7(1) do not find application in the present matter. The prohibition there against in **HM v AM** and the reasons therefore did not affect the parties' capacity to contract in respect of other agreements.[65]

50. The applicant contends that[66] the prenuptial agreement "*is undistinguishable a settlement agreement which pertains to the payment of spousal maintenance upon the dissolution of the marriage, which will deprive the applicant of inter alia the protection provided in the Divorce Act 70 of 1979 or the Maintenance of Surviving Spouses Act 27 of 1990*" and "*then to label the prenuptial agreement a donation agreement, in this matter, does not take the agreement out of the ambit of the Divorce Act 70 of 1979*".

51. The difficulty with this contention is that the agreement never fell within the ambit of either the Divorce Act or the Maintenance of Surviving Spouses Act in the first place. The agreement in the circumstances of this case is neither unusual nor impermissible.[67] It must be remembered that the respondent does not seek to have the agreement made an order of court whether in terms of section 7(1) or otherwise.

---

64 *Ibid.*

65 Vol 2, pg 155, par 14, judgment of the SCA; **AM v HM** *supra* at par 32.

66 Par 15, applicant's heads of argument.

67 Cf. Odgers *supra*, par 8.

52. There is accordingly, with respect no conflicting legal principle in regard to the facts of the present matter.

DISTINGUISHABLE CASE LAW

53. The applicant contends that the SCA "*erred in applying the principles confirmed in the matter of Odgers*".[68]

54. Odgers referred with approval to the judgment of Didcott J in **Hodges v Coubrough *N.O***[69] with regard to the correct legal position in our law, namely that the High Court owes no duty to the parties in a divorce action to ensure that the parties' best interests are served during divorce proceedings. The freedom of individuals to bind their estate by contract to pay maintenance does not invoke the provisions of section 7(2) of the Divorce Act. The respondent's counterclaim is not for maintenance *per se*, but for the enforcement of the applicant's contractual obligations in terms of the agreement.

55. It is, with respect, not understood how this point of law is arguable, ie. a point of general public importance that ought to be considered by this Court.

SECTION 7 OF THE DIVORCE ACT 70 OF 1979

---

68 At par 43, heads of argument.

69 1991 (3) SA 58 (D) at 66D.

56. The applicant contends, with respect, incorrectly that[70] "*there is therefore no automatic right to maintenance on divorce and furthermore a party who claims maintenance in terms of section 7(2) must prove that he or she is entitled to maintenance*" due to the use of the word "may" in both section 7(1) and (2), which it is contended that "*Therefore a court order for post-divorce maintenance is clearly discretionary*".

57. The mere fact that one of the many obligations of the applicant in terms of the agreement is to pay the respondent lifelong maintenance either upon their divorce of the death of the applicant, does not invoke the provisions of either section 7(1) or (2) of the Divorce Act. The respondent does not in any event seek to have the agreement made an order of court, nor does the respondent claim maintenance from the applicant upon divorce. Nor does the enforcement of the terms of the agreement invoke the provisions of section 7(1) or (2).

58. The assertion by the applicant[71] that the labelling of the agreement as a "donation agreement" by the SCA somehow creates "*an inference that parties can, parallel to the ANC and without anticipating a divorce or without a divorce lis pending between the parties, at any stage, enter into a separate agreement, which will, in the future event of the dissolution of the marriage, be enforceable, as long as it can be characterised as a donation agreement*" is unfounded and misleading.

---

70 Par 22, applicant's heads of argument.

71 Par 23, applicant's heads of argument.

59. The principle is clear that there is no absolute prohibition on the parties' capacity, in a marriage, to contract in respect of other agreements, the terms of which do not have the effect of changing the parties' matrimonial regime without being sanctioned by a court order.[72]

60. The assertion by the applicant that "*the SCA's judgment...ousted the court's discretion under both section 7(1) and 7(2) and proclaimed that a prenuptial agreement, in essence relating to issues of "maintenance" should be enforceable, many years thereafter, and in the event of a divorce*", is with respect, incorrect.

