IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU–NATAL LOCAL DIVISION, DURBAN

CASE NO: 4181/2014

In the matter between:

H B Plaintiff

and

S B Defendant

ORDERS

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[1] A decree of divorce.

[2] An order that the plaintiff and the defendant shall remain co-holders of full parental responsibilities and rights in respect of the minor children, namely:

[2.1] A B, a girl, born on […] June 2006; and

[2.2] S B, a boy, born on […] May 2009.

[3] An order that the minor children's primary place of residence shall be with the plaintiff.

[4] An order that the defendant shall be entitled to exercise contact with the minor children at all reasonable times.

[5] An order directing the defendant to:

[5.1] pay to the plaintiff maintenance for the minor children at the rate of R 4 000.00 per month, per child, payable on or before the first day of every month;

[5.2] pay one half of the monthly premiums to retain the minor children as beneficiaries of the plaintiff's current medical aid scheme;

[5.3] pay one half of all reasonable non-elective medical expenses for the minor children which are not covered by the aforementioned medical aid plan;

[5.4] pay one half of all the reasonable educational expenses of the minor children, such to include but not to be limited to educational fees, books, stationery, school uniforms, school clothing, aftercare fees, extra lessons, school subscriptions and insurances and agreed extra mural activities.

[6] In respect of the defendant's accrual claim the plaintiff is directed to pay to the defendant the sum of **R 1 259 899, 35.** within 120 days of the date of this order. In terms of s 10 of the Matrimonial Property Act the plaintiff is granted leave to make application for the deferral of such payment, subject to whatever conditions the court deems appropriate. The application for the deferral of such payment is to be brought within 30 days of the date of this order.

[7] Costs

[7.1] The Rule 43 application

The plaintiff is liable for the costs in respect of the Rule 43 application from December 2013 up to and including 3 April 2014. These will include the reserved costs. The remainder of the costs of the Rule 43 application are to be paid by the defendant. In respect of these costs, the limitations imposed by Rule 43(7) and (8) do not apply.

[7.2] Rule 43(6) application

Each party is directed to bear their own costs occasioned by such application.

[7.3] The application to compel further particulars.

In respect of the application to compel further particulars, as agreed, the defendant is to bear the costs of such application.

[7.4 The interdict application of 1 September 2017

The defendant is directed to pay the costs of such application.

[7.5] The Rule 33(4) application

The defendant is directed to pay the costs of such application.

[7.6] Divorce action

The defendant is directed to pay the costs of the divorce action.

JUDGMENT

HENRIQUES J

Introduction

[1] This is a divorce action in which the only issue for determination is the defendant's counterclaim for an amount equal to one half of the difference between the accrual of the estate of the plaintiff and the accrual of his estate and the costs of the litigation between the parties.

[2] I am indebted to the parties for the detailed heads of argument filed and the authorities handed up. In addition, I apologise for the delay in the delivery of the judgment in the matter. The parties are aware, as is the office of the Chief Justice, the Judge President and the Deputy Judge President of the predicament that I find myself in, insofar as not having a registrar permanently assigned to me. So as to set out how the parties eventually defined the issues, I borrow freely from Mr Humphrey's heads of argument.

The pleadings

[3] It is common cause that:

[3.1] the plaintiff and the defendant are married to each other out of community of property, with accrual sharing, such marriage being concluded at Durban, on 21 June 2003;[1]

[3.2] there are two minor children born of the marriage between the parties, A B, a girl, born on […] June 2006 and S B, a boy, born on […] May 2009;[2]

[3.3] the marriage relationship between the parties has irretrievably broken down, and they are both desirous of being divorced from one another.

[4] In the plaintiff's particulars of claim dated 3 March 2014, she sought the following relief:

[4.1] a decree of divorce;

[1] Paragraph 3 of the particulars of claim.
[2] Paragraph 5 of the particulars of claim.

[4.2] an order that the parties remain co-holders of full parental responsibilities and rights in respect of the minor children;

[4.3] an order that the primary place of residence of the minor children be with her;

[4.4] an order entitling the defendant to maintain reasonable rights of contact to the minor children;

[4.5] an order directing the defendant to pay maintenance to her at the rate of R15,000.00 per month for a period of three years from the date of divorce;[3]

[4.6] an order directing the defendant to pay maintenance to her for the minor children at the rate of R15,000.00 per month per child;[4]

[4.7] an order directing the defendant to pay all of the medical and allied expenses incurred in respect of the plaintiff and the minor children;

[4.8] an order directing the defendant to pay all of the minor children's educational and allied expenses incurred;

[4.9] an order directing the defendant to pay to the plaintiff an amount equal to one half of the nett value of the difference between the accrual in the estate of the defendant and the accrual in the estate of the plaintiff.[5]

[5] In defence of the divorce proceedings, the defendant instituted a claim-in-reconvention, in which he also sought a decree of divorce and an order similar to

[3] Paragraph 9 of the particulars of claim.
[4] Paragraph 9 of the particulars of claim.
[5] Prayer 7 of the particulars of claim.

that as claimed by the plaintiff in respect of the exercise of the parties' parental responsibilities and rights of care of and contact to the minor children.[6]

[6] In addition, the defendant tendered to contribute towards the minor children's maintenance costs and expenses, by paying:

[6.1] maintenance to the plaintiff for the minor children at the rate of R4,000.00 per month per child, with such amount to be payable on or before the first day of each month in advance;

[6.2] one half of the monthly premiums to retain the minor children as beneficiaries on the plaintiff's medical aid benefit scheme;

[6.3] one half of all of the reasonable non-elective medical expenses of the minor children which are not covered by the said medical aid scheme;[7]

[6.4] one half of all of the reasonable educational and allied expenses incurred in respect of the minor children.

[7] Based upon an oral agreement concluded between the parties, the defendant sought the following relief. An order directing the plaintiff to pay to him:

[7.1] any amount outstanding to Investec, in respect of the mortgage bond registered against the plaintiff's immovable property situate at […], Mount Edgecombe Estate ('the M property');

[6] Prayers 2, 3 and 4 of the claim-in-reconvention.
[7] Prayer 5 of the claim-in-reconvention.

[7.2] any amount outstanding to SA Home Loans in respect of the mortgage bond registered against the defendant's immovable property situate at […], La Lucia;

[7.3] the sum of R500,000.00, plus interest thereon at prime less 2% from 20 January 2010 until date of final payment.[8]

[8] In respect of his patrimonial claim, the defendant sought an order directing the plaintiff to pay one half of the difference between the accrual in her estate and the accrual in his estate.[9]

[9] Two amendments were effected to the plaintiff's particulars of claim, the first in March 2017, and the second on 29 September 2017, a few weeks before the commencement of the trial in the matter. In the March 2017 amendment, the plaintiff sought additional relief, as provided for in s 9 of the Matrimonial Property Act, No. 88 of 1984 ('the MPA').

