REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

28/11/2016
DATE

SIGNATURE

CASE NO: **62488/15**

1/12/2016

In the matter between:

M Plaintiff

and

M Defendant

JUDGMENT

OPPERMAN AJ

[1] This is an action for a decree of divorce in which the Plaintiff seeks payment of half of the accrual of the Defendant's estate in terms of an antenuptial contract entered into on 26 May 2007 which reflects the nett commencement values of the parties' respective estates as nil ("**the antenuptial contract**"). The Plaintiff initially

sought maintenance, which claim, at the commencement of the trial, was abandoned. The Defendant in his counterclaim seeks rectification of the antenuptial contract to the effect that the commencement value of his estate be rectified from "*nil* "to "*R 2 768 198.*"

[2] In the alternative, the Defendant contends that he is entitled to lead evidence as to the actual value of his estate at the commencement of the marriage by virtue of the provisions of section 6 of the Matrimonial Property Act 88 of 1984 ("**the MPA**"). The Defendant also seeks an order that the Plaintiff forfeits her right, either wholly or in part, to share in the accrual of his estate.

[3] For reasons that will become apparent I consider it appropriate not to furnish the names of the parties in the heading to this judgment because this might have an adverse effect on the children and cause unnecessary distress to them. I will refer to the Plaintiff as "Mrs M" and to the Defendant as "Mr M", or as "Plaintiff" or "Defendant" respectively.

[4] The parties agreed that the accrual of the Defendant's estate amounts to R 7.5 million from date of the marriage, being 2 June 2007, to date of the trial.

[5] At the conclusion of the evidence, I granted a decree of divorce, I set aside an interim maintenance order granted in the Middelburg Regional Court under case number MRCB557/2014, and I reserved my judgement on certain aspects of Defendant's counterclaims , namely:

(a) his claim for rectification of the antenuptial contract;

(b) his claim for a declaratory order regarding the commencement value of his estate as recorded in the antenuptial contract;

(c) his claim that the Plaintiff should forfeit the benefits of the marriage; and

(d) costs.

I refer to these as "**the reserved issues**".

[6] In the trial the Plaintiff testified and called one witness, Mrs Wentzel. The Defendant testified and he too called one witness Mr Maritz.

COMMON CAUSE FACTS (OR FACTS WHICH ARE UNDISPUTED)

[7] The following facts are undisputed in any material respect and are relevant to the reserved issues. The private lives of the litigants have been laid bare in the proceedings. Their actions, many of which seem to have been motivated at the time by desire, affection and generosity, have become the ammunition in their war where all available ammunition seems to have been used, irrespective of the emotional, reputational and material costs to the adversaries. It is my duty to apply the principles of the law to it.

[8] During mid-2005 the Plaintiff was married to her then husband, Dr V. They, Plaintiff and Dr V, were introduced to another married couple, the Defendant and his then wife, Mrs H. Both the Plaintiff and the Defendant were in their third marriages at the time. There is some dispute as to the facts relating to their first meeting. It does appear to be common cause that the Plaintiff and Dr V were at the time known to engage in sexual practices with persons other than their spouses. They were colloquially known as "swingers". The two couples visited one another's homes and exchanged partners, both couples engaging in this practice. This lead to an extra-marital affair between the Plaintiff and the Defendant.

[9] During December of 2005, the Defendant divorced Mrs H. The Plaintiff separated from Dr V and moved in with the Defendant at his home in Marblehall, without taking her 4 year old son from her marriage with Dr V with her.

[10] During 2006 the M Trust (a trust created by the Defendant during or about 2004)) purchased a cosmetic treatment machine for the Plaintiff which she used to generate an income. The purchase price of the machine was approximately R180 000.

[11] During March 2006, the Plaintiff divorced Dr V. The Defendant paid for all the legal costs of that divorce as well as those of the custody dispute relating to the minor son of the Plaintiff and Dr V, who were involved in a dispute over the residence of the child. During this time the Plaintiff submitted a written complaint to the South African Revenue Services as well as to the Medical Health Professions Council in respect of the conduct of Dr V. During July of 2006 the Plaintiff had approached the Magistrate's Court for a protection order in terms of the Prevention of Domestic Violence Act, 1998, alleging that Dr V had emotionally and physically abused her and had made threats to her.

[12] The Defendant produced in evidence a wad of letters, which had been written by the Plaintiff to him over the years. The content of such letters is not in dispute. However, the sincerity of the communications, as well as the interpretation of such communications, is. I will, from time to time, quote from these letters but do not at this stage, express any views with regard to whether or not the Plaintiff was sincere when writing these letters or whether she was, as the Defendant contends, extremely manipulative and insincere. It will be appreciated that the question of forfeiture of the benefits of the marriage is directly implicated in these facts. The implications of forfeiture are serious and it is therefore necessary to consider these facts in some detail.

[13] On 22 August 2006 (before they were married), the Plaintiff wrote to the Defendant saying:

"I'm so thankful me luv(sic), and sometimes feel that I am not able to show my gratitude. The house we live in, the cars we drive, the furniture in the house, those are all secondary things. It makes your life easy, but not happy. To sit next to you with my head on your shoulder, to lie beside you in bed, you holding me, your hugs, your kisses, that is LIFE. ..... I know I sometimes do something or don't do something that bring(sic) a cloud in your eyes. For that I am so sorry. I just want you to know that I won't do anything on purpose to make you unhappy. ..... I love you my prince and will love you until the end of time."

When asked in evidence about what it was that would 'bring a cloud' to the Defendant's eyes, as referred to in her letter, the Plaintiff explained that she could sometimes do the wrong thing, like not close the garage doors or, on one occasion, she was making food and the Defendant had accused her of speaking about him to her son, which annoyed him. It was this type of conduct which apparently brought a cloud to Defendant's eye, and for which she had been tendering her apology in her letter.

[14] On 22 October 2006 the Defendant wrote another love letter to the Defendant in which she expressed her love for him, as well as her gratitude for his love and patience with her. She explained that it was a big privilege to be loved by him. She opined that he was probably tired of her, who caused so much conflict and all the apologies but acknowledged that he had a lot of patience with her. She explained that he conducted the song in her heart and that if all went well with him, then she was also on top of the world.

[15] On 26 May 2007 the Plaintiff and the Defendant signed a power of attorney for purposes of the antenuptial contract and on 30 May 2007 the antenuptial contract was signed by a notary. In terms of such antenuptial contract the commencement

values of both parties' estates were nil. On 2 June 2007 the Plaintiff and the Defendant married.

