REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**

DATE SIGNATURE

Case Number: **A5045/2017**

In the matter between:

J G Appellant

And

J G Respondent

JUDGMENT

FISHER J, (MAUMELA J & MAIER-FRAWLEY AJ CONCURRING):

INTRODUCTION

[1] This is an appeal against a judgment of Van Oosten J handed down in relation to a separated issue in the divorce action which prevails between the parties. The appeal is with the leave of the SCA.

[2] The issue determined by the learned Judge *a quo* was a dispute in relation to the matrimonial property regime which applies to the marriage of the parties.

FACTS AND DISCUSSION

[3] The parties are married out of community of property. The antenuptial contract executed by the parties and duly notarized and registered reflects an agreement that the accrual system apply. This is by virtue of the operation of section 5 of the Matrimonial Property Act which provides that the accrual system applies to every marriage out of community of property, except in so far as that system is expressly excluded by the antenuptial contract. There being no express exclusion of the accrual system in the antenuptial contract in issue, the default position set out in section 5 operates.

[4] The appellant, Mr G claims that this failure to exclude the accrual system came about by mistake. He says that the intention of the parties in signing the antenuptial contract was to exclude the accrual system. He explains that the instructions given to the attorney who drafted the antenuptial contract were that the accrual system not apply. Mrs G the respondent denies this. She says that it was at all times her understanding that the marriage would be out of community of property with the inclusion of the accrual system.

[5] In light of this departure in the parties' versions of the property regime applicable to the marriage, Mr G pleaded a case of rectification in respect of the antenuptial contract. He asked that the contract be amended to expressly exclude

the accrual system. It is this case that was adjudicated as a separate issue by the learned Judge *a quo.*

[6] In order for Mr G to succeed in his claim for rectification he had to show that the common intention of the parties was that the accrual system not apply to their marriage. The learned Judge *a quo* found that he had not established this.

[7] Mr G testified that, when the parties met, he was practising as a "junior accountant". Mrs G was a widow. She had been married to her late husband with the accrual system. She had inherited her late husband's estate which comprised a number of video shop businesses and other interests.

[8] Mr G testified that, at the stage that the parties decided to get married, both of them had business interests in companies and trusts. He testified that it was because of these interests that the parties made the decision to marry out of community of property without the application of the accrual system. Mrs G on the other hand stated that she always understood that the marriage was to be in terms of the accrual system. She testified categorically that she would never have agreed to marry on the basis of any other property system.

[9] The learned Judge *a quo* in his judgment sets forth a detailed evaluation of the evidence of all the witnesses who testified, being the parties and Ms Geyser, the attorney who drew up the antenuptial contract and attended to its notarization and registration.

[10] After such evaluation he reaches the conclusion that both the parties were truthful witnesses. It is accepted by him that Mr G intended to marry without the accrual system. It is accepted also that Mr G instructed Ms Geyser to draw the contract on the basis of an exclusion of the accrual system and that a mistake in her office led to the document being framed as reflecting a marriage out of community of property without the accrual system being specifically included.

[11] He accepted also however that, on all the evidence, Mrs G did not understand that she was entering into a marriage which was without the accrual system. The testimony of Ms Geyser does not contradict this as the thrust of her evidence was

that she was instructed by Mr G and assumed that he was conveying the instructions of Mrs G.

[12] Mr Wannenberg, for Mr G, argued in the appeal that the probabilities favoured the finding that the parties intended to enter into a marriage excluding the accrual system. He pointed to the fact that the parties both had relatively substantial estates when they decided to marry and that this pointed to a likelihood that they would marry in a way that kept their estates separate. Mrs G however explained that her estate was comprised to a large extent of the inheritance from her late husband and that she understood that this was excluded from any accrual calculation in any event.

[13] It was not disputed that Mr G had taken control of the process of having the antenuptial contract drawn up and that he was generally dominant in handling the parties' finances. Mrs G also indicates that she contributed substantial resources to the growth of the estates in that she invested amounts in improving the property at the Vaal on which the parties lived and conducted the business of letting out cottages which were constructed thereon. She makes the point that she would not have done so had she believed she would not share in the enterprise.

[14] Mr Wannenberg sought to make much of a statement of assets provided to ABSA, which revealed that the parties were married without the accrual system. The explanation of Mrs G as to the fact that she signed this document was that she accepted that it had been filled out correctly by Mr G . This was accepted by the learned Judge *a quo* as truthful.

[15] What concerned the learned Judge a quo was the lack of detail and clarity in the evidence of Mr G in relation to the agreement which he relied on. In contrast Mrs G was categorical in her evidence to the effect that she would never even have contemplated marrying without the accrual.

CONCLUSION

[16] To my mind, the learned judge's evaluation of the evidence cannot be faulted and neither can the conclusion reached by him in relation thereto.

[17] Added to this is the generally accepted principle that an appeal court will be slow to disturb credibility findings made by a trial court who has had the benefit of seeing, hearing, and evaluating the witnesses (see *Estate Parry v Murray* 1961(3) SA 487 (T) at 488 C- F).

COSTS

[18] As to costs, I am reluctant to award costs of the appeal against Mr G. This is because of the finding that the parties were both honest in their understanding of the contract and that, in essence, they were operating at cross purposes. Given the nature of the dispute – being matrimonial - there is scope for departing from the usual approach to costs. It seems to me that the separated issue at hand is central to the entire divorce and thus should be treated as part of the entire cause. I note also that the learned Judge *a quo* took the same approach in relation to the costs. Accordingly, to my mind, a fair order would be that the costs be in the cause.

ORDER

[19] In the circumstances, I make the following order:

a. The appeal is dismissed.
b. The costs of this appeal are in the cause of the action for divorce.

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FISHER J

HIGH COURT JUDGE

GAUTENG DIVISION, JOHANNESBURG

I concur,

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MAUMELA J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur,

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MAIER-FRAWLEY AJ

ACTING JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 10 October 2018.

Judgment Delivered: October 2018.

APPEARANCES:

For the Appellant	**:** Adv WF Wannenburg
Instructed by	**:** Esthe Muller Inc.
For the Respondent	**:** Adv J Vermaak-Hay
Instructed by	**:** Leany Attorneys Inc.