REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 12/06766

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

2013-05-16
DATE

SIGNATURE

In the matter between:

VAN ROOYEN, JON-PIERRE Plaintiff

and

ANDERSON, GIOVANNE JONATHAN RAYMOND Defendant

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] On 22 February 2012 the plaintiff instituted an action in this Court against the defendant for the dissolution of a civil union subsisting between

the two of them, as Claim 1, and as Claim 3, for an order that the defendant forfeit in whole all of the patrimonial benefits arising out of the civil union in favour of the plaintiff.

[2] In Claim 2, the plaintiff is praying for an order rectifying the antenuptial contract concluded between the parties in anticipation of the civil union by deleting clause 6 thereof in its entirety and substituting same with a new clause 6 that according to the plaintiff best represents the meeting of the minds between him and the defendant or their intention and purpose when same was concluded. This is the application presently before us.

[3] The applicant also prayed for costs of suit only in the event of the defendant opposing the action. He further prayed for other and/or alternative relief.

[4] When the parties appeared before me in court on 22 April 2013 the applicant moved an interlocutory Notice of Motion which was served on the defendant on 18 April 2013, asking that Claims 1 and 3 be separated from Claim 2 and then postponed *sine die* with no order of costs until Claim 2 has been disposed of. The costs of the interlocutory application were to be costs in the cause.

[5] The defendant did not oppose this interlocutory application for separation.

[6] I granted an order that the rest of the claims or issues other than issues relative only to Claim 2 be separated and postponed *sine die* to be proceeded with after Claim 2 has been determined, with the costs of the interlocutory application being costs in the cause.

[7] The trial then continued in respect of Claim 2 only.

CLAIM 2's PARTICULARS

[8] For completeness sake I quote the entire Claim 2's particulars so as to not lose any of its essence or meaning which can occur if I summarise same in my own words. It reads as follows:

> "***CLAIM 2***
>
> 7. *The parties were married to each other out of community of property in terms of an antenuptial contract, a copy of which is annexed hereto marked 'A', which contract incorporated the accrual system provided for in Chapter 1 of the Matrimonial Property Act, No. 88 of 1984, and was duly executed by a notary and registered by the Registrar of Deeds according to law.*
>
> 8. *Shortly prior to the civil union at Vaaloewer the parties, each acting personally, concluded an oral agreement, the express, alternatively tacit, further alternatively implied terms of which were the following:-*
>
> 8.1 *The parties would enter into an antenuptial contract in terms of which:*
>
> 8.1.1 *the accrual system as provided for in Chapter 1 of the Matrimonial Property Act, No. 88 of 1984, would regulate the proprietary consequences of their civil union;*
>
> 8.1.2 *the assets and liabilities owned by either party at the commencement of the civil union as well as*

any asset acquired by virtue of his possession or former possession of the first-mentioned asset shall not be taken into account as part of each party's estate at the dissolution of the civil union.

9. *The antenuptial contract, annexure 'A' hereto, does not correctly reflect the agreement between the parties in that it reflects:-*

> *'6. That for the purposes of proof of the nett value of their respective estates at the commencement of the intended marriage the intended spouses declared the nett values of their respective estates to be as follows:*
>
> ***6.1 Jon-Pierre Van Rooyen***
>
> *6.1.1 (motor vehicle) Mercedes Benz 240 PTZ 388 GP*
>
> *6.1.2 (motor vehicle) GMV black WLV 974 GP*
>
> *6.1.3 business and accounts for Waiters International*
>
> *6.1.4 furniture and appliances at residence 25 Quellrie Street Witpoortjie Roodepoort*
>
> ***6.2 Giovanne Johnathan Raymond Anderson***
>
> *6.2.1 (motor vehicle) Golf blue RKP 042 GP*
>
> *6.2.2 fish tank and contents*
>
> *6.2.3 chameleon.'*

10. *The antenuptial contract should have reflected:-*

> *'6. That for the purposes of the accrual system the assets of each of the parties set out below as well as any other asset acquired by either party by virtue of his possession or former possession of an excluded asset shall not be taken into account as part of his estate at the commencement or the dissolution of the marriage:*
>
> ***6.1 Jon-Pierre Van Rooyen***
>
> *6.1.1 (motor vehicle) Mercedes Benz 250 PTZ 388 GP*
>
> *6.1.2 (motor vehicle) GMV Black WLV 974 GP*
>
> *6.1.3 business and accounts for Waiters International*

6.1.4 *furniture and appliances at residence 25 Quellrie Street Witpoortjie Roodepoort*

6.2 *Giovanne Johnathan Raymond Anderson*

6.2.1 *(motor vehicle) Golf blue RKP 042 GP*

6.2.2 *fish tank and contents*

6.2.3 *chameleon.*

6.3 *That for the purposes of proof of the nett value of their respective estates at the commencement of the intended marriage the intended spouses declared the nett values of their respective estates to be nil.'*

11. *The failure to incorporate the agreement between the parties as set out in paragraph 10 above was occasioned by a common error of the parties who authorised Christiaan Johannes Scheepers ('Scheepers') to appear before a notary public, James Sales ('Sales'), to sign the antenuptial contract, annexure 'A' hereto, on their behalf in the bona fide but mistaken belief that it recorded the true intention and agreement of the parties.*

12. *In the premises the Plaintiff is entitled to rectification of the antenuptial contract by the deletion of the existing clause 6 in its entirety and the insertion in place thereof of the following:-*

'6. *That for the purposes of the accrual system the assets of each of the parties set out below as well as any other asset acquired by either party by virtue of his possession or former possession of an excluded asset shall not be taken into account as part of his estate at the commencement or the dissolution of the marriage:*

6.1 *Jon-Pierre Van Rooyen*

6.1.1 *(motor vehicle) Mercedes Benz 240 PTZ 388 GP*

6.1.2 *(motor vehicle) GMV black WLV 974 GP*

6.1.3 *business and accounts for Waiters International*

6.1.4 *furniture and appliances at residence 25 Quellrie Street Witpoortjie Roodepoort*

6.2 *Giovanne Johnathan Raymond Anderson*

6.2.1 *(motor vehicle) Golf blue RKP 042 GP*

6.2.2 fish tank and contents

6.2.3 chameleon.

6.3 That for the purposes of proof of the nett value of their respective estates at the commencement of the intended marriage the intended spouses declared the nett values of their respective estates to be nil."