[16] During 2007 the Plaintiff wrote to the Defendant and discussed having children with him. At the time of writing the letter they had clearly already been receiving IV fertilisation. The Plaintiff implored the Defendant to accompany her when she was going to be subjected to the implanting procedure. She reassured him that she was supportive of him and that he was not alone in his unhappiness with his son B. During her evidence she explained that B had, at the time, been staying with his biological mother in Cape Town.

[17] During 2009 / 2010 the Defendant appointed the Plaintiff as a trustee of his family trust.

[18] During 2010 the Defendant and Mr Maritz started a business enterprise called M Lodge.

[19] On 13 July 2010 the Plaintiff wrote to the Defendant:

"*My liefste ... mag jou toekoms wat voorlê (saam met my natuurlik) vir jou net blessings, geluk en voorspoed inhou! Ek het jou innig innig lief my man en ek waardeer alles wat jy vir my en die kids doen! Al is ek soms so selfsugtig en self-centred....*".

Loosely translated this means –

"*My dearest ..., may your future which lies ahead (with me of course) be filled with blessings, happiness and prosperity! I love you dearly, dearly my husband and appreciate everything that you do for me and the children! Even if I am sometimes selfish and self-centred.*"

[20] On 13 September 2010 the Plaintiff wrote to the Defendant. It commences with:

"My liewe, liewe, liefste ..., my man, my koning, my priester en profeet", translated this means –

"*My dear, dearer, dearest ..., my husband, my king, my priest and prophet*".

This is a 3 page letter typed in 1.5 line spacing, in which the Plaintiff discussed her past and her religious beliefs. She praised the Defendant and towards the end of the letter recorded the following:

"*En my man ek is lief vir jou, ek is trots daar op om jou vrou te wees. Maar dit maak my seer* ***as jy te veel drink, want dan verander jy en ek weet nie hoe om dit te hanteer nie.*** *My hoop en begeerte is dat ons 'n oplossing kan vind, wat vir ons altwee aanneemlik is. My hoop en begeerte is dat ons 'n sterk koord sal wees wat saam gevleg is wat niemand, niemand kan verswak of breek nie." (own emphasis)*

Translated this means –

"And my husband I love you, I am proud to be your wife. It hurts me when you drink too much because then you change and I don't know how to deal with it. My hope and desire is that we can find a solution that is acceptable to both of us. My hope and desire is that we will have a very strong bond which no one can weaken or break."

The letter continues with the Plaintiff expressing empathy and understanding for the Defendant's background and the hurt that he has experienced during the course of his life.

[21] During October of 2010 an incident occurred at the M Lodge which was witnessed by Mr Maritz. The Defendant and Mr Maritz testified that the Plaintiff had slapped the Defendant across the face, had thrown the contents of his glass at him and that due to this assault, the Defendant had sustained an injury to his eye. The Plaintiff had denied the facts in relation to this assault and had contended that the Defendant had sustained the injury to his eye when he, in an inebriated state, had stumbled and had fallen into the car door.

[22] The following day a further incident occurred at the home of the Plaintiff and the Defendant and in the presence of Mr Maritz. Mr Maritz had arrived at the matrimonial home at about 11h00 in the morning. According to him the Plaintiff was

standing on the balcony and had opened the gate for him remotely. He entered the home, took two beers from the fridge, walked to the bedroom and woke the Defendant. He didn't exchange one word with the Plaintiff. Mr Maritz and the Defendant drank the beers on the balcony. The Plaintiff and the Defendant started arguing and the Plaintiff became physical with the Defendant.

[23] On 2 November 2010 at 23h00, the Plaintiff wrote a letter to the Defendant, in which she asked for his forgiveness for saying hurtful things to him but explained that she did so when she felt offended by his conduct. She again expressed her love for him.

[24] On 11 December 2010, the Plaintiff wrote to the Defendant. She asked for forgiveness for those occasions when she treated him unfairly. She asked him to forgive every mean word, every time she shouted at him or hurt him or threw things around. She said that she did not want to conduct herself in such a manner anymore.

[25] On 8 October 2011, the Plaintiff admitted herself to the Benmar Clinic for counselling.

[26] For the period 31 January 2013 to 11 March 2013 the Plaintiff received therapy at the Vista Clinic.

[27] On 2 May 2014, the Plaintiff obtained interim domestic violence interdictory relief against the Defendant. The parties then reconciled, the Plaintiff moved back to the Defendant's home during the period 5 to 10 May 2014 and on 10 May 2014 she wrote another letter thanking him for all the energy and passion that he had put into their marriage.

[28] On 20 May 2014 the interim interdict was set aside and on 25 May 2014 she gave the Defendant a note in which she expressed her love for him referring to him as her king. During May of 2014 the parties attended marriage guidance counselling.

[29] Over the weekend of 5 to 6 July 2014, the Plaintiff together with her son and the Defendant's daughter, went away for the weekend. The Plaintiff had asked the Defendant to accompany them but he had declined the invitation. On Saturday evening the 5th of July at about 24h00, the parties sent whatsapp messages to one another and the Plaintiff sent the Defendant an email containing two proposals: They should get divorced or the Defendant should buy the Plaintiff a townhouse in Groblersdal and a car, they would thus not get divorced but continue seeing one another whilst resident at separate residences.

[30] During the evening of 6 July and the morning of 7 July the parties had had various telephone discussions. Some of these were transcribed. It is not in dispute that the telephone discussions have been correctly transcribed. What is in dispute is whether all of the telephone discussions were transcribed. It is clear from the content of the transcriptions that the Defendant suspected that the telephone calls were being recorded. He also confirmed during his evidence that he thought during the time of the telephone calls that such calls were being recorded.

[31] During the conversations the Defendant accused the Plaintiff of stealing his money, gold and files. He accused the Plaintiff of an extra marital relationship with Dr V. He called her a prostitute. He told her that she was pathetic, that she was a thief, that she was a dog, that he would get her, that she was materialistic and that she just wanted his money. I quote some of the portions:

"*The Defendant: Ag, fokken is, jou hoer. .....*

The Defendant: Jou fokken pateet.....

The Defendant: Ja, dis hoe jy is jou hoer. ..... jou fokken dief.
The Defendant: .... Ja, omdat jy so fucked up is jou fokken hond. Ek sal jou fokken ..... ek gaan jou op fok, ek se vir jou..... "
I consider it unnecessary to provide a precise translation of this abuse.

[32] On 8 July 2014, the Plaintiff collected the remainder of her belongings. On 13 July 2014 it was the Defendant's birthday. The Plaintiff left a note for him together with a gift of a pipe which had his name engraved on it, next to his bed.

