IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

Case No: 12866/2014

In the matter between:

L W Plaintiff

and

C W First Defendant

C W N.O. Second Defendant

L W N.O. Third Defendant

DOROTHY DIXON N.O. Fourth Defendant

(In their capacities as the Trustees for the time being of the C's Trust IT No. 3043/97)

THE MASTER OF THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT Fifth Defendant

CORAM:	**JUDGE SALIE-HLOPHE**
DATE OF HEARING:	**11 MAY 2020**
DELIVERED:	**26 AUGUST 2020**
COUNSEL FOR PLAINTIFF:	**Advocate L Buikman**
ATTORNEYS FOR PLAINTIFF:	**Catto Neethling Wiid Inc.**
COUNSEL FOR DEFENDANTS:	**Advocate Ferreira**
ATTORNEYS FOR DEFENDANTS:	**Roberts Inc.**

JUDGMENT DELIVERED ELECTRONICALLY ON 26 AUGUST 2020

SALIE-HLOPHE,J:

1] This matter commenced before me in September 2017 as an action for divorce together with relief in respect of patrimonial consequences, maintenance and costs. On 5 March 2019 this Court granted an Order between the plaintiff and first defendant, by agreement, in which a decree of divorce was granted dissolving the bonds of marriage between them together with an order interdicting the first defendant from encumbering his property and that belonging to the Trust to enable a receiver to give effect to any order of this Court to divide any accrual. The balance

of the issues in the divorce action were postponed for determination upon finalisation of the trial.

Background facts:

2] L and C W were married to each other on 7 March 1997 and at Cape Town out of community of property with application of the accrual system. Two children were born of the marriage, a daughter (aged 23) at present attending university and a son (aged 18) in matric. The plaintiff's estate had a commencement value of R50 000-00. She excluded a number of assets including her interest in a restaurant partnership, On the Rocks, and various immovable properties and policies. The first defendant excluded his interest as a sole proprietor in a business named Art Cast. The parties agreed that these assets *"or any other assets acquired by such party by virtue of his possession or former possession of such asset"* would not be taken into account as part of such party's estate at either the commencement or the dissolution of the marriage. The antenuptial contract excluded the consumer price index when calculating the plaintiff's commencement value. It made provision for the fact that the parties could not during their marriage make donations or dispositions of assets at less than their fair market value without the consent of the other party. Further, it provided that the first defendant would cede a life insurance policy to the plaintiff.

3] In July 1997, shortly after the marriage, the C's Trust IT No.3043/97 ("the trust") was formed. The founder of the trust is the first defendant. The plaintiff and first defendant are trustees and beneficiaries together with the children. Mr. Peter Gees, a financial advisor, was the first independent trustee, replaced by Ms. Schafer,

a bookkeeper by profession.[1] The trust was formed to purchase an immovable property for the first defendant's business which was subsequently sold. In 2000 the parties' then matrimonial home situate at […] Street, Parklands was purchased by the trust followed by a vacant erf in Langebaan during 2002. A holiday home was developed on the erf, referred to as the "Langebaan" property. Another erf was purchased in Atlantic Beach Golf Estate, developed into a family home in 2006/2007. In 2008 the parties moved from […] Street to the Atlantic Beach property.

4] The plaintiff gave birth to a daughter in September 1997, sold her share in the partnership restaurant in August 2000, was diagnosed with Hodgkins Lymphoma two months later and underwent a series of radiation and chemotherapy treatment. In 2002 she gave birth to their son. The first defendant was the breadwinner of the family, had developed the business successfully over the years into the company, Gilded Edge (Pty) Ltd ("Gilded Edge"), the family lived a lavish lifestyle and regularly travelled locally and internationally. The plaintiff had not pursued employment or other businesses since selling her shares in the restaurant in 2000 and received a small salary from first defendant's business, the Gilded Edge, although she was not so employed.

5] It is not disputed that the first defendant had a number of extra-marital indiscretions since the earlier days of the marriage, which included a long standing

[1] First defendant's bookkeeper

extra-marital affair with an employee of the business, Ms. B. This relationship started around 2003 until approximately 2015.[2]

6] In 2003 the first defendant, unhappy with the terms of the ante nuptial contract, raised his grievances with the plaintiff and pursuant to an application to change their marital regime, this Court granted the parties the right to enter into a postnuptial agreement.[3] In the affidavit in support of the application for the registration of a postnuptial agreement (with a confirmatory affidavit signed by the plaintiff) the first defendant stated as follows:

> *"8.1 It was always our intention to exclude any interest which either the Second Applicant and I may have in any business both at the time of the marriage and subsequent thereto. The Second Applicant has subsequent to our marriage sold her interest in the business referred to in the Antenuptial Contract and I have furthered my business interests. It is our wish for any interest which either of us may have in any business venture, to be excluded from any accrual calculation."*

7] After the granting of the Order, the parties concluded a postnuptial agreement[4] on 31 October 2005 in terms of which they agreed that:

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[2] Ms. C B was employed by the first defendant's business in 2001. The first defendant testified that he was not serious about the relationship.

[3] Volume 2 – defendant's trial bundle, page 802

[4] Pleadings and File Bundle: 1 of 4 - - postnuptial agreement annexure CW1 to First Defendant's plea, page 73

7.1] the first defendant excluded his interest in the Gilded Edge CC and his interest in any current and/or future business and/or interest in any partnership, close corporation or company" as well as his interest in any immovable property;

7.2] the plaintiff's excluded assets were her interest in any current and/or future business and/or interest in any partnership, close corporation, company, immovable property and her interest in the policies that existed at the time of the antenuptial contract. The Park Manor property, owned by the plaintiff prior to the marriage was excluded. The clause regarding donations was removed and the CPI was included to calculate the plaintiff's commencement value of R50 000-00.

8] It is not in dispute that the effect of the postnuptial agreement secures the first defendant in his financial position with an onerous position for the plaintiff. Whilst the accrual was not excluded, the effect of the terms of the postnuptial agreement was that her accrual claim would be substantially limited.

9] The parties' marriage started breaking down from 2008 and finally in 2014 when, after a heated argument, the plaintiff moved out of the main bedroom. In 2010 the plaintiff approached her attorneys of record and in 2013 the parties entered divorce and settlement discussions. In or around May 2014 the first defendant instituted divorce proceedings out of the Cape Town Regional Court. As the plaintiff wanted to claim relief against the trust, the matter was removed by agreement from the Regional Court, followed by these proceedings, instituted by the plaintiff in July 2014.

10] On 31 August 2015 the first defendant brought an application to separate the relief relating to the trust. The application was dismissed with costs. An order *pendente lite* in terms of rule 43 was granted during 2015 that the first defendant maintain the plaintiff and the children in an amount of R34 500, contribution towards costs together with the payment of expenses relating to a property owned by the plaintiff and which the first defendant continued to use as his second home. This was on the basis that the plaintiff and the children would continue to reside at the Atlantic Beach property,[5] she had however since vacated with the children. The property is occupied by the first defendant.

11] On 17 March 2017 the Court ordered in terms of a rule 43(6) that the first defendant make a further contribution of R350 000 towards the plaintiff's costs. In terms of a further rule 43(6) application the monthly maintenance amount payable by the first defendant was increased to an amount of R40 250 and ordered the first defendant to contribute towards the applicant's rent to a maximum of R30 000 per month as well as the payment of a number of household expenses.[6] Combined the value of the present maintenance paid by the first defendant is approximately R85000 per month.[7]

12] During May 2019 the Langebaan property, owned by the trust, was sold for an amount of R6 507 385-79. The amount was paid by the first defendant's attorney,

[5] Pleadings bundle Rule 43 case number 5107/2017. Founding affidavit annexure "LW1" page 26. First defendant was ordered to pay the costs of the application.
[6] The first defendant's current interim maintenance obligation.
[7] Amount made up of cash maintenance R40 250, plaintiff's rent R25000, monthly expense for re-imbursement totalling an average of R19 500.

also acting as the transferring attorney, to the Gilded Edge. The basis of the payment was that first defendant's business had a loan account in the trust. In terms of an order of Court (commonly referred to in the trial as the interdict application) an order was granted, by agreement that the funds totalling R5 394 315.20 be "ring-fenced" in a money market account held by the Gilded Edge at ABSA Bank pending the final determination of the divorce action.[8] At the resumption of the trial in May this year, the first defendant was found in contempt of Orders of this Court[9] and an order was made that a portion of the ring-fenced amount was to be paid into the trust account of the plaintiff's attorneys of record as follows:

12.1] R82 429 in respect of outstanding amounts in respect of previous orders;

12.2] R350 000-00 as a contribution towards the applicant's arrear legal costs;

12.3] R45 000-00 per day commencing on 11 May 2020 on each day of trial thereafter until closing arguments;

12.4] R8 000-00 per day in respect of plaintiff's expert witness attendance;

[8] Case number 8932/19 – application instituted by plaintiff in May 2019
[9] Respondent was found in contempt of the Orders of Ndita J, Sievers AJ and Mantame J

12.5] The costs of the application was ordered to stand over for determination of the action.[10]

13] The first defendant had at various instances not complied with the maintenance orders, resulting in the issue of three writs of execution and contempt of court proceedings. After institution of the first contempt proceeding the amount was settled in February 2020 in excess of R185 000 and the second contempt proceeding culminated in an order finding him in contempt of Court.

Issues for determination:

14] This Court is required to determine the patrimonial and maintenance disputes between the parties, briefly summarised as follows:

14.1] determination of the accrual that has taken place in the first defendant's estate. There is no accrual in the estate of the plaintiff;

14.2] whether the assets that are currently registered in the name of the C's Trust form part of the first defendant's estate for the purposes of calculating the accrual that has taken place in his estate;

[10] Including the previous applications in respect of which costs stood over for later determination.

