THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case no: 700/2013

In the matter between:

D E B **APPELLANT**

and

M G B **RESPONDENT**

Neutral citation: *B v B* (700/2013) **[**2014] ZASCA 137 (25 September 2014)

Coram: **Lewis, Tshiqi and Theron JJA and Mocumie and Gorven AJJA**

Heard: 3 September 2014
Delivered: 25 September 2014

Summary: In an accrual claim under s 3(1) of the Matrimonial Property Act 88 of 1984, the defendant contended that no accrual had been proved and the trial court had erred in granting an order based on such an accrual. The appeal against that order was dismissed on the basis that an accrual had been shown to the estate of the defendant and none to that of the plaintiff save that the accrual calculation was calculated differently. Admissibility of documents discussed.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Lopes J sitting as court of first instance):

1 The appeal is dismissed with costs, save to the extent that the order of the court a quo is amended as set out below.

2 Paragraphs (a), (b) and (d) of the order of the trial court are amended to read as follows:

'(a) The defendant is to pay to the plaintiff the sum of R 6 478 717.75 by no later than 30 November 2014.

(b) The defendant is directed to transfer to the plaintiff an amount equal to one-half of the defendant's loan account in Full House Taverns (Pty) Ltd as at the date of divorce.

(d) (i) The defendant is to pay the plaintiff's costs of the action.

(ii) The plaintiff is to pay the costs of the applications to compel her to attend on the defendant's psychologist.

(iii) The defendant is to pay all reserved orders for costs not dealt with in paragraph (d)(ii), save that, where those costs relate to applications concerning the custody of the minor children, each party is to pay his or her own costs.'

JUDGMENT

Gorven AJA (Lewis, Tshiqi and Theron JJA and Mocumie AJA concurring)

[1] This appeal concerns a claim by the respondent (the plaintiff in the court a quo) for one half of what had accrued to the estate of the appellant (the defendant in the court a quo) during just over 14 years of the marriage between the parties. I shall refer to the parties as the plaintiff and the defendant respectively. In the divorce action all the other issues between the parties were resolved, including those relating to the minor children of the parties which had given rise to a number of pre-trial applications and conferences. A consent order for a decree of divorce and the other settled issues was granted on 7 June 2013 at the end of the trial. The only contentious issue in the end was whether or not an accrual had occurred to the estate of the defendant and, if so, the extent of that accrual. There had been no accrual to the estate of the plaintiff.

[2] After reserving judgment on the accrual claim, the trial judge granted the following order:

'(a) The defendant is to pay the plaintiff the sum of R7 324 984.63 by no later than the 31st August 2013;

(b) The plaintiff is declared to be the owner of one half of the defendant's loan account in Full House Taverns (Pty) Ltd;

(c) In the interim, and pending the payment of the amount in (a) above by the defendant to the plaintiff, the defendant is to continue paying maintenance to the plaintiff pursuant to the agreement reached between the parties in the Rule 43 proceedings;

(d) The defendant is to pay the plaintiff's costs of the action, including all reserved orders for costs, save those with regard to the applications to compel her to attend on the defendant's psychologist and the plaintiff is to pay the defendant's costs of those applications;

(e) All costs are to include the costs of senior counsel, and two counsel, where applicable.

(f) In any report of this judgement, no person other than the advocates, the attorneys instructing them, or persons (other than the parties, members of the extended families and their children) identified by name in the judgement itself, may be identified by name or location. In particular the anonymity of the children and the adult members of their family must be strictly preserved. If reported, it shall be the duty of the Law Reporters to carry out this part of the order.'

[3] With the leave of the trial court, the defendant appeals against paragraphs (a) to (d) of the order, asking that they be substituted with an order that:

'(a) The Plaintiff's claim for payment of any amount in terms of the accrual system, referred to in Chapter 3 of the Matrimonial Property Act, No. 88 of 1984, be dismissed, alternatively that there be absolution from the instance.

(b) The Plaintiff is to pay the Defendant's costs of the action, including all reserved orders for costs, and including those with regard to the applications to compel her to attend on the Defendant's psychologist.'