[33] On 31 July 2014 the Plaintiff issued summons from Middelburg Regional Court. The action in Middelburg was not pursued save to obtain the maintenance order referred to in paragraph [5] above. Instead, this action was instituted in the Pretoria High Court.

RECTIFICATION OF THE ANTENUPTUAL CONTRACT

[34] To oppose the claim for rectification of the antenuptial contract, in which defendant claimed that the commencement value of his estate should not have been recorded as "nil" but at a sum of "*R 2 768 198*" the Plaintiff called as a witness Mrs Wentzel, an attorney, notary and conveyancer, who in her testimony explained that she had represented the Plaintiff in her divorce from Dr V. Mrs Wentzel testified that both the Plaintiff and the Defendant had consulted her about concluding an antenuptial contract. She had also assisted the Defendant with his will and aspects relating to the M Trust.

[35] The parties had come to her stating that they wanted to be married out of community of property but subject to the accrual with nothing excluded from the accrual sharing. She testified that she had explained to them that what they wanted was essentially a marriage in community of property as everything would be shared equally at the dissolution of the marriage. After the consultation and after a thorough

discussion Mrs Wentzel was instructed to prepare the appropriate documents. Mrs Wentzel explained that she was conscious of the fact that they both had just been divorced. She took great care to explain it all to them. She recalled however that there was no conflict and that the parties were in agreement about the content of the antenuptial contract, which was to reflect the commencement values of their respective estates as nil.

[36] A few days later on 26 May 2007 the parties again met with Mrs Wentzel when she explained the content of the documents to them and they signed the special power of attorney authorising a representative to do all that was necessary to conclude the antenuptial contract which reflected the commencement values of their respective estates as nil. She was present when they signed the power of attorney.

[37] Mrs Wentzel was later, and by agreement, recalled to testify about her receipt book in respect of her trust account that reflected receipt from Mr M of the amount of R1254 in respect of services rendered for the preparation of an antenuptual contract. At that stage the Plaintiff still used the name of her previous husband Dr V and accordingly the reference to Mr M on the receipt could only be a reference to the Defendant. The receipt reflected that a 'direct' payment had been made i.e. an electronic transfer had been done. The receptionist, who would have completed the receipt, has since passed away.

[38] The Defendant denied most of Mrs Wentzel's evidence. He denied that the parties had met with Mrs Wentzel to discuss the content of the antenuptual contract (this conflicted with what had been put in this regard to Mrs Wentzel being that he *could not recall* such a meeting), he denied that she had explained the nature of the contract they were about to enter, that they had returned to her offices on 26 May

2007 and that they had signed the power of attorney in her presence. He also denied that he had paid for this service. He testified that the Plaintiff had suggested that they marry subject to the accrual. He had been in agreement with that provided that his assets, as at the commencement of the marriage, were excluded. He was told that the antenuptual contract had been prepared. When he arrived at Mrs Wentzel's offices on the relevant day, the document was lying on the table. Neither Mrs Wentzel nor the Plaintiff were present and he was told, by some other person, where to sign. He did not read the document presented to him for signature.

[39] This Court is to approach the factual disputes which exist between the evidence adduced on behalf of the Plaintiff, and the evidence presented on behalf of the Defendant, by applying the principles enunciated in the decision of *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 at 14I-15D where Nienaber JA held as follows:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging

it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[40] I have grave difficulties on the probabilities in accepting the Defendant's version in regard to the events leading up to the conclusion of the antenuptual contract. The Defendant had testified how important it was that his assets be protected for the benefit of his two children from his first marriage as their biological mother was not in a financial position to assist them. Despite this, he didn't read the document presented to him in the boardroom for signature. One would have thought that he would ensure that the attorney, with whom he had, on his version, not consulted at all, had recorded the terms of the antenuptual contract correctly. On his version, he did no such thing. He is an astute businessman who runs a lodge and has created a trust. Also, if his version were correct, the Plaintiff deliberately mislead him.

[41] According to the Defendant they had discussed the exclusion of his assets and had agreed that this would be embodied in the antenuptual contract. The Plaintiff would then have had to have approached Mrs Wentzel and have untruthfully told her that the commencement values of their respective estates should be recorded as nil. The Plaintiff under these circumstances ran enormous risks that would have included that the Defendant would contact Mrs Wentzel to discuss the contract and/or that he would read the completed contract before he signed the power of attorney. Assuming the Plaintiff were bold enough to take these risks (which I don't find she is), I find it improbable that Mrs Wentzel would come to court to perjure herself in respect of these issues. It made no difference to her whether the commencement value of the

Defendant's estate as at 26 May 2007 was recorded to be nil or R 2 791 729, she would in both scenarios have marked a fee of R 1254. Mrs Wentzel's evidence is corroborated in all material respects by the evidence of the Plaintiff. I have no hesitation in finding that in so far as the Defendant's evidence conflicts with that of Mrs Wentzel, her evidence is accepted.

[42] In consequence I find that there exists no basis in fact to find that the commencement values of the respective estates of the parties were recorded to be nil in error.

INTERPRETATION OF SECTION 6 OF THE MATRIMONIAL PROPERTY ACT 88 OF 1984

Conflicting Judgments

[43] This reserved issue relates to whether the Defendant could rely on Section 6 of the MPA to prove that the commencement value of his estate in the antenuptial contract should, even if not rectified, be, in effect, not "nil" but the sum of *R 2 768 198* as contended for by him. Section 6 of the MPA provides:

6 Proof of commencement value of estate

(1) Where a party to an intended marriage does not for the purpose of proof of the net value of his estate at the commencement of his marriage declare that 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 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) A notary attesting such a statement shall furnish the parties with a certified copy thereof on which he shall certify that the original is kept in his protocol together with the copy of the antenuptial contract of the parties or, if he is not the notary before whom the antenuptial contract was executed, he shall send the original statement by registered post to the notary in whose protocol the antenuptial contract is kept, or to the custodian of his protocol, as the

case may be, and the last-mentioned notary or that custodian shall keep the original statement together with the copy of the antenuptial contract of the parties in his protocol.

(3) An antenuptial contract contemplated in subsection (1) or a certified copy thereof, or a statement signed and attested in terms of subsection (1) or a certified copy thereof contemplated in subsection (2), serves as prima facie proof of the net value of the estate of the spouse concerned at the commencement of his marriage.

(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.