[9] The plaintiff called three witnesses, namely, the plaintiff himself, Ms Sylvia Lindiwe Mabizela and Ms Johanna Maria Magdalena Smith *alias* Hannie.

[10] The plaintiff was the first witness to testify. He is an adult male person and "*female part*" of this same sex civil union that was entered into on 16 December 2007. This civil union was confirmed or proved by a certificate issued by a marriage officer and registered by the Department of Home Affairs.

[11] It is common cause that the parties herein met each other at a club and began a relationship that ultimately developed into an intimate one. The defendant was 17 years when they met. According to the plaintiff this happened during January 2007. The defendant's counsel insisted that they met either during late 2005 or early 2006. However, when one takes the defendant's date of birth as depicted in the marriage certificate, viz 23 January 1989, he (defendant) would have been 17 years in 2006.

[12] According to the plaintiff further, when he met the defendant the latter was not employed and even throughout the duration of this civil union to date, he never was employed. Their friendship developed into a love relationship after a couple of months in March. Although the plaintiff's testimony was that it was during March 2007, as stated above, it should have been during March 2006.

[13] At first the defendant moved with him in a cottage inside his parental home yard before they moved to a flat nearby at Sunset Village.

[14] At this period the plaintiff owned two motor vehicles, to wit, a GWM and a Mercedes Benz as well as a catering and travel sole proprietorship business called Waiters International. It further emerged during cross-examination that in addition to the above business, the plaintiff also owned a funeral undertakers business at which he used to cater for services through his catering business. The GWM was still having a financing balance of around R80 000,00 and that of the Mercedes Benz was around R120 000,00. The Mercedes Benz was repossessed by the bank or its financiers sometime before he instituted the divorce or dissolution proceedings. He also had a few household furnishings and effect.

[15] As love presents before they got married, the plaintiff bought the defendant a Volkswagen Golf, a fish tank and a live chameleon.

[16] Shortly before their planned date of marriage being 16 December 2007 they went around seeking a notary public in order to execute an antenuptial contract. According to the applicant he was advised by his mother to execute the antenuptial contract securing his possessions because she did not believe that the defendant was entering the intended civil union for the same reasons as him, being for love. She suspected he was going along with the civil union solely for purposes of benefitting patrimonially therefrom, seeing that he was not working.

[17] He and the defendant discussed the terms of their proposed antenuptial contract in their cottage first and their agreement according to him (plaintiff) was that they set out their respective assets and have them recorded in the antenuptial contract with the express intention that they be excluded from community of property as well as accrual. It is so that the plaintiff stated that he was not adept with terms like accrual, however their intention and where their minds met was that each of them would keep whatever property he owns as his exclusive property or possession "*without any benefit accruing ...*" to the other at any stage. He further stated that he did not want the defendant to become co-liable for any debts or liabilities that he had or may have in future. According to him the defendant was happy with this set-up.

[18] They both then went to see one Hannie (Ms Smith) who had a shop not far from his own business, which were both situated at Witpoortjie. They explained their intentions to her and sought her counsel or help. She gave

them the phone number of her daughter Alta, who worked as a secretary or personal assistant at some attorneys' offices called Hauptfleisch & Van Zyl in Roodepoort. They contacted Alta who asked them to forward particulars of their request as well as their personal details to her.

[19] The paginated record show at folio E.16 that an e-mail was forwarded from jp@waiters-interntional.co.za to alta@hlaw.co.za on 8 December 2007 with the following message:

> *"Hi there*
>
> *Please find attached a copy of our personal listing for our wedding on 16 December 2007 also you will find our ID books attached.*
>
> *Thank*
>
> *Jon-Pierre Van Rooyen*
> *Operations Manager*
> *Waiters International*
> *South Africa JHB.*
>
> *Tell: +27 11 762 3796*
> *Fax: 08 66 960 766*
> *AH: +27 11 762 6367*
> *Cell: +27 76 767 1858 ..."*

[20] The attachment to the above e-mail contained the plaintiff's ID document and part of a photo silhouette of the defendant together with the following message; which appears at folio E.18 of the paginated record:

> *"Hi there*
>
> *Could you please draw up a contract for Jon-Pierre and Jonathan for our community of property we will be getting married on 16 Dec 2007.*

Listing

Jon-Pierre Van Rooyen

1. *Mercedes Benz 240 PTZ 388 GP*
2. *GMW Black WLV 974 GP*
3. *Waiters International and all belongings and accounts of all nature etc.*
4. *All belongings at 25 Quellrie Street Witpoortjie, Roodepoort*

Jonathan

1. *Golf blue RKP 042 GP*
2. *Fish and Tank*
3. *Firkleurmantjie* [sic] *(verkleurmannetjie)*

Thanks"

[21] Subsequent to the above preliminary or explanatory overtures both the plaintiff and the defendant visited the offices of Hauptfleisch & Van zyl Attorneys on 10 December 2012. They were ushered into that firm's boardroom where they found two ladies who introduced themselves to them. The plaintiff could not give any details or particulars of who those women were, what their capacities – professional or otherwise were -. The outcome of this visit and encounter with the two women at Hauptfleisch & Van Zyl Attorneys was that the two litigants herein signed a power of attorney nominating and authorising one Johannes Christiaan Scheepers to appear before a notary public to execute their wish of drawing up an antenuptial contract. The said antenuptial contract was drawn up and signed by both the plaintiff and defendant the same date, i.e. 10 December 2012.

[22] Alta was not present when the above were done. However, despite the plaintiff's assertion that he never met any attorneys or saw any antenuptial contract, it is clear and obvious that this antenuptial contract was initiated by an attorney at attorneys' offices and was executed by a duly qualified Notary Public (attorneys authorised to register such and similar documents), namely Mr James Sales.

[23] The civil union was solemnised and registered on 16 December 2012.

[24] According to the plaintiff further, their union was beset with problems from day one : He accuses the defendant of infidelity, which act even resulted in his (defendant's) concubine, one Lee-Anne falling pregnant; the defendant abusing drugs, which misdemeanour even led to him (plaintiff) being arrested when the police found drugs in his car. The drug belonged to the defendant.