It can therefore be seen that the amount awarded is attacked as is the order declaring the plaintiff the owner of one half of an asset of the defendant, namely his loan account in Full House Taverns (Pty) Ltd (Full House Taverns).

[4] The parties were married to each other out of community of property with the application of the accrual system. The Matrimonial Property Act[1] introduced into South African Law the system of accrual which could be made applicable to marriages contracted out of community of property and of profit and loss by way of an antenuptial contract (ANC). In addition to excluding community of property and of profit and loss, under this regime a claim (an accrual claim) arises at the dissolution of the marriage 'for an amount equal to half of the difference between the accrual of the respective estates of the spouses'.[2]

[5] Since community of property is excluded, each spouse maintains a separate estate. If a spouse so desires, the assets which make up the separate estate are under his or her sole control. In an accrual claim, therefore, the spouse making the claim often has little or no knowledge of the assets which make up the estate of the other party. It is presumably for this reason that the legislature enacted s 7 of the Act, the relevant parts of which are as follows:

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[1] Act 88 of 1984.

[2] Section 3(1). The dissolution may be by way of death or divorce.

'When it is necessary to determine the accrual of the estate of a spouse … that spouse … shall within a reasonable time at the request of the other spouse … furnish full particulars of the value of that estate.'

It is therefore clear that the legislature requires that a spouse furnish full particulars if requested. The relevance of the requirement to this action will become clear in due course.

[6] The ANC of the parties deals in paras 7 and 8 with the commencement values and the approach to calculating the accrual claim. Paragraph 7 declares the nett value of the estate of the defendant at the inception of the marriage to be R2 543 939. This is said to be made up of two parts, reflected as follows:

'(i) R1 438 000,00 . . . consisting of interest in immovable property, cash on hand, claims receivable, shares and interest in companies and corporations, investments and movable assets.

(ii) R1 105 939,00 . . . being the value of [the] option to purchase shares at agreed price in Aristocrat Leisure Limited.'

[7] Paragraph 8 provides that certain assets (the excluded assets) 'shall not be taken into account as part of each party's estate at either the commencement or the dissolution of the marriage'.[3] These were said to comprise the following:

'1. The value of all amounts standing to the credit of the following bank accounts:

Standard Bank, Sandton City Branch, Account Number […]; and

Investec Bank, Durban, Account Number […]

as at 1st March 1999.

2. Any balance of any proceeds of the sale of shares and any other interest or claim in respect of A L I Gaming Solutions (Pty) Limited.

3. The value of the interest in the immovable property situated at 47 R[…], 208 C[…] Road, Durban and the proceeds of any alienation thereof.

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[3] This echoes the provisions of s 4(1)(*b*)(ii) of the Act which reads:

'[I]n the determination of the accrual of the estate of a spouse ─

(ii) an asset which has been excluded from the accrual system in terms of the antenuptial contract of 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 the marriage'.

4. Any interest in Propwell CC and the proceeds of any alienation thereof.

5. The value of shares held in respect of SISA and the proceeds of any alienation thereof.

6. The value of all shares held in the Hamilton Airship Company and the proceeds of any alienation thereof.

7. The value of any claim against Propwell CC, or the value of any asset acquired with the proceeds of such claim.

8. The value of the rights arising in respect of the option to purchase shares in Aristocrat Leisure Limited, the value of any shares purchased in terms thereof, and the value of any proceeds of the alienation of such shares.'

Admissibility of documents discovered by the defendant; assertions in cross-examination

[8] The only evidence led by either party regarding the accrual was that of Mr Peter Duncan, a chartered accountant who was called by the plaintiff. The defendant neither testified nor called any witnesses to do so on his behalf.

[9] On appeal it was contended on behalf of the defendant that Mr Duncan's evidence was inadmissible as it was based on hearsay. When Mr Duncan was called, and before he had given any evidence, counsel for the defendant indicated that she objected to his being called on two bases. She summarised the objection as follows, 'We have difficulty in understanding how he can testify to factual matters and we believe it would, of necessity, venture into opinion evidence'. The court a quo ruled, 'We will deal with that as it arises'. This quite clearly meant that, if Mr Duncan ventured into either of those forbidden territories, the defendant would need to object at that point. The objection would then be dealt with. The only objection made by the defendant during the leading of his evidence was early on when Mr Duncan produced a schedule to which he wished to refer. The objection at that stage was that the schedule had not been seen until then and that no rights were being waived 'that arise from late documentation'. When it emerged that the schedule simply contained a

compilation of amounts reflected in the documents discovered under oath by the defendant and used by his own accountant to compile a similar schedule, no further issue was made of this. Accordingly, after the defendant had been given the opportunity to consider the schedule, it was used without any renewal of the objection. No objections were made to the use by Mr Duncan of the defendant's discovered documents or to their authenticity.