14.3] whether the first defendant owes the plaintiff R1 010 000 being the total that the plaintiff claims had been advanced by her to first defendant personally as loans. The first defendant maintains that of this funds, he personally owed her an amount of R130 000, that the Gilded Edge owes her R151 240 and that R225 466-00 is owed to her by the trust. The first defendant also maintains that both the Gilded Edge and the trust have repaid the plaintiff her loan accounts in these entities;

14.4] whether a declaratory order should be granted that the credit amount of the proceeds of the sale of the Langebaan property, which is currently held in an ABSA bank money market account of the Gilded Edge, is an asset of the trust. Relief is sought that the proceeds form part of the first defendant's assets and that this amount may only be released to the first defendant once he has made payment in full of the amount that is due to the plaintiff in terms of the accrual;

14.5] determination of the amount of maintenance contribution the plaintiff requires on divorce until her death or remarriage (Her monthly maintenance needs were not placed in dispute). The required contribution is subject to the findings of this Court in respect of the accrual amount due to her;

14.6] costs of the action,[11] including the costs of senior counsel (together with the qualifying fees of the experts) as well as the costs of applications which stood over

[11] Case No.12866/2014 issued on 22 July 2014

for later determination: rule 43 application[12], postponement application,[13] rule 43(6) application[14] and contempt of court application.[15]

Issues not in dispute:

The parties agreed prior to the commencement of the trial that:

15.1] first defendant agreed to contribute towards the children's maintenance requirements until such time as they have completed their tertiary education and are self-supporting, notwithstanding that they may have attained the age of majority by:

15.1.1] payment to plaintiff of the sum of R8000 per child per month;

15.1.2] bearing the costs of and by retaining the children as dependant members of a medical aid scheme and by bearing the costs of all of the reasonable medical expenses incurred in private healthcare in excess of the cover provided by the medical aid scheme, together with undertaking to reimburse the plaintiff for payments made within 5 days of the provision of the proof of payment or invoice;

15.1.3] payment of all reasonable expenses incurred in respect of Justin's education, together with an undertaking to reimburse the plaintiff for all expenses

[12] Instituted on 17 March 2017
[13] Instituted on 4 March 2019
[14] Instituted on 11 May 2020
[15] Instituted on 22 January 2020 – reset down on 11 May 2020

which had been paid by plaintiff or that he shall make payment directly to the service providers as the case may be, within 5 days from the provision of proof of payment or the invoice;

15.1.4] payment of the reasonable costs of all or any university fees and/or fees due to an institution for higher learning attended by the children including related costs, including vehicles and costs relating thereto;

15.1.5] annual adjustment of the maintenance for the children in accordance with the Consumer Price Index inflation on the anniversary of the date of divorce.

15.2] maintenance for the plaintiff until her death or remarriage. Whilst the amount was not agreed, the first defendant has agreed to make payment of:

15.2.1] her reasonable medical expenses and to retain the plaintiff as a member of a comprehensive medical aid together with re-imbursement of payments made upon provision of the proof of payment or invoice;

15.2.2] annual adjustment in accordance with the Consumer Price Index inflation on the anniversary of the date of divorce;

15.2.3] the parties agreed to the capital value of the plaintiff's maintenance requirements as per expert report of actuary, Mr. Alex Munro.[16] At the resume hearing on 11 May 2020 the parties agreed that the contents of the updated actuarial report of Mr. Munro would be admitted into evidence without the need to call the said expert. According to the admitted expert report, every R1 872 020 would generate R10 000 upon investment;[17]

15.2.4] On 11 February 2020 the parties' respective financial experts, Mr. Horton Griffiths ("Griffiths") on behalf of the plaintiff and Mr. Hilton Greenbaum ("Greenbaum") on behalf of the first, second and fourth defendants, signed a joint minute[18] in which they agreed on the net value of all the assets of the parties as well as the trust as at date of divorce, 5 March 2019, save for the following:

15.2.5] the value of the contents of the property situated at the Atlantic Beach property registered in the name of the Trust is valued for the plaintiff at R750 000 and for the first defendant at R20 000;

15.2.6] whilst initially the value of the vehicle in the plaintiff's possession was disputed, the value was agreed during the trial as R85 000;

[16] Experts bundle, expert report, page 429 - 432
[17] Experts bundle, expert report, page 493
[18] Expert minute – plaintiff's pleadings – expert bundle page 502

15.2.7] the value of the total loan owed to plaintiff was determined for the plaintiff as R1 010 000. For the first defendant it was R506 706, made up as follows: (i) R130 000 by the first defendant personally; (ii) R151 240 due by the Gilded Edge; and (iii) R225 466 due by the trust;

15.2.8] the assets of the first defendant were determined by his expert as R30 825 085 and R30 508 379 by the expert for the plaintiff. The difference is caused by the dispute on the loan due to plaintiff. The expert for the first defendant stated that he was instructed that certain of these amounts belong to the first defendant, making his estate greater than that determined by the expert for the plaintiff. However, it is so that the amounts are registered in the loan ledgers of the trust and the Gilded Edge as being loans due to plaintiff by both the business and the trust;

15.2.9] the plaintiff's assets are determined as being R1 237 766 by her expert and R734 472 by the expert for the first defendant. The difference of R503 294 is due to the said amount being contended as being loans due to the plaintiff thereby increasing the value of her estate. Insofar as the first defendant claims that the amount is due to him, her assets are determined by his expert as being of a lesser value as set out above;

15.2.10] the experts are in agreement that the net value of the assets registered in the name of the trust is R7 298 368.

Disputes between the experts in respect of estate calculations:

16] The experts are not in agreement as to how the antenuptial contract and the postnuptial agreement are to be treated in relation to the parties' assets as this is a question of law. Exhibit A sets out a depiction of various possible scenarios depending of what may be determined by this Court as being applicable to the parties' marriage. The said exhibit was confirmed under oath by the expert for the plaintiff and not disputed by the defendants. Which specific scenario is applicable is in dispute. On the plaintiff's version, scenario 1 and 2 are set out which is a depiction of the application of the antenuptial contract where on the one hand it includes the trust assets and on the other it excludes the trust assets. Scenario 3 and 4 are predicated on the first defendant's version wherein the postnuptial contract applies including and excluding the trust assets respectively. Scenario 5 and 6 are also on the plaintiff's version setting out the financial position in the event the postnuptial contract applies including and excluding trust assets respectively.[19]

Issues in dispute:

17] The case for the plaintiff is that Art Cast was sold to a close corporation in February 2003, of which the first defendant was a sole member and director. The purchase price was credited to the first defendant's loan account. The first defendant's case is that the business of Art Cast (excluded in terms of the antenuptial contract) was converted into a close corporation and in turn converted into the company called the Gilded Edge, thus being excluded from the accrual of his

[19] Exhibit A(1) as amended – pages 1 – 6 thereof attached with calculation in respect of each scenario

estate.[20] The sole proprietorship was transferred at a sale price of R3 837 919 and thus falls to be excluded from any accrual calculation of the value of his estates if the antenuptial contract applies to the parties' marriage. This amount must be deemed to be part of the amount in the loan account of the Gilded Edge owing to the first defendant.

18] The plaintiff received certain payments pursuant to a dread disease policy when she was diagnosed with cancer. It is not disputed that the plaintiff made payment of an amount of R1 010 000 from the proceeds of the sale of excluded assets and her policies. Both experts agree that the loans need to be repaid as they are reflected as amounts owing in the most recent joint financial minute.[21] The amount of the loan is in dispute between the experts.

19] The first defendant contended during the trial that the payments to him by the plaintiff were a contribution towards their life together and did not constitute loans as the amounts were not repayable and that he would not have borrowed money from his wife. However, analysis of the financial statements of the trust and Gilded Edge reflected funds as beings loans due to the plaintiff. The experts for both sides agreed that the financials show amounts owing to the plaintiff in the form of a loan account. The amount of the funds were however disputed. The plaintiff received annual interest payments of loan accounts. In terms of an order granted in terms of Rule 43(6), the first defendant was ordered to procure payment to the applicant of an amount of R369 768 which amount in the papers filed in this application owing to the

[20] Underlining to emphasise 'SOLD" as opposed to "CONVERTED"
[21] Mr. Greenbaum, expert for the first defendant, calculated the loans as being R506 000

plaintiff by the trust and the Gilded Edge CC in respect of her loan accounts in these entities. Whilst the case for the plaintiff is that the capital loan amount of R1 010 000 is owing to her, the plaintiff received the amount of R369 768 in terms of the aforesaid variation of the rule 43 order, leaving a balance of R640 232. The plaintiff maintains the full amount of R1 010 000 remained due to her.

20] In short, this Court is required to determine the maintenance amount payable to the plaintiff; whether the ante-nuptial contract applies; or whether the postnuptial contract applies, whether the trust must be found to be the alter ego of the first defendant and thus the value of the assets be included in the estate of the first defendant; whether the amounts paid by the plaintiff are in fact loans and the amount which must be repaid to her; the costs of the interlocutory applications which stood over for determination at the end of the trial and the costs of this action including the costs in respect of the experts for the plaintiff.

Evidence led by the Plaintiff and Defendant:

Mrs. L W[22]

21] The plaintiff testified that the parties met in 1995, became engaged in 1996 and married in March 1997. In the weeks leading up to their marriage it was agreed that the property they owned respectively prior to the marriage would remain their own but that they would share in the assets acquired during their marriage, including future business interests. Their two children were born in 1997 and 2002. She had a miscarried pregnancy shortly after moving into their home in 2000 and her father

[22] Evidence of all witnesses summarised

died in April that year. In August 2000 she transferred her interests in the restaurant of which she was a partner. Two months later she was diagnosed with cancer. She underwent extensive chemotherapy and radiation therapy. Justin was conceived in August 2001 and at a time requiring her to engage between oncologists and her gynaecologist. During this time her husband had become absent from home, was very invested in the business and spending time socializing in the evenings. She expressed to him that she wanted him to spend time at home with her and their daughter. His staff compliment grew as the business expanded and one, Ms. B, was employed by the business. Their son was born in 2002, however her husband remained absent and their fights intensified. He would make decisions regarding purchasing of properties and she was not involved or included in these decisions. From around 2003 first defendant raised discussions that he was unhappy with the antenuptial contract and at some point presented her with a draft post nuptial contract. He was very aggressive about his stance. She testified that her husband was a bully and she was petrified of his threats if she had not consented thereto.