61. As mentioned previously, the respondent does not seek to have the agreement made an order of court and nor does she claim maintenance *per se* from the applicant. The respondent merely seeks specific performance of the applicant's various obligations in terms of the agreement, one of which includes the payment of lifelong maintenance upon divorce or upon the applicant's death.

THE ENFORCEABILITY OF THE AGREEMENT IS *CONTRA BONOS MORES*

62. The only ground relied upon by the applicant in his plea to the respondent's counterclaim as to why the agreement is unenforceable, is that "*the parties*

---

72 **AM v HM** at par [32].

abandoned the terms of the agreement by entering into marriage and having the ante-nuptial contract registered".[73]

63. The applicant has neither raised the issue of *contra bonos mores* in his plea and nor was the issue of *contra bonos mores* argued in any of the previous court appearances.

64. It is trite that a point that has not been previously raised by a party may only be argued or determined by an Appeal Court if it is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party.[74]

65. The issue as to whether the enforcement of the agreement offends public policy was not previously ventilated in either of the three previous courts.

66. The contention by the applicant that the Full Court, with reference to the matter of **ST v CT**[75] "*confirmed the principle that parties cannot contract in respect of maintenance prior to marriage*", is with respect, incorrect. In **ST v CT** the SCA was confronted inter alia with the enforcement of a waiver by a respondent in her ante-nuptial contract to seek maintenance from her husband from her divorce. The respondent expressly challenged the validity and enforceability of the waiver clause on four broad grounds, firstly that it is inconsistent with public policy, secondly that it is unreasonable, unfair, unjust and thus against

---

73 *Ibid.*

74 **Wilkinson v Crawford *N.O*** 2021 (4) SA 323 (CC) at par [31] and [32].

75 2018 (5) SA 479 (SCA).

public policy, thirdly that the enforcement of the clause would be unreasonable and against public policy and fourthly, that the court has an overriding discretion to award maintenance notwithstanding the waiver provisions.

67. The issue regarding the enforceability of the waiver clause in **ST v CT** was pertinently raised by the respondent in her pleadings and dealt with at the trial and on appeal. The majority judgment, per Majiedt JA held that the waiver clause *per se* offends public policy, more particularly legal policy in the form of section 7 of the Divorce Act.[76]

68. I pause to mention that in the present matter, and upon the death of the applicant the provisions of the Divorce Act would have no bearing on the matter which is about the enforcement of contractual obligations freely entered into by the parties. Furthermore, the agreement would simply lapse and be of no further force or effect. It only comes into play upon divorce or the death of the applicant.

69. The minority judgment in **ST v CT** per Rogers AJA agreed with Majiedt JA that the maintenance waiver is not enforceable, but for different reasons. Rogers AJA stated *inter alia* that the fact that the overriding statutory power afforded a court upon divorce in terms of section 7(1) and (2) cannot be ousted by contract does not allude to the conclusion that the parties' endeavour that the contractual ordering of maintenance is contrary to public policy.

---

[76] At par [171].

70. The contention by the applicant that the agreement purports to oust the jurisdiction of the court and deprives him of a legal right or remedy and is therefore against public policy finds no application in the present matter.

71. It is arguments such as these which render it impermissible for the applicant to raise the issue of public policy on appeal for the first time in this Court. The prejudice to the respondent is apparent in that none of these arguments were pleaded by the applicant or considered previously by a court dealing with the matter. Furthermore, no evidence was led in regard thereto.[77] The onus is on the party seeking to avoid the enforcement of the contract to demonstrate why its enforcement would be unfair and unreasonable in the given circumstances.[78]

72. The applicant has accordingly failed to make out a case that the enforcement of the agreement would be *contra bonos mores* and therefore inimical to the public policy at any stage of the proceedings.

CONCLUSION

73. The respondent respectfully submits that none of the four legal points of law raised by the applicant are sufficient to meet the requirements of section 167(3)(b)(ii).