[10] At the outset, Mr Duncan was asked '[W]ere you given seven lever arch files containing all of the defendant's discovered documents?' His reply was in the affirmative. This evidence was never challenged. He indicated that, from the discovered documents, he had drawn up a schedule which set out the defendant's assets and liabilities at the end of each tax year of the marriage. Apart from the 1999 tax year and that ending in February 2013, he had taken the figures for his schedule from the defendant's tax returns for the years in question. The 1999 information was based on the defendant's declaration of assets and liabilities as at 28 February 1999 to the Gambling Board which was signed by him on each page. The 2013 figures included in Mr Duncan's schedule were taken from a statement of assets and liabilities as at 28 February 2013 drawn up and discovered by the defendant.

[11] During the cross-examination of Mr Duncan, counsel for the defendant handed in a schedule and posed questions based on it. In response to a question by the trial judge, counsel said that this had been drawn up by an accountant employed by the defendant, Ms Wright. It had been compiled from the same discovered documents as those provided to the plaintiff. In other words, Ms Wright used the same documents as did Mr Duncan. These documents resulted in the schedule prepared by her which, it was asserted during cross-examination, reflected the assets and liabilities of the defendant as at 30 April 2013.

[12] On appeal, the defendant's counsel submitted that, apart from the ANC, there 'was no agreement as to the status of any other documents and thus the authenticity of any such documents needed to be proved' as regards 'the value of the estate of the [defendant] as at date of divorce'. I have outlined how the evidence based on the documents emerged. In the first place, there was no objection to the statement that Mr Duncan had based his schedules on all of the discovered documents of the defendant. Secondly, there was no objection 'as it arises' to Mr Duncan referring to the discovered documents. Thirdly, the defendant's counsel introduced Ms Wright's schedule into evidence, saying that it was based on the very same documents used by Mr Duncan on the basis that this schedule accurately reflected the assets and liabilities of the defendant as at 30 April 2013. There was, finally, no challenge to the authenticity of the documents relied on by both accountants.

[13] In *S v W*[4] this court held that assertions made during cross-examination could be regarded as admissions. This was dealt with by Ogilvie Thompson JA as follows:

'From all the foregoing it thus becomes abundantly plain that, while disputing the major issue of intercourse as deposed to by F, appellant, through his attorney, at the same time asserted: (i) that money had been paid by him to F in a total sum exceeding that which she herself maintained; and (ii) that he had been in F's company only on "one night in January, 1961", when intercourse might possibly have occurred while he was drunk. Although advanced only in cross-examination, these assertions were specifically and deliberately made: the facts of the case do not admit of the possibility of any error on the part of the cross-examining attorney. In the context of F's evidence, these assertions must, in my view, be regarded as unequivocal admissions by appellant of the matters so asserted. Having been made during the actual hearing in the trial court, the admissions in question require, in my judgment, no additional formal proof before they may be used against appellant'.[5]

[4] *S v W* 1963 (3) SA 516 (A).
[5] At 523B-F.

In the context of civil litigation, *Nkuta v Santam Assuransie Maatskappy Bpk*[6] followed this approach, saying:

'Hoewel, soos reeds gemeld, die verweerder sy saak gesluit het sonder om enige getuie te roep, is hy gebonde aan die saak wat formeel as 'n feitlike bewering deur sy raadsman in die ope Hof aangekondig en aan 'n getuie van die teenparty gestel is.'[7]

[14] The thrust of these cases cannot be avoided by the defendant in these circumstances. The assertions of the defendant, as put by his counsel during cross-examination, amounted to 'unequivocal' admissions. These were at least twofold; an admission that the documents used by Mr Duncan and Ms Wright were authentic in that they were relied on by the defendant to place his financial position before the court for the purpose of the accrual claim and an admission as to the actual amount owed to him by Full House Taverns.[8]