[10] In this regard the plaintiff sought an order that in the event of it being established that her estate had increased by more than the defendant's estate, having regard to the defendant's misconduct during the marriage, the circumstances leading to the breakdown of the marriage, and the duration of the marriage, the defendant would be unduly benefited if an order were not made in terms of s 9 of Act 70 of 1979[10] that the defendant forfeits the benefits of the marriage according to the accrual system.[11]

[11] The defendant amended his claim-in-reconvention during March 2017. The effect of this amendment was to withdraw the claim in respect of the oral agreement and the amounts owing to him. This was as a consequence of the fact that the

[8] This was pleaded by the defendant in his original claim-in-reconvention delivered in 2014.
[9] Prayer 6 of the defendant's claim-in-reconvention.
[10] The Divorce Act.
[11] Prayer 8 of the plaintiff's amended particulars of claim.

immovable property in question, situate at […], Mount Edgecombe ("the M property") had already been sold, and the balance of what was still owing to the defendant would be dealt with as part of the accrual claim.

[12] In the notice of amendment dated 29 September 2017, the plaintiff amended her particulars of claim to introduce a claim in respect of an oral agreement, in terms of which she alleged that the plaintiff and the defendant agreed that her property at […] B, Mount Edgecombe Country Club Estate ('the B property') would be treated as an excluded asset for the purposes of the accrual calculation.[12]

[13] The trial was set down for hearing from Monday, 23 October 2017 to Wednesday 25 October 2017. Prior to the trial commencing, the plaintiff's legal representatives informed the defendant's legal representatives that the plaintiff would no longer be pursuing:

[13.1] her claim for spousal maintenance;

[13.2] her claim for maintenance in respect of the minor children as pleaded by her in her particulars of claim;

[13.3] her claim in terms of Chapter 1 of the MPA, that the defendant be directed to pay to her an amount equal to one half of the nett value of the difference between the accrual of each of the parties' estates;

[13.4] her claim in respect of the alleged oral agreement concluded with the defendant, that the B property would be treated as an excluded asset for the purposes of the accrual calculation;

[12] Paragraphs 12A to 14 of the Plaintiff's amended Particulars of Claim.

[13.5] her claim in terms of s 9 of the MPA, that the defendant be ordered to forfeit the patrimonial benefits of accrual sharing.

[14] It had been agreed to and recorded in the minute[13] of the Rule 37 conference, the plaintiff had the duty to begin adducing evidence. However, with the withdrawal of all of her claims, it now fell upon the defendant to present his case, and he had the duty to begin adducing evidence.

[15] At the commencement of the trial, the parties indicated that there was no agreement on the status of the documents and they 'are what they purport to be without proof of the contents'. This meant that the authenticity of such documents needed to be proved when determining the value of the estates of the respective parties.

Issues for determination

[16] As there was common cause relief sought by both parties, the remaining two issues which had to be decided by this court were:

[16.1] whether the plaintiff's estate has accrued to a greater extent than the estate of the defendant, and if so, the amount payable by the plaintiff to the defendant in satisfaction of his accrual claim;

[16.2] who should pay the costs of the proceedings.

[17] It is the defendant's case that the estate of the plaintiff has shown a greater accrual than his and despite the fact that the plaintiff was employed, such accrual is largely as a consequence of his employment and the contributions he made thereto

[13] Minute of Rule 37 conference held on 8 March 2017.

and for these reasons he seeks to be paid an amount equal to one half of the difference between the accrual of his estate and that of the estate of the plaintiff.

The litigation between the parties

[18] It is necessary given the history of the litigation between the parties and which will become relevant for the issues of the costs, to set out in brief the interlocutory applications that preceded the hearing of the divorce action[14].

[19] On 10 December 2013, the plaintiff instituted proceedings in terms of Rule 43[15]. Essentially, the plaintiff sought orders directing the defendant *pendente lite* to pay all educational and medical costs incurred by the plaintiff for the minor children and the sum of R42 850.00 per month with effect from 1 December 2013.

[20] The respondent opposed the Rule 43 application and filed an answering affidavit on 2 January 2014. A supplementary sworn statement was served and filed by the plaintiff and on 20 January 2014, when the matter served before Nkosi J, a consent order was taken which adjourned the application to 10 February 2014. The order in addition, granted both the plaintiff and the defendant leave to supplement their papers and also directed the defendant to provide the plaintiff with copies of all documents supporting payment of the expenses referred to in his sworn reply as well as all financial statements and management accounts of Absolute Return Partners LLP. On 13 February 2014, the matter was adjourned to 21 February 2014 by consent with costs reserved. On 21 February 2014, the matter was adjourned *sine die* by consent with no order as to costs.

[21] On 19 March 2014, the opposed Rule 43 application had been enrolled for hearing. Ploos Van Amstel J declined to hear the matter and adjourned the application on the basis that it may not be set down again until the divorce action had been instituted and served on the defendant. On 26 March 2014, Ploos Van Amstel J provided written reasons for the orders which he delivered. Although same is a matter of record, it is necessary to deal with the reasons.

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[14] Under case no: 4181/2014.
[15] Under case no: 13702/2013.

[22] The plaintiff had instituted Rule 43 proceedings on the basis that divorce proceedings were currently pending before the court. It is common cause that, that was not the position, and there was no divorce action pending before the court at the time that the Rule 43 application was instituted or adjourned. As a consequence, the court was of the view that the matter was not properly before the court in terms of Rule 43. The Rule 43 application was adjourned on the basis that it may not be enrolled again until the divorce action had been instituted and papers served on the defendant.

[23] It is common cause that on 3 April 2014, the particulars of claim and the divorce summons were issued by the court although the particulars of claim were signed on 31 March 2014. The return of service reflects that on 8 April 2014 the summons and particulars of claim were served on the defendant by effecting service on his then attorneys, Barkers Attorneys.

[24] Subsequently and on 25 April 2014, the opposed Rule 43 application served before Ploos Van Amstel J and orders were issued *pendente lite*. The orders in essence directed the defendant to retain the minor children on his medical aid scheme and pay all premiums in respect of their membership of the medical aid scheme and all medical expenses not covered by such medical aid, to pay all the educational costs reasonably incurred by the plaintiff for the minor children, to pay the reasonable necessary monthly expenses relating to the immovable property at M Drive, and to collect all rental received from such property, to pay to the plaintiff R 30 000.00 per month in respect of maintenance for herself and the minor children. It was also recorded that the costs of the application were reserved for decision by the trial court and the limitations imposed by Rule 43(7) and 43(8) would not apply.

[25] In December 2014, the defendant instituted the Rule 43(6) proceedings. This was based on an alleged reduction in the plaintiff's monthly expenses due to the registration of transfers arising from the sale of the M property and the purchase of the B property. The net effect of this was that the plaintiff would no longer be paying rental and thus her expenses decreased, and she was by this stage employed. The plaintiff filed a sworn reply to same agreeing to a reduction in the monthly amount

the defendant was to pay in respect of maintenance *pendente lite* in respect of her and the children. It is common cause that the Rule 43(6) application was never enrolled for hearing, the parties having resolved this variation between themselves. The plaintiff has also not sought to enforce compliance with the court order of 25 April 2014 insofar as it relates to the monthly cash payment the defendant was ordered to pay.[16]

[26] On 28 April 2017, the divorce action was consolidated with the Rule 43 proceedings under case no: 13702/2013 by order of Madondo DJP. On 18 May 2017, the trial in the matter was enrolled for hearing from 23 to 25 October 2017.