---

77 Cf. **Barkhuizen v Napier** 2007 (5) SA 323 (CC); **Beadica 231 CC v Trustees, Oregon Trust** 2020 (5) SA 247 (CC) at par [60]

78 *Ibid.*

74. The respondent will seek the dismissal of the application for leave to appeal, alternatively that the appeal be dismissed, together with an order for costs.[79]

HP West
Counsel for respondent
24 April 2023

[79] **Permanent Secretary, Department of Education and Welfare, Eastern Cape v ED-U College PE (Section 21) Inc.** 2001 (2) SA 1 (CC) at par [25].

RESPONDENT'S TABLE OF AUTHORITIES WITH PAGE REFERENCE TO WRITTEN ARGUMENT

11.	Barkhuizen v Napier 2007 (5) SA 323 (CC) (par 72, pg 28); Beadica 231 CC v Trustees, Oregon Trust 2020 (5) SA 247 (CC) at par [60]	71	28
12.	Permanent Secretary, Department of Education and Welfare, Eastern Cape v ED-U College PE (Section 21) Inc. 2001 (2) SA 1 (CC) at par [25]	74	29

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Constitutional Court Case number: 293/22

The court *a quo* SCA Case number: 820/2021

High Court Case number: A135/2020

Regional Court Case number: GP/SPR/RC352/2018

In the application for leave to appeal between:

DAVID HERCULES BOTHA Applicant

(Respondent in the SCA)

and

CICILIA SUSANNA BOTHA Respondent

(Appellant in the SCA)

APPLICANT'S HEADS OF ARGUMENT

CONTENTS

AD INTRODUCTION

1. This is an application for leave to appeal to the above Honourable Court in respect of the judgment of the Supreme Court of Appeal handed down on 22 September 2022.

2. This application is brought under Section 167(3)(b)(ii) of the Constitution of the Republic of South Africa, 1996, as the issues raised by the Applicant raises an arguable point of law of general public importance which ought to be considered by the above Honourable Court.

3. The arguable points of law relate to the following:

   3.1 Conflicting legal principles now exist.

   3.2 Distinguishable caselaw was applied in the Supreme Court of Appeal.

   3.3 The Court's discretion, as provided for in Section 7 of the Divorce Act 70 of 1979, has been ousted.

   3.4 The enforceability of the agreement is contra bones mores.

4. The main issue in dispute relates to the enforceability of an agreement entered into between the Applicant and the Respondent prior to entering into marriage, which agreement was signed on 20 February 2015 (hereinafter referred to as "*the prenuptial agreement*").

5. The prenuptial agreement was entered into after the Applicant and the Respondent entered into a valid Ante-Nuptial Contract (hereinafter “ANC”).

6. The divorce action was issued by the Applicant out of the Regional Court. The parties agreed on a separation of issues in the main action, which divorce action is still pending.

7. The separated issue that the Regional Court was required to adjudicate upon was whether the prenuptial agreement was enforceable and should be read together with the parties’ ANC or not.

8. The separated issue first served before the Regional Court, and a judgment was delivered on 21 November 2019. The Regional Court found that the prenuptial agreement was enforceable.

9. The Applicant appealed the Regional Court judgment to the Gauteng Division of the High Court, Pretoria. The High Court, Pretoria, upheld the appeal with costs and set aside the order of the Regional Court on 16 July 2021, thereby concluding that the prenuptial agreement was not enforceable.

10. The Respondent then applied for special leave to the Supreme Court of Appeal, which leave was granted.

11. On 22 September 2022 the Supreme Court of Appeal granted an order upholding the appeal, with costs, setting aside the order of the High Court, Pretoria, which entails that the prenuptial agreement is enforceable and also that it should be read together with the parties' ANC.

12. The finding of the Supreme Court of Appeal entails that a prenuptial agreement, entered into prior to marriage, after the conclusion of an ANC, should be enforceable.