22] She signed the postnuptial agreement on 12 August 2003, though she does not recall reading the contents thereof nor that of the first defendant's affidavit to the joint application in support of the change to the antenuptial contract. She understood from a consultation with an attorney appointed by her husband, one Mr. Visser, that everything would be his in terms of the postnuptial agreement. She laboured under the concern that he would divorce her if she did not sign and she wanted to preserve her marriage, her health, peace, their life together and the interests of their children.

She also recalled them meeting with an advocate[23] whom expressed concerns regarding the consequential effect for plaintiff's financial future based on the terms of the proposed change of the ante-nuptial contract. At the time of the execution of the postnuptial contract, she was financially dependent on her husband being a stay-at-home mom and he was in a secured financial position. They enjoyed a high standard of living, travelling locally and abroad regularly and her husband provided well for the needs of the family as his business continued to grow exponentially. She did not work in the business, however, she was on the payroll, receiving a bi-weekly income. There was no restriction on her access to the first defendant's bank cards, enjoying signing powers and had unlimited access to the cash stored in their home safe. She described her emotional state at the time of signing the postnuptial agreement to be unhappy, she was vulnerable and felt that she was under duress to consent to it. She did not however understand the marriage to be broken down and would never have signed had she been aware that her husband believed the marriage was over. She only found out in 2015 that he had a 12 year extramarital affair with his employee, Ms. C B.

23] A dread disease policy following her diagnosis of cancer paid out R450 000 to her which she in turn advanced as loans to first defendant's business, trading at the time as Art Cast. She also received amounts through an inheritance from her father's deceased's estate. The payments so advanced were recorded as a loan account due to her.

[23] Advocate McCurdie

24] With the experience of some years of tension, she consulted with her attorney of record during 2010 in respect of the marriage and related issues. Sometime during the period of 2012 and 2014 the first defendant had instituted divorce proceedings against her in the Regional Court. At this time her husband started removing assets from her such as the BMW X5 which was in her possession and use, replaced with a Polo Vivo. Her cellphone contract was not renewed and she was told by first defendant to get a job otherwise her contribution towards the household was to be in the form of cleaning etc. Herself and the children had prior to the divorce action lived a more extravagant and luxurious lifestyle. She has had to limit expense on clothing, holidays and cashed in her share portfolio to cover the costs for herself and the children to St. Francis Bay.

25] As she understood it, the trust was created for the purposes of her husband's business affairs as he would decide whether to buy properties in the name of the trust and that she did not have any involvement in the matters relating to the trust. The first independent trustee, Mr. Gees, was the accountant of the first defendant, whom was also a personal friend of hers. After he resigned, her husband's bookkeeper, Mrs Dorothy Dixon, became the trustee. Though the former common home was registered to the trust, they would not pay rent to the trust. Similarly, when the Langebaan and Rose-Innes Street properties was rented out the rental received was paid to her husband and not reflected as rental income to the trust. When orders *pendente lite* were made against her husband, he started using the trust to effect the payments in respect thereof. He wanted her to sign trust resolutions authorising the payments. At some point she was removed as a trustee of the trust by way of a majority resolution which was placed on her car at the

children's school grounds but she was subsequently re-instated. In terms of correspondence addressed to the independent trustee, her husband undertook to pay the costs in respect of their daughter's university and residence fees but was of the view that the amounts must be paid through the trust and that it would reflect as a loan account due to him or the company.

26] When the Sheriff attended upon her husband to execute a warrant against movables in respect of outstanding maintenance due to her, he informed the sheriff that the only movable property he has is the Polo Vivo in her possession and sent a whatsapp to their daughter to hand over the keys of her mother's vehicle to the Sheriff should he attend at the premises. The property registered in her name is not suitable to accommodate her and the children as it is a two-bedroomed apartment and that she rents it out for an amount of approximately R10 000 per month. She obtained a Domestic Violence Order against her husband not to abuse her and to return her movable property. He was in contravention of the order to the effect that he could not remove furniture in her possession or under her control. He had not returned the furniture and was in contravention of the order.

27] **Under cross-examination** she testified that the antenuptial contract was finalised shortly before their marriage and that it is possible that her husband never obtained a second opinion. She had insecurities stemming from an acrimonious marital relationship of her parents, causing her to be insecure and suspicious of her husband's faithfulness. She did not know how it came to be that her husband wanted to change the ante-nuptial contract however he had constantly raised it with

her from 2003. She confirmed that from 2008 they were no longer intimate and that tensions escalated. When she consulted with counsel in the joint application to amend the antenuptial contract she was advised by her to obtain independent advice and that if she persisted in concluding the postnuptial agreement she should ensure to own properties or assets jointly with her husband.

28] She attended university in pursuit of a degree in social science but had dropped out. She started off in the restaurant trade waitressing in 1984, became duty manager and later acquired partnership in a restaurant until she surrendered it to her partner in August 2000. She had experience in preparing wage books, writing up of cashbooks but do not have bookkeeping experience. She had no formal employment since she left the restaurant in 2000 but that she had recently tried to find employment such as scribing for children with special needs at Du Noon Primary School but as she is not bilingual had not met the requirements.

Mr. Griffiths:[24]

29] The expert for the plaintiff, Mr. Griffiths, confirmed the joint minute signed between himself and the expert for the first defendant in respect of various valuations. He testified that they were unable to agree to the valuation of the household furniture at the former common home at Atlantic beach and owned by the trust. The loans calculated by him was done taking into account the various bank records and cheque stubs handed to him by the plaintiff totalling an amount of R1 010 000 whilst the amount calculated by Mr. Greenbaum was just over

[24] Expert for the plaintiff. Qualifications not in dispute – testimony appears from record page 239

R500 000. He could not account as to how first defendant's expert had come to that figure. He took the Court through differences between himself and Greenbaum and the various calculation scenarios incorporating the versions of the plaintiff and first defendant respectively which is to be determined by the Court. Both experts confirmed in their joint minute that each scenario reflects amounts which are correctly calculated.[25]

30] The monthly average income received by the first defendant from the business and as deducted from the business financials illustrate an amount of R270 039 over a 25 month period.[26] He analysed the trial balances of the business books of account over a number of years that there was a drastic increase in the salaries paid by the business, from 1,7m to 5,5 m, thereby decreasing the annual turnover. Whilst this could be a simple case of the business having expanded its staff compliment,[27] the sales, costs of sales and rental income had remained the same making the payroll information out of line,[28] which requires an explanation from the first defendant or his expert.

31] He analysed Greenbaum's expert report which reads:[29]

> ***"I am instructed that the business of Art Cast was sold by C to Gilded Edge in or about February 2003."***

[25] Record page 277, line 10 - 13
[26] Record page 293, line 10 - 20
[27] Record page 307, line 20
[28] Record page 309, line 1 - 10
[29] Expert bundle- expert report – page 411 – paragraph 2.3

Greenbaum's supplementary report dated August 2017 retains the aforesaid recordal but the report is supplemented to refer to the sale price having been determined by a **goodwill figure** in 2005 and first defendant's credit loan account of 3,8 m arising from the sale of the business, including fixed assets in 2003 and 2004. He was of the view that the transfer of the business into the close corporation was a transaction as opposed to a conversion because in accounting it is not so that an asset on the balance sheet can include an internally-generated goodwill. Only for the purposes of purchasing a business, would the goodwill value be reflected as such. Goodwill is an intangible value which is attributed in the course of buying a business but not for the purposes of conversion of a business. Goodwill is essentially internally generated value only used when there is an actual sale or acquisition of the business. It is the value that is measured in the transaction between the two parties to the purchase and sale.[30] Hence, reference to transaction by Greenbaum in his expert notice could only mean to be a sale transaction. The purchase price was credited to first defendant's loan account as the purchase amount which included R2 8m in goodwill value, repayable to him over a period of time. The loan account due to first defendant by the business was determined jointly to be at R4 302 806 (This would include the purchase price of the business of Art Cast and an excluded asset in the estate of first defendant).

32] The accounting records of the trust only reflect the business, Gilded Edge, as a creditor in 2017. The Gilded Edge did not appear in the trust account records prior to 2016.[31] Essentially, after the divorce proceedings were in motion, the payments

[3030] Record page 265, line 1-3

[31] Record page 321, line 10 – 20 and Record page 327, line 3- 5

due by the first defendant are made via the trust, by way of money lent to it by the business and repaid to the first defendant personally in that the records of the trust records that the money is owed to him by way of a loan account. The trust relies on funding from Gilded Edge to make the payments as there is no income generated by the trust.[32]

33] **Under cross-examination** Griffiths confirmed that the accounting of the trust shows it to be a family trust as opposed to a business trust, with the parties and their children as beneficiaries. He clarified however that normally in family trusts one would find properties with funding. In the case of this trust, an analysis of the cash flow illustrates that the trust is also a channel or conduit for funding. The trust gets funding but it goes through to other persons. Whilst it funds the children's school fees etc, which is normal in a trust, in this case the school fees are funded by the business, paid by the trust and the trust repays the first defendant. Hence, it is not a pure family trust or property-owning trust.[33] Griffiths testified as follows:[34]

> ***"MR GRIFFITHS: …you asked me what is… different about this; this is just a normal family trust. And my answer was that fine, a normal family trust gets funded and it buys property. Normally it doesn't happen that the family trust will, for instance, go and borrow some money somewhere and give it to the trustee of the trust. Its like a – this trust became kind of a banker. There's money; its gets money, and its lends***

[32] Initially some funding came from bond finance and plaintiff but mostly from first defendant – record page 344, lines 10 – 20
[33] Record page 349, lines 3 - 4
[34] Record page 351, lines 20 – 25 and record page 352, lines 1 - 8

the money to other people. That's the point I wanted to make. ….<u>That really struck me – its is not a clean, clean family trust.</u> Its not a business trust; there's no income, there's no sales. …a family trust is normally more clean than this one."

