IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 8954/10

In the matter between:

A M Plaintiff

and

JOHANN (J) M Defendant

Court: **CLOETE, AJ**

Heard: 2, 3, 26, 29, 30 November 2010; 1 and 6 December 2010

Delivered: 10 December 2010

ADV. FOR PLAINTIFF: Adv A E Heese

INSTRUCTED BY: Michalowsky, Geldenhuys Humphries (A Geldenhuys)

ADV. DEFENDANT: Adv F Harmse

INSTRUCTED BY: Honey Attorneys (Mr G de Beer)

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CASE NO: **8954/10**

In the matter between:

A M **Plaintiff**

And

J (J) M **Defendant**

JUDGMENT DELIVERED ON 10 DECEMBER 2010

CLOETE. AJ

[1] This is a divorce action in terms of which the plaintiff claims (a) a decree of divorce; (b) an order declaring that the asset of the J M Family Trust No IT1281/2005 ('the Trust') forms part of defendants personal estate for purposes of calculation of the accrual in accordance with the provisions of the Matrimonial Property Act. No 88 of 1984 ('the Act'): (c) an order directing defendant to pay to plaintiff an amount equal to 50% of the difference in the accruals of the nett estates of the parties; (d) costs; and (e) that any order which this court makes shall be binding upon the defendant's estate Although plaintiff initially claimed rehabilitative maintenance for a period of 24 months, this claim was abandoned at the commencement of the trial.

[2] In his counterclaim filed of record, the defendant admitted that the marriage between the parties has irretrievably broken down and counterclaimed against plaintiff for an order that (a) plaintiff is to forfeit her right to share in the accrual in defendant's estate, more particularly with regard to certain assets of defendant; (b) the values of the immovable properties situate at 16 Prins Street, Oranjezicht, Cape Town and 26 Prins Street, Oranjezicht. Cape Town and/or any assets acquired by defendant as a result of his possession or former possession

of such assets, shall not be taken into account in the calculation of the accrual in defendant's estate; and (c) costs. During the course of the trial is became apparent that defendant also contends that other immovable properties (over and above 16 and 26 Prins Street) were also acquired by him as a consequence of assets which were excluded in terms of the parties' antenuptial contract and that accordingly these properties and/or the proceeds thereof must also not be taken into account in the calculation of the accrual in defendant's estate.

[3] Although this aspect was not specifically dealt with on the pleadings, the parties are in agreement that those assets and/or values reflected in clause 4 of the their antenuptial contract, being the commencement values of their respective estates as envisaged in terms of s 4{1){a) of the Act are the same assets as those which were excluded by the parties in clause 5 of the antenuptial contract as is envisaged in terms of s 4(1)(b)(ii) of the Act.

[4] Plaintiff argued that the provisions of the Act make it clear that assets which are excluded in accordance with s 4(1)(b)(ii) cannot be taken into account as forming part of the estate of a party at the date of commencement of the marriage by virtue of the provisions of s 4(1)(b)(ii) itself which read as follows:

> *•4. Accrual of Estate-(1)(a) ...*
>
> *(b) in 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 assets 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;'* (my emphasis)

[5] Plaintiff accordingly argued that the provisions of clause 4 of the antenuptial contract (reflecting the commencement values of the parties' respective estates) must be regarded as *pro non schpto.*

[6] In his opening address, defendant's counsel informed the court that it was not a simple matter of regarding clause 4 of the antenuptial contract as being *pro non schpto* and

requested the court to deal with this issue on the basis of the evidence presented by the parties during the course of the trial.

[7] Plaintiffs evidence was that she understood the antenuptial contract to mean that, in the event of termination of the marriage, the assets of each party reflected in the antenuptial contract would revert to them and the balance of assets accrued during the marriage would be divided between the parties.