13. The terms of the prenuptial agreement are as follows:

"[6] The agreement reads:

'Having said that, on the date of signing hereof, the parties hereby declare that both are unmarried and intend to enter into marriage with each other on the 14th of March 2015 which the marriage will be out of community of property;
and having said that, the parties have already entered into a Prenuptial Agreement which will be registered with the Registrar of Deeds, the parties request that the following agreement be read together with the Prenuptial Agreement, and the parties mutually agree as follows:
At the dissolution of the intended marriage by the death of D[…] B[…];
Or
through divorce: The said, D[…] B[…], donates the following property to S[…] C[…] as her exclusive property:

*1. **IMMOVABLE PROPERTY***

1.1 A residence to the value of R1 500 000-00 (one million five hundred thousand rand) which property will be designated by S[…] C[…].

1.2 D[…] B[…] and or the estate of D[…] B[…] will oversee the transfer costs of the property in the name of S[…] C[…].

2. ***VEHICLE***

A vehicle to the value of R250 000-00 (Two hundred and fifty thousand rand) which vehicle will be designated by S[…] C[…].

3. ***MEDICAL***

D[…] B[…] and or the estate of D[…] B[…] will pay for the premium of S[…] C[…] with regards to a medical aid (similar to the plan on which she is with the undersigning of this) for as long as she lives.

4. ***MONTHLY ALLOWANCE***

D[…] B[…] and or the estate of D[…] B[…] will, before the 7th day of every month, pay the amount of R20 000-00 (Twenty thousand rand) to the mentioned S[…] C[…] into a bank account nominated by S[…] C[…] as lifelong maintenance between spouses.

5. ***POLICY***

D[…] B[…] and or the estate of D[…] B[…] will oversee the payment of the M[…] L[…] Policy with number […], for as long as the mentioned S[…] C[…] may live.'"[1]

14. The interpretation of the prenuptial agreement is in dispute between the parties as the Respondent maintains that the prenuptial agreement provides for **spousal maintenance** in the form of a prenuptial donation, which can be enforced by means of specific performance upon dissolution of the marriage.

15. The Applicant on the other hand, contends that the prenuptial agreement is undistinguishable a settlement agreement, which pertains to the payment of **spousal maintenance** upon dissolution of the marriage, which will deprive the Applicant of *inter alia* the protection provided in the Divorce Act 70 of 1979, or the Maintenance of Surviving Spouses Act 27 of 1990. To label the prenuptial

[1] Volume 2 of the Record, pg 151, para 6.

agreement a donation agreement, in this matter, does not take the agreement out of the ambit of the Divorce Act, 70 of 1979.

16. The Applicant therefore seeks leave to appeal against the judgment and order of the Supreme Court of Appeal dated 22 September 2022 under case number: 820/2021.

AD GROUNDS OF APPEAL:

SECTION 7 OF ACT 70 OF 1979:

17. There is no bar against donation agreements between spouses being enforceable. However, the finding of the court a quo that the prenuptial agreement in this instance, is nothing more than a simple “donation” agreement, interferes with legislation and the interest of justice, in various respects.

18. Section 7 (1) of the Divorce Act 70 of 1979 provides the Divorce Court with a discretion to make an agreement, dealing with the division of assets or the payment of maintenance by one party to another, an order of court upon dissolution of the marriage relationship between the parties.

19. Section 7 (2) of the Divorce Act 70 of 1979 provides the Court with the discretion to grant an order in respect of spousal maintenance having regard to certain factors *inter alia* including the parties’ financial needs and obligations, as well as their respective earning capacities, at that time.