[27] In preparation for trial, various pre-trial procedures were complied with in terms of Rules 35, 36 and 37 of the Uniform Rules of Court. On 1 September 2017, the plaintiff instituted an urgent application and obtained a rule *nisi* calling upon the defendant to show cause on 19 September 2017, why an order in the following terms should not be granted:

> '[1.1] the respondent be and is hereby interdicted from disposing of, alienating or encumbering his 5% interest in Absolute Return Partnership LLP without the applicant's written consent or leave of the court;
>
> [1.2] the interdict aforesaid is to operate *pendente lite* until finalisation of the divorce action between the parties instituted by the applicant under case no: 4181/2014;
>
> [1.3] the respondent is directed to pay the costs of this application.'

[28] Pending the return date the plaintiff obtained an order in terms of paragraph [1.1] with immediate effect in terms of which the defendant was interdicted from disposing of his five percent (5%) interest in Absolute Return Partnership LLP. Such application was opposed by the defendant and a replying affidavit was filed by the plaintiff.[17]

[29] On 19 September 2017, when the matter served before Olsen J, an order was

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[16] This is despite the email exchange between them in this regard contained in Exhibit L.
[17] It was the first time that the purchase and sale agreement relating to his interests had been made available and the audited financials of 31 August 2017.

taken by consent adjourning the application to 23 October 2017, to be dealt with by the court hearing the divorce trial. The rule was extended to that date and costs were reserved for the court determining the trial of the matter. The trial of the matter then proceeded on 23 to 25 October 2017 and was adjourned for hearing from 14 to 16 November 2017.

[30] In the interim, after the matter was adjourned, and on 1 November 2017, the defendant instituted an application in terms of Rule 33(4) of the Uniform Rules of Court in terms of which he sought orders that the decree of divorce and the relief relating to the defendant's maintenance obligations in respect of the minor children be separated from the determination of the accrual claim and the issue of costs. Such application was opposed by the plaintiff.

The Evidence Presented at the Trial

[31] Various exhibits were handed in during the course of the trial which are a matter of record. I will only refer to certain of these insofar as they are relevant to the calculation of the accrual. These exhibits and values were updated during the course of the trial.[18] Only the defendant testified in support of his counterclaim. His evidence related to the values he attached to the assets and liabilities of himself and the plaintiff and what was contained in the exhibits.

[32] The plaintiff elected not to testify and confined herself to cross-examination of the defendant. In addition, the plaintiff called two witnesses Andrew Jackson, the purchaser of the M Road property and Kerry-Anne Donachie, a recoveries consultant at Investec bank. In light of the fact that the plaintiff did not testify, the admissions[19] elicited from the defendant during cross-examination become relevant for purposes of challenging the defendant's claim to the accrual and the values he attached to the assets and liabilities of the parties.

[33] At paragraph 14 Gorven held the following:

[18] Exhibits A to G

[19] *B v B* (700/2013) [2014] ZASCA 137 (25 September 2014) at paragraph 13. Gorven AJA writing for the court referred to *S v W* 1963(3) SA 516 (A) and *Nkuta v Santam Assuransie Maatskappy Bpk* 1975 (4) SA 848 (A).

> 'The thrust of these cases cannot be avoided by the defendant in these circumstances. The assertions of the defendant, as put by his counsel during cross-examination, amounted to 'unequivocal' admissions.'

[34] Although forming part of the common cause relief, the defendant testified regarding the contact he had with the minor children prior to returning to South Africa. He has since September 2017 relocated permanently to South Africa, where he resides with his mother at La Lucia. He sees the children almost every day and watches their activities after school and exercises his contact with them on Wednesday evening and every second weekend.

[35] He returned with his fiancé, L S, who is a New Zealand citizen and is presently in South Africa on a three month tourist visa. The only other way for her to be in South Africa is on a spousal visa but they are unable to get married given the fact that he is still married to the plaintiff. It is given that her visa expires on 22 December 2017, he initiated the rule 33(4) application. This is despite the fact that he testified he intends to return to the United Kingdom to finalise matters there.

[36] I will return to the evidence of the defendant when dealing with the determination of the value of the assets and liabilities.

<u>Preliminary issue relating to admissibility of the defendant's evidence and the documents referred to</u>

[37] Shortly after the defendant had commenced testifying, a preliminary issue arose in relation to the jointly owned London property, referred to as the F property, an objection was raised to his evidence. Although it arose at this point in his evidence, it also had a bearing on the admissibility of the evidence which the defendant was to tender in respect of what he said the values of individual items his estate and that of the plaintiff were. Much of the evidence to be tendered by the defendant in relation thereto would be hearsay evidence and the truth of the contents of the documents relied on would have to be proved.

[38] The plaintiff had served and filed expert notices and valuations from 3 London

estate agents reflecting what the value of the property was and the recommended values at which the property should be marketed.[20] Neither party called these witnesses to testify. It was submitted on behalf of the defendant by his counsel that the costs of calling such witnesses was prohibitive.

[39] The parties presented argument in relation to the admissibility of the evidence. Mr Humphrey, who appeared for the defendant argued that the evidence was not hearsay as the reports of the estate agent were discovered by the plaintiff and she had filed notices in terms of Rules 36(9)(a) and (9)(b). All the defendant was going to do during the course of his evidence was to refer to these. He submitted, consequently, that this is not hearsay and thus admissible, alternatively, in the event of the evidence constituting hearsay then he made application in terms of the provisions s 3(1)(c) of the Law of Evidence Amendment Act[21] arguing that it was in the interests of justice and just and equitable to allow the hearsay evidence to be admitted.

[40] In respect of his submissions, he relied on the decision in *MB vs DB*[22] a decision of Lopes J, subsequently confirmed by the Supreme Court of Appeal.

[41] Mr Stokes, who appeared for the plaintiff, submitted that the evidence was hearsay. It was evidence of a third party not evidence of the plaintiff or the defendant. He submitted further that whilst it is true that the plaintiff served and filed the notices in term of Rule 36(9)(a) and (9)(b), it did not change the makeup of the evidence tendered or the fact that the evidence was hearsay, it was evidence of a third party. It was thus inadmissible. He submitted that the decisions relied on by Mr Humphrey were not applicable, as the facts in *MB v DB* were different. He argued that what distinguishes it from the current matter was the fact that in *MB v DB* the documents relied on were documents which the defendant had discovered, these were his own statements some of which he had signed and submitted to the Receiver of Revenue.

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[20] Fergus Purtill of Ellisons valued and recommended £920 000, Graeme Gordon of Brinkleys valued at £900 000 but recommended it being marketed at £925 000,Lucy Barnes of Kinleigh, Folkard and Hayward valued at between £880 000 and £900 000 and recommended it being marketed at £925 000.
[21] 45 of 1988.
[22] 2013 (6) SA 86 KZD.