[8] Defendant's evidence on this issue focused entirely on precisely which of his assets were excluded in terms of clause 5 of the antenuptial contract. He did not place any evidence before this court to indicate anything other than that his understanding of the antenuptial contract was that certain assets were excluded from the accrual, as opposed to forming part of the commencement value of his estate for purposes of calculation of the accrual upon termination of the marriage. Further, defendant's counsel did not deal at all with plaintiffs submissions in this regard in his closing argument.

[9] Accordingly, I am satisfied that the common intention of the parties was that the provisions of the clause 4 of the antenuptial contract should indeed be regarded as *pro non scripto.*

ISSUES AGREED UPON

[10] At the commencement of the trial the parties informed the court that the following aspects had been agreed upon between them:

[10.1.] The division of their household furniture and effects as reflected on the schedule appearing at pp 41 and 42 of plaintiffs trial bundle (exhibit "A"), subject to defendant retaining the desk, chair, book case and single bed in the plaintiffs study at the former common home;

[10.2.] The assets, liabilities and attendant values thereof in the estates of plaintiff, defendant and the Trust, save and except that plaintiff disputes that the defendants investments in

Hungary are limited to the amount of €142.300. (There was some debate about the amount of capital gains tax payable in respect of the sale of defendant's immovable property situated at 17 Scott Street, Gardens, Cape Town but in her closing argument plaintiffs counsel informed the court that the plaintiff would accept that the sum of R60.000 is payable in respect of capital gains tax on this sale, as claimed by defendant for purposes of calculating the accrual in defendant's estate);

[10.3.] The parties are further agreed that in the event of this court making an order in favour of plaintiff for payment to her by defendant of an amount in excess of R2.1m in respect of her accrual claim, then plaintiff shall receive the immovable property situated at 16 Prins Street with an agreed value of R2,1m as part payment of her claim, with the balance to be paid to her in cash (The parties also agreed that plaintiff shall pay the costs attendant upon the transfer of the aforesaid immovable property into her name).

[11] At the commencement of the trial defendant made an open tender to pay to plaintiff an amount of R3m by way of the transfer of the 16 Prins Street property to her (at the agreed value of R2,1m), and the balance in cash. During the course of the trial and in light of defendant's open offer, the parties agreed that defendant would pay to plaintiff the sum of R250.000 as an advance on her accrual claim. This amount was duly paid to plaintiff by defendant.

FACTS NOT IN DISPUTE

[12] In addition to the aspects agreed upon and referred to above, the following facts are not in dispute:

[12.1.] The parties were married to each other on 22 February 1985 out of community of property by antenuptial contract and in terms of which the accrual system reflected in chapter 1 of the Act was made applicable to their marriage. This is thus a marriage of almost 26 years;

[12.2.] There are two children, both daughters, who were born of the marriage, Margit who was born in 1985 and Lisa who was born in 1988. Both children have thus attained the age of majority. Towards the end of her secondary schooling, Lisa was diagnosed as suffering from bipolar disorder. Both parties feel that in all likelihood, Lisa will continue to require their support from time to time, including financial support;

[12.3.] The marriage has irretrievably broken down;

[12.4.] The assets inherited by plaintiff during the course of the marriage do not form part of the accrual in her estate. These assets are plaintiffs Marriott Property Income Fund of R241,463.81, Old Mutual Portfolio (Investors Fund) of R28.201.82 and Citroen motor vehicle with a value of R50,000. The motor vehicle is currently registered in defendant's name and he has agreed that it will be transferred by him into plaintiffs name;

[12.5.] The amount of R310,000 inherited by defendant during the course of the marriage shall similarly not form part of his estate for purposes of calculation of the accrual therein.