20. The Supreme Court of Appeal found that "*Section 7 (1) of the Divorce Act is not applicable*".[2]

21. The Supreme Court of Appeal's finding was *inter alia* based on the following:

"The import of s 7(1) is to confer the power upon the divorce court to make a written settlement concluded by divorcing parties which relate to the payment of maintenance an order of court when a decree of divorce is granted. The appellant does not ask for a settlement agreement to be made an order of court under s 7(1). A proper scrutiny of the appellant's particulars of claim reveals that the appellant's counter-claim is clearly a contractual claim for specific performance."[3]

"The fact that the agreement refers to a lifelong monthly payment of 'maintenance' does not render it an attempt to settle a pending divorce action."[4]

"It appears that the court a quo [the High Court] *was intrigued by the words 'lifelong maintenance' which led it to conclude that 'absent a settlement agreement envisaged in s 7(1) of the Divorce Act, the court still retains the statutory power to enquire into the reasonable needs of the spouse who requires maintenance and therefore the discretionary power vested in the court in terms of s 7(2) of the Divorce Act has been ousted by the regional court's order'. The court a quo's*

[2] Volume 2 of the record, pg 153, para 11.
[3] Volume 2 of the record, pg 153, para 11.
[4] Volume 2 of the record, pg 154, para 11.

finding and reasoning in this regard are misplaced if regard is had to the correct legal position in our law. Unlike the duty of the high court as upper guardian of minor children to ensure that their best interests are served during divorce proceedings, it owes no such duty to the parties."[5]

"Likewise, the agreement in this matter does not fall within the ambit of the provisions of s 7(2)."[6]

"The invocation of the discretionary power conferred by s 7(2) by the court a quo was therefore uncalled for. Therefore, the agreement does not take away a discretion under s 7(2)."[7]
(Own underlining)

22. As section 7(1) and (2) both contains the word: *"may",* therefore a court order for post-divorce maintenance is clearly discretionary. There is therefore no automatic right to maintenance on divorce, and furthermore a party who claims maintenance in terms of section 7 (2) must prove that he or she is entitled to maintenance. [8]

23. The SCA therefore labelled the prenuptial agreement as a "donation agreement" and therefore found that same should be enforceable through an elementary claim of specific performance. This finding creates an inference that parties can, parallel

[5] Volume 2 of the record, pg 164, para 12.
[6] Volume 2 of the record, pg 155, para 15.
[7] Volume 2 of the record, pg 155, para 15.
[8] AV v CV 2011 (6) SA 189 (KZP) para 9.

to their ANC and without anticipating a divorce, or without a divorce *lis* being pending between the parties, at any stage, enter into a separate agreement, which will, in the future event of the dissolution of the marriage, be enforceable, as long as it can be characterised as a donation agreement. This finding was reached without regard to the substance and content of the prenuptial agreement.

24. It is trite that the common law principle of "*plus valet quod agitur quam quod simulate concipitur",* which, simply put, means that the substance of a transaction, is more important that its form, has been applied to a plethora of cases dealing with the enforceability of contracts.

25. In considering the nature of the agreement, the court a quo, erred in not having regard to the true nature of the prenuptial agreement. The Honourable Court is referred to the matter of **Auditor-General v MEC for Economic Opportunities, Western Cape and Another 2022 (5) SA 44 (SCA)** at para 22

"In answering the question that I have posed, substance must prevail over form and proper regard must be had to context. Labels used by the parties are not decisive."

26. In labelling the agreement, furthermore, entails that parties are free to bind themselves to "donate" a common law reciprocal duty of support, which is an invariable consequence of marriage, despite the fact that neither spouse has an automatic right to maintenance upon divorce, or even death. An award for spousal

maintenance post-divorce is only afforded by virtue of the creation of a statute, and can only be granted by a Divorce Court, as provided for in Section 7 of the Divorce Act.

27. Section 7 of the Divorce Act has cloaked the Divorce Court with a discretion to consider unfair discrimination and to make an order that is **just** and **equitable** under the circumstances, regardless of the parties having agreed thereto.

28. With reference to the case of **Granoth v Granoth [1983] 4 All SA 504**, it was reiterated that parties to a contract may not by agreement deprive the courts of their normal jurisdiction.