[25] It was the plaintiff's case throughout that the antenuptial agreement as it stands does not correctly reflect the intention of the parties which, according to him, was to protect all the assets that he owned or possessed at the commencement of the civil union. Although he attempted during his testimony to convey a message to the effect that that intention was that he is not to lose any benefit arising from the property or assets he owned at that stage, the overall understanding I got from his evidence was that the assets as well as any proceeds or gains accruing thereto does not form part of any accrual that can and should occur in respect of those assets that were

acquired during the subsistence of the marriage. I will come back to this aspect when I evaluate the evidence and the law.

[26] Cross-examination of this witness was long. However, it concentrated mostly on issues of credibility. In addition thereto cross-examination on behalf of the defendant was geared or aimed at showing that the defendant was active in the affairs of the couple, even taking charge of things when the plaintiff was injured in a motor vehicle accident. The plaintiff denied all this, intimating that the defendant was throughout a next-to-nothing pugnacious lay-about who would come to the plaintiff's business offices only to sit at the computer and play games therewith or indulge in the intake of intoxicating drinks or abuse drugs while he (plaintiff) worked. According to the plaintiff further, whatever assets the defendant owned, including those set out in clause 6 of the antenuptial contract, were bought by and/or donated by the plaintiff to him in the spirit of their antenuptial contract which decreed or ought to have decreed that each party is the sole and exclusive owner of whether assets belong to him, inclusive of any accretion thereto.

[27] Cross-examination also raised questions relating to the role played by Hannie in the affairs of their civil union. It further cast aspersions on the stamp impression of Mokgobi Attorneys that appeared on folios E.20 and E.22 of the paginated record which the plaintiff averred were documents generated at Mokgobi Attorneys in which the defendant made undertakings not to continue bad-mouthing the plaintiff or making utterances that could hurt the latter's businesses. He also undertakes therein not to oppose any divorce

proceedings as long as he is given his snake cage, 4-wheel quad bike, a computer, a DVD player and a flat screen TV set. Although the defendant admitted that his signature appears on these documents, he however denied that their execution meant that he was abandoning his right or claim to "*a 50-50*" division of everything the parties acquired during their civil union's life-time.

[28] This precipitated the calling as a witness by the plaintiff of Mokgobi Attorneys' office manager and attorney Isaac Mokgobi's secretary to put issues in perspective.

[29] Suffice to add that in addition to the above, the plaintiff conceded that he also ran a funeral undertaker's business. He was categoric that the defendant was never employed or worked for any of his businesses. Instead he said the latter was helping his own father with odd job as well as collect and transport scrap metals. According to him (plaintiff), the defendant used to forcibly take his debit card and purchase all sorts of things with it without his consent or authority. Even when he moved into a function venue and started equipping it, the defendant would not join in to help. Instead he would go to a neighbouring pub and drink the whole time while he (plaintiff) slaved away.

[30] It was also specifically put to the plaintiff that the defendant did go and speak to Hannie about the implications of a marriage preceded by an antenuptial contract, and that, Hannie assured him that whatever they

achieved together they would share equally when the civil union was dissolved.

[31] It also emerged during cross-examination that the documents at folios E.20, E.22 and E.25 were executed and signed when divorce summons had already been served on the defendant.

[32] As proof of how both he and the defendant understood what the nature of their marriage was, the plaintiff stated that among others, during the subsistence of this civil union he bought the defendant a Mercedes Benz sedan which they later sold and bought another with the proceeds of the sale. He stated further that this new car was registered in the defendant's names and thus formed part of his separate estate. In addition to the above according to the plaintiff, he also bought the defendant a BMW Z4, clothing, jewellery, quad bike and a TV set. The defendant took those assets with him when he left their shared matrimonial home at the beginning of 2012.

[33] The next witness for the plaintiff was ms Sylvia Lindeni Mabizela ("*Ms Mabizela*"), attorneys Mokgobi Attorneys' office manager and Mr Isaac Mokgobi's personal assistant and secretary. She testified that she knew both the plaintiff and defendant very well as they used to come to her office frequently to consult with her employer, Mr Isaac Mokgobi.

[34] She confirmed that the documents on folios E.20, E.22 and E.25 were in her own handwriting and her signature also appears on them in addition to those of the plaintiff and the defendant.

[35] The circumstances under which the documents were written and signed were as follows:

35.1 The plaintiff came to the office looking for Mr Mokgobi, complaining that the defendant had cut off or disenabled the telephone line. Unfortunately Mr Mokgobi had gone to court in Limpopo on that day. The plaintiff wanted to start divorce proceedings.

35.2 She phoned the defendant who came to the office in the company of a friend of his.

35.3 The two (plaintiff and defendant) exchanged rude and vulgar words and she had to intervene and managed to calm them down.

35.4 The two engaged in discussions which culminated in an agreement that the plaintiff would give the defendant certain assets which would be listed in a document and the defendant would in turn re-connect the phone line.

35.5 The two dictated to her what to write on pieces of paper. She did so.

35.6 All these discussions took place at Mokgobi Attorneys' old business address which was situated next to the Roodepoort Magistrate's Court.

35.7 After she had written folios E.20 and E.22 both of them signed them and she also countersigned.

35.8 She opened a file and placed those documents in that file.

35.9 Sometime in 2013 the plaintiff came to their new offices asking for those documents, which included folio 25 of the paginated papers, which was written later and also placed in the file. She made photocopies thereof and imprinted the office stamp bearing details of Mokgobi Attorneys' new premises which are situated at 74 Meyer and Edward Streets, Roodepoort, on the photocopies and handed them to the plaintiff.

35.10 She stated that Mr Mokgobi was definitely not present when all of the above took place.

[36] During cross-examination this witness stated that it was the defendant who was dictating to her what to write on folios E.20 and E.22.

[37] The last witness for the plaintiff was Johanna Maria Magdalena Smith alias Hannie ("*Hannie*"). She is an upholstery business owner and the mother to or of Alta who worked as office administrator at Hauptfleisch & Van Zyl Attorneys which is situated somewhere along Beyers Naude Drive, Johannesburg.

[38] She knew both parties herein very well.

[39] She further stated that she was approached by the two seeking counsel about how to go about drawing up an antenuptial contract. In fact she said "*marriage contract*". What they told her they wanted was that whatever belonged to the plaintiff should remain his, likewise with what belonged to the defendant. She referred them to Alta who worked for attorneys.

[40] She attended their wedding and celebrations on 16 December 2007.

[41] She further stated that the two's marriage was a stormy one. That in fact they went their separate way on the very day of their wedding due to a fight between them.