[44] In *Olivier vs Olivier*, 1998 (1) SA 550 (D & CLD), Combrink J, held at 555 I, in respect of Section 6 of the MPA, the following:

"*In my view, the provisions of the subsection were only intended to be applicable as against third parties. This is the only interpretation which would give efficiency to it and would not offend against accepted legal principles. Third parties with an interest in the initial value of the estates of the parties would be heirs and creditors at the dissolution of the marriage.*"

[45] In *Jones and Another vs Beatty N.O. and Others*, 1998 (3) SA 197 (T), MacArthur J at 1100 G - I held that Section 6(3) of the MPA has no application where the parties declared the commencement values of their estates in their antenuptial contract.

[46] In *Thomas vs Thomas*, 1999 JDR 0296 (NC), Buys J, held that section 6(3) of the MPA was applicable to parties to an antenuptial contract *inter se*.

[47] On the very same day that this matter was argued before this court and unbeknownst to all, a judgment was handed down in this division by Fourie AJ, in the matter of *Maria Magdalena Gonsalves Erasmus v Geraldene Jayde Erasmus N.O.* Case number 54914/2014, in terms of which Fourie AJ aligned herself with the

reasoning of Buys J in *Thomas* (supra). It does not appear from her judgment that Fourie AJ considered *Jones* (supra). She would have been bound by the decision of *Jones* unless she held the view that such court was clearly wrong, which does not appear to be the case.

[48] I turn then to deal with the various interpretations. Before doing so, I set out some general principles applicable to statutory interpretation.

Principles applicable to statutory interpretation

[49] In *Cool Ideas 1186 (CC) vs Hubbard and Another*, 2014(4) SA474 (CC) at para 28 the Constitutional Court held:

[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)." (footnotes omitted).

[50] Section 39(2) of the Constitution of the Republic of South Africa requires that when interpreting any legislation, every court must promote the spirit, purpose and objects of the Bill of Rights. This duty is one in respect of which "no court has a discretion" and must "always be borne in mind" by the courts. This is so even if a litigant has failed to rely on Section 39(2), see *Phumalalela Gaming and Leisure Limited vs Grundlingh and Others* 2007(6) SA 350 (CC) at para 26 to 27.

[51] The Constitutional Court has repeatedly pronounced on the obligation arising from Section 39(2) for the interpretation of legislation. There are 3 independent obligations that emerge from the Constitutional Courts jurisprudence in this regard:

51.1 If a provision is reasonably capable of two interpretations and one interpretation would render it unconstitutional and the other not, the courts are required to adopt the interpretation that would render the provision compatible with the constitution. See *Investigating Directorate; Serious Economic Offences vs Hyundai Motor Distributors (PTY) Limited: in re: Hyundai Motor Distributors (Pty) Limited vs Smit N.O.* 2001 (1) SA 545 (CC) at paras 22 to 23;

51.2 If a provision is reasonably capable of two interpretations, Section 39(2) requires the adoption of the interpretation that "better" promotes the spirit, purpose and object in the Bill of Rights. This is so even if neither interpretation would render the provision unconstitutional. See *Wary Holdings (Pty) Limited vs Stalwo (Pty) Limited and Another,* 2009 (1) SA 337 (CC) at paras 46, 84 and 107;

51.3 Where a court is faced with an interpretation of legislation that limits fundamental rights and one that does not, it is required to adopt the latter interpretation. See *National Union of Metal workers of South Africa and Others vs Bader Bop (PTY) Limited and Another,* 2003 (3) SA 513 (CC) at para 37.

Olivier decision

[52] In *Olivier* (supra), Combrink J, at 445D held as follows:

"On the face of it therefore, s 6(3) is not applicable to a case such as this where the parties have in their antenuptial contract expressly declared the value of their estates, because it specifically refers to an antenuptial contract in which the net asset value of the party's estate is not declared. Counsel argued, however, that if the antenuptial contract referred to in ss (3) was to be restricted to only an antenuptial contract in which no value of a party's estate was declared it would lead to an absurdity. The absurdity lies in the fact that read literally, the

subsection would provide that an antenuptial contract in which for the purpose of proof of the net value of the estate of a party at the commencement of the marriage ***nothing is said****, it will serve as prima facie proof of the net value of the estate of that party. Saying nothing cannot in logic constitute prima facie proof of net asset value. The antenuptial contract referred to, so it was submitted, must refer to contracts where the net asset values of the parties is declared." (own emphasis)*

[53] What is clear from the "absurdity argument" is that the court did not have regard to the provisions of Section 6(4) of the MPA which provides that where the nett value of the estate of a spouse at the commencement of the marriage was not declared, it would be deemed to be nil. It is correct that "saying nothing cannot in logic constitute *prima facie* proof of nett asset value" but where, saying nothing, is deemed to be that the commencement value is nil, saying nothing can indeed constitute *prima facie* proof of the nett asset value as at commencement date. In such circumstances the commencement value is clearly nil and no absurdity arises. Section 6(4) was not considered at all in *Olivier* (supra) and in my view explains away the absurdity.

[54] The court reasoned that because there was a written document, which governed the position between the parties, such written document (being the antenuptial contract) constituted conclusive proof of such term. At 555 E of *Olivier*, Combrink J found that this was the position at common law and no authority needed be quoted for so basic a principle. He then argued that if the legislature had intended to change the common law, it was required to have done so in clear language. It did not do so, Combrink J could think of no sound reason why the legislature would intend to alter the common law by Section 6(3) and thus concluded that the Section is applicable only as against third parties.

[55] What underpins this reasoning however, and why he concludes that the section is applicable to third parties only is an acceptance of the absurdity argument relating to an agreement in which the parties had not declared the commencement values being considered *prima facie* proof. As already indicated, this premise is incorrect, if Section 6(4) is read together with Sections 6(3) and 6(1), no absurdity results as then the deeming provision kicks in and the commencement values of nil constitute *prima facie* proof.

[56] The common law presumption that statutes do not contain invalid or purposeless provisions has met with constant approval in the case law. The interpretation by Combrink J in *Olivier* (supra) that the words "contemplated in s(1)" were inserted into Section 6(1) *in per curiarum,* offends the principles formulated by Cameron J in *National Credit Regulator* (supra), where he remarked at paras 99 and 100:

"[99] A longstanding precept of interpretation is that every word must be given a meaning. Words in an enactment should not be treated as tautologous or superfluous. This is for good reason. Interpretation is a cooperative venture between legislature and judge, bounded by mutually understood rules, in which the latter seeks to give meaning to the text enacted by the former. The mutual suppositions, and the constraints of principle and constitutional precept on the judge's role, enable the joint process to reach a coherent and practical outcome. For this, it has to be assumed that the legislature's enacted text includes only words that matter. For to enact words that do not would violate the most basic supposition of the shared enterprise. Hence none can be ignored.