29. With reference to the matter of ***PL v YL***[9] the Court, with specific reference to divorce actions, reiterated that*: "…it must be accepted that there exists a need for the court to retain a degree of control over agreements and consent orders and for it to scrutinise settlement agreements, the object in each case to ascertain and make a determination whether the terms thereof are appropriate so as to be accorded the status of an order of the court. It is however important to stress that the court's role is of a discretionary nature which should be exercised in light of all the relevant considerations including the benefits which the granting thereof may hold for the parties, and the general judicial policy favouring settlement. Each matter should be considered on its own merits. What it requires the court to do is*

[9] 2013 (6) SA p52 at para 41

to attempt to strike a balance between the different considerations relevant to the exercise of its discretion."

30. Further thereto, the Court stated that*: "…Nevertheless, while there are weighty reasons why a court may not apply exacting scrutiny to the terms of a proposed order at the time of the divorce action, the fact remains that the court is vested with a discretion and may insist that the parties effect the necessary changes to the proposed terms as a condition for the making of the order. The institutional interests of the court are not subordinate to the wishes of the parties."*[10]

(Own underlining)

31. Parties can agree to the payment of spousal maintenance, however, the issue that will arise by virtue of the SCA's judgment is *inter alia* the stage at which such an agreement can be reached.

32. In the matter of **AM v HM (CCT95/19) 2020 (8) BCLR 903 (CC)** it has already been decided that parties can only enter into an agreement which pertains to patrimonial aspects of the marriage, including spousal maintenance, in contemplation of a divorce action. [11]

33. The prenuptial agreement in *casu* specifically refers to *"lifelong maintenance between spouses."*

[10] 2013 (6) SA p56 at para 47
[11] AM v HM (CCT95/19) 2020 (8) BCLR 903 (CC) para 33.

34. The SCA's judgment in the matter *in casu* ousted the Court's discretion under both Section 7(1) and 7(2) and proclaimed that a prenuptial agreement, in essence relating to issues of "maintenance" should be enforceable, many years thereafter, and in the event of a divorce.

35. The permissibility of allowing an agreement containing "spousal maintenance" to be enforceable on the basis of specific performance creates uncertainty, is not in the interest of justice, and creates a precedent prejudicial to the general public.

CONFLICTING LEGAL PRINCIPLES:

36. It was confirmed by the above Honourable Court in the matter of ***AM v HM*** supra, that an agreement not signed or entered into in contemplation of a divorce action, would be unenforceable and furthermore held that the agreement was the wife's "*insurance policy"* to allay her fears of insecurity in the event of *"a divorce"* some time in future.

37. In the matter in *casu*, the agreement was entered into prior to the marriage and certainly with no anticipation of any divorce action, clearly to allay the Respondent's fears of insecurity in the event of "a divorce" some time in future.

38. The agreement in *casu* refers, in its preamble, to the specific condition that the agreement shall only find application in the event of dissolution of the marriage by death or through divorce.

39. The court *a quo* in the matter *in casu* held [12] that the matter of ***HM v AM*** is not applicable.

40. However, the findings of the SCA in the matter *in casu* entails that an agreement which pertains to the patrimonial aspects of a marriage, or spousal maintenance, entered into prior to the marriage, which agreement is to take effect upon dissolution of the marriage, is enforceable, if defined as a “donation”.

41. However, this honourable Court confirmed that an agreement which pertains to the patrimonial aspects of the marriage, or an agreement regarding maintenance, entered into during the marriage, is not enforceable unless entered into in contemplation of divorce.

AD DISTINGUISHABLE CASELAW APPLIED:

42. The court *a quo* placed significant reliance on the judgment of **Odgers v De Gersigny 2007 (2) SA 305 (SCA)** wherein specific emphasis was placed on the following:

[12] At para 11 of the judgment to which this application pertains.