[15] The submission meets a further difficulty when it is made on appeal. As was mentioned earlier, no objection was raised to any of the evidence given by Mr Duncan at the trial. This after the trial court ruled that objections should be made at the time that objectionable evidence was introduced. If no objection is made during a trial, an appeal court cannot consider an objection of this nature. In *Transnet Limited v Newlyn Investments (Pty) Limited*[9] Cloete JA held:

'. . . So far as this court is concerned, it is a salutary principle that an appeal court will not entertain technical objections to documentary evidence which were not taken in the court below and which might have been met by the calling of further evidence . . . It would be unfortunate in cases such as the present if a party could claim a forfeit on appeal.'[10]

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[6] *Nkuta v Santam Assuransie Maatskappy Bpk* 1975 (4) SA 848 (A).
[7] At 853G-H. 'However, as already mentioned, since the defendant closed his case without calling any witness, he is bound by the case which was formally advanced by his representative in open court by way of factual assertions put to a witness of the opposite party.' (My translation.)
[8] See also *Zungu NO v Minister of Safety and Security* 2003 (4) SA 87 (D) at 91E-93B.
[9] *Transnet Limited v Newlyn Investments (Pty) Limited* 2011 (5) SA 543 (SCA).
[10] Paragraph 18.

[16] Counsel for the defendant sought to distinguish this matter submitting that, because the issue had been raised in heads of argument before the trial court, the dictum in *Transnet* did not apply and the objection could be dealt with on appeal. At that stage, the parties had already closed their cases. Without a formal application to reopen the case, the objection could not have been met by calling evidence. We know, too, that all of the documents in question were those of the defendant. The plaintiff was hardly obliged to call him as a witness. Counsel for the defendant submitted that use could have been made of Rule 35(10) of the Uniform Rules of Court.[11] It seems to me that to require the plaintiff to have done so in the circumstances of this matter would be to adopt an unduly formalistic approach.

[17] The approach of counsel for the defendant in this matter differs markedly from the salutary approach adopted by counsel in *Zungu*. Counsel for the defendant quite properly alerted counsel for the plaintiff to the fact that he would take the point in argument that there had not been sufficient proof by way of admissions made under cross-examination. As a result, counsel for the plaintiff sought a ruling from the court on this issue before closing his case. In the present matter, the defendant's counsel did not in a similar way alert that of the plaintiff but raised the issue for the first time in argument. This despite a specific ruling by the trial judge that objections should be raised as the basis for them arose. In the light of what was said above on the issue of assertions put on behalf of the defendant and the dictum in *Transnet Ltd*, I am of the view that no forfeit can be claimed on appeal and the objection ought not to be dealt with.

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[11] Rule 35(10) reads:
'Any party may give to any other party who has made discovery of a document or tape recording notice to produce at the hearing the original of such document or tape recording, not being a privileged document or tape recording, in such party's possession. Such notice shall be given not less than five days before the hearing but may, if the court so allows, be given during the course of the hearing. If any such notice is so given, the party giving the same may require the party to whom notice is given to produce the said document or tape recording in court and shall be entitled, without calling any witness, to hand in the said document, which shall be receivable in evidence to the same extent as if it had been produced in evidence by the party to whom notice is given.'

[18] Counsel for the defendant submitted on appeal that the evidence of Mr Duncan amounted to expert opinion evidence and should therefore be excluded. It is my view that his evidence did not amount to that of an expert giving an opinion. As Mr Duncan himself said, 'This is purely a compilation engagement. I purely compiled this straight off the documentation that was there and put it in a format that would be more easily understood by everybody, as opposed to having to go through hundreds of files looking at different documents.'