[42] Three to four months after that marriage according to this witness, the defendant came to her place and told her that she wanted to end the civil union and keep his blue Volkswagen Golf.

[43] The defendant's version was put to this witness. Her answer was that what the defendant told her was that all he wanted to keep from the civil union or marriage was the Volkswagen Golf.

[44] She confirmed that the two were her friends and she saw and spoke to them frequently. According to her, the defendant was never employed and he would now and then discuss personals with her, i.e. confide in her about their intimate affairs, which among others included a frequent comment by him that should he decide to end the marriage he will receive nothing.

[45] She confirmed the arrest of the plaintiff for possession of drugs. About this she stated that the defendant approached her, asking for her help to have the plaintiff released from custody and the allegations or charges quashed as he was in fact the owner of those drugs. She also stated that the defendant was hooked on drugs and had sought her help to kick away that addiction.

[46] This witness was not cross-examined on whatever she said in court.

[47] That concluded the plaintiff's case.

[48] The defendant was the only witness for the defendant.

[49] About how he met the plaintiff : He had attended a club in Boksburg South with his mother's friend in January 2006 when he was 17 years old. When the mother's friend left, the plaintiff asked him to stay behind. He

agreed. The latter then asked him to be his friend, to which he also acceded to or agreed. He later that night took him to another club and thereafter to his office in Witpoortjie. On their way home they were involved in a motor vehicle accident. He was slightly injured but the plaintiff was seriously injured and had to be taken to hospital where he was admitted and kept for some time.

[50] When he was discharged from hospital after 6 weeks he invited him (defendant) to move in with him in his granny flat at the back of his mother's house. He initially refused but ultimately acceded when the plaintiff told him that he was inviting him to come and live with him at his (defendant's) mother's request. It was also his evidence that his mother later denied ever asking the plaintiff to invite him to come and share his residence with him. He stated that the plaintiff had told him that his (defendant's) mother had told him (plaintiff) that he no longer wanted him in her house. He also stated that he did not confront his mother about this as he did not want to, more-so that he knew that his mother did not allow or suffer him asking her any questions.

[51] According to the defendant, after he moved in with the plaintiff permanently he helped him in the running of his businesses, more-so that the latter had encouraged him to work hard as they should –

> "... *build a future together* ..."

He (plaintiff) also ran a funeral undertakers business. According to him the businesses were not profitable and they would at times struggle or even fail to pay the employees.

[52] As regards the circumstances leading to their civil union in 2007 he put it as follows: Apart from the business at Witpoortjie they decided to hire a function venue at Sunset Rock and he was active all the way in the preparation of that venue for start of business. A year later the plaintiff invited or asked him to marry him. He agreed. The plaintiff then completely took charge of all the arrangements like arranging for a private priest, prenuptial contracts and like arrangements.

[53] According to him, the plaintiff's mother did not like or trust him (defendant). As such she advised her son to go for an antenuptial contract so as to protect whatever he owned before entering into the marriage. That according to him was a negation of what the plaintiff had told him when he proposed : That whatever they owned at the commencement of the marriage as well as whatever would be acquired during its subsistence would be shared on a 50-50(%) basis.

[54] The defendant denies having approached Hannie together with the plaintiff to ask for guidance on antenuptial contracts. He stated that the plaintiff went there alone, contradicting what Hannie testified to in this Court. It deserve re-mentioning that Hannie's testimony was left unchallenged as no questions were put to her about what she said. The only question put to her

was whether she and the plaintiff were still friends and she answered in the affirmative. He also denies ever having met Alta. He also denied being present when the plaintiff sent the e-mail to Alta which was used to draw up the antenuptial contract. He was adamant that –

> *"... I know nothing about the excluded goods or assets ..."*

[55] He further stated that he accompanied the plaintiff to Alta's offices, i.e. Messrs Hauptfleisch & Van zyl Attorneys in Roodepoort to sign the antenuptial agreement. However, when he wanted to read it first before he signed, the plaintiff cut him short, ordering him to sign as they were in a hurry to go see the priest. At first his evidence was that –

> *"... I was all along under the impression that I was signing in community of property, i.e. a 50-50 marriage ..."*

That is why he was shocked to see what he was to get from the civil union the day he saw the e-mail sent to Alta, which was at the time the divorce papers had just been served on him.

[56] He stated further that the plaintiff was the dominant party in their relationship, he being *"like a puppy behind him"* doing his bidding. He indicated that in addition to the list of assets in clause 6 of the antenuptial contract, he also owned a dog, monkey, quad bike and other assets like clothing as well as pieces of furniture. He did not elaborate on what type of furniture that was. He added that during the subsistence of the marriage,

among others, the plaintiff bought other furniture with a cheque that bounced but had kept the furniture to date by dodging the furniture owners as he would change residences regularly.

[57] He stated further that when he got married he was working for T & H Cranes as a general labourer.

[58] About business ventures started during the subsistence of the marriage his evidence is that Afri-Tours SA CC was started and registered. It is a tourist transportation business at which, as he testified, he and the plaintiff's mother's boyfriend, one Wayne, were the drivers. As the evidence unfolded, it emerged that the defendant did not have a public drivers permit ("*PDP*") which is an absolute prerequisite to drive a vehicle transporting passengers or goods for a fee. He tried to go around this impediment by stating that he only drove when one of the professional or regular drivers were unavailable.

[59] Other assets acquired during the marriage included Waiters International SA CC, a catering company; a property at 402 Meerkat Street, Vanderbijlpark where they built the matrimonial home. According to him he was the one purchasing building materials and supervising the construction of this house, getting to the building site at 06h00 and only leaving around 18h00 daily. They then purchased another property situated at 272 Vaal Oewerlaan, Vanderbijlpark for R400 000,00 which they rented out to augment their earnings.

[60] The defendant confirmed Hannie's testimony about him seeing her and she assuring him that their marriage was a 50-50 one on property. It is on record that Hannie never saw the antenuptial contract in issue here. However about the rest of what Hannie testified to in this Court he said she told lies.

[61] About the drugs for which the plaintiff was arrested he testified that he told Hannie that the plaintiff was arrested for being in possession of drugs belonging to him (plaintiff) and that he took or accepted liability for them being there solely to save him. He also testified that it was the plaintiff who had a drug problem, not himself.