At record page 352, lines 15 – 23:

"MR. GRIFFITHS: I wouldn't do it the same. The trust is a different, separate entity. The trust must act in the best interests of the beneficiaries, and I would keep the trust separate from my own financial affairs. If you ask – if you say that there is nothing wrong to do it this way, <u>why doesn't the owner of the business take the loan directly from the business</u>? Why does he have to do it through the trust?"

34] Griffiths testified that his reference to "loan" due to the plaintiff is determined from the information she provided and the supporting vouchers. Furthermore, the financials reflect it as a loan in other words he worked on the narrative provided by the plaintiff whereas Greenbaum worked on the end-balances from the financial statements.

35] The witness clarified that the mandate to both experts was to determine valuations of assets and liabilities as at date of divorce, 5 March 2019. The cash flow of the business of Gilded Edge and the determination of the first defendant's

income was up to September 2019. It was put to him that the same income cannot be anticipated given the economic implications of Covid 19 lockdown. The witness testified that they were not asked to make determinations of the financials for the period post 2019 nor was he qualified to make economic projections.

36] **Under re-examination** Griffiths testified that money comes from the business of the first defendant, goes into the trust account and "goes out the other side" to the first defendant.[35] Money paid to the trust by the business and repaid to the first defendant achieves the effect of reducing the salary paid by the business to the first defendant.

> ***"MR GRIFFITHS: "…But what I saw here and was extra-ordinary to me is that you've got – that is the way it starts off, but then the business of the person who started this trust and advanced the money, the business funds, then takes his place and funds the trust. And what the trust then does is the trust advances money to the individual. <u>So the trust becomes like a middleman.</u> It gets money from somewhere and it advances it to somebody else."***

<u>Mr. C W</u>

37] The first defendant testified that he grew up on a farm in Natal. He started out as a small business in curtain accessories and later converted it into a close

[35] Record page 375, lines 1 – 20

corporation. When he got married to the plaintiff, it was out of community of property with application of the accrual system and that both their respective businesses were excluded. His present business is the business converted from the sole proprietorship which traded as Art Cast. Prior to the marriage they were both business people and that they each wanted to protect their respective businesses from each other. He was not afforded a second opportunity to consider the terms of the antenuptial contract. The persons whom were involved in the preparation of the antenuptial contract was Mr. Gees and Mr. Mark Hurst, a friend and relative of the plaintiff respectively.

38] His wife comes from a dysfunctional family hence she would accuse him of having affairs. They lost any meaningful marriage by 2008 and had a heated argument in late 2013 which he termed as the *"rubicon speech"*, she moved out of the marital bedroom and it was a definitive moment in the road pursuant to their divorce. Whilst he was always unhappy about the terms of the antenuptial contract, it was a discussion with his bank manager to obtain a loan for the business where his antenuptial contract was pointed out as not being conducive to obtaining the said loan.[36] He testified that his wife was a very smart business woman and the terms of the postnuptial contract did not change anything for the plaintiff as she could continue to pursue her business interests. He referred to his wife's patrimonial claims as completely bizarre[37]. It had always been his intention post the date of marriage to rectify the antenuptial agreement.

[36] Paragraph 9 of the Antenuptial Contract
[37] Footnote Record page 401, line 1 and 2

39] He testified that the interim maintenance orders required of him to exceed R200 000 per month and *"it just didn't fit the cloth".* In order to meet these payments he would have to take out a monthly salary of R400 000. The records reads at page 396, line 25 and page 397, lines 1-5.

> ***"MR W: So we had to make, we had to make this fit. And seeing as that they were, <u>decided to attack the trust, it made no, it made sense that the trust to try and get this</u>, these resolutions to fit, to make this happen. I mean I paid this money for six years, it made sense that the trust paid its own expenses."***

And further on at record page 400, line 13:

> ***"MR W: There is not one second in my life that I see in the trust as my alter [ego] – everything that I'm, being accused of. The trust is a standalone thing. But after the divorce started, we've had to jump up and down and wriggle and try and get this maintenance paid."***

40] He testified that he is residing in the Atlantic Beach property, but denies that the furniture could be in excess of R20 000. He considers all the furniture to belong to the trust. Refurnishing of the house could in his estimation cost no more than R100 000.

41] He testified further that when his business re-opens, post stage 5 lockdown, it would probably only be able to trade at 20% of its former turnover. He confirmed that he responded with an affidavit to the writ of execution issued in respect of unpaid maintenance that the sheriff could execute against the vehicle registered in his name, the Polo Vivo, presently in the possession and use of the plaintiff. He testified that after the divorce order was granted by this Court on 5 March 2019, he sold 1% shareholding in the company to his long-time employee, Ms. Hilary Anne Billing in August 2019 however he still needs to calculate a market-value for the share. He also sold 1% of Essensico CC to her.

42] **Under cross-examination** the first defendant confirmed that he instructed his attorney to communicate in writing that he would forego the mediation attempts to resolve the issues in the divorce action. He conceded that in his evidence in chief he testified that his wife's accusations of him being unfaithful in the marriage had been without merit, however, that he had inappropriate marital affairs and that he had an extra-marital affair with Ms. B for a long period of time. He conceded that the payment of the proceeds of the Langebaan property was paid out to him without a trust resolution authorising the payment. He denied that the trust is his alter ego or that he is in fact the trust. He confirmed that initially all the family's expenses were funded through the business, without the Gilded Edge having a loan account in the family trust prior to 2015 for the family expenses so funded. As the divorce action proceeded, payments made by the business started to reflect as being due to the business by the trust but not due to him, although he was responsible for the payments in his personal capacity. The trust does not generate any income. He maintained however that the affairs of the trust and that of his own were separate

and distinct. In terms of the financials of the trust it is indebted to the Gilded Edge around R5 m.

43] He maintained that the money advanced by the plaintiff and which is claimed back by her in the action are without foundation as he had not borrowed money from her. To the extent that his expert confirmed that interest on loans were paid to his wife annually, he testified that the loans had been repaid to her or that loans were created in her name for the purposes of her benefit.

44] With reference to the transfer of 1% shareholding to his employee, in contravention of the order of divorce granted on 5 March 2019, he denied that it was done in contempt of the order of divorce and that it was orchestrated by him to prevent an attachment of the shareholding of the business in execution of payments due to the plaintiff. The employee to whom he made the transfer had not at the time of the testimony paid the purchase price of the 1% shareholding. He testified he was not aware that the divorce order prevented such transfer.

45] He denied that he pursued the change of the terms of the antenuptial contract around 2003 as he had started a serious relationship with Ms. B around that time. Communication by way of SMS's between himself and Ms. B, though it contained promises of their future life together and giving her the choice as to which home she would like to move in to was referred to by him as simply pillow-talk and testified that the "*test of the pudding was in the taste*", meaning that he never took her seriously.

46] Whilst he did not comply with the order for the maintenance obligations due as at 1 May 2020, he nonetheless made payments for his personal expenses. He testified that he wanted to bring the maintenance obligations to the plaintiff up to date and that he was at the time of the beginning of the trial 11 – 13 days late, but it was his intention to pay it. He testified that he always paid his maintenance obligations, but conceded that monthly payments were not timeous and that pursuant to the issue of writs and contempt of court orders, the amounts were paid. He conceded that after a writ was served on his bank account for arrear maintenance, he did not pay the December maintenance due thereafter. He acknowledged that in opposition to the contempt application he indicated that he was not able to pay the maintenance obligations although he had access to funds and notwithstanding his stance earlier in his testimony that he was going to pay the maintenance, albeit later.

47] He conceded that he had not returned the outdoor furniture at the plaintiff's property notwithstanding the terms of the domestic violence order that he return it, because he had placed it at his holiday home in Misverstand and had not been back there. When cornered that that is a contravention of the order, he indicated that he can return it. When asked if he had offered to return it, he changed his version and said that he is not allowed to talk to her. He does not recall correspondence addressed to his attorneys seeking compliance of the order and return of the furniture.

48] He travelled to Australia in March this year, flying business class, a trip that was fully paid for by the business. He confirmed that he did not comply with the

maintenance order for that month but maintained that he had been paying maintenance for 6 years pending action and after a number of concessions he answered:

"MR W: You're tripping me up on a few things, its fine."[38]

49] In his answering affidavit to the contempt application (heard at the recommencement of the trial), the first defendant stated under oath that the business is not receiving any oncome. He conceded that the business bank statements reflect income received albeit limited income. When this was pointed out to him, he testified that it was a mistake and apologised.[39] He also conceded that he had access to funds in the bond account of the close corporation that owned the business properties in the amount of R700 000 which he accessed to finance his legal costs but had stated in the contempt application that he could not pay the maintenance due for the month. He could not dispute that his trip to the Americas in 2019 costed close to R300 000.

50] His reasoning for selling 1% of the shareholding in the businesses to an employee was to ensure that if he were to pass away, the Gilded Edge could still be functioning. He conceded that he resisted a writ of execution in favour of the plaintiff for unpaid maintenance against the shareholding of the business on the basis that he is no longer 100% shareholder thereof. He testified that he was not aware that he

[38] Record page 454, line 15
[39] Record page 455, lines 21 - 22

was in transgression of the order of divorce which ordered that he could not alienate his assets pending the finalisation of the remainder of the trial. He acknowledged that his counter application in August 2019 was dismissed by the Court in terms of which it was held that he was not at liberty to use the proceeds of the sale of the property to pay the maintenance obligations. However, shortly after the order, he instructed his attorney (who also acted as the conveyancing attorney) to pay the money over to the Gilded Edge on the basis of a loan account owing to the business in order that he could pay the maintenance payments due to plaintiff.