[100] The shared enterprise is imperilled if this precept is too readily ignored. It could seem to license judges to pick and choose among words and phrases, and to omit those considered inconvenient. That cannot be. Everything the legislature has enacted must be included in the meaning assigned to the whole. The rule performs a boundary-setting function. Its observance shows that judges are staying within their assigned role of interpretation, and not straying outside it into amendment, enactment or innovation. As this court pointed out in its very first judgment, if the language used by the lawgiver is ignored in favour of other pursuits,

'the result is not interpretation but divination'. Though said in a different context, the point is that constitutionalism has not upended the basic rules of interpretation."

Proposed Interpretation

[57] In my view, section 6 of the MPA, contemplates 2 situations. They are:

57.1. The commencement value of a party's estate is not declared in the antenuptial contract concerned – in this instance the nett value of the estate of such spouse at the commencement of the marriage is deemed to be nil. This presumption serves as "proof" of the commencement value but only constitutes *prima facie* proof.

57.2. A party to an antenuptial contract who has not declared the commencement value of her estate in the antenuptial contract concerned, may, prior to the marriage being entered into or within a period of 6 months after the marriage is entered into in a statement, unilaterally declare what she contends the commencement value of her estate to be. This act is not consensual and merely requires notification to the other party who must sign acknowledgment of receipt of such declaration.

[58] This latter declaration is submitted 'for the purpose of proof' (as envisaged in Section 6(1)) and serves as *prima facie* proof of the nett value of the estate of the spouse concerned at the commencement of her marriage. However, the written document i.e. the written antenuptial agreement concluded between the parties is conclusive proof of the terms of the parties' agreement and it can only be attacked on the recognised grounds of misrepresentation, duress, undue influence, etc. This, as Combrink J, held in *Olivier* (supra) 'is the position at common law and no authority need be quoted for such basic a principle.' If a statute intends to alter the common law, its language should be clear. In my view, quite the contrary is clear from the provisions of the statute. Section 2 of the MPA provides that:

"every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of the Act, is subject to the accrual system specified in this Chapter, except in so far as that system is expressly excluded by the antenuptial contract."

And Section 4 where the accrual of the estate is dealt with provides in Section 4(b)(ii):

"an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, ... is not taken into account as part of that estate at the commencement.... of his marriage."

[59] In my view, Sections 2 read with Sections 4 and 6 contemplates the following situations:

59.1. Where the parties are married out of community of property but are silent about whether or not the accrual system is applicable, such marriage is subject to the accrual system (Section2). In such circumstances the question will arise what the commencement value of the respective estates were. The presumption that the commencement values is nil will kick in (Section 6(4)) but this will only constitute *prima facie* proof and the parties will be entitled to dispute the correctness thereof;

59.2. Where the parties are married out of community of property and expressly include the accrual system but are silent in respect of the commencement values, the situation will be as follows: The commencement value of the respective estates is deemed to be nil (Section 6(4)). Such commencement values will only constitute *prima facie* proof.

59.3. Where the parties get married out of community of property, expressly include the accrual system and agree and record commencement values, the situation will be as follows: These agreed commencement values constitute

conclusive proof of the commencement values. The parties are precluded from relying on the provisions of Section 6.

[60] What should not be confused is the objective value of the commencement values of the parties' estates and the subjective agreement that is reached in respect of such commencement values. This principle is perhaps best explained by way of example: party A, being a very wealthy businessman, whose estate objectively and at the commencement of the marriage is worth R 50 million, enters into an antenuptial agreement with party B. He decides to be generous and agrees that the commencement value of his estate is to be recorded in the antenuptial agreement to be R 25 million. It is not open to party A, at the dissolution of the marriage, to contend that the objective value was R 50 million. His agreement with party B constitutes conclusive proof of the commencement value. It is only when the parties have not agreed what the commencement values of the respective estates should be, that Section 6 avails them.

[61] That this construction accords with the intention of the legislature is also to be gleaned from the provisions of Section 4(1)(b)(ii), which provides that where an asset is to be excluded from the accrual system in terms of the antenuptial contract of the spouses, such excluded asset is not to be taken into account as part of that estate at the commencement or the dissolution of such marriage. The legislature has clearly not curtailed or removed the parties' contractual freedom. They can regulate their affairs as they deem fit and as long as their agreement bears constitutional scrutiny, will be enforced and respected by our courts.

Thomas decision

[62] The court in *Thomas* (supra) examined Sections 2 to 6 of the MPA and concluded that such sections govern the relationship of the spouses *inter partes* and that the legislature did not intend Section 6 to be applicable to third parties only as was held in *Olivier* (supra). This conclusion appears to be sound.

[63] The court reasoned further that a literal interpretation of Section 6(3) leads to an absurdity because where the parties indicate the commencement value in an antenuptial agreement, such commencement value would be conclusive proof but where the parties declare the commencement values in a subsequent declaration, it would only constitute *prima facie* proof. As already indicated hereinbefore, I hold the view that Section 6(3) applies to:

63.1. antenuptial contracts in which there is no declaration of the commencement value and the deeming provision thus has application (Section 6(4)); or

63.2. the situation where there was a unilateral statement made by one of the parties, either prior to the marriage ceremony or within a period of 6 months thereafter, in which event section 6(3) applies to such unilateral statement or declaration.

[64] The distinction that Buys J fails to draw in *Thompson* (supra) is that the conclusion of an antenuptial contract, is a bilateral consensual act whereas the declaration envisaged in Section 6(1) is a unilateral act. It does not require the consensus of the other spouse. It is exactly because it does not require the consensus of the other party that such declaration merely constitutes *prima facie* proof. The spouse who omitted to state his commencement value in the antenuptial contract is afforded a further opportunity to advise the other spouse what he

contends the commencement value of his (or the other spouses) estate at the commencement of the marriage was.

[65] The signature of such declaration by the other party, does not constitute agreement with the value placed on such estate by the party issuing the declaration, but represents acknowledgement of receipt of such communication. In other words, such party is given notice of what the spouse contends the commencement value of his or her estate should be. Of paramount importance is the distinction between the consensual act which is embodied and fundamental to the act of concluding the antenuptial agreement on the one hand and the unilateral act of declaring the commencement value on the other.