[62] He further stated that during 2009 he reluctantly accompanied the plaintiff to Mossel Bay in order to go and purchase a double stand there. On their way back home they were involved in a head-on collision and the plaintiff broke or fractured the other hip and was immobilised, being unable to run the businesses as a result. He was the one doing so for the four months he was in hospital and even the time he was home recuperating. He pointed to the fact that the plaintiff, being a very heavily built and overweight person could not be operated upon at hospital. As such he had to take the long and winding read to recovery, leaving him in charge and control of family businesses.

[63] According to the defendant, the businesses are worth around R17 million. He is claiming a share thereof which he calls or quantifies at 50%.

[64] As for the antenuptial contract, the defendant contended that it did not correctly reflect their agreement of a 50-50 division on divorce and that never in his wildest dreams or expectation did he imagine himself walking away with nothing when the civil union was to be dissolved. He ascribes this to his low education (Standard 5) as he unlike the plaintiff, never reads documents before he signs.

[65] Then the defendant dropped a bombshell : all the properties he mentioned above are registered in the plaintiff's grandmother's names. This was new evidence that contradicted his earlier evidence and none of it was put to the plaintiff when he was in the witness box.

[66] The defendant also testified about his alleged adultery with Lee-Anne as well as evidence from a forensic auditor he has engaged to probe the affairs of their estate(s). Unfortunately, these aspects belong to the aspects that have been postponed *sine die*, namely, the forfeiture of benefits aspect when the actual divorce matter is heard.

[67] Cross-examination revealed that the defendant is totally denying Ms Mabizela's testimony as lies even though his counsel never disputed it. His version is that he found Mr Isaac Mokgobi at Mokgobi's Attorneys office on the day he went there and signed folios E.20, E.22 and E.25. Furthermore, his evidence is that he went there simultaneously with the plaintiff, not arriving there later in the company of a friend of his as testified to by Ms Mabizela. This piece of evidence also was never denied or gainsaid when Ms Mabizela

was in the witness stand. He in fact contended during cross-examination that he has signed many other documents at the plaintiff's bidding as and when he so commanded. He does not know why his counsel did not raise this aspect with the plaintiff also as he had told her (counsel) about it.

[68] Then came the issues of when he started staying *in concubinum* with Lee-Anne. His evidence was at first that it was December 2011. When he mistakenly believed he was wrongly implicating himself he changed to state that his sexual relationship with her started only in February 2012 although he lived at her place from December 2011. The problem with all the above is that he further stated that a child fathered by him with Lee-Anne was born on 13 September 2012 "*... and it was a normal birth and child*". When it was pointed out to him that a normally gestated child born on 13 September 2012 would on all probabilities have been gestated around November or December 2012 he added that this child was born two weeks premature, albeit healthy or normal. This anecdote cannot avail the defendant on this aspect because even if the baby was born two weeks premature, such birth would never add up to and/or with a birth on 13 September 2012.

[69] Thereafter followed questions about the defendant's employment history, what he earned then and what he is making per month since he left the matrimonial home. Counsel for the plaintiff explained that all these were for purposes of testing the defendant's credibility when I pointed out to her that they are irrelevant to the issue of rectification which is the object of the present enquiry. Nevertheless, if plaintiff's counsel's explanation is anything

to go by, then the defendant fared very badly on the aspect of credibility because he materially contradicted himself and the evidence he previously tendered as well as whatever was put to the plaintiff on this aspect.

[70] One of the aspects also canvassed was the R50 000,00 the defendant was demanding as monthly maintenance in the face of combined monthly expenses he estimated at around R10 000,00 to R15 000,00. It was put to him that this was one of the many indicators pointing to his greed and spirit of undue entitlement that is evidenced by his claims for assets and/or proceeds he is not entitled to arising from the marriage.

[71] Defendant was also cross-examined over his assertion that he started staying with the plaintiff in the cottage or granny flat at the back of the latter's mother's house during 2006 when the plaintiff's father had already passed away. It was pointed out to him that the plaintiff's father's death certificate was handed in as evidence by mutual consent when the plaintiff was still in the witness box and he (defendant) was also inside the court, and that the death certificate depicted that the plaintiff's father died on 27 February 2007. He then questioned the authenticity of the death certificate.

[72] It was during this spat with the cross-examiner that the defendant clarified his understanding of the antenuptial contract. According to him he and the plaintiff agreed that whatever was there before the commencement of the marriage would not form part of any division on divorce. Only assets

acquired during the subsistence of the marriage would be shared, as we all agree, as accrual.

[73] It became clear to me that all the four (4) day's evidence and arguments were an exercise in futility as both parties are agreed as to the essence and/or meaning attachable to the antenuptial contract. That is not unexpected because throughout this trial it became clear that both the plaintiff and the respondent had no clue as to what community of property or antenuptial contract meant.

[74] When the defendant was asked if as at the time assets were listed in the antenuptial contract or e-mail to Alta he knew that those listed assets would not form part of any community of property, he answered in the affirmative. He further confirmed that that was the agreement they reached before the marriage was entered into. He reiterated that their agreement was also that –

> "*... whatever we have in future during our marriage will be jointly owned.*"

EVALUATION

[75] From the totality of the evidence led herein both the plaintiff and defendant did not have a clue about what the terms "*antenuptial contract*" or "*in community of property*" or "*out of community of property*" or "*accrual*"

meant in their technical senses. What is clear to this Court is that they each had property which they wanted to retain as their respective sole and/or exclusive property which they wanted to exclude from the hurly-burly if life's catastrophes and/or experiences that might ensue during the subsistence of their marriage.

[76] In short, this Court accepts and finds that the two parties intended that their civil union be out of community of property. It is further common cause that irrespective of their respective allegations, which this Court regards as being rather "*rich*", that they had no clue as to what an antenuptial contract was, the fact remains that they sought counsel from others like the plaintiff's mother and Hannie about it. They ultimately instructed Hauptfleisch & Van Zyl Attorneys to draw up an antenuptial contract. They both attended at those attorneys' offices where in the presence of two ladies whose titles were not disclosed or verified by this Court, and indeed signed the antenuptial contract.

[77] I find it highly improbable that two prospective spouses attending at an attorney's offices for the sole purpose of signing a pre-marriage contract would not peruse it before signing it or ask questions regarding same. I also find it improbable that the plaintiff and defendant would be ushered into the boardroom of Hauptfleisch & Van Zyl Attorneys and not be told why they are in that boardroom.