51] He testified that his intention at the time of the antenuptial contract was to exclude all future businesses and assets from the accrual.[40] He conceded that the effect of the postnuptial agreement was as if they would be married out of community of property. The record reads:

> ***"MR W: We should have been married out of community of property. It would have made life so much easier."***[41]

And further at record page 530, line 4 – 11:

> ***"COUNSEL: So Mr. W, just to summarise….Your intention and L W's intention at the time of the entering into the antenuptial contract was to exclude everything going forward?***

[40] Record page 524 and 525
[41] Record page 526, lines 6 - 7

MR W: Correct"

52] Whilst he testified that the reason for him wanting the postnuptial agreement signed in 2003 was so that he could obtain a loan, however the bank wanted both him and the plaintiff to sign as sureties. Whilst it was not put to the plaintiff, he testified that she did not want to sign as surety, which prompted him to amend the terms of the antenuptial contract although he always had intended right from the inception of the marriage to exclude his business and all properties in his name. The purpose of the postnuptial agreement he testified was to bring it in line with that intention. The process took a period of two years and was registered in 2005 after the granting of an order by Court. He could not remember what happened to the loan application or finance that he required in 2003 and which prompted the need for the amendment of the terms of the antenuptial agreement.[42] At the time of the postnuptial agreement in 2003, the plaintiff had been recovering from cancer however her business interests were excluded in terms thereof. However she had no business interests. He conceded that the purpose of the postnuptial agreement was essentially to ensure that there would be no accrual.

53] Further cross examination dealt with his disposition of 1% shareholding – the company and the close corporation in August 2019 which was in contempt of the order of divorce granted five months prior. He maintained that the purpose of the transfer of shareholding was not to resist the execution of writs in favour of the

[42] Record page 531

plaintiff and but in order to secure the continuation of the businesses in the event of his passing.

54] He had a meeting with plaintiff's attorneys of record in 2014 and explained how he operated his financial affairs including that of the business and the trust. He chose not to be formally represented at the meeting, having obtained legal advice from a friend. Pursuant thereto the plaintiff laid claim to the trust as being part of the estate of the first defendant. He was bitterly aggrieved at the fact that the plaintiff's attorney used the information so acquired from him and launched divorce proceedings at the instance of the plaintiff for relief against him and the trust. He launched a complaint against the plaintiff's attorneys of record to the Law Society (now called the Legal Practice Council) on the basis that the attorneys used sensitive information obtained from him to pursue the plaintiff's claim against him and the trust. He testified in respect of the meeting with plaintiff's attorney as follows:

> ***"COUNSEL: But you're complaining that she's used financial information against you.***
>
> ***MR W: Not the financial information more the discussion on the mechanics of how we set out, how everything works."*** (Record page 649)

DISCUSSION:

Is the business excluded from the accrual?

55] It is trite law that the effect of the terms of the antenuptial contract *apropos* the business of the first defendant is that Art Cast (a sole proprietorship as at time of the marriage), its proceeds and assets which replace this excluded asset or acquired with its proceeds are excluded from the accrual. In terms of Section 4(1)(b)(ii) of the Matrimonial Property Act 88 of 1984 ("the MPA"):

> ***"An asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or dissolution of the marriage."***

56] According to the February 2003 financial statements of the Gilded Edge CC, the first defendant **sold** Art Cast to the close corporation of which he was the sole member and director. The purchase price was credited to the first defendant's loan account. Although the first defendant's case is that the business of Art Cast was converted into the close corporation (not sold), this evidence is not borne out by the financial statements which reflect the transaction as a sale. In his, report dated 20 February 2019 Greenbaum states that he was:

> ***"…instructed that the business of Art Cast was sold by C to Gilded Edge CC in or about February 2003. This is evidenced in the CC's 2005***

comparative figures in the financial statements of the CC which reflects a goodwill figure of R2 818 166 in 2005 and C's credit loan account of R3 837 919 arising from the sale of the business, including fixed assets in 2003/2004.'"[43]

57] Only the expert for the plaintiff, Griffiths, testified. He explained in his testimony that the reflection in the financial statements of a goodwill figure is evidence of a sale and not a conversion as being the evidence of the first defendant. As at the date of divorce the defendant's loan account was still showing in excess of R4 m. There is no evidence to support or illustrate that the first defendant's excluded proceeds had acquired assets which enjoys the exclusion as set out in Section 4(1)(b)(ii) of the MPA. The first defendant bears the onus in that regard. However, it is not challenged that the amount credited to his loan account (in excess of the sale price) is excluded from any accrual calculation of the value of his estate if the antenuptial contract is found to be applicable to the marriage of the parties.

58] In my view the first defendant's contention that the business was not sold but simply converted from the Art Cast sole proprietorship to Gilded Edge CC was a tailored explanation to overcome the terms of the antenuptial contract. A conversion of the business would continue to make it the same excluded business contemplated in the antenuptial contract. However, neither the terms of the financial statements nor the report by his own expert and the expert testimony of plaintiff's expert support a finding that Art Cast had been converted into a close corporation and not sold.

[43] Expert report by Greenbaum – expert bundle, page 470

The first defendant testified that the Mr. Gees who had assisted in preparing the antenuptial contract had *"snookered"* him in that as soon as his sole proprietorship would be sold, it no longer had the protection of being excluded from the accrual. The first defendant thus felt tricked, enticed or trapped by the conclusion of the antenuptial contract. If anything, on a balance of probabilities, he sold Art Cast to the close corporation as it was a more lucrative option. He was not mindful of the fact that the sale of the business would mean in terms of the antenuptial contract that proceeds and assets acquired from such proceeds would be excluded and not the sale of his business. It is evident that he pursued the more financially viable option, that is, to sell Art Cast at a value which provided for an excess of R2 m in goodwill. A conversion would not have allowed for a goodwill value and the business would have been converted at a far lesser value. The first defendant had clearly not been truthful to the Court and fabricated a conversion theory as a means to secure his business, (now operating as a company), from the accrual calculation.

Is the postnuptial agreement valid?

59] The first defendant maintained that he always wanted to be married out of community of property and that he wanted to rectify the antenuptial contract. The effect of the postnuptial contract was to exclude everything that he would acquire in the future as the assets that the parties would share in jointly were the assets registered in the trust. The plaintiff maintained that the first defendant unduly and unlawfully influenced her to sign the postnuptial agreement in that she was on a low ebb as a result of emotional abuse by the first defendant, exacerbated by her diagnosis of cancer, extensive treatment of cancer, the passing of her father and her

fears regarding the dissolution of the marriage as well as the adverse consequences for her and the children. She believed the first defendant that were she not to sign the postnuptial agreement that the children and her would end up with nothing. She wanted to preserve the peace and the status quo, believing that by doing so she would succeed in sustaining the family unit, the marriage and their lifestyle.

60] It is significant a feature that the parties were in vastly different financial positions as at the time they signed the postnuptial agreement. The plaintiff had at this time become financially dependent on the first defendant, had no business interests with little prospect of pursuing same in the foreseeable future given her health including her emotional circumstances and the fact that she had been the primary carer of their two young children. The only person who stood to benefit from the postnuptial agreement was the first defendant. Whilst he was excelling in the business and basking in the affirmation of his success, she had by that time regressed in those spheres, offering her commitment to the primary care of their children, running of the household and overcoming a miscarriage, cancer and extensive medical treatment. It is not in dispute that when the plaintiff signed the postnuptial agreement, she was very unhappy when they attended at counsel when the joint application was prepared and was emotional during the consultation. The fact that the plaintiff seemingly acquiesced to the first defendant's demands by signing the affidavits and the postnuptial agreement does not mean that she was not unduly or improperly influenced to do so.

61] The first defendant was alive to the numerous vulnerabilities that the plaintiff experienced at this time. He had become the proverbial hand that rocked the cradle.

Given the financial and emotional superiority he had by that time exercised over her and by asserting himself in his persistence to protect and advance his financial interests, he abused his position of trust as the breadwinner in the family and as a spouse and partner to his wife. The parties were not on equal footing in concluding a change in the patrimonial consequences of their estates and it is patent that the first defendant was not committed to the marriage at the time. The execution of a nuptial contract (before or after the marriage) is for the purpose of determining the patrimonial issues in terms of a future or sustained marriage as opposed to the creation of a divorce.

62] The historical gender based inequalities continues in recent times to persist in marriages, though it had no doubt declined in recent decades. Systematic gender differences given the respective roles of the spouses in the marriage results in reality that one party may have more authority in the marital and financial decision making.[44] In a society where gender inequality remains a reality, one partner often excelling in pursuing a career and financial success whilst the other is servicing the interests of the union by primarily taking care of the household and the children, it cannot be held in these circumstances that such spouse are seen to have equal bargaining power to the other. This is the case herein. Given plaintiff's vulnerable position in the marriage and the consequent power imbalance, she was unable to contest her objections or to bring into will the protection and advancement of her own financial interests. It is fair to say that the plaintiff experienced emotional battering by her husband. Her consent may have been apparent but not real. That much is borne out by the facts of this case. It is evident that the first defendant unduly

[44] Lerner, G: The creation of patriarchy - Oxford University Press - 1987

influenced the plaintiff by capitalising on her subordinate and crippling circumstances to act contrary to her own free will resulting in her acting to her detriment not only to the adverse financial consequences she faced but also to the fact that it would bring about for her further determination and emotional subjugation.

63] Whilst the case for the first defendant is that he pursued the change of the antenuptial contract because on an occasion in 2003 when his bank manager considered the terms thereof as a bar to the granting of a loan, it is far more plausible an explanation that he had in 2003 due, to being in a serious extra-marital affair or simply not taking the marriage seriously, wanted to ensure that if the marriage did not succeed he would be free from sharing his estate with his wife, save for paying spousal maintenance to her. Though the first defendant denied the seriousness of the relationship notwithstanding that it spanned over a period of 12 years where he had made various offers to her of a life together, it remains a fact that he was not committed to the marriage and that he clearly wanted in the circumstances to secure his financial interests to the detriment of his wife. He tried to achieve her exclusion from his financial interest *post facto* without any embroilment and an easy financial disentanglement from his wife.

64] It is not without significance that whilst he insisted on the conclusion of the postnuptial agreement for the interests of the continued marriage, he stated in his

opposing affidavit to the Rule 43 application launched by the plaintiff in February 2015, that:[45]

> ***"The fact of the matter is that our marriage has been over <u>for more than ten years</u> and we have only stayed together for the sake of the children."***

It is evident that when he went about to ensure changes to his nuptial contract he was in actual fact managing his affairs to enable an extrication as favourably as possible for himself from the marriage and a time when he had no confidence in the marriage. He also induced in the plaintiff a belief that the change to the terms of their antenuptial agreement would be simply to regulate their future marriage, at a time when he was in fact not committed to the marriage and had been conducting himself contrary to the sanctity of a continued marriage.