[66] Buys J in *Thomas* (supra) held that the legislature expressly changed the common law i.e the commencement values of the respective estates is not to be considered conclusive proof as per the parties' antenuptial agreement but is to be considered *prima facie* proof as provided for in Section 6(3) of the MPA. In my view, if the legislature had wanted to amend the common law principle being that agreements are to be enforced (unless the terms of such agreements are contrary to public policy having regard to Constitutional values), should have done so expressly. It did not.

[67] If the parties do not know what the commencement values are when the antenuptial agreement is concluded, they do not have to record anything in respect thereof. If no agreement is reached in respect of commencement values, the deeming provision has application (section 6(4)) which is that the commencement values are nil but such deeming provision only constitutes *prima facie* proof. If, however, the parties agree that the commencement value of their respective estates

is nil, such written document constitutes conclusive proof of the terms of their agreement and it should only be capable of attack on the recognised grounds of misrepresentation, duress, undue influence etc.

[68] If the antenuptual agreement does not correctly reflect the agreement between the parties due to common error, then rectification can be sought. In my view such a construction is in line with the values that underlie our Constitution. Such an interpretation would promote the spirit, purpose and objects of the Bill of Rights.

[69] For these reasons I do not align myself with the *Thomas* decision. I consider it to be clearly wrong and accordingly do not consider myself bound by the judgment that followed *Thomas (supra)*, the aforesaid *Erasmus* judgment of Fourie, AJ.

[70] Even if I were wrong in the aforegoing interpretation, the Defendant failed to prove the value of his estate at the commencement of the marriage.

THE COMMENCEMENT VALUE OF THE DEFENDANT'S ESTATE

[71] The Defendant relied on his annual financial statements for the year ended 28 February 2007 produced by his accountants on 2 August 2007, for proof of the value of his estate at the date of commencement.

[72] These financials purportedly recorded the value of the Defendant's estate as at 28 February 2007 to be R2 791 729. It also recorded the Defendant's nett profit for the 2007 year to have been R201 831 and his drawings to have been R262 793. The financials reflected that the Defendant had lent R 687 340 to the M Trust during that financial year. With the net profit and the drawings being what they are, there appears to be insufficient funds available to justify the loan to the M Trust. Without an explanation the financials do not appear to be reliable.

[73] The Defendant argued that because the Plaintiff's expert did not comment in his report on the correctness or otherwise on the commencement value of the Defendant's estate as recorded in the Defendant's expert summary, and because the Plaintiff did not place this value in dispute during her evidence in chief, therefor it follows that such value has been admitted. I find such reasoning flawed. Firstly, the Plaintiff's expert did not testify. His report was not received as evidence and has no evidential weight. Secondly, it is for the Defendant to prove his case. Neither the Defendant nor the Plaintiff are qualified to express opinions on the values as recorded in the financials. Had the Plaintiff attempted to comment on such value, the Defendant, on the basis that she was not an expert in this regard, would no doubt have met her evidence with an objection. The financials as they stand constitutes inadmissible unreliable opinion evidence.

[74] It is common cause what the Defendant's assets were as at the commencement of the marriage. I find that no reliable evidence has been placed before this court as to what the value of these assets were at the commencement of the marriage though.

FORFEITURE OF BENEFITS

[75] In terms of section 9 (1) of the Divorce Act, 70 of 1979 ('**the Divorce Act**') a court may grant an order that the patrimonial benefits of a marriage be forfeited, either wholly or in part, by one of the spouses in favour of the other.

[76] At the conclusion of the trial, the Defendant sought forfeiture wholly alternatively that the Plaintiff forfeit 70% of her share in the accrual.

[77] At the commencement of the matter, I drew counsels' attention to the judgment of *MC v JJC* case A231/2014 in which Semenya, AJ with whom Jansen, J

concurred, held that section 9(1) of the Divorce Act might infringe upon a variety of rights and thus be unconstitutional. The Defendant argued that the *MC v JJC* (supra) matter was not in accordance with *Wijker v Wijker*, 1993 (4) SA 720 (AD) at 729I – 730A. *Wijker* (supra) was delivered pre Constitution and is therefore not necessarily authority for the contrary view. Neither party though, relied upon the unconstitutionality of section 9(1) of the Divorce Act. That does of course not mean that I should not *mero moto* raise it. Because of the findings I make herein, it is unnecessary for me to consider this issue.

[78] In *Wijker* (supra) at 727 E – F, the following was held:

"It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be purely a factual issue. Once that has been established the trial Court must determine, having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefited if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial Court after having considered the facts falling within the compass of the three factors mentioned in the section."

[79] It is common cause that the Plaintiff will be benefitted. The parties agreed that the value of the Defendant's estate as at the date of the hearing was R7,5 million. Two scenarios were sketched:

79.1. If the commencement value of both parties' estates were accepted as being nil, then the benefit to which the Plaintiff would be entitled would be: R 7,5 million/2 = R 3,75 million.

79.2. If the commencement value of the Plaintiff's estate were accepted as being nil and the commencement value of the Defendant's estate were accepted as R 2 791 729, then the CPI inflation rate adjusted value as contended for by the Defendant would be R 4 784 151.16 (this amount was actually calculated on the

amount of R 2 768 198 but the difference is negligible and I ignore it for purposes of this calculation) and then the benefit to which the Plaintiff would be entitled would be: R7,5 million – R 4 784 151 = R 2 715 848.84 /2 = R 1 357 924.

[80] Thus, the Plaintiff would either benefit by R 3 750 000 or by R 1 357 924. As I have already found that the commencement value of the Defendant's estate as at date of marriage was nil, the amount the Plaintiff stands to forfeit is R 3 750 000. To determine whether the Plaintiff will be unduly benefited if a forfeiture order is not made, the court must have regard to the duration of the marriage, the circumstances which gave rise to the breakdown of the marriage and any substantial misconduct on the part of either of the parties.

[81] It is now established law that the factors mentioned in section 9 (1) of the Divorce Act should not be looked at cumulatively, see *Wijker* (supra) at 729 E- F and *Botha v Botha*, 2006 (4) SA 144 (SCA) at par [6]. What the court is required to do is to make a value judgment.

[82] The marriage lasted for 7 years, from 2 June 2007 to 8 July 2014, when the Plaintiff left the common home. The parties were together from December 2005. The Plaintiff argued that one and a half years should be added to the duration of the marriage. In my view, section 9 (1) does not permit this. The duration of the marriage should be calculated from the commencement of such marriage which is the date of marriage.

[83] The Plaintiff contended that the marriage started to suffer when the Defendant and Mr Maritz started the M lodge which occurred in 2010. She explained that he started abusing alcohol and would sometimes loose consciousness as a result. She would find him sleeping on the stairs to the bedroom. She explained that

when inebriated his personality would change. He would become verbally abusive. This would escalate into a full on confrontation resulting in, in some instances, her throwing objects such as crockery against the walls.