[19] Undeterred, counsel for the defendant submitted that, if this was the case, the evidence of Mr Duncan was 'supererogatory evidence'. It has been held by this court that, unless an expert witness can give the court 'appreciable help', evidence which is not of an expert nature is 'supererogatory and superfluous'.[12] It was clear that the documents discovered were voluminous. Even the defendant, who is himself a chartered accountant, contracted Ms Wright to perform a similar exercise. The work done by Mr Duncan and his evidence certainly had the effect of saving the time of the court and the expense of the parties, and was accordingly of appreciable help. It was therefore in no way superfluous or inadmissible. In any event, similar considerations arise to the other objection since it was not raised during evidence.

The estate of the defendant

[20] What, then, did the evidence disclose? There was agreement on the following. There were two immovable properties owned by the defendant. These were reflected in Mr Duncan's schedule at cost price plus cost of improvements but were reflected in that of Ms Wright as being the market values from figures supplied to her. These were agreed by the plaintiff. A Landrover vehicle owned by the defendant was also reflected in Ms Wright's schedule at a value obtained by her and this was also agreed to by the plaintiff.

[12] *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616H.

All of the balances shown in Ms Wright's schedule for the defendant's overseas investments and bank accounts were accepted. It was agreed that a cash payment of R700 000 had been made to the plaintiff and two vehicles, one valued at R260 000 and one at R100 000, had been transferred to her during an attempt to reconcile and that these amounts should be deducted from any accrual claim if the reconciliation failed.

[21] This left the following differences between the parties. First, the commencement value which must be used in the accrual calculation. Secondly, the value of the defendant's loan account in Full House Taverns. Thirdly, the amount which the defendant owed a Family Trust (the Trust) of which he was a trustee and which shall not be named in this judgment so as to preserve the anonymity of the parties and their children. Fourthly, which of the assets of the defendant at dissolution, if any, should be excluded from the accrual calculation. Finally, the schedule prepared by Ms Wright included liabilities of approximately R1.37 million for estimated legal and related fees which found no expression in any prior schedule discovered by the defendant. I shall deal with each in turn.

[22] The commencement value of the defendant's estate requires the construction of paras 7 and 8 of the ANC. It will be recalled that a commencement value was declared (the declared value). This was said to comprise certain assets. Paragraph 7 declares that the commencement value totalled R2 534 939. The paragraph did not leave it at that. The assets which made up this amount were listed. Paragraph 8 then provided that the excluded assets and assets which derive from them should not be taken into account either at the commencement or the dissolution of the marriage.

[23] This means that, where an excluded asset forms part of the value declared in para 7, the declared value must be reduced by the value of that asset. What remains after the deduction is the commencement value (the accrual commencement value) to be used for the purpose of the accrual claim.

The shares option

[24] Applying this approach to the facts, therefore, the value of the option to purchase shares in Aristocrat Leisure Limited (the shares option) must be subtracted from the declared value. This is because that asset is an excluded asset as specified in para 8. This obtains equally for any other assets which are referred to in both paras 7 and 8. This is where the evidence of Mr Duncan was material. He gave unchallenged evidence linking the other excluded assets specified in para 8 to those referred to in the first part of para 7. He did this by reference to the declaration of the defendant to the Gambling Board of his assets and liabilities as at the end of February 1999. The ANC was executed on 11 March 1999, a few days later. After Mr Duncan had completed this exercise, the only assets not identified as excluded assets had a value of R108 000. The position regarding unchallenged evidence was set out in *President of the Republic of South Africa & others v South African Rugby Football Union & others* to the following effect:[13]

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.'

[13]*President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) para 61.

This means that the plaintiff proved that the accrual commencement value of the defendant's estate, after deducting the excluded assets from the declared value, was R108 000.

[25] The Act requires the application of the Consumer Price Index (the CPI) to the accrual commencement value so as to achieve a present day value (the inflated commencement value). In the circumstances, it is the figure of R108 000 to which the CPI must be applied. The relevant rates of the CPI are contained in another schedule prepared by Ms Wright and handed in by the defendant. In that schedule, the CPI rates were applied to the declared value of R2 543 939. Because the calculation had not been done using R1 438 000, being the declared value less the stated value of the shares option, or for R108 000, counsel for the plaintiff was requested at the hearing to have the calculation performed on these two amounts.