[42] In fact, what Mr Stokes submitted was that in *MB v DB* this was the defendant's evidence and his documents and he elected not to testify. This was the distinguishing feature of this matter and consequently, the decision in *MB v DB* was distinguishable. After hearing argument in the matter, I ruled the evidence hearsay and thus inadmissible. It was also not admissible in terms of s 3(1)(c) of the Law of Evidence Amendment Act. The defendant could testify as to what the values reflected in the reports were but he could not testify about matters not within his knowledge, specifically, comparable sales in the area and the number of properties in the vicinity.

[43] In addition, I indicated that my reasons for such ruling would follow. These are the reasons.

The Legal Position

[44] Hearsay evidence means 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'. In *Estate De Wet v De Wet*[23], Watermeyer J defined hearsay evidence as follows:

> 'Evidence of statements made by persons not called as witnesses, which are tendered to prove the truth of what is contained in the statement.'

[45] Hearsay evidence is inadmissible. However, there are certain exceptions to the admissibility of hearsay evidence and this is catered for in s 3(1) of The Law of Evidence Amendment Act. Section 3 reads as follows:

> '1. Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
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> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
> (c) the Court, having regard to –
> (i) the nature of the proceedings;

[23] 1924 CPD 341.

(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

2. The provisions of subsection (1) shall not render admissible any evidence which is admissible on any ground other than that such evidence is hearsay evidence.
3. Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the Court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify if such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.'

[46] In *MB v DB*[24] Lopes J had cause to consider the admissibility of hearsay evidence in the context of matrimonial actions. In such matter, the defendant had in terms of Rule 35 made discovery of various documents in respect of the value of his estate. The defendant then instructed Mr Duncan, an accountant, to collate the information and compile a schedule of values, which he extracted from the discovered documents. It was argued that Mr Duncan's evidence in relation thereto was hearsay and that any evidence in the schedules relating to the values was inadmissible. At para 36 of the judgment, Lopes J, was of the view that the information in the schedules relied on by Mr Duncan, were extracted by him from documents and statements made by the defendant, consequently, the schedules were not hearsay. All that Mr Duncan did was extract the information from the documents discovered.

[47] In the alternative, he found that even if the statements used by Duncan were hearsay evidence, having regard to the provisions of s 3 (1) of The Law of Evidence Amendment Act it was admissible. At para 42 of the judgment, he held the following:

> 'In the circumstances, I have no hesitation whatsoever in accepting that the defendant's discovered documents, from which Mr Duncan extracted the figures from the defendant's tax return and correctly transposed those figures onto the schedules which he produced, can be used to demonstrate his worth.'

[24] 2013 (6) SA 86 KZD.

[48] He goes on further at paragraph 43 to find as follows:

> 'It then falls upon me to place a value upon the accrual in the defendant's estate. In this regard I am mindful of the fact that where the evidence is imperfect. It is incumbent on me to do the best I can in the circumstance.'

[49] The decision of Lopes J in *MB v DB* and the approach was subsequently confirmed by the Supreme Court of Appeal on 25 September 2014 reported as *B v B* (700/2013) [2014] ZASCA 137 (25 September 2014).

[50] The evidence which the defendant would give was certainly not based on his first-hand knowledge. Inasmuch as he may have allowed the agents access to the property, his evidence was clear, copies of the valuations were emailed to the plaintiff and himself. The only conversation he appears to have had with the estate agent relates to the valuation received when the property was marketed at £825 000.00 and no offers were made. Any other evidence in relation to the reasons why the property was not sold or any offers made, were based on what he was told by the agents. This is hearsay evidence and was thus inadmissible.

[51] Having regard to 3(1)(c) and the factors the court has regard to in deciding whether or not to admit evidence in the interests of justice, submissions were advanced by the defendant as to why the estate agents could not testify. His counsel submitted that it was financially prohibitive for both the plaintiff and the defendant to incur the costs of the estate agents from London testifying in court. I was not satisfied having regard to the factors referred to that this court ought to admit the evidence in terms of s 3(1)(c). Given the fact that the defendant bears the onus to establish his accrual claim, he must do whatever is necessary to ensure that the evidence is properly before the court.

[52] If the defendant was allowed to present this evidence in terms of s 3(1)(c), the plaintiff would be seriously prejudiced. Her legal representatives would not be in a position to challenge or test this evidence in anyway as the witness was not being called. In addition, the evidence in *MB v DB* was based on the defendant's own documents and was not hearsay. This was not the position in the current matter. It was for these reasons that the evidence was ruled hearsay and inadmissible.

[53] During the course of the trial, Mr Stokes was entitled to object to the evidence as constituting hearsay and in circumstances where the contents of the documents had not been proved. This he did on a number of occasions. I further indicated that at the end of the trial, I would decide what weight to attach to the evidence.

[54] The defendant presented a schedule of updated assets and liabilities in respect of his estate and a schedule of what he submitted was an updated statement of the plaintiff's assets and liabilities.[25] These were updated during the course of his evidence.

[55] For purposes of the judgment I will refer to the schedule marked annexure A which reflects the values as presented by the defendant in his evidence.[26] By way of an email dated 21 November 2017, Mr Stokes raised no objection to the calculations being received by the court, but pointed out that in respect of annexure B which is the schedule compiled by Mr Humphrey, that no evidence was presented by the defendant in relation to the values specifically the median amounts reflected in respect of the B property.

Analysis

[56] Section 3 of the MPA provides:

> '(1)At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.
>
> (2) Subject to the provisions of section 8 (1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.'

[25] Exhibits A and B.
[26] This was forwarded under cover of an email dated 17 November 2017 by the defendant's counsel Mr Humphrey.

[57] It is trite that the defendant, who claims an accrual claim against the plaintiff, bears the onus of establishing the amount to which he or she is entitled.[27] However, a spouse who alleges that certain assets are to be excluded from the accrual in his or her estate bears the onus of proving which assets are to be excluded and why they are to be excluded.[28]

[58] Having regard to the conduct of the parties, I agree with the submission of Mr *Stokes*, that the plaintiff has played open cards with the court insofar as her assets and liabilities are concerned. There has been proper discovery and disclosure of her assets and liabilities. It was never suggested otherwise. What was suggested was that by not agreeing to values and the contents of documents she was being obstructive. The defendant has the onus to prove the amount he is entitled to and must do so based on admissible evidence.

[59] There has been no explanation as to why, the defendant, fully aware of this onus chose not to present admissible evidence. All the more so when he has been resident in the United Kingdom for 19 years and is best placed to access the documents and prove their contents. He was aware that he would have to discharge an onus. It goes without saying that there is no obligation on the plaintiff to assist the defendant in any way to discharge this onus and her unwillingness to make the defendant's life easier by agreeing to values and the contents of documents can hardly be said to be obstructive.