[78] There is evidence from the plaintiff that the two ladies they found in that boardroom indeed introduced themselves to the prospective life partners.

Their place of employment is known to both, as such, nothing prevented either of them from going there and enquiring about salient aspects of the execution of this antenuptial contract or even calling somebody from that firm as a witness to come and clarify this Court about what actually happened.

[79] Ultimately the issues relating to Claim 2 of the plaintiff's particulars of claim and the concomitant application for rectification would primarily be decided on the law applicable.

[80] In any event, in my view, the two parties are not far from each other on the facts relevant to the antenuptial contract. Simple issues are now buried or shielded by a lot of evidence that belonged to the main trial herein.

ACCRUAL SYSTEM

[81] It is the law that every marriage entered into after 1 November 1984 out of community of property in terms of an antenuptial contract by which community of profit and loss are excluded is subject to the accrual system, except where the parties have expressly excluded the accrual system in their antenuptial contract.

[82] It follows that parties intending marrying each other subject to an antenuptial contract may have several options to choose from – some coming

from the previous dispensation, others coming from the current situation, provided however, that they clearly and unambiguously agree on and record the terms they wish to be bound by : They may opt for the standard accrual provided for by Chapter I of the Act or opt for any modified version thereof.

See: Brigitte Clark, *Family Law Service*, Lexis Nexis (Issue 58), under title "*Matrimonial Property*" at p 11.

[83] The accepted practice is that parties who intend getting married adopting the antenuptial route should consult separate advisers if there is any uncertainty about the legal consequences regarding a particular matrimonial property system, especially if they are divided about the system best suited for their particular circumstances.

[84] The accrual system is sometimes referred to as a form of deferred community of property. It is so that the above view may be true from the economic standpoint or point of view, but from a legal point of view, it may be an oversimplification of a somewhat involved, if not complex situation.

[85] The important identifying feature of this system is that both spouses are in principle, independent during the subsistence of the marriage. It is only at the dissolution of the marriage that they share in the accrual accumulated by each other during the marriage.

[86] The sharing mentioned above is based on the principle that in most marriages both spouses make a contribution in various forms to the

accumulation of their assets during the subsistence of the marriage. That may not be the case in practice in some marriages. However, if they do, it will be just and fair to both that they share in the fruits of their accumulated contributions.

See: *S v Beira* 1990 (3) SA 802 (W) at 804-805.

[87] It is a basic principle of the accrual system that the spouses can only share in the accrual or profits that accumulated during the marriage at its dissolution. This automatically excludes the possibility of the creditors of one spouse save for the principles of the law of insolvency looking to the assets of the other spouse to satisfy the debtor spouse's debts. There is no sharing of losses, only of profits.

[88] Save for the express exception provided for by section 8, there can be no right of a spouse to share in the other spouse's accrual before the prescribed calculations of both the spouses' estates have been completed at the dissolution of the marriage, either by death or divorce. It is only at that stage that calculations can be made as to whose estate shows no accrual at all, or a smaller accrual than the estate of the other spouse.

[89] Section 8 circumscribes the powers of a court to intervene where there are serious disputes between spouses married in accordance with the antenuptial system. The material portions thereof read as follows:

"*8.* *Power of court to order division of accrual*

(1) *A court may on application of 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 estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or the proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Chapter or on such other basis as the court may deem just.*

(2) *A court making an order under subsection (1) may order that the accrual system applicable to the marriage be replaced by a matrimonial property system in terms of which accrual sharing as well as community of property and community of profit and loss are excluded.*"

[90] Of interest as well as allied or linked to the above section 8 are sections 9 and 10 of the Act which provide as follows:

"*9.* *Forfeiture of right to accrual sharing*

The right to share in the accrual of the estate of a spouse in terms of this Chapter is a patrimonial benefit which may on divorce be declared forfeit, either wholly or in part.

10. *Deferment of satisfaction of accrual claim*

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

WHAT IS ACCRUAL

[91] Section 4 of the Matrimonial Property Act, 1984 (Act 88 of 1984) as amended ("*the Act*") provides as follows:

"*(1)(a)* *The accrual of the estate of a spouse is the amount by which the nett value of his estate at the dissolution of the marriage exceeds the nett value of his estate at the commencement of that marriage.*

(b) *In the determination of the accrual of the estate of a spouse -*

(i) *any amount which accrued to that estate by way of damages other than for patrimonial loss, is left out of account;*

(ii) *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 or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;*

(iii) *the nett value of that estate at the commencement of his marriage is calculated with the due allowance for any difference which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the weighted average of the consumer price index as published from time to time in the Gazette serves as prima facie proof of any charge in the value of money.*

(2) *The accrual of the estate of a deceased spouse is determined before effect is given to any testamentary disposition, donation mortis causa or succession out of that estate in terms of the law of intestate succession.*"

[92] The nett effect of the above when applied to the facts of this case is that any assets excluded from accrual at the commencement of this civil union including any accretion or accrual to such assets shall not form part of any accumulated accruals gained during the subsistence of the marriage. Only

those assets acquired or started after the date of the commencement of this civil union shall, at its dissolution, be subjected to the accrual system.

[93] The parties here have two separate estates. Any accrual can only be contemplated at the dissolution of the civil union after the requisite calculations have been made.

[94] Whenever there is a dispute as to when the right to the accrual becomes perfected, that has been decided to be the moment when the spouses become legally invested with legally enforceable entitlements, if any. This has been interpreted to be the point when the divorce court makes the applicable order.

See: *Reeder v Softline Ltd and Another* 2001 (2) SA 844 (W).

[95] The time at which the respective estates of the parties must be assessed is at *litis contestatio*, as this is the time when the dispute crystallises and can be presented to the court for decision.

See: *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA).

[96] However, as Brigitte Clark puts it in *Family Law Service (supra)* at page 13 of Chapter I –

> "*Since litis contestatio is the lodestar for the applicable decision, transactions after this juncture are irrelevant and should be left out of*

account. This does not mean that the pleadings cannot be altered : if they incorrectly reflect the real state of affairs, they can (subject to the normal exceptions) be corrected so that they correctly or accurately state the facts. What cannot be done, however, is to make amendment or otherwise tender evidence in order to bring transactions into account that occurred only after close of pleadings."

See: *MB v NB* 2010 (3) SA 220 (GSJ) at 233F-G para [41].