42.1. There is no bar to agreeing on the duration and extent of the payment of maintenance.[13]

42.2. Everybody may bind his estate, by contract, no less firmly than by will[14], to pay maintenance after his death. [15]

43. The court a quo erred in applying the principles confirmed in the matter of ***Odgers v De Gersigny 2007 (2) SA 305 (SCA)*** and the following is to be considered in respect of the Odgers matter:

43.1. The parties, on 21 January 1998, "*had concluded a written deed of settlement which was intended to be incorporated into the decree of divorce.*"[16]

43.2. The parties were ultimately divorced less than two months later, without incorporating the settlement agreement in the divorce order.

43.3. The enforceability of the settlement agreement was not in dispute, as the parties abided thereby.

44. Therefore, the distinguishing factors are furthermore *inter alia* the following:

44.1. The prenuptial agreement in *casu* was entered into prior to the parties concluding the marriage.

---

[13] Volume 2 of the record, pg 154, para 12.
[14] The statement by the court a quo is patently incorrect, as no contract can restrict a testator's testamentary freedom, but is not discussed herein, as it does not relate to the crux of the appeal.
[15] Volume 2 of the record, pg 154, para 13.
[16] Odgers v De Gersigny 2007 (2) SA 305 (SCA) at para 1.

44.2. The prenuptial agreement in *casu* was not concluded in contemplation of a divorce action

44.3. The agreement in the Odgers matter was concluded in contemplation of a divorce, whilst having had all the facts and circumstances relevant to such obligation within the parties' knowledge, and at the time when the divorce action was pending, and have agreed to be bound thereto, in light of the relevant information.

AD *CONTRA BONES MORES*:

45. The judgment of the court *a quo* makes no reference to the matter of **ST v CT 2018 (5) SA 479 (SCA)** or the matter of ***W v H 2017 SA 196 (WCC)***[17] despite the fact that the High Court's judgment placed significant reliance thereon.[18]

46. With reference to the matter of ***ST v CT 2018 (5) SA 479 (SCA)*****,** on the strength of the High Court judgment in ***W v H 2017 SA 196 (WCC),*** the principle was confirmed that parties cannot contract in respect of maintenance prior to marriage, and as such the High Court was correct in declaring the waiver of maintenance to be unenforceable.

47. Although this particular case does not pertain to the waiver of maintenance, the principles which the High Court relied on in declaring the waiver clause in the antenuptial contract unenforceable, are equally applicable in the case at hand.

[17] The court a quo judgment of ST v CT 2018 (5) SA 479 (SCA).
[18] Volume 1 of the record, pg 71, para 10 of the judgment of the High Court.

48. It is trite that any purported ouster of the jurisdiction of the court which deprives a party of a legal right or remedy is *per se* against public policy.

49. If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the courts of justice for any future injury or wrong committed against him, there would be a good ground for holding that such an undertaking is against the public policy.[19]

50. The court ***a quo's*** finding that the prenuptial agreement should be regarded as a contract in terms of which specific performance is to be given effect, deprives the Applicant of the right to the legislative protections afforded in *inter alia* Section 7 and Section 8 of the Divorce Act 70 of 1979, as well as those rights provided for in the Maintenance Act 99 of 1998. [20]

51. An agreement in respect of maintenance, concluded prior to the conclusion of the marriage, be it a waiver thereof or an agreement to maintain, is offensive because it purports immutably to waive the Applicant's future rights at a time when the Applicant could not have known what the parties' financial position would be, on dissolution of the marriage.[21]

---

[19] See para 23 & 24 of W v H 2017 SA 196 (WCC).
[20] See section 1 of Act 99 of 1998 wherein 'maintenance order' is defined as "*any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person;"*
[21] See para 31 of W v H 2017 SA 196 (WCC).

52. The differences between the matter of ***ST v CT*** supra and this matter is that the court *a quo* stated, contrary to the finding of ***ST v CT***, that:

52.1. Section 7 of Act 70 of 1979 does not find application.

52.2. That the agreement is purely contractual in nature.

52.3. That the Court does not have an overriding discretion, nor a duty to serve the interests of the parties, in a divorce action.