[60] The evidence is a matter of record and I will not repeat same but will refer to those portions when they are relevant to the findings I make. I want to however, comment on the defendant, his demeanour whilst he testified and his evidence. The defendant did not impress me as a witness. I agree with the written submissions of Mr Stokes that 'having regard to his demeanour in the witness box and the answers he provided, the defendant was malicious, dishonest, hostile, aggressive, argumentative and determined to paint the plaintiff in a bad light'. Having regard to the emails exchanged between himself and the plaintiff during the course of the

[27] MB v DB 2013 (6) SA 86 (KZD).
The Law of Divorce and Dissolution of Life Partnerships in South Africa – Jacqueline Heaton Page 98.
[28] MB v DB 2013 (6) SA 86 (KZD).

litigation, he is foul-mouthed and aggressive and at times abusive. This was not limited to the email exchanges with the plaintiff. In the witness box too, he also used foul language, specifically when he was being cross-examined by Mr Stokes, so much so that the court had to admonish him. His comments also appeared to be facetious and often malicious at times. He was not an honest witness in a number of respects and I will highlight some of these. He was clearly shown to be dishonest in relation to the negotiations which resulted in the reduction in the purchase price of the M property and the B property and was evasive and dishonest in his disclosure of his business dealings in relation to his divesture of his partnership interest in Absolute Return Partners LLP.

[61] He did not make full disclosure in relation to his interests in Kinnerton ARP Ltd as well as his interest in Absolute Return Partners LLP. His cross-examination was incomplete when the trial of the matter was adjourned in October and the defendant resumed cross-examination in November. During the intervening period he then 'discovered' documents which were relevant to his evidence in chief and which were not produced during same. These documents, in my view, were only produced as a consequence of the nature of the cross-examination by Mr Stokes and dealt with in re-examination. As a result of the urgent application, he knew by the latest September 2017, that he would need to make full disclosure of his interests and discover all relevant information.

[62] Yet in relation to his interest in Absolute Return Partners LLP and Kinnerton ARP Ltd, the defendant was not forthcoming. All the information was available only to him. The facts relating to his shareholding and voting interests was peculiarly within his knowledge. Yet he did not make full disclosure.He indicated that he had negotiated the sale of his 5% interest in Absolute Return Partners LLP and could only sell it to an existing partner of the business[29], yet someone who was as meticulous and savvy as he is,[30] would certainly have negotiated the best possible deal. The value of his 4.9% shareholding covered monies owing by him debited to his loan account and I have no doubt must have to some extent covered his tax

[29] This he testified and responded to in the further particulars was a requirement of the partnership agreement. A partnership agreement was discovered in Danish. No attempt was made to make this available in any other form.

[30] It became very obvious during the course of his evidence that he is extremely meticulous given the nature of his work and his qualifications and a Financial Analyst I have no doubt that he would have negotiated the best possible deal for himself.

liability. No admissible evidence was led in relation to his tax liability. In addition, he never during the course of his evidence in chief openly admitted that he retained a 0.1 % interest in Absolute Return Partners LLP. It was only during the course of cross-examination and probing by Mr Stokes that this evidence was elicited.

[63] Even then too he indicated that 0.1% only enables him to continue with the work of a compliance officer and what he did before. This allows him to do so even whilst he is in South Africa. It was only during cross-examination that he testified he would receive some remuneration for this work but would not say how much he would receive. I have doubts, serious doubts that the defendant does not know what his remuneration would be for performing these services. He has been a partner for a considerable period of time. He also actively participated in the restructuring of Absolute Return Partners and Kinnerton ARP Ltd. On his own evidence, he has a 20 % voting right in Kinnerton ARP Ltd[31] but he would have this court believe that it is of no financial benefit to him. In regard to his business interests in Absolute Returns as well as Kinnerton ARP Ltd, I find the defendant's evidence to be wholly unsatisfactory and dishonest.

[64] No reliance can be placed on his version that he was only paid £5000 for this. The agreement put up by him in support of this contention was something that was drawn up soon before he was to leave and return to South Africa. In addition, the family tree which he relied on and which he testified about in re-examination was only produced as a consequence of cross-examination. It was never disclosed or discovered prior to that evidence. What also is of grave concern, is that he was aware of the court order of 1 September 2017. The £5000 had not been paid to him as yet. Knowing full well of the existence of the court order, he goes ahead and concludes the transaction and is paid the monies in breach of the order. He testified that this was based on legal advice he was given. His conduct is in my view contemptuous.

[65] I agree with the submission of Mr Stokes in his heads of argument that the defendant had an obligation not only to disclose the asset being his interest in Kinnerton ARP Ltd but also to prove its value with admissible evidence. He did not do so. I agree that the defendant played his cards close to his chest in relation to his

[31] The response to the request for further particulars indicates that he is a director .

interests in Absolute Return Partners LLP and, Kinnerton ARP Ltd and Blu Family Office Ltd. These facts were peculiarly within his knowledge and he chose not to disclose same. He also did the same in relation to the value of his loan account and his so called tax liability. I further agree that this conduct is what is described by the Supreme Court of Appeal in *B v B* as the 'catch me if you can' approach.

[66] I agree that the defendant set out to paint the plaintiff in a bad light. This does not mean to say that the defendant was not hurt by the conduct of the plaintiff but there is nothing to justify bad mouthing, foul mouthing and using the type of foul language that he did in his communications with the mother of his children and his wife. There can simply be no excuse for it. He on oath in affidavits accused her of committing fraud on the Receiver of Revenue and the Registrar of Deeds-this in relation to the B property. He testified under oath in court that it was the plaintiff who devised the plan with Andrew Jackson, to pay less transfer duty and reduce the purchase prices of the M property and B. This was a blatant lie.

[67] In his heads of argument and during the course of oral argument, Mr Stokes submitted that the defendant had led no admissible evidence as to the value of either his assets or those of the plaintiff. The defendant based his evidence on hearsay evidence or on documents that were not authenticated and whose contents were not proved and hearsay. In addition, in relation to the evidence of the value of the B property, the defendant appeared to rely on the evidence of Mr Jackson.

[68] I align myself with the sentiments expressed by the Supreme Court of Appeal at paragraphs 39 and 40 of the judgment in *B v B* where the court held the following:

> '[39] The attitude of many divorced parties, particularly in relation to money claims where they control the money, can be categorised as "catch me if you can". These parties set themselves up as immovable objects in the hopes that they will wear down the other party. They use every means to do so. They fail to discover properly, fail to provide any particulars of assets within their peculiar knowledge, and generally delay and obfuscate in the hope that they will not be "caught" and have to disgorge what is in law due to the other party.
>
> [40] The conduct of the trial on the accrual claim appears to have been run by the defendant on a "catch me if you can" basis. He clearly failed to comply with the provisions of s 7 of the Act. He delayed providing with the obviously relevant documents until the last minute and then did not discover them. He declined to provide any documents concerning the financial position of Four House Taverns. He did not provide documents which could be used to trace assets derived from the excluded assets. He did not prove that documents relating to the Trust were furnished timeously or at all pursuant to a subpoena *duces tecum* after initially

> claiming that he could not furnish these without the consent of his co-trustees. He inexplicably did not testify and then took a technical point concerning documentary proof.'