[97] The above limitation in my view is aimed at encouraging parties to expedite their litigation which may remove the temptation to squander assets in between. The court in the *MB v NB* case (*supra*) held among others that the above is in the spirit and principle that a spouse cannot by his or her conduct, wilfully deprive the other party to the marriage of the benefits of the claim under the accrual system. It is not yet settled whether the courts should confine themselves with possible fraud only or extend their scrutiny into the realms of recklessness also.

See: *Govender v Chetty* 1982 (3) SA 1078 (C).

[98] However, transactions outside the ordinary course of household management will naturally be subject to careful scrutiny during the so-named *interregnum* between anticipated separation and close of pleadings.

See: *MB v NB (supra)* at 233I para [42].

THE NETT INITIAL VALUES

[99] Sections 6(1) and (4) of the Act deals with the issue of nett values for purposes of marriages with or by antenuptial contract. It reads as follows:

> "*(1) Where a party to an intended marriage does not for purposes of proof of the net value of his estate at the commencement of his marriage declare that the value in the antenuptial contract concerned, he may for such purpose declare that value before the marriage is entered into or within six months thereafter in a statement, which shall be signed by the other party, and cause the statement to be attested by a notary public and filed with the copy of the antenuptial contract of the parties in the protocol of the notary before whom the antenuptial contract was executed.*
>
> *(2) ...*
>
> *(3) ...*
>
> *(4) The net value of the estate of a spouse at the commencement of his marriage is deemed to be nil if –*
>
> *(a) the liabilities of that spouse exceed his assets at such commencement;*
>
> *(b) that value was not declared in his antenuptial contract or in a statement in terms of subsection (1) and the contrary is not proved.*"

[100] The nett initial value of an estate is the total value of the assets less any liabilities of the estate of the particular person. I cannot rule on the often asked question whether or not any legally relevant expectations should be included in calculating the commencement value of the estates herein as it is an issue never canvassed or contemplated by the parties herein.

[101] Where a value has been placed on the assets set out in the antenuptial contract, in the context of present day or current values to be used as a yardstick, the objective resale value of the assets of the estate at the date of

the commencement of the marriage, *in casu*, the civil union should be taken as the initial or commencement value.

[102] In our present case or action, the commencement value is deemed to be nill. In any event, the assets listed in the antenuptial contract were meant to be excluded from any accrual that may occur during the subsistence of the marriage.

[103] As already stated above, on any interpretation of the antenuptial contract in the light of all the surrounding circumstances and probabilities, and more importantly, according to the evidence led by and/or through both the spouses herein, accrual was specifically excluded in respect of the assets listed in the antenuptial contract.

[104] In the spirit of the Act, it is my considered view and finding that all other assets accumulated by either party during the subsistence of the civil union is subject to the accrual system.

ASSETS ACCUMULATED DURING MARRIAGE WHICH ARE TO BE EXCLUDED FROM ACCRUAL

[105] It is an accepted principle of accrual that the spouses in a marriage subject to the accrual system should only share in the accrual accumulated during the marriage due to their joint efforts. The spouses cannot share in the commencement assets or values of the estates if they have been declared. In the same reason or spirit, the Matrimonial Property Act excludes any sharing in assets that were acquired by a spouse during the subsistence of the marriage without any contribution or effort from the other. Such include:

105.1 any amount which accrued to the estate by way of *solatium*. It is logical that patrimonial damages should be included for purposes of calculating accrual because, but for the damage, the particular asset concerned would still be having or have had its original "*undamaged*" value which would have been part of the end value of the particular estate.

See: Section 4(1)(b)(i) of the Act.

105.2 an inheritance, legacy or a donation which accrues to a spouse's estate during the subsistence of the marriage, as well as any asset(s) which he acquired by virtue of his possession or former possession of such inheritance, legacy or donation.

See: *Bona* 1990 (3) SA 802 (W).

It should be noted here that a donor or testator is free to stipulate that the donation or inheritance should form part of the accrual. The spouses themselves may also agree otherwise in their antenuptial contract. However, the parties cannot agree in their antenuptial contract that a donated or inherited asset should form part of the accrual if the donor or testator stipulated that it should be excluded.

THE CASE FOR RECTIFICATION

[106] From the totality of the circumstances before evidence was led in this interlocturoy application for the rectification of the antenuptial contract as set out in the Notice of Motion, initially the defendant (in main action) and the respondent in the rectification application was understood to claim that at the termination of this civil union, they must share everything i.e. that everything including the commencement assets and their accretion or increase without more. That is why the plaintiff sought an order to the effect that insofar as the antenuptial contract may be capable of being interpreted as stating the above initial view of the defendant, it should be rectified.

[107] The defendant's evidence, although it initially went around in circles and thus not being clear as to what his understanding was in respect of the real meaning and consequently the intention of the parties, ultimately straightened out, especially during his evidence-in-chief, to clearly and unambiguously state that the assets listed in the antenuptial contract were not

to form part of any accrual at the end of their civil union, and that only what was accumulated during the subsistence of the marriage should do so.

[108] When his counsel cross-examined the plaintiff, this point was not clearly articulated. When the defendant cleared this aspect in his testimony, it put paid to any misapprehension or confusion that may have been there concerning the true intention of these two spouses. This is also what the plaintiff has always been gunning for.

[109] Had the parties confined themselves to the issue of rectification alone, and led their evidence thereon alone and/or desisted from or resisted the temptation of also straying into the terrain reserved for the main trial, this issue would have been determined without much fan-fare. This judgment also would have been brief and to the point. I had to deal with the various aspects or issues raised by the parties herein in their *viva voce* evidence as well as in their counsel's closing arguments.

[110] It is my finding that issues relating to the other assets mentioned in their respective testimonies in this application inclusive of the residential properties and business concerns, all belong to the main action when the divorce issue and the concomitant prayer for forfeiture of benefits, will be ventilated fully and/or to the parties' hearts' delight, as people sometimes say.

[111] The plaintiff argued further that the probabilities inherent herein and the inferences that are capable of being drawn from the proven facts point to

accrual only being in respect of whatever would have been accumulated during the subsistence of the marriage. This is now common cause. I need therefore not decide on the probabilities and inferences.

CONCLUSION

[112] An antenuptial contract, just like any other contract is an instrument that should enshrine or embody a meeting of the minds of its executors, the so-called consensus. Like any contract, it is not open to any body or any of the parties to the agreement to lead evidence or come up, without more, with evidence outside the written instrument that contradicts or vary its terms. Such a person may be estopped from doing so by the parole evidence rule. It is so that there may be exceptions where a party under similar circumstances cannot call itself on parole evidence rules. Rectification is one such exception.