65] The evidence supports the inescapable conclusion that by 2003 the first defendant perceived the plaintiff as an obstacle to his financial and business security. He had not conducted himself with good faith in the marriage, the plaintiff had become more emotionally insecure and dependant on him and he did not want her to come after his assets in the event of divorce. Bringing about the effect of an out of community marriage by changing the terms of the accrual would to his mind achieve his desired goals. The postnuptial contract was nothing but a financial exit strategy of the marriage for the first defendant. Spouses however cannot seek to exclude assets from their marriage which do not exist at the time of their marriage.

[45] Case number: 3634/15 – affidavit of CR W – dated 12 March 2015 at paragraph 10 thereof

On the first defendant's case the postnuptial agreement was simply to rectify his intention at the time of the conclusion of the marriage, but rectification of an error in the antenuptial contract which the first defendant sought to achieve was not common to both parties as it was his intention as opposed to theirs, to have the consequence of being effectively married out of community of property. Had the Court been aware of the true position of the plaintiff it would not in any event have granted the order allowing for the change of the antenuptial contract. On this basis alone, it stands to be rescinded.

66] Section 21 of the MPA regulates a change of matrimonial property system. The parties herein, however, had not sought to change their marital regime. It sought to bring about change to the effect of the applicable matrimonial regime through an amendment of the terms the accrual by retaining the marriage as being a marriage in terms of Chapter 1 of the Act, on the face of it, (a marriage subject to the accrual system) but which is in truth and in fact out of community of property. The MPA brought into our jurisprudence the default position that every marriage is in community of property (*communio borum*) unless the parties entered into an antenuptial contract to the effect that it is out of community of property. Furthermore, if the marriage is contracted by an antenuptial contract to be out of community of property the default position is that it is subject to the accrual system unless it is expressly excluded by the antenuptial contract.

67] The purpose of these default positions is clearly an embodiment of the principle that marriage also represents a collaboration of a partnership with

patrimonial consequences and affording the parties to a marriage in various degrees as to what financial interests they would choose to share. The term "accrual" means the net increase in value of a spouse's estate since the date of marriage. It bears the principle that what belonged to each party upon entering of the marriage remains their respective property, however, what had been earned during the marriage belongs to both parties. The accrual system is effectively a deferred community of gains.

68] The application of the accrual system presupposes that at the dissolution of that marriage, the spouse whose estate shows no or smaller accrual than the estate of the other spouse acquires a claim against the latter for an amount equal to half of the difference.[46] Notwithstanding that the estates are separate and the right to share only comes into effect upon dissolution of the marriage, the spouse to an accrual marriage retains the right to protect his or her potential claim to the growth of the other spouses' estate. The provisions of the MPA acknowledges that right and provides relief in terms of section 8 to a spouse whose marriage is subject to the accrual system and who satisfies the Court that his right to share in the accrual of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or reasonably apprehended conduct of the other spouse and that other persons will not be prejudiced by such an order, the immediate division of the accrual may be granted in accordance with the provisions of the MPA and on such or other basis as the Court may deem just.

[46] Heaton, J – South African Family Law 3rd edition (Durban: Lexis Nexis 2010 at 94)

69] The aforesaid is a clear illustration that a marriage subject to the accrual system anticipates the one party to have a claim upon dissolution against the other party with the greater growth in estate. An accrual system cannot be valid when in truth it amounts to being a marriage out of community of property and a construction of an antenuptial contract with inclusion of the accrual but effectively making it a marriage with the exclusion of the accrual is not valid. For these reasons I am of the view that the postnuptial agreement is contrary to the provisions of the MPA and cannot be of any force and effect and in addition to the reasons stated above it is accordingly set aside.

Were the payments advanced by plaintiff loans to the first defendant?

70] It is not disputed that the plaintiff made payment of an amount of R1 010 000 from the proceeds of the sale of excluded assets and payment of a dread disease policy. The first defendant maintained during the trial that the payments so made to him was made by the plaintiff towards their expenses and did not amount to loans as same were not repayable. This position is however contrary to his expert witness (in the form of the joint minute) which reflect the funds as being loans. It is also contradicted by the contents of his personal letter addressed to the plaintiff dated 14 March 2014 which reads:

"I built the house. I did all the work. I do all the maintenance. I pay for everything. You help me as little as possible even though you are supposedly the homemaker. I paid for it entirely through my business bonds."

Furthermore it was not disputed that the plaintiff received annual interest payments on the loan. The experts could however not agree on the amount. The plaintiff's expert was of the view that the amount of R 1 010 000 remained due to the plaintiff whilst the expert for the first defendant considered the financial statements of Gilded Edge, the trust and first defendant and determined the amount to be R506 000 in total.

71] Counsel for the first defendant argued that the plaintiff did not testify as to explain the basis for any such loans; the purpose of any of the loans; what the terms of any loan agreement were; and what the discussions with the first defendant with regards to such loans were. The affairs between husband and wife and the running of their household is not a business enterprise. The relationship between them in the course of financial affairs is *sui generis* compared to persons engaging each other in such matters and contracts as a whole. For example, prescription do not run between spouses in respect of monies due to each other. This is illustrative of the law's respect for the sanctity of marriage and the preservation of the bonds of between them. Parties to the marriage do not engage each other in the construction of their finances with the calculated prudence as business individuals. They do not necessarily keep records of finances or agreements between them. Whilst their marital union is recorded in writing by way of a marriage certificate, their undertakings to each other are generally not reduced to writing. They go about these affairs with a relaxed attitude, alacrity and a lot of good faith. They are generally gullible to each other until the love has gone. Like the lyrics of the popular

Earth, Wind and Fire hit: **"After the love is gone"**,[47] "*what used to be right is wrong*." As the cold reality of war dawns, all the "*I do's*" become "*You didn't*".

72] In terms of an interlocutory order of this Court, the defendant was ordered to pay to plaintiff an amount of R369 768 in lieu of partial repayment of the loans advanced by the plaintiff. This amount must be taken into account in the determination of the amount due by first defendant to the plaintiff. The versions by the parties on the issue whether the amount advanced were in fact loans are diametrically opposed between the parties. The plaintiff's evidence is that she advanced the money to the first defendant and that he nominated in which accounts it ought to be paid. The first defendant's version is that the payments were not loans, however contradicted by the financial statements that an amount of R506 000 reflected as loans due to the plaintiff supported by his own expert.

73] The question remains as to whether the amounts advanced by the plaintiff were in fact loans. The submissions on behalf of the first defendant is that the plaintiff did not sufficiently explain the basis for such loans, the purpose of such loans, the terms of the loan agreements and what the discussions were around the loan agreements.[48] It was also submitted that the claim of loans is a matter of reverse engineering and that it is her case at the eleventh hour.[49] The plaintiff testified in a manner which is clear and satisfactory and in relation to this aspect it cannot be said that her evidence is not to be believed. The first defendant's

[47] Song released by Earth, Wind and Fire 1979 – R&B band
[48] HOA – on behalf of the first defendant – page 11, para 12
[49] HOA – on behalf of the first defendant - page 10

testimony on the other hand was evasive and contradictory in his denial that plaintiff had advanced the amounts to him as loans. His evidence was that they had previously engaged relatives to invest any extra money in the business which would generate a return on investment.

74] I am satisfied that not much turns on the fact that the loans were reflected in the financials of the first defendant personally, the trust and the company. On a balance of probabilities I am satisfied that the plaintiff had proven that she had advanced the amounts as loans to the first defendant personally irrespective how he sought to allocate it. The monies were from assets excluded from accrual being policy proceeds, properties and inheritance. She was by that time not financially independent and it is highly improbable that she would have disposed of these monies by simply paying it over to the first defendant. It was a persistent feature of his evidence that he provided for the family's needs, that he did so well and had worked very hard to sustain himself as the breadwinner. It was only after the institution of the action and during *pendente lite* proceedings that he took the stance that his wife should go get a job and start becoming financially self-sufficient and start to make contributions. He did not rely on her finances nor did she contribute financially to the business or the marriage.

75] However, the principle is that he or she who alleges must prove and it is not sufficient that she is merely required to prove that the amounts paid were in fact loans. The onus remains on her to discharge that the full amount is due as opposed to the amount as per the books of account and as per the report of the first

defendant's expert. I am not persuaded that the full amount of R1 010 000 had successfully been proven to be outstanding and owing to her. The financial books of account shows that the amount outstanding is R506 000. The plaintiff did not adduce evidence which could support a finding that the full total of the amounts paid is due and payable. Her expert relied on cheque stubs, her bank statements reflecting the payments and instructions given to him by the plaintiff to come to the amount of R1 010 000. That her expert repeated her instructions cannot make it more creditworthy than what the Court found it to be. The fact that the first defendant denied it was loans or claimed that any monies paid were contributions by plaintiff does not shift the onus on to him. The burden to satisfy, on a balance of probabilities, what the amount due to her is, continues to rest upon her.

76] The issue of a loan was only pursued upon commencement of the trial in September 2017, as an agreement between counsel that there exists a claim of an unpaid loan between the parties.[50] At the inception of the action, by issue of summons, 22 July 2014, the plaintiff's particulars of claim are set at over 22 pages, dealing with various claims except the loans advanced by her to the first defendant.[51] The particulars of claim were amended in terms of Rule 28 at the resumption of the

[50] Email dated 11 September 2017 between Adv. Buikman SC and Adv. Cloete SC:

> "Adv Cloete SC and I are in agreement that the following issues will require evidence at the hearing:
> 1 …
> 2. It is not agreed that the first defendant has a loan liability to the plaintiff [is] in an amount of R1 010,00 as contended by her. Mr. Greenbaun, the first defendant's expert, maintains that, based on his understanding, the first defendant owes the plaintiff an amount of R130 000, that the close corporation Gilded Edge CC, owes her R151 140,00 and that R185 294,00 is owed to her by the C's Trust."