[26] Such calculations were presented under cover of a letter indicating that they had been sent to the defendant but that the defendant's legal representatives were not in agreement. A subsequent letter was received from the defendant's legal representatives confirming their disagreement and disputing that the CPI rates referred to in court had been agreed. In addition, they provided various accrual calculations, using the declared value, a value excluding the declared value of the share option and R108 000 and applying each of these to Mr Duncan's schedule as a whole and that of Ms Wright as a whole. This had not been requested. As to the denial of agreement that the CPI rates were accurate, Ms Wright used those rates to arrive at her inflated value in her schedule. This schedule and in particular the inflated value of the declared value arrived at by the application of those CPI rates, was asserted by the defendant's counsel to accurately represent the accrual calculation. This contains at least an implicit admission that the CPI rates used were correct. As a result, I accept their

accuracy. The plaintiff's representatives indicated that, after applying the CPI rates to R108 000, the figure arrived at is R234 075.00. I had performed the calculation myself which resulted in a figure of R234 077.76. I shall use the higher one as the inflated commencement value.

The Full House Taverns loan

[27] The second asset in dispute was the value of a loan account held by the defendant in Full House Taverns, of which he was the sole shareholder and director. Ms Wright placed a value on this of R74 000. She did so, it was said by counsel for the defendant, because it was her opinion that only that much of the loan was recoverable due to financial difficulties experienced by Full House Taverns. This evidence was, of course, not led. There is thus no admissible evidence for the value used by her. Mr Duncan said, again without challenge, that no documents were discovered concerning the financial position of Full House Taverns. As a result of this failure, he was unable to comment on the recoverability or otherwise of that loan. Once again, the defendant inexplicably failed to provide the relevant documentation or to testify in support of his contention on recoverability.

[28] In the schedule of his assets and liabilities as at 28 February 2013, the loan was reflected by the defendant as being R7 502 636. During evidence, Mr Duncan indicated that the defendant's legal team had provided a document during the trial showing the loan balance as more than R11 million. The defendant's counsel then put to him that the correct figure for the loan was in fact R11 101 528. Once again, this assertion amounts to an admission by the defendant and must therefore be accepted as being the value of the loan account.

[29] This asset was not brought into account by the trial court in arriving at the value of the defendant's estate at dissolution. A separate order was made

concerning it. This was possibly done out of caution in the light of the unsupported assertion that it would not be recoverable. At the hearing of the appeal, counsel for the defendant indicated that, if this court found that the loan account should be included in the defendant's assets at the value asserted by her during cross-examination, the defendant would abandon his appeal against para (b) of the order granted by the court a quo. Counsel for the plaintiff indicated that the plaintiff was amenable to this approach. The parties further agreed that, if this was the outcome, para (b) of the order should be amended from a declaratory order to one requiring the defendant to transfer to the plaintiff one half of the value of his loan account in Full House Taverns calculated as at the date of the divorce order.

The loan from the Trust

[30] The third material discrepancy between the schedules of Mr Duncan and Ms Wright relates to a loan reflected as being due by the defendant to the Trust. In Mr Duncan's schedule, based on the schedule prepared and discovered by the defendant, the amount owing to the Trust as at 28 February 2013 was R418 343. In Ms Wright's schedule the amount owing as at 30 April 2013 was said to be R1 418 335.31. When Mr Duncan was asked about this figure, his response was twofold. First, he said that there were no discovered documents for the Trust beyond 28 February 2013. Secondly, he expressed surprise that the Trust could have lent the defendant an additional million or so Rand because the only asset in the Trust was its loan to the defendant and he could not see how it could have obtained monies to advance to him. The figure reflected in the schedule of Mr Duncan must accordingly apply, being consistent with the other documents. This is an aspect which appears to have been overlooked by the trial court and was excluded from the accrual calculation. It must thus be brought into account as a liability.