[84] The Defendant testified that the Plaintiff would assault him, on occasion in public. The Defendant suspected that the Plaintiff had formed and had conducted extra-marital relationships with other men. He explained that the Plaintiff often threatened to commit suicide and that she would behave in an aggressive, moody, quarrelsome and manipulative fashion towards him.

[85] Having regard to the evidence presented on behalf of both parties I conclude that the marriage broke down as a result of the parties' inability to deal with one another's conduct and insecurities. The Plaintiff was nervous, sensitive and submissive in the extreme. The Defendant was controlling, rigid, without any insight into any wrongdoing on his behalf and consequently unable to take any responsibility for their marital problems.

[86] The Defendant testified that the Plaintiff dressed provocatively in that she did not wear the appropriate under garments. I accept his evidence (which was not, in this respect, disputed). What is clear though is that the Defendant had met the Plaintiff when she had dressed in the manner complained of. It had caused friction prior to them getting married but the Defendant had nonetheless married her. The Defendant argued that it was not his case that the Plaintiff had to obtain permission from the Defendant to dress in a certain way. It was the Defendant's case that the manner in which the Plaintiff dressed, embarrassed the Defendant, this gave rise to arguments and subsequent assaults on the Defendant by the Plaintiff and this conduct contributed towards the breakdown of the marriage.

[87] No argument was advanced which could justify the entitlement to dictate to one's spouse a clothing regime. The acceptance of such a principle would amount to this court endorsing a gross infringement of a parties' right to privacy and dignity. Not even the marital powers which have now been abolished, countenanced this. Such powers were limited to the proprietal aspects of the marriage relationship only. This evidence supports my conclusion that the Defendant was controlling of every aspect of the Plaintiff's being. Her unwillingness to submit to his power, frustrated the Defendant and gave rise to arguments and friction.

[88] The Defendant yielded the economic power in the relationship and was very generous towards the Defendant. However, he used this to control her and would withdraw gifts or privileges when the Plaintiff engaged in conduct of which the Defendant disapproved. The Plaintiff brought very little material goods into the marriage. She brought a piano into the marriage, which, she testified, she had had from childhood. The Defendant repaired it. Because he had spent money on it, he laid claim to it. He still has it. The Defendant bought the Plaintiff an IPL machine which the Plaintiff contended had been gifted to her by him. During the trial he testified that an agreement had been concluded between the Plaintiff and the M Trust in terms of which the Plaintiff had to repay the capital sum to the M Trust.

[89] I do not have to find whether such agreement was concluded but do find, that to contend that such an agreement was concluded almost 9 years prior to the trial hearing when no demands had been made for repayment during the existence of the marriage, seems, *prima facie*, not to support a finding that such an agreement had been concluded. Be that as it may, the threat of taking the Plaintiff's only source of income away, was a powerful weapon in the hands of the Defendant, who in fact

used this weapon to it's full potential to attempt to force the Plaintiff to tow the line and submit to his controlling ways.

[90] On 2 July 2014, the Plaintiff recorded the following in one of her final mails to the Defendant:

'...jy weet ek is nie baie goed met woorde nie. Ek gaan vir jou probeer verduidelik. Ek weet ek het al baie met jou baklei....maar as ek reg onthou was dit meestal omdat jy laat en gedrink by die huis aangekom het. Ek weet wel dat my optrede van skree en slaan nie daardeur regverdig kan word nie. Dan het ek telkemale vir jou gesê jy f my op. En dis hoe ek dan gevoel het. Het dit gesê want dis hoe ek dit ervaar het. En wat my op maak is dat ek in moeilikheid is by jou en jy lelik is met my oor niks. Voorbeelde is daar wat ek jou kan gee. En ek het altyd gedink dis omdat ek sensitief is. Maar ek besef dat dit nie so is nie. Ek kan nie meer so leef nie. En elke keer sê jy vir my ek moet iemand dan kry wie my nie op f nie en dat jy my nie keer om te gaan nie en dat ek moet f off. En dis altyd ons geld en ons huis en ons plaas....totdat ons baklei. Jy het die IPL masjien vir my gekoop en ek is dankbaar daarvoor.....maar nou is dit ook nie meer myne nie.....die klavier wat jy vir my reggemaak het ook nie meer myne nie....my geskenke nie meer myne nie. So ek het niks eintlik nie. Niks is myne nie....net wanneer jy so sê." (quoted as it appears in mail. Ellipses as per original text)

Loosely translated and without the foul language:

'you know I am not very good with words. I am going to attempt to explain. I know I have fought with you a lot....but if I recall correctly, it was mostly when you arrived late at home and in an inebriated state. I know this does not justify my screaming and hitting. I have told you repeatedly that this conduct messes me up. I said so because that is how I felt and that is how I experienced it. What really gets to me is that I am in trouble with you and that you treat me badly for no reason. Examples I can give you. I always thought it was because I was sensitive. I have realised that is not so. I can't live like this anymore. And then you always say I must find someone who does not mess me up, that you don't prevent me from leaving and that I should leave. And it is always our money and our house and our farm....until we fight. You bought me the IPL machine and I am so appreciative.... But now it is also not mine anymore...my piano which you repaired is also not mine anymore.....my gifts are also not mine. So I don't have anything really. Nothing is mine...just when you say so."

[91] The Plaintiff denied that she had assaulted the Defendant as regularly or as violently as described by the Defendant. She admitted to only two incidents where she had hit the Defendant with her fists on his back. The Plaintiff's counsel conceded, quite rightly in my view, that this court should find that the Plaintiff did indeed assault the Defendant from time to time. He argued though that the court should find that this occurred under circumstances of extreme provocation when the Defendant was inebriated or unbearably controlling in dictating to the Plaintiff how she should conduct herself in every aspect of her being. I agree with this assessment.

[92] I find too that there is no conspicuous disparity between the conduct of the Plaintiff and the conduct of the Defendant and to indulge in an exercise to apportion the fault of the parties, would nullify the advantages of the 'no fault' system of divorce, see *Wijker* (supra) at 730 E – F and *Beaumont v Beaumont*, 1987 (1) SA 967 (A) at 994I.

[93] In *JW v SW*, 2011 (1) SA 545 (GNP), Makgoka J held as follows in respect of assault :

"Any substantial misconduct on the part of either party

[29] I have already found that the defendant assaulted the plaintiff. That constitutes substantial misconduct on the part of the defendant. Domestic violence, in particular against women, strikes at the foundation and premise of a non-sexist and democratic order. It is a repulsive phenomenon which has no place in a society founded on the values of freedom, dignity, honour and security.