53. Whilst the similarities in the matter of ***ST v CT***, and the matter at hand are that:

53.1. Both agreements were concluded prior to the parties entering into the marriage.

53.2. Both agreements governed the financial consequences of the parties, upon dissolution of the marriage.

53.3. Both agreements dealt with the aspect of maintenance, upon dissolution of the marriage.

53.4. Both agreements were concluded without the parties contemplating a divorce action at the time of entering into the agreements.

54. There are strong similarities between the judgment of ***ST v CT*** and the judgment of the Supreme Court of Appeal in the matter in *casu.* However, the difference turns on the fact that the SCA termed the agreement in *casu* as an executory donation without regard to the substance of the agreement. The parties in *casu* elected to describe the monthly payments as Spousal maintenance, leaving no

doubt to the substance. The other conditional “donations” may very well also resort under maintenance.

55. With reference to ***ST v CT*** cited supra, the High Court in *casu* correctly stated that:

[193] The court proceeded to formulate a two-stage process in assessing whether to give effect to the pre-existing spousal-support agreement. At stage 1 the court considers the circumstances prevailing when the agreement was negotiated to determine whether there is any reason to discount it (a power imbalance, oppression, other conduct falling short of unconscionability, the duration of negotiations, the presence or absence of professional advice, the extent to which the agreement at the time of its conclusion was in substantial compliance with the objectives of the Divorce Act). At stage 2 the court assesses the extent to which the agreement still reflects the original intention of the parties and the extent to which it is still in compliance with the objectives of the Divorce Act. A certain degree of change is always foreseeable by spouses when they conclude an agreement, leading the majority to say the following

'Although we recognise the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their ow n lives. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts

them at odds with the objectives of the Act, that the court may be persuaded to give the B agreement (the prenuptial) *little weight.'"*

56. It was further reiterated in the matter of ***W v H***, with reference to the decision in ***Schierhout v Minister of Justice 1925 AD 417***, wherein it was held that if the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the courts of justice for any future injury of wrong committed against him, there would be a good ground for holding that such an undertaking is against the public law of the land.

57. However, this finding was not followed by the Court *a quo,* as the SCA stated that a Court "*owes no such duty to the parties*"[22], therefore, to ensure that their best interests are served during divorce proceedings.

58. If the findings of the court *a quo* are not overturned it would lead to uncertainty in law, in matters whereby the parties can agree to financial consequences of their divorce, prior to marriage, whether there is a registered antenuptial contract or not, and thereby ousting judicial oversight, as long as it can be labelled a commercial contract.

59. In conclusion, with reference to the matter of ***W v H*** cited supra, it is submitted that the following needs to be taken cognisance of:

[22] Para 12 of the Court a quo's judgment.

[155] As far as pacta sunt servanda is concerned, I am fully aware of this principle and I accept that it is one which is I frequently applied in commercial contracts and contracts of service, etc. However, as I have indicated, an ANC is a contract which is sui generis. Any pacta that finds its way into an ANC will always be subject to the test of public policy because ANCs are unique in the sense that they can only be executed in a prescribed manner and in a prescribed form because this is the very foundation of a contract of marriage. The legislator and our courts have consistently monitored contracts of this nature. It is not helpful to refer to commercial contracts or to import the findings of the courts in those cases into ANCs as if ANCs stand on the same footing."

AD CONCLUSION AND ORDER PRAYED FOR:

60. Consequently, the Honourable Constitutional Court will be requested to grant the Applicant leave to appeal, and furthermore to uphold the appeal, with a consequential amendment of the order granted by the SCA.

61. The Respondent should be ordered to pay the costs.

DATED AT PRETORIA ON THIS THE 3RD DAY OF APRIL 2023.

Adv. R. Ferreira

Adv. A. Koekemoer

Counsels for the Applicant

TABLE OF AUTHORITY TOGETHER WITH PAGE OF CITATION IN WRITTEN ARGUMENT ABOVE

Cases