[69] In *AB v JB*[32] the court definitively dealt with the date for determining the accrual in a divorce action. It is at the time of the granting of the divorce.[33] Each of these disputed assets in the plaintiff's and defendant's estate will be considered individually in the totality of the evidence presented. In doing so, this court must also have regard to the approach adopted by Lopes J, in this division, when he held as follows:

> 'It then falls upon me to place a value upon the accrual in the Defendant's estate. In this regard I am mindful of the fact that where the evidence is imperfect, it is incumbent on me to do the best I can in the circumstances.'[34]

[70] In doing so I will have regard to admissible evidence and that not in dispute. It is common cause that the parties were married to each other at Durban on 21 June 2003, out of community of property in terms of an ante-nuptial contract with the application of the accrual system. The respective commencement values of their estates was declared to be nil. Clause 4[35] of the ante-nuptial contract reads as follows:

> 'The following immovable property, registered in the name of S L B, is specifically excluded from the operation of the accrual, namely:
>
> […] Avenue, La Lucia, Durban.'

<u>The F Road Property</u>

[71] The plaintiff and defendant are joint owners of this property. There is a bond registered over the property for which they are jointly liable. In an attempt to place a value on the property, the defendant testified as follows. The plaintiff had, in March

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[32] 2016 (5) SA 211 (SCA)
[33] (Paragraphs [16], [19] and [20] at 216B – D and 217A – F.)
[34] *MB v DB* supra at paragraph 43.

[35] Page 19, index to pleadings.

of this year, obtained three valuations from estate agents. The notices in terms of Rule 36(9)(a) and (b) had been filed by the plaintiff in respect of such valuations. Even though these estate agents were mandated by the plaintiff, he facilitated the logistics and a copy of the valuations was sent to both the plaintiff and himself.

[72] He testified that his experience with estate agents is that they often put the property on the market for a higher value. The property was put on the market by Ellison's for £900 000 in June/July 2017. This was £20 000 less than the actual valuation which Ellison's provided. Despite 20 viewings of the property no offer was generated. In the United Kingdom any offer made must be disclosed to you by the estate agent. As a consequence of no offer being made, the estate agent then recommended that the sale price be reduced to £825 000. Six or seven viewings of the property took place but no offers were made on the lower price either and he then rented out the property and derives a rental income therefrom. The defendant expressed the opinion, that the F property is worth in the region of £850,000.00. He expressed the opinion that this was a realistic price at which the property could be sold.

[73] All the defendants' evidence in relation to the value to be assigned to the F Road property was hearsay and inadmissible. Given the evidence, I am not able to determine what the value of the F Road property is, and the defendant has not discharged the onus in this regard.

[74] With regard to the plaintiff's updated schedule of her assets and liabilities I quote from Mr Humphrey' heads of argument.

> "With regard to the Plaintiff's updated assets and liabilities schedule (page 1 of Exhibit G, or Exhibit B), in respect of a number of those assets and liabilities, the Defendant relied upon a document prepared by the Plaintiff setting out what she contended were her assets and liabilities. This document appears at page 1 of Exhibit F."[36] ….It is understood that this document which

[36] Defendant's Heads of Argument para 25.11

appears at page 1 of Exhibit F was presented to the Defendant in early October 2017."[37]

'There are a number of assets and liabilities represented by the Plaintiff on page 1 of Exhibit F which the Defendant dealt with in his evidence and which he did not place in dispute, and these are as follows:

[25.13.1] the Plaintiff's UK pension in the amount of £112,500.00;

[25.13.2.] the Plaintiff's South African pension in the amount of R167,684.00;

[25.13.3] the Plaintiff's home furnishings in the sum of R50,000.00;

[25.13.4] the Plaintiff's Honda motor vehicle with a value of R320,000.00;

[25.13.5] the Plaintiff's Investec account with an amount of approximately R60,000.00;

[25.13.6] one half of the mortgage bond liability in respect of F Road in the sum of £219,721.00."[38]

Mortgage Bond Liability in respect of the F Road Property

[75] As the defendant did not place in dispute the mortgage bond liability reflected in exhibit F, the figure reflected of £219,721.00. is to be used as representing each of their respective liabilities.

Pension Interests

[76] Both parties have pension interests in the United Kingdom and the plaintiff has a pension interest in South Africa. Even though Mr Stokes submitted that this

[37] Defendant's Heads of Argument para 25.12
[38] Defendant's Heads of Argument para 25.13

ought to fall outside the accrual calculation, as same does not fall within the definition of a pension interest as defined in the Divorce Act I do not agree with this submission. The particulars of the plaintiff's pension interest were provided by her and the defendant accepts these values. Although they were challenged on the basis that the contents of these documents had not been proved by the defendant these were provided by the plaintiff, and I must "do the best I can". The defendant testified as to what his pension interests were and he does not appear to be challenged on this. Consequently, for purposes of the accrual both parties respective pension interests will be considered.

The Value to be attached to the B property

[77] The defendant testified relating to the purchase of this property. It was sold to the plaintiff by the purchaser of the M Road property, Andrew Jackson. The defendant during the course of his evidence suggested that the plaintiff and Mr Jackson had committed a fraud on the Receiver of Revenue and Registrar of Deeds as the purchase prices of both properties had been reduced by some R800 000.00. He suggested that he had nothing to do with this "underhand deal" and did not sign anything.

[78] Andrew Jackson confirmed that he had purchased M Road from the Bs. The negotiations took place between him and the defendant and the estate agent Brenda Neatley. The negotiations for the purchase of the M Road property took between 18 months to 2 years before a purchase and sale agreement was concluded. He confirmed that initially for the first major portion of the time period he dealt directly with the estate agent. Any offers he would make she would communicate to Mr B who was overseas. The estate agent then said that it may be better for her to arrange a face to face meeting between him and S B and they could see if they could find middle ground. A meeting was held at the estate agent's office with him, the estate agent and Mr B. The outcome of this meeting was that they agreed a purchase price of R12.5 million for the M Road property.

[79] During his conversations with the defendant, he mentioned that he was

returning to South Africa and needed to buy a place. Mr Jackson indicated to him that he needed to sell B to pay for the M Road property and he could look at it. The defendant looked at the property and mentioned that he was interested and he informed him that the purchase price was R5.3 million. After he discussed the matter with the defendant, Mr B mentioned that he had discussed the purchase of B with his wife and she indicated that she wanted to purchase the house.

[80] At the time Mr Jackson mentioned that it did not matter to him who purchased the property, he just needed to sell it quickly as he needed the money to buy M Road. The plaintiff looked at the property with her father and after that a sale agreement was entered into in terms of which he purchased the M Road property and she purchased B. The price that they agreed on was R11.7 million for the M Road property and R4.5 million for the B property.

[81] In the discussions to get the final price he and the defendant had a conversation about the respective purchase prices and dropping the price to pay less in transfer duties. They negotiated this by debating the purchase price per square metre for the respective properties. After a couple of days they had a final discussion and they agreed to both reduce their purchase prices by the sum of R800 000. It was a joint discussion and a joint agreement reached between him and the defendant. He testified that he thought that the reductions should be more but the defendant mentioned to him that he had a discussion with a friend who told him that they cannot make it any more than R800 000 as they would run into trouble. The plaintiff was in no way involved in the negotiation of the final figure.

[82] Even though Mr Jackson was questioned as to what he thought the value of B was, he testified that at the time he sold it, R5,3 million was too much. He suggested that now R5,3 million was a fair value for the property because of the recent sale of a property similar to B.