[51] Pleadings bundle – 1 of 4 – divorce summons and particulars of claim dated 22 July 2014 – subheadings titled: marriage, the trust, accrual, maintenance, costs

trial on 11th May 2020, 6 years after issue of the summons in a highly contested litigation with various interim applications. Taking into account all relevant factors, this Court finds for the plaintiff in the amount of R506 000 less the amount of R369 768 paid to her in terms of the order of Mantame J.[52] In the result, the first defendant is liable to the plaintiff for the balance of R136 232.

Is the trust the alter ego of the first defendant?

77] The plaintiff seeks an order that the assets of the trust are considered to be those of the first defendant. The parties together with their two children are the beneficiaries of the trust. The evidence of the plaintiff's expert is that the way in which the trust's finances were run, particularly since around 2016/2017 were unusual. The trust had no income and met the payments put through the trust, (in particular with reference to the past 3 to 4 years), by way of funding from the company and thereby introducing a new creditor, namely the company. Nothing stopped the first defendant from paying the maintenance expenses directly from the company as he traditionally (prior to the acrimony of divorce proceedings) had done. However, as the litany of court proceedings followed in the bitter action between the parties, the structure of finances changed so that the Gilded Edge who previously funded the first defendant, now started funding the trust which resulted in a loan account created in its favour. This caused the financial statements of the trust to reflect an increase in the Gilded Edge's loan account. Instead of lending funds to its member on loan account, the Gilded Edge was paying the trust. The trust was interposed as a banker, holding the trust property as collateral for payments of the

[52] The order of Mantame J reads: ***"The defendant is ordered to procure payment to the applicant of an amount of R369 768 which amount is, according to the defendant, allegedly owing to the applicant by the C's Trust and the Gilded Edge CC in respect of her loan accounts in these entities"***

first defendant in respect of financial commitments of the first defendant. The financial obligations of the first defendant was not that of the trust, it was in respect of payments due by him in her personal capacity. The orders made against him were not made against the trust.

78] The trust seemed to have been put into effective use as the hostility increased and by making the trust effect payment of maintenance obligations the first defendant could in that way have it reimbursed to the company via a loan account due to it by the trust. This in turn amounts to the first defendant pilfering away at the net asset value of the trust, by having maintenance contributions repaid by to his business and set off against the trust. By reflecting the payments made by the trust in terms of a loan account payable to first defendant personally, the effect was that he was looting the assets of the trust to the detriment of its beneficiaries. This is well illustrated by the fact that the Langebaan property gets sold in excess of R5m which would be proceeds due to the trust, for the benefit of the beneficiaries (the parties and the two children). However as a result of the loan account due to the company, he claimed the proceeds of the sale by calling up the loan account. The language of the first defendant during his evidence in chief was most telling that he did not operate at armslength to the trust. By stating that he "*paid this money for six years, it made sense that the trust paid its own expenses*" demonstrates the paradigm of the first defendant in this regard. His personal expenses in his view was the trust's expenses. At best the company under his control would lend the money to the trust to pay his expenses and in return the trust assets stood to account for it.

79] The Langebaan property (owned by the trust) inclusive of its movables were sold in April 2019 for a cash amount of R6 750 000, with a net balance of R6 517 127. The attorney for the first defendant was appointed to attend to the registration of transfer on the basis of an undertaking that the net proceeds would be retained in trust, pending the finalisation of the trial. When the plaintiff's attorney demanded payment of compliance of the first defendant's maintenance obligations outstanding at the time, his attorney responded on 15 May 2019 that the first defendant could not comply with the provisions of the order and made suggestions which culminated in utilising the proceeds of the sale proceeds which belonged to the trust. When the plaintiff was not amenable to these proposals, events unfolded where the majority of the net proceeds were paid to the company in respect of its loan account held in the trust. The first respondent had in this way effectively achieved the relief which was dismissed in the Rule 43(6) application, that is, the Court specifically refused his claim that the proceeds of the Langebaan property be used to pay the first respondent's personal obligations which had previously been met with income generated by the company. The trust had no obligation whatsoever to pay the first defendant's maintenance obligations.

80] Furthermore the payment was made pursuant to an invalid resolution as the plaintiff was not given notice of such resolution prior to the majority of the trustees taking a decision. The first defendant and his bookkeeper (as independent trustee) signed the resolution without it having been furnished to the plaintiff. The payment also amounted to a breach of the provisions of the divorce order of 5 March 2019 which required that the assets would remain intact and third party creditors would not be preferred to disenable the parties from being able to execute any future orders

that the Court could make upon finalisation of the action. The matter was thus subjudicae. The actions of the first respondent meant that he, as the sole director of the company, had upon receipt of the payment become in control of the Langebaan sale proceeds. An urgent application brought by the plaintiff for interdictory relief was successful in terms of an order by agreement on 7 June 2019, in terms of which the proceeds were ring fenced in the ABSA account of the Gilded Edge, pending the final determination herein.

81] In his expert testimony, Griffiths did not testify that the trust is a sham. It was however clearly abused by the first defendant. These are distinctly different concepts in our law. It is now generally accepted that the issue of going behind the trust form should be clearly distinguished from the issue whether a particular trust is a so-called scam.[53] In the case of a 'sham' trust, no valid trust has ever come into existence, typically because the necessary intention to create a trust was absent.[54] In this case the assets would still vest in the personal estate of the founder of the trust and there would be no trust to go behind.[55] On the other hand, the principle of "going behind the trust form" entails accepting that the trust exists, but disregarding the ordinary consequences of its existence. A Court's willingness to 'go behind the trust form' in a particular instance appears to be closely linked to the notion of trust abuse. Dishonesty or unconscionability is not necessarily requirements before trustee conduct can be described as trust abuse.[56]

[53] Honore: South African Law of Trust, 6th edition, page 311
[54] Sections 67 and 68 of the Trust Property Control Act 57 of 1988
[55] See footnote 48 supra
[56] Honore at 53 supra

82] In *REM v VM*[57] the Supreme Court of Appeal held that this would generally occur when the trust form is used in a dishonest or unconscionable manner to evade a liability or avoid an obligation. This type of trust abuse is typically represented by a general disregard of the separation between the ownership (or control) of trust assets and its enjoyment and non-compliance with the basic principles of trust administration. In *Badenhorst v Badenhorst 2006 (2) SA 255 (SCA)*, dealt with a claim where the parties were married out of community of property and in considering a claim for a redistribution order, the wife sought an order that 50% of the value of the husband's estate be transferred to her. Incorporated was a claim that the assets of a discretionary trust be regarded as assets in her husband's estate. In order to decide the issue the Court formulated the following test:

> ***"To succeed in a claim that trust assets be included in the estate of one of the parties to a marriage there needs to be evidence that such party controlled the trust and but for the trust would have acquired and owned the assets in his own name. Control must be de facto and not necessarily de iure."***[58]

83] In assessing whether a party has such *de facto* control, regard must be had to both the terms of the particular trust instrument and the evidence of how the affairs of the trust have been conducted. The evidence herein was that the independent trustee, the bookkeeper of the first defendant, acted nominally in her function as the independent trustee, generally at the behest of the first defendant and did not wish to

[57] 2017 (3) SA 371 (SCA) at para 17
[58] Paragraph 9

get involved with decision making of the affairs of the trust. In certain respects the first defendant would invoke a decision for the trust and only thereafter seek endorsement by way of a resolution. It is apparent that the first defendant never intended to hand over control of the trust affairs to the named trustees. It is common cause that prior to 2014 when the plaintiff had instituted proceedings in this Court, the parties had never asked the independent trustee (appointed in 2005) to sign any resolutions. The first defendant and plaintiff signed resolutions but according to the second to fourth defendants, these were only resolutions as required by financial institutions and transferring attorneys etc.[59]

84] Trust affairs would be discussed on a daily basis between the plaintiff and first defendant, with the first defendant making the final decisions. In most respects the first defendant would decide on the trust finances or how money would be spent. Whilst initially the trust was funded by the first defendant, this changed pursuant to the Rule 43 order when the first defendant decided (according to him with his bookkeeper) to restructure the trust's affairs to enable the trust to make payment of many expenses of the beneficiaries. No rental was paid to the trust in respect of properties belonging to the trust, however, appropriated by the first defendant. The trust is named the C's Trust as opposed to the W Family Trust.

85] In considering the trust instrument, it is most telling that the trust deed regulates what happens when the office of a trustee is vacated. In clause 5(f) under

[59] Pleadings bundle – 2nd – 4th defendants reply to the request for trial particulars para 17.2 p158

the heading: **"TRUSTEES VACATING OFFICE"** The office of the trustee shall be vacated:

> ***"If the majority of the Trustees shall in writing require him to resign, provided that it shall not be competent for the trustees to remove C W in this manner."*** [60]

This is a clear illustration that the trust deed favours the first defendant's involvement in the trust over others and that he is in total control. He also testified that he paid the expenses and legal costs of the trust and that once the divorce is finalised the books will be corrected. The attorney of the first defendant also acts as the attorney for the trust, suggesting that there could never be a conflict of interest, actual or anticipated. In May 2019 first defendant instructed his attorney, who also attended to the conveyancing of the Langebaan property, to repay the amount of R5 395 000 to the Gilded Edge in payment of the loan account due to it. Only after the payment had been made did the first defendant seek the plaintiff's consent for the payment transfer to the company.