ISSUES IN DISPUTE

[13] The issues which remain in dispute and which must thus be determined by me are the following:

[13.1.] The extent of plaintiffs accrual claim, taking into account my findings in respect of the Trust's asset, the defendant s investments in Hungary and any assets which should be excluded from defendant's estate;

[13.2.] Whether the Trust asset (being an immovable property situate at 11 Elise Way, Hout Bay) forms part of defendant's assets and should be taken into account in the calculation of the accrual in defendant's estate alternatively, what amount should be taken into account as constituting a loan by defendant to the Trust arising out of the funding of the purchase price

thereof for purposes of the accrual calculation;

[13.3.] The value of defendant's investments in Hungary for purposes of the accrual calculation;

[13.4.] Whether defendant is entitled to a forfeiture order:

[13.5.] Whether any assets (other than the inherited sum of R310.000 which has already been agreed between the parties) should be excluded from defendant's estate for purposes of the accrual calculation, on the basis that such assets were acquired by assets excluded by defendant in terms of clause 5 of the antenuptial contract;

[13.6.] Costs.

WHETHER THE TRUST ASSET FORMS PART OF DEFENDANT'S ESTATE

[14] The unchallenged evidence of the plaintiff was as follows;

[14.1.] The Trust was registered when the immovable property situate at 11 Elise Way, Hout Bay {'the Hout Bay property') was purchased in 2005. Plaintiff confirmed that the Trust bears no: IT1281/2005. which would of course have been the year in which the Trust was registered;

[14.2.] She, together with defendant and a third party were appointed as the initial trustees of the Trust and that, as far as she can recall, the purpose of the Trust was to limit estate duty payable by defendant in the event of his death;

[14.3.] The Hout Bay property was immediately registered in the name of the Trust upon

registration of transfer of the Hout Bay property and the Trust has no ether assets;

[14.4.] She is no longer a trustee of the Trust since defendant, shortly after plaintiff believed that the parties had reached an agreement pertaining to the divorce, had her sign a document in which she resigned as trustee:

[14.5.] She does not have any real knowledge as to what a trustee is. or of what the functions of a trustee are. that trustees meetings were never held and that the Trust, as far as she is aware, does not have a bank account (although there is a mortgage bond registered over the Hout Bay property);

[14.6.] The Trust has no financial statements and no resolutions were taken by the trustees, not even in respect of the purchase of the Hout Bay property;

[14.7.] The Hout Bay property is comprised of three separate dwellings/living units The parties and their family lived in the main dwelling and rooms were rented in the other dwetlings/iiving units. There were various different tenants during the period in which she resided in the Hout Bay property;

[14.8] A number of lease agreements were entered into with the tenants, which lease agreements were typed by her. She testified that the document appearing at page 24 of exhibit 'A' was an example of such a lease agreement. The heading of this lease agreement bears the defendant's name and reflects that the tenant concerned would be contracting with the defendant personally,

[14.9.] She referred to a pro forma lease agreement at pages 47 to 51 of exhibit 'A' and testified that the latter differed from the lease agreement typed by her in that the heading of the pro forma lease agreement now refers to the J M Family Trust and the defendant as a trustee of the Trust, which was not the case previously;

[14.10.] When the family moved to the Hout Bay property they did not enter into a lease agreement with the Trust in respect of their occupation of the Hout Bay property and that she was never approached in her capacity as a trustee in respect of any lease agreement for the family;

[14.11.] Defendant paid the municipal account (including rates and taxes) of the Hout Bay property;

[14 12] No separate books or records were kept in respect of rentals paid by the various tenants of the Hout Bay property and rentals received in respect of the other immovable properties leased by defendant personally all formed part of the same set of records;

[14.13.] To the best of her knowledge neither she nor defendant are beneficiaries of the Trust;

[14.14.] In response to a question by this court, she confirmed that the bank account details on the Trust lease agreements' are the same as the defendant's personal bank account details.