[83] The defendant sought to rely on this estimate by Mr Jackson and the defendant's own evidence that in his opinion that is a fair value. His evidence in this regard is inadmissible and no reliance can be placed on such estimate. What one does have is the value which the plaintiff provided in exhibit "F" which in the absence of admissible evidence by the defendant, "I must do the best I can".

The liability owing to Investec Bank in respect of the B mortgage bond account.

[84] Kerry Ann Donachie a recoveries consultant with the legal division of Investec Bank confirmed that she attended at court under subpoena. She was required to check the records to obtain a printout of the balance owed on the plainitff's Investec home loan account. She confirmed that the balance owing was the sum of R968 490.36. A facility of R1 million was extended to her and she accessed this facility over a period of time. Even though she was cross-examined on the facility she was unable to answer any questions put to her as this did not fall within her job description. The defendant was not able to challenge and dispute her evidence relating to the liability of the plaintiff arising from the mortgage bond account.

The parties jewellery

[85] The defendant submits that the jewellery of the plaintiff her wedding ring and diamond stud earrings must form part of the accrual, so too his platinum wedding ring. The plaintiff contends that these are donations and fall outside the accrual calculation. It was put to the defendant under cross-examination that he had given these items of jewellery to the plaintiff as a gift, and on that basis they were to be excluded from the accrual calculation. He agreed that these were gifts. However, submitted that because monies were received from the Simbithi refund and the plaintiff insisted on using these funds to what he termed" improve" the gifts it should form part of the accrual.

[86] Section 5 of the MPA provides that inheritances, legacy and donations are excluded from the accrual. I agree with this submission. The same will apply to the defendant's platinum ring. I say this mindful of the submission in the defendant's written heads of argument that she "faces the difficult reality that in law the defendant is entitled to demand the return of these items as a consequence of her gross ingratitude.[39]

[39] Para 30.12 defendants heads of argument

[87] That then brings me to the defendant's assets. The defendant's evidence in relation to his furnishings and BMW X 3 was not in dispute. As regards items 1 to 7 in exhibit A referred to in Mr Humprey's email no admissible evidence was presented. Mr Stokes objected at the appropriate time to this evidence and there is no explanation by the defendant as to why he did not lead admissible evidence in this regard. These items must be excluded from his liabilities.

The defendant's loan repayable to his mother

[88] The defendant testified that he had concluded a loan with his mother in January 2010, in terms of which she had loaned him the sum of R500000.00, and on which he was obliged to pay interest thereon at prime minus 2, which is the interest that she would have been earning on these funds if they had remained in her investment. The defendant explained to the court that, after his relationship with the plaintiff terminated in October 2010, his mother had wanted some assurance she would be repaid the loan. She sought assistance of an attorney and he executed a written acknowledgement of debt in favour of his mother in April 2011. The defendant presented the acknowledgement of debt[40] which is the original acknowledgement of debt which was handed up to court. A colour photostat copy thereof also appears at page 1 of Exhibit I.

[89] A printout of his bank account indicating payment of the sum of R500,000.00 by way of a cheque deposit into his account on 20 January 2010.[41] A printout of his bank account statement reflecting the repayment of R125 000.00 paid to his mother on 7 October 2014. A loan account statement was also prepared by the defendant reflecting the outstanding balance owing, inclusive of interest thereon.[42] The defendant was cross-examined on the acknowledgment of debt specifically the interest aspect. Indeed, it was put to him by Mr Stokes, that this alleged loan was fictitious. It was contended that he had fabricated this loan and was unlikely that he

[40] Exhibit H.
[41] Exhibit I page 2.
[42] Exhibit I pages 4 and 5.

would not have repaid this loan once the M Drive property was sold. In fact it was suggested that rather than pay his mother, the mortgage bond over the property at […] G. was settled.

[90] On this issue the defendant presented the original acknowledgment of debt. He elected not to call his mother for valid reason. This document has to be accepted as an authentic document. However, what is significant about the document is that the interest clause has been deleted in its entirety. He was cross examined about this extensively and at best for the defendant, and on the probabilities, I am of the view that the monies were loaned without an interest component. Consequently, the defendant's indebtedness in this regard is the sum of R375 000.00

Non-compliance with the Rule 43 Order of Ploos Van Amstel J

[91] Having regard to exhibit 'K' even though it reflects that the defendant is in arrears with the Rule 43 order in the sum of R407 136, I agree that there was an agreement in place between himself and the plaintiff to vary the rule 43 order. The plaintiff has not taken any steps to enforce compliance with the order and some 3 years has passed. Nothing more need be said regarding this even though the defendant was cross–examined on this aspect.

[92] The accrual calculation is thus as follows. I have utilised the exchange rate of R17.04 to the £ for purposes of the values.

Plaintiff's Assets

6 B	R 4 716 666,67	
UK Pension (£112, 500)		R 1 917 000,00
SA Pension		R 167 684,00
Home Furnishings		R 50 000,00
Honda CRV		R 320 000.00
Investec Account		R 60 935,96
Investec Account		R 47.88

Total	**R7 232 334, 51**
Plaintiff's Liabilities	
½ Bond liability F	
((£219, 721,00)	R 3 744 045,80
Mortgage Bond B R 968 490,00	
Total	**R4 712 535, 80**
Difference	**R 2 519 798,71**

Defendant's Assets	
UK Pension (£70, 000)	R 1 192 800,00
Home Furnishings	R 45 000,00
BMW X 3	R 75 000.00
Total	**R1 312 800,00**
Plaintiff's Liabilities	
½ Bond liability F	
((£219, 721,00)	R 3 744 045,80
Loan iro G B R 375 000.00	
Total	**R4 119 045,80**
Deficit of	R 2 806 245,80

The defendants liabilities exceed his assets.

[93] As the defendant's estate has shown no accrual, he is entitled to half of the accrual of the plaintiff's estate which is half of R 2 519 798,71., being **R 1 259 899, 35.**

[94] It was suggested to the defendant under cross-examination that the court is unlikely to compel the plaintiff to find the money to pay him an accrual claim. It was proposed to the defendant that the most suitable order that the court could make

was to transfer the plaintiff's share in the F property to the defendant. A party to a divorce action can apply for a deferral of the accrual claim payment. This is provided for in s10 of the MPA. The section reads as follows:

> "10. A court may on the application of a person against whom an accrual claim lies, order that satisfaction of the claim be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just."

[95] The plaintiff did not testify at the trial and did not institute an application for the deferral of the payment of the accrual claim. Mr Stokes made submissions in this regard in his heads of argument. Given the nature of the evidence in this matter I am not in a position to consider was is just and equitable for purposes of section 10.

[96] In his heads of argument Mr Stokes submitted that in the event of the court finding an accrual due by the plaintiff to the defendant, then she applied under s 10 of the MPA to order that payment be deferred and that it be discharged from the plaintiff's entitlement to a 50 per cent of the F road property. Although the defendant conceded that the only way in which the plaintiff could pay any amounts should he succeed in his counter-claim, was to transfer her half share of the F property to him, I agree that the deferral for payment accords with the defendant's evidence during cross-examination and during the trial of the matter. However, the appropriate time for such application is once the order has been given as a court will have to be provided with facts showing that such deferred order in terms of s 10 is just and equitable at the time it is made.