86] The first defendant reported the plaintiff's attorneys to the Cape Law Society on the basis that the averments in the particulars of claim which relate to the trust and specifically where it is alleged that its assets are beneficially owned and controlled by him, were drafted on the basis of financial information that he gave them in a meeting. He claims this financial information was used against him in the

[60] Plaintiff's PLEADINGS BUNDLE: Trust Deed: attached as annexure "B" to Plaintiff's particulars of claim

divorce and joining the trustees as a party to the action. First defendant also complained of information given to this Court during the opening address by the plaintiff's counsel in which the mechanisms and functioning of the Gilded Edge were explained. He took issue with the fact that it was based on the information which he had told the plaintiff's attorneys. In an answer to a question from the Court, the first defendant confirmed that whilst the information in the particulars of claim and the opening address on behalf of the plaintiff in relation to the machinery of the trust was correct, he felt aggrieved by the manner in which it was obtained. The admissibility of information so acquired however was not placed as an issue in dispute before this Court. In conclusion of this point, the first defendant's testimony in this regard was not satisfactory. He was evasive, argumentative and contradicted himself in material respects. The evidence supports the inherent probabilities that the first defendant controlled the trust and he would have acquired and owned the assets in his own name but for the trust. I am satisfied that the evidence meets the requirements for this Court to invoke its discretion in terms of common law in the granting of an equitable remedy in law which would adequately address the consequences of unconscionable abuse of the trust form by the first defendant. Accordingly the value of the trust assets is to be added to the value of the first defendant's personal estate for the purpose of calculating the accrual calculation.

Calculation of the Accrual:

87] Having determined above that the terms of the antenuptial contract applies with inclusion of the value of the trust assets, it follows that scenario 1 of the amended Exhibit A(1) applies. There is no accrual in the estate of the plaintiff. The

first defendant's estate is valued at R26 457 plus the value of the trust R7 298 368 totalling an accrued estate in the amount of R33 755 647. Fifty percent of this amount is due to the estate of the plaintiff totalling **R16 877 823** to be paid by the first defendant.[61]

88] The payment of the amount of R5 394 315.20 in the Gilded Edge ABSA Bank money market account (the ring-fenced amount) represents the proceeds of the sale of the Langebaan property which was registered in the name of the trust. The payment was paid pursuant to an invalid resolution and is declared part of the trust's assets for the purposes of the divorce. An order that the amount be allocated to the payment of the accrual amount due the plaintiff is warranted given the fact that the first defendant do not respect orders of Court, had repeatedly been in contempt thereof and once subjected to an order, engineers creative ways to get around the terms thereof. He also attempted dissipation of the sale proceeds which necessitated plaintiff's resort to the urgent interdict application which culminated in the order (by agreement) in terms of which the money in the ABSA Bank account of the Gilded Edge was retained pending direction of this Court. He also dissipated (in contravention of the order by this Court) 1% transfer of his shareholding in the Gilded Edge and Essensico CC respectively. When the cross examination of the first defendant stood over on the Thursday until Court could resume on the Monday, he continued with his testimony with documents which he sought leave to hand up recording the purported 1 % transfer of shares to his employee and which had in fact been executed over the past weekend. When again confronted with the fact that he

[61] Scenario 1 as per Exhibit A(1) as amended and handed up by agreement. Projected calculation in the event of a finding that the ANC applies including of the trust asset value.

was in contempt of the Court's order as had been the subject of his earlier cross examination, he answered:[62]

"COUNSEL: ***That you had violated the order of this Judge by encumbering that asset.***

MR. W: ***Okay***

COUNSEL: ***And then what you did, was you compounded it on the weekend. That's what I'm saying to you.***

MR. W: ***Well, I don't know this stuff, so…"***

At line 3 of record page 762, the first defendant testifies further under cross-Examination:

"MR. W: ***I am not an administrative type of person, and I just tried to do as much housekeeping as I could over the weekend…"***

"MR. W: ***Obviously it needed to be done at any stage anyway. So I've done it…"***

89] The first defendant described himself in his evidence in chief as a *"maverick".* When asked by the Court what he meant by that he said he is a businessman and that he takes chances. The conduct of the first defendant

[62] Record page 761 and 762

is exactly that. He gambles with his affairs, his marriage and orders of Court. He does not align himself within the parameters shown to him by authority. This is well illustrated throughout the record. He conducts his affairs in a manner that's suitable to him. He is recalcitrant[63] in his way of doing things, irrespective of the letter of the law. During his cross-examination and after he was vigorously cross-examined as to the fact that he had divested himself of 1% shareholding in his business and the close corporation respectively, notwithstanding, that the order of this Court prohibits him from doing so, he pleaded ignorance of the terms of the divorce order in that regard. He was clearly well aware of what he was doing and that he was in breach of an order. However, (whilst under oath), he saw fit to continue his cross examination with a flippant attitude explaining the sale agreement was executed over the intermittent weekend on the basis that he just did his homework as it had to be done.

Valuation of the furniture owned by the trust:

90] I am not persuaded that the values provided by either experts are reliable and reasonable figures. The items of the Atlantic Beach property had not been reasonably assessed or appraised and itemised. The experts had provided a value in accordance with their instructions. This was apparent from the evidence of the parties, in particular, the first defendant who testified that the furniture could not be worth more than R20 000. Taking into account the standard of living of the parties, they had moved into the property in 2008 and their holiday home furniture sold for

[63] Oxford Language: "recalcitrant" - defined as having an obstinately uncooperative attitude towards authority or discipline.

R1 m, the property is luxurious golf estate, I am satisfied that R500 000 would be a reasonable determination in respect of the furniture.

Maintenance in respect of the children and the plaintiff:

91] It was agreed between the parties that an order in respect of the maintenance payable by the first defendant may be taken in terms of the amount payable per child and other related costs for their care until such time as they have completed their tertiary education and are self-supporting notwithstanding that they have respectively attained the age of majority adjusted annually by such rise that may have taken place in the CPI on the anniversary date of the divorce. The parties further agreed that first defendant will pay spousal maintenance to the plaintiff until her death or remarriage, the amount determined by the Court is also agreed to be subjected to a CPI adjustment annually on the anniversary date of divorce as well as other costs related to her medical care.

92] For the purposes of determining the quantum of maintenance payable by the first defendant to the plaintiff, the parties agreed to a maintenance projection prepared by forensic actuary, Mr. Alex Munro,[64] on behalf of the plaintiff. The purchase of a R5 m property for the plaintiff, would leave her with a balance of R63 450 per month towards her maintenance requirements. It was not placed into dispute that the maintenance needs of the plaintiff is R95 193-00 monthly.[65] The plaintiff has income generating immovable property (excluded from accrual) to which

[64] Expert bundle, page 429
[65] Plaintiff's trial bundle 4: Filing Notice: Reasonable maintenance requirements dated August 2017

she testified would afford her income of R10 000 per month, reducing her required maintenance to just over R85 000.[66] At the resumed hearing on 11 May 2020 the parties' agreed that the contents of the updated report of the forensic actuary would be admitted into evidence without the need to call Mr. Munro. According to him for every R10 000 required by the plaintiff to finance her maintenance needs of R85 000 she requires R1 872 020 to be able to generate it through investment.

93] In terms of the projection figures of the accrual calculation which had been determined by this Court above,[67] after deduction of a R5m expense allocated to an immovable property, the balance of the funds being R11 877 823, if invested, will provide the plaintiff an amount of **R63 450** per month.

94] The schedule of monthly expenses in respect of the plaintiff were not placed into dispute. During closing arguments counsel for the plaintiff submitted that the amount as per the schedule filed dated August 2017 indicates an amount of R85 400, which amounts to R95 193 per month adjusted annually to date of hearing in accordance with the rise of the Consumer Price Index.

95] The schedule had not been updated or amended at the resumed hearing some three years later save for insofar as it relates to inflation adjustment. Upon a proper analysis of the listed expenses with the evidence on record, I consider it appropriate and reasonable that the capital monthly maintenance be adjusted accordingly.

[66] Record page 910
[67] Scenario 1 – Exhibit A(1) as amended

Certain amounts are deducted as set out in the foot hereof and in light of the Order which follows or as had already been catered for in the remainder of the Order. This includes certain provision relating to the motor vehicle expense, cleaning expenses in respect of the Park Manor property subjected to lease, medical expenses and medical aid premium for plaintiff and the children. In answer to a question by the Court, plaintiff's counsel indicated that the rental income of R10 000 of the Park Manor property had already been provided in the maintenance schedule and the required contribution had been reduced accordingly. On perusal of the schedule it is not apparent that such income had been provided for and in the result same is deducted from the total maintenance contribution to be considered by this Court.[68] In the result the reasonable maintenance requirements for the plaintiff is determined to be R88 976 adjusted to R78 976 taking into account the plaintiff's rental income.

96] Taken together with the return on income from the balance of the investment provided for in the actuarial report given the accrual payment to the plaintiff, calculates to just over **R15 500** per month deficit. The first defendant is accordingly ordered to contribute this amount as a cash contribution towards plaintiff's maintenance requirements.

Costs:

97] The plaintiff was successful in every application and interlocutory proceeding brought pending finalisation of this trial. Certain matters stood over for costs to be

[68] Park Manor (cleaning service R2000), gifts for friends/family reduced to R1500, motor vehicle expense reduced to fuel allowance of R3000, entertainment reduced to R5000. Total reduced by R 6217.

determined accordingly. The defendant's stance was that the plaintiff is not entitled to any payment whatsoever from any accrual, that she was required to find employment to sustain her reasonable costs of her maintenance needs. The plaintiff is substantially successful in her claims before this Court and it follows that the costs must follow the result.

98] The postponement of the trial in March 2019 was as a result of the first defendant's expert report filed belatedly, the costs of the postponement application still have to be determined. The first defendant tendered and made payment of the plaintiff's wasted costs of the postponement on 4 March 2019. The costs of the application for postponement by the plaintiff was necessitated by the first defendant.

99] The costs of the Rule 43 application under case number 5107/2017 instituted on 17 March 2017 and the Rule 43(6) application on 9 May 2020 stood over for determination. In terms of the Rule 43 the Court awarded an amount substantially in excess of the first defendant's tender and she was also substantially successful in her application for variation of the rule 43 brought at the inception of this trial.

100] For the reasons aforesaid I am satisfied that the first defendant be held liable for the costs of the plaintiff in the above proceedings and that an order in that regard is accordingly justified.

CONCLUSION:

101] In the result and in all circumstances of this case, I grant the order as set out in the attachment marked hereto as “X”.

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SALIE, HLOPHE, J