[113] The approach in our law to the interpretation of a written contract is to determine the intention of the contracting parties by looking at the words which they used and giving those words their ordinary meaning. In cases of ambiguity there are rules of interpretation which are employed in an endeavour to determine the intention of the parties and save the contract from being void for vagueness.

[114] Ploos van Amstel J aptly put it as follows in *Flying Time Carriers CC v Monier Roofing SA (Pty) Ltd* [2012] JOL 28450 (KZN) at p 4 para [11] thereof:

> *"[11] A party is ordinarily not allowed to give evidence as to what the parties intended, or to aver that the agreement is different from what is recorded in the written memorial of it. Such evidence is precluded by the parole evidence rule. An exception is when a party to the contract seeks rectification thereof on the basis that due to a mistake common to the parties it does not reflect their true agreement. The emphasis is on the fact that the mistake must have been common to the parties. It is not enough, in a case for rectification, for a party to say that now that he has read the contract properly he realises that it reflects something that he had not intended to agree to. In the absence of a common mistake he is bound by what he has signed, unless of course he can void the contract on the basis of fraud or iustus error."*

[115] As already alluded to above, the defendant's utterances and actions before the proceedings were instituted pointed towards him not being in agreement with terms of the antenuptial contract, hence the plaintiff was necessitated to seek its rectification insofar as it did not reflect the true meaning and intention of the spouses. Consequently, it is not an anomaly for parole evidence to have been led herein purely for reasons of rectification.

[116] In his plea to the plaintiff's averments concerning the antenuptial contract, specifically the material terms thereof, the defendant practically refuted and denied the allegations and put the plaintiff to the proof thereof. His plea is in my view contradictory or mutually destructive. For example, at paragraph 16 thereof the defendant pleads that the antenuptial contract reflects the common and continuing intention of the parties as reflected therein. Then he further pleads that the remaining allegations, where inconsistent with the above, are denied. Contrasting this with cross-examination of the plaintiff and the initial or the beginning of the defendant's evidence-in-chief, it became clear that there was some *dissensus* as to the

true meaning of the antenuptial agreement, which state of affairs required to be rectified for clarity.

[117] It is my considered view and finding that the amplification of issues in the proposed rectification clarified issues and removed any ambiguities that may have been there on this aspect. There is no prejudice to the defendant that can be ascribed to the pleadings as rectified.

[118] Insofar as the defendant may have not pleaded correctly due to any misunderstanding or wrong interpretation of the plaintiff's averments, I also see no prejudice to the plaintiff if the former is granted leave to amend his plea so as for same to be in line with the explanations coming out of the evidence or this judgment.

[119] It is my further finding that this application for rectification of paragraph 6 of the antenuptial contract should be allowed subject to the indulgence mentioned in paragraph 119 of this judgment hereinbefore.

COSTS

[120] The award of costs is a matter wholly within the discretion of the court, which discretion is a judicial one which must be exercised on grounds upon which a reasonable man could have come to the conclusion arrived at.

See: *Van der Ploeg v Vivier & Another* 1966 (3) SA 218 (SWA) at 222A-B.

Mouton v Die Mynwerkersunie 1977 (1) SA 119 (A) at 149A-B.

Lornadawn Investments (Pty) Ltd v Minister van Landbou 1980 (2) SA 1 (A) at 14C-D.

Bruwer v Smit 1971 (4) SA 164 (C).

[121] In *Fripp v Gibbon & Co* 1913 AD 354 at 363 the court held that:

> *"... the law contemplates that (a judge or magistrate) should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties. And if he does this, and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion."*

Erasmus v Grunow en 'n Ander 1980 (2) SA 793 (O) at 797B-D.

Smit v Mogabe 1985 (3) SA 974 (T) at 977A-H.

[122] As a general rule, the successful party is entitled to his costs. In determining who is the successful party, the court should look at the substance of the judgment and not merely its form. The court can, for good

reason, deprive a successful party of his costs, in whole or in part. The court can also, for good reason, order a successful party to pay the whole or portion of the costs of the other party. The court can, in special cases, make an order that the unsuccessful party must pay the costs of the successful party on an attorney-and-client basis.

[123] Where an unsuccessful party had no choice but to defend an action or application, such unsuccessful party may not be saddled with an order of costs.

See: *Chetty v Louis Joss Motors* 1948 (3) SA 329 (T) at 333.
Rainbow Chicken Farm (Pty) Ltd v Mediterranean Woollen Mills (Pty) Ltd 1963 (1) SA 201 (N) at 206A-C.
Sandler v Middelburg Coal Agency (Pty) Ltd 1940 (WLD) 282.
Merber v Merber 1948 (1) SA 446 (A) at 453.

[124] This is an interlocutory application. As stated above, both parties herein traversed almost the entire spectrum of their intended cases when fighting over this issue of rectification. Both the plaintiff and the defendant displayed above average degrees of ignorance on the very essence of their civil union, namely, the antenuptial contract. If they had litigated between themselves honestly or opened up to their legal advisers early enough, this interlocutory application could have been avoided.

[125] In the circumstances, it is my considered view and finding that none of the parties should derive any benefit in the form of costs in respect hereof. Now that the main matter is still to go to court soon, it is my further view and finding that the costs of this application should be costs in the cause.

ORDER

[126] The following order is made:

126.1 The application for the rectification of the antecuptial contract of the parties at clause 6 thereof as set out in Claim 2 of the Particulars of Claim is granted.

126.2 Should any of the parties find it necessary to amend its pleadings to bring same in line with their true intention when the antenuptial contract was executed, leave is granted for such amendment(s) on the following conditions:

126.2.1 The plaintiff is allowed 14 (fourteen) court days from date of delivery of this judgment, to do so, at the expiry of which this indulgence shall lapse.

126.2.2 The defendant shall plead to the plaintiff's amended pleadings, if any, or bring an amendment to its plea, within 10 (ten) court days of receipt of

such amended pleadings or the expiry of the 14 days allowed the plaintiff to do so, as the case may be.

127.3 The costs hereof shall be costs in the main action (cause).

N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	25 APRIL 2013
DATE OF JUDGMENT	10 MAY 2013