The proceeds of the shares option

[31] The next issue is whether the excluded assets, or those which derived from them, could be identified with any assets in the estate of the defendant. Mr Duncan gave evidence that, after various splits, the shares option had been finally exercised in June 2001. When he was asked whether he had been able to identify which assets, if any, derived from this, he said that he had not been able to do this as a result of the failure of the defendant to provide a full schedule of the requisite bank accounts. The defendant's counsel challenged this evidence, saying that complete sets of 'the Standard Bank statements and also Investec Bank statements, those that our client had were furnished on 30 May 2013'. The trial commenced on 3 June 2013. It emerged that the statements referred to by counsel did not comprise a complete set of bank statements and, in any event, had not been discovered. Although it was put to Mr Duncan during cross-examination that Ms Wright had traced the assets derived from the exercise of the option, no evidence to that effect was led. This kind of assertion stands on a completely different footing to those dealt with earlier where the assertion put in cross-examination amounts to an admission by the defendant. Here, if the assertion is to be taken into account, either the plaintiff must agree to it or evidence must be led in support of it. Neither of these alternatives materialised.

[32] The net effect of this is that there was no evidence as to which assets of the defendant, if any, derived from the excluded assets. In response to this, counsel for the defendant submitted that the onus was on the plaintiff to prove that the exemption clause was not enforceable. This is not a correct formulation of the issue. At no stage did either party claim that the clause was not enforceable. The evidence of Mr Duncan that the discovered documents did not show which of the defendant's assets, if any, were derived from the excluded assets, was contested. Counsel for the defendant then submitted that, as part of

the onus on the plaintiff to prove the accrual to the estate of the defendant, she must prove which assets derive from the excluded assets.

[33] It is not necessary or desirable to decide the issue of the onus in the present circumstances and I expressly refrain from doing so. Here there is uncontested evidence that no excluded assets can be traced from the discovered documents. On the evidence, therefore, the plaintiff proved that no assets can be identified as deriving from those excluded by the ANC. If this evidence was incorrect, no documentation was shown to Mr Duncan tracing any such assets such as to cause the trial court to reject this evidence. Likewise, no countervailing evidence was led.

The estimates of the legal fees of the defendant

[34] The final issue relates to the amounts included in Ms Wright's schedule which are said to be estimates of the defendant's indebtedness for legal fees and associated costs. There is no such liability disclosed in any of the documents prepared by the defendant on which Mr Duncan based his evidence. This includes the schedule prepared and put up by the defendant as at 28 February 2013. Since, once again, neither the defendant nor Ms Wright led evidence as to this liability, it must be ignored for present purposes.

The value of the defendant's estate

[35] The value of the defendant's estate emerges as follows. The amounts under Lentus Asset Management after deducting liabilities totalled R13 707 426.13. The three cheque accounts totalled R115 676.67 and the Investec Money Market account totalled R126.58. To this must be added the agreed net value of the immovable properties in the sum of R1 686 433.23 and the Landrover with a value of R244 000. From this must be deducted the amount by which the Standard Bank account was overdrawn and amounts

owing for the credit card. These total R23 806.35. All of the above figures are taken from Ms Wright's schedule and were accepted by the plaintiff. The liability of the defendant to the Trust in the sum of R418 343 must be deducted. The inflated commencement value of R234 077.76 must be deducted. Since there are no excluded assets identified, no further deduction takes place in that regard.

[36] If, after this exercise, there is a positive balance, there has been an accrual. The plaintiff is entitled to one half of any such accrual less what she received in advance. As mentioned, this was agreed to be cash of R700 000 and two vehicles with agreed values of R260 000 and R100 000 respectively. From the accrual, therefore, a sum of R1 060 000 must be deducted in order to arrive at an award, if any.

The calculation of the accrual award

[37] Excluding the loan account in Full House Taverns, the accrual to the defendant's estate and the award to be made to the plaintiff is therefore calculated as follows:

Lentus Asset Management	R 10 802 415.41	
Lentus Asset Management	R 1 199 884.60	
Lentus Asset Management	R 774 208.60	
Lentus Asset Management	R 444 474.44	
Lentus Asset Management	R 223 316.89	
Lentus Asset Management	R 263 126.19	R 13 707 426.13
Landrover	R 244 000.00	R 244 000.00
Citi Cheque Account	R 55 363.05	