[97] In the circumstances the only order that this court can make is an order directing the plaintiff to pay to the defendant an amount in money for the value of his accrual claim and to grant the plaintiff to make application on notice for a deferral of such payment.

[98] A further matter which warranted attention related to the application in terms of rule 33(4). I agree with the submissions of the plaintiff as indicated in the

answering affidavit. I could not grant a divorce order without dealing with the accrual claim as the issues were inextricably linked.

Costs

[99] It is trite that the award of costs is a matter which falls within the discretion of the court, which discretion must be judicially exercised having regard to the facts of a matter. The costs which must be determined relate to the divorce action, the Rule 43 and Rule 43(6) applications, the application to compel, the urgent interdict application in September 2017 and the application in terms of Rule 33(4) of 1 November 2017.

The rule 43 and 43(6) applications

[100] It is common cause that when the plaintiff instituted the Rule 43 application in December 2013 the divorce action was not pending. The divorce action was instituted on 3 April 2014. Therefore, all costs occasioned prior to that date in relation to the rule 43 proceedings must be for the plaintiff's account. Having regard to the order and the affidavits filed in such application, the plaintiff obtained orders *pendente lite.* In the result, the defendant ought to bear the costs of the opposed Rule 43 application as there is no reason to depart from the usual rule that the successful party is entitled to his/her costs.

[101] In respect of the Rule 43(6) application, the defendant initiated these proceedings for reasons dealt with earlier on in the judgement. Even though such application was opposed by the plaintiff the matter was never enrolled for hearing, presumably as the parties resolved this amongst themselves. In those circumstances, it will be fair to direct each party to bear their own costs of the Rule 43(6) application.

The application to compel

[102] In respect of the application to compel further particulars, the parties made submissions in relation to the costs. It is common cause that the application was

instituted by the plaintiff and once the defendant had supplied the response to the request for further particulars, it was agreed with the defendant's attorneys of record that the matter would be removed from the roll and the defendant directed to pay the costs occasioned by the application. It seems to me that the parties are *ad idem* that the defendant pay the costs occasioned by the application to compel.

The urgent interdict application in September 2017

[103] This application although initiated on 31 August 2017, served before the court on 1 September 2017. From the transcript the presiding judge had concerns regarding the aspect of urgency as it appeared that the relief may have been academic. It was not clear at that stage whether the defendant had in fact disposed of his partnership interests in Absolute Return Partners LLP despite having indicated his intention to do so in May 2017.

[104] During the course of his evidence and under cross-examination, the defendant conceded that even though the financials of Absolute Return Partners LLP and Kinnerton ARP Ltd were made available they were not easily understood. This too he realised as when the answering affidavit was filed in the rule 43 application of December 2013, he deemed it fit to file a further supplementary affidavit explaining the financials, his partnership holdings and his tax liability. It was for the first time when he testified and was cross examined at the trial hearing that the nature of his partnership interests in Absolute Return and Kinnerton ARP could be interrogated and understood for the first time. In addition, what also became apparent for the first time was that the defendant still retained a 0,1 percent interest in Absolute Return and thus indirectly an interest in Kinnerton ARP.

[105] The disposal of his 4.9 % interest in the partnership for the meagre sum of £5000.00 is somewhat suspicious. Having regard to the further particulars his 5 % interest earned him £135 000.00 over a period of 8 months. He could not explain how he arrived at the purchase price of £5000.00 but explained that it had to be sold to a remaining partner. The partnership agreement evidencing this was not produced. Given the concessions made by the defendant during cross-examination about the financials, the plaintiff was justified in bringing the application.

[106] In my view, the most appropriate order would be for the defendant to pay the costs of this application.

The application in terms of Rule 33(4) of 1 November 2017.

[107] This application, initiated by the defendant, was opposed by the plaintiff, in my view for good reason. The basis for seeking such relief was in the main for the benefit of the defendant and his fiancé as her tourist visa was set to expire. The defendant when testifying, was correct that until such time as he is divorced, he cannot marry Ms S. However, the parties only secured three days for the divorce trial in this matter, and it was only one the morning of the trial that the only issue remained. It is trite that given the nature of the issues in this matter, I could not order a separation as requested by the defendant and he should thus bear the costs of such application.

Divorce action

[108] The defendant has been successful in his counter-claim. However, given the manner in which he has conducted himself in court and his blatant dishonesty to the court whilst testifying, I am going to depart from the usual rule in relation to costs, that costs follow the result. In the circumstances, the defendant is directed to pay the costs of the divorce action.

[109] In the result the orders I issue are the following:

[109.1] A decree of divorce.

[109.2] An order that the plaintiff and the defendant shall remain co-holders of full parental responsibilities and rights in respect of the minor children, namely:

A B, a girl, born on […] June 2006; and

S B, a boy, born on […] May 2009.

[109.3] An order that the minor children's primary place of residence shall be with the plaintiff.

[109.4] An order that the defendant shall be entitled to exercise contact with the minor children at all reasonable times.

[109.5] An order directing the defendant to:

[109.5.1] pay to the plaintiff maintenance for the minor children at the rate of R 4 000.00 per month, per child, payable on or before the first day of every month;

[109.5.2] pay one half of the monthly premiums to retain the minor children as beneficiaries of the plaintiff's current medical aid scheme;

[109.5.3] pay one half of all reasonable non-elective medical expenses for the minor children which are not covered by the aforementioned medical aid plan;

[109.5.4] pay one half of all the reasonable educational expenses of the minor children, such to include but not to be limited to educational fees, books, stationery, school uniforms, school clothing, aftercare fees, extra lessons, school subscriptions and insurances and agreed extra mural activities.

[109.6] In respect of the defendant's accrual claim the plaintiff is directed to pay to the defendant the sum of **R 1 259 899, 35.** within 120 days of the date of this order. In terms of s 10 of the Matrimonial Property Act the plaintiff is granted leave to make application for the deferral of such payment, subject to whatever conditions the court deems appropriate.

The application for the deferral of such payment is to be brought within 30 days of the date of this order.

[109. 7] Costs

[109.7.1] The Rule 43 application

The plaintiff is liable for the costs in respect of the Rule 43 application from December 2013 up to and including 3 April 2014. These will include the reserved costs. The remainder of the costs of the Rule 43 application are to be paid by the defendant. In respect of these costs, the limitations imposed by Rule 43(7) and (8) do not apply.

[109.7.2] Rule 43(6) application

Each party is directed to bear their own costs occasioned by such application.

[109.7.3] The application to compel further particulars.

In respect of the application to compel further particulars, as agreed, the defendant is to bear the costs of such application.

[109.7.4] The interdict application of 1 September 2017

The defendant is directed to pay the costs of such application.

[109.7.5] The Rule 33(4) application

The defendant is directed to pay the costs of such application.

[109.7.6] Divorce action

The defendant is directed to pay the costs of the divorce action.

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HENRIQUES J

Case Information

Date of Trial :	23-25 October 2017, 14-17 November 2017
Date of Judgment :	20 December 2017

Appearances:

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