[30] That I have found substantial misconduct on the part of the defendant, does not, on its own, justify a forfeiture order: see Engelbrecht (supra) at 602J – 603A."

[94] The conduct of the Plaintiff in having assaulted the Defendant clearly constitutes substantial misconduct however, it does not on its own, justify a forfeiture order. The court is obliged to make a value judgment having regard to all the

evidence. (The court in *JW v SW* (supra) did not make a forfeiture order. This was not because of a value judgment, but rather because of the proportion in which the parties had contributed towards the immovable property and the renovations in relation thereto.)

[95] This court was urged to make a finding that the Defendant suffered from battered husband syndrome. During argument an academic article was referred to entitled: "*Psychological Effects of Partner Abuse Against Men: A Neglected Research Area*" Psychology of Men & Masculinity 2001, Vol 2, No 2, p 75 – 85 authored by Hines DA & Malley-Morrison K (Boston University). The article discusses the research on abuse against men in intimate relationships with a primary focus on the effects of abuse. It seems as though what was requested by the Defendant's counsel in this regard was for the court to read the article and then to apply the learning to the facts of this case.

[96] I find this approach and this request extraordinary. One would have thought that expert evidence would be presented to explain the theories embodied in the article and to apply those principles to the specific facts underpinning this case. The court was requested to find that the Defendant suffered from this syndrome if regard is had to the abusive nature of the letters written by the Plaintiff to the Defendant over the years. On my reading of the letters I see very little support for such an inference. The submissiveness of the Plaintiff shining from the letters, is striking. The Plaintiff almost worships the Defendant: she refers to him as her king, her prophet. I don't see any verbal abuse in the letters.

[97] I see a person with very low self esteem, struggling to communicate frankly for fear of incurring the Defendant's wrath. This is particularly evident from her 3 page

letter written on 23 September 2010 where she, only towards the end of the letter, plucks up the courage to address the Defendant's drinking habits and then does so in the humblest of ways.

[98] The Defendant accused the Plaintiff of extra marital relationships. There was absolutely no evidence to support this. When confronted with this, the Plaintiff explained that she was not even permitted to have coffee with her friend at the Wimpy. That the Defendant was very controlling of her is supported by this throw away line.

[99] The Defendant sought to prove the Plaintiff's infidelity by introducing as evidence a document, which by agreement between the parties, reflected, amongst other things, the following information: that, during their marriage the Plaintiff had used her own sim card, another as a modum, her son's sim card on 27 August 2013, 13 December 2013 and 26 May 2014 and another sim card, a fourth, on one occasion being 26 May 2014 (the same day she had used her son's). She could not explain the identity or origin of this sim card. This then, according to the Defendant, proved that the Plaintiff was conducting extra marital relationships as the only reason she could possibly have utilised other sim cards was because she was contacting other men with whom she was having adulterous relationships.

[100] In my view, the existence and use of the four sim cards proves no such thing. For one, the Plaintiff had very little opportunity to consider these facts. It was presented to her during cross examination. The matter stood down and within a short period of time, the Plaintiff could explain three of the four numbers. One wonders why the Defendant waited until the trial before exploring the identity of the holders of the

sim cards. Be that as it may, I cannot find that any of this points to the Plaintiff having conducted extra marital relationships.

[101] I cannot on the evidence before this court conclude that the Plaintiff will in relation to the Defendant be unduly benefitted should forfeiture not be ordered either wholly or in part. The parties met under circumstances where they were breaching their wedding vows to their then partners. They then started a secretive relationship culminating in the Plaintiff marrying the Defendant and Dr V marrying Mrs H. The couples swopped partners. The Defendant mistrusted the Plaintiff throughout their marriage and towards the end even accused her of having a relationship with Dr V. He mistrusted her sincerity in every respect to the point that he argued in this court that the court should conclude that the Plaintiff only married the Defendant in order to gain a financial advantage for herself. There exists not a shred of evidence to support such a conclusion. To the contrary, the Plaintiff tried extremely hard to save this marriage.

[102] It is clear that these two parties had a great affection for one another at some point. The Defendant was at times very generous with his money and his emotional energy. It is unfortunate that the parties could not work through their difficulties and break the cycle they were locked into.

COSTS

[103] The Plaintiff abandoned her claim for maintenance during the opening address. The Defendant had to prepare on this issue. The abandonment of this feature at such a late stage should carry with it the appropriate costs order.

[104] The Plaintiff conceded that her current partner is paying her legal costs. This, the Defendant argued, precluded this court from making a costs order in favour of the Plaintiff. No authority for this proposition was referred to.

[105] The Plaintiff has been substantially successful and the costs order should reflect this.

[106] No order in respect of interest on the capital sum, which this court will order Defendant to pay the Plaintiff, has been sought and I accordingly will make no order in that regard.

CONLCUSION

[107] I accordingly grant the following order:

107.1. It is declared that the commencement value of the Defendant's estate for purposes of calculating the accrual is nil.

107.2. The Defendant's claim for rectification of the antenuptual contract concluded on 26 May 2007 is dismissed.

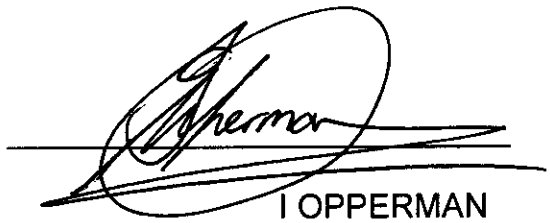
107.3. The Defendant is ordered to pay to the Plaintiff the amount of R 3 500 000 (three million five hundred thousand rand) being her benefit in respect of the accrual to which she is entitled.

107.4. The Defendant is ordered to pay the costs of this action (sa

107.5.

107.6. ve as qualified in para 106.5 hereof) including the costs consequent upon the employment of senior counsel.

107.7. The Plaintiff is ordered to pay all costs relating to the spousal maintenance claim including the costs consequent upon the employment of two counsel.



I OPPERMAN
Acting Judge of the High Court
Gauteng Division, Pretoria

Heard: 29 August 2016
Judgment delivered: ~~November 2016~~ 1/12/2016
Appearances:
For Plaintiff: Adv AF Arnoldi SC
Instructed by: Couzyn Hertzog & Horak
For Defendant: Adv LC Haupt
Adv GT Kyriazis
Instructed by: De Beer Attorneys