Macquarrie Bank Account	R 54 320.96	
Investec Private Bank	R 5 992.66	R 115 676.67
Investec Money Market Account	R 126.58	R 126.58
South Ridge Road	R 36 433.23	
Rietvlei	R 1 650 000.00	R 1 686 433.23
less		
Standard Bank o/d	-R 7 287.77	
Standard Bank credit card	-R 16 518.58	-R 23 806.35
The Trust loan	-R 418 343.00	-R 418 343.00
Inflated commencement value	-R 234 077.76	-R 234 077.76
Accrual		R 15 077 435.50
Plaintiff's share		R 7 538 717.75
less		
Advance payment	-R 700 000.00	
Vehicle 1	-R 260 000.00	
Vehicle 2	-R 100 000.00	-R 1 060 000.00
AWARD		R 6 478 717.75

[38] Before arriving at the order to be made, it is appropriate to comment on the manner in which the defendant approached the litigation on the accrual claim. As I mentioned, the defendant's counsel put to Mr Duncan that Ms Wright had been able to trace assets which derived from the exercise of the share option which was an excluded asset. If this is so, it must mean that Ms

Wright was privy to documentation that was not shown to Mr Duncan. This must mean, in turn, that relevant documents exist which the defendant failed to discover or furnish. This was also true of the financial statements of Full House Taverns, a company of which the defendant was the guiding mind. In addition, the plaintiff attempted to subpoena *duces tecum* through the defendant, as trustee, documents showing the financial position of the Trust. This provoked a response by the defendant that he could not provide these documents without the consent of his co-trustees. When the loan was shown to have increased by approximately R1 million between the end of February 2013 and 30 April 2013, Mr Duncan stated that he had not seen any financial documents relating to the trust for the period after the end of February 2013. It was then put to him that documents had been provided to the plaintiff's attorneys pursuant to a subpoena *duces tecum* on the Thursday or Friday before the trial commenced. The accuracy of this assertion was not proved.

[39] The attitude of many divorce parties, particularly in relation to money claims where they control the money, can be characterised as 'catch me if you can'. These parties set themselves up as immovable objects in the hopes that they will wear down the other party. They use every means to do so. They fail to discover properly, fail to provide any particulars of assets within their peculiar knowledge and generally delay and obfuscate in the hope that they will not be 'caught' and have to disgorge what is in law due to the other party.

[40] The conduct of the trial on the accrual claim appears to have been run by the defendant on a 'catch me if you can' basis. He clearly failed to comply with the provisions of s 7 of the Act. He delayed providing what were obviously relevant documents until the last minute and then did not discover them. He declined to provide any documents concerning the financial position of Full House Taverns. He did not provide documents which could be used to trace

assets derived from the excluded assets. He did not prove that documents relating to the Trust were furnished timeously or at all pursuant to a subpoena *duces tecum* after initially claiming that he could not furnish these without the consent of his co-trustees. He inexplicably did not testify and then took a technical point concerning documentary proof.

[41] This approach of the defendant deserves censure. In my view, it may have warranted a punitive costs order at the trial. There is no cross appeal before us on costs so such an order is not competent. Even though the award has been reduced on appeal and it may be argued that the defendant achieved a measure of success, because this attitude persisted on appeal, the defendant will be liable for the costs of the appeal.

[42] The following order issues:

1 The appeal is dismissed with costs, save to the extent that the order of the court a quo is amended as set out below.

2 Paragraphs (a), (b) and (d) of the order of the trial court are amended to read as follows:

'(a) The defendant is to pay to the plaintiff the sum of R 6 478 717.75 by no later than 30 November 2014.

(b) The defendant is directed to transfer to the plaintiff an amount equal to one-half of the defendant's loan account in Full House Taverns (Pty) Ltd as at the date of divorce.

(d) (i) The defendant is to pay the plaintiff's costs of the action.

(ii) The plaintiff is to pay the costs of the applications to compel her to attend on the defendant's psychologist.

(iii) The defendant is to pay all reserved orders for costs not dealt with in paragraph (d)(ii), save that, where those costs relate to applications concerning the custody of the minor children, each party is to pay his or her own costs.'

T R Gorven

Acting Judge of Appeal

Appearances

For Appellant:	J A Julyan SC, with her S I Humphery Instructed by: Belinda Ardenbaum Attorneys, Durban Phatshoane Henney Attorneys, Bloemfontein
For Respondent:	A Stokes SC Instructed by: Roger Knowles Attorneys, Durban Webbers Attorneys, Bloemfontein