[15] Defendant's evidence relating to the Trust was, in essence, limited to the following:

[15.1] He regarded the Hout Bay property as being one where he could retire. When he was diagnosed in 2002 with diabetes he was informed that his life expectancy was immediately reduced by ten years. The purpose of the Trust was to ensure that his assets would be protected for his children and grandchildren, not only after his death, but in the event that South Africa plunged into financial ruin. The fact that defendant failed to mention any intention on his part to also make provision for plaintiff in the event of his death gave rise to the clear impression that it was also his intention to protect his estate against any accrual claim by the plaintiff in the event of termination of the marriage, whether by divorce or death;

[15.2.] He clearly regarded the access bond registered over the Hout Bay property as his own and made numerous references to 'my access bond' whilst being cross examined by plaintiff's counsel regarding whether or not he had withdrawn any funds from the access bond. He also confirmed that he personally had made payments on account of the access bond.

[16] Defendant also elected not to produce a copy of the Trust Deed despite request by plaintiff to do so. Similarly, he did not produce any financial statements of the Trust, minutes of meetings of the trustees of the Trust, resolutions by the trustees of the Trust, any evidence of any bank account of the Trust (including any bond statements relating to the access bond over the Hout Bay property), nor did he produce any separate books or other records of the Trust.

[17] The principles relating to whether a Trust has been dealt with at arms length are set out in *Jordaan v Jordaan* 2001 (3) SA 288 (C) and *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) and need not be repeated here. The cumulative effect of plaintiff's unchallenged evidence, defendant's evidence and the absence of any independent evidence to show that the Trust has been dealt with at arm's length by defendant leads me to the irresistible conclusion that, from the time when the Trust was established, the defendant has always been in sole and absolute control of its affairs. In *Pringle v Pringle,* an as yet unreported decision of Erasmus J in the Eastern Circuit Local Division under case nos H36/2006 & 18754/2007, the learned judge at paragraph 17 put it thus:

> *'Having regard to the fact that one of the considerations giving rise to the establishment of the trust* was *the protection which a trust would give the defendant against accrual claims by the plaintiff in the event of a divorce, and having regard to the discretionary nature of the trust, the defendants de facto sole control of the affairs of the trust and the fact that the trust in essence consists of assets accumulated by the defendant, I am of the view that the nett asset value of the trust should be taken into consideration for purpose of determining the accrual of the defendant's estate.'*

[18] Accordingly, I conclude that the agreed nett asset value of R2,8m must be taken into consideration in the assessment of the accrual in the estate of the defendant for purposes of s 3(1) of the Act.

[19] As I have concluded that the Trust asset indeed forms part of defendants estate for

purposes of the accrual calculation, it is not necessary for me to make any findings regarding defendant's loan to the Trust as this would result in a partial duplication of the value of this asset for purposes of the accrual calculation.

THE VALUE OF DEFENDANT'S INVESTMENTS IN HUNGARY

[20] Plaintiff testified that she had made a calculation based on the documentation available to her that defendant has investments in Hungary totalling €286.553. A schedule prepared by plaintiff setting out how this total amount is calculated and made up appeared at page 54 of exhibit 'A' For sake of convenience, the schedule is reproduced, but numbered, hereunder:

(a)	€20 195.00
(b)	€77 570.00
(c)	€30 903.97
(d)	C79 495 00
(e)	€1 090.00
(f)	€47 300.00
(g)	€30 000.00
	C286 553.00

[21] Defendant admitted all of the amounts invested save for the following-

[21.1.] He alleged that the amounts at (b) of €77 570.00 and (d) of €79 495.00 must relate to the same investment; and

[21.2.] He alleged that the amount at (g) of €30 000.00 must be included in the amount at (f) of €47 300.00 (initially defendant alleged that the amount at (c) of €30 903.97 must be the same as the amount at (g) of €30 000.00, but appeared to abandon this contention during the course of his evidence and cross examination).

[22] As to defendant's first contention, this cannot be correct. An e-mail addressed by the defendant to one Yvonne at Unicredit Bank dated 29 December 2009 reads as follows:-

'My Euro investment of €77 570 matures on 29/12/09. Kindly re-investment this investment plus interest at your highest rate of 2.75% (as you telephonically informed me) for a period of six months. Please confirm the reinvestment and new maturity date by e-mail to J(G)live.co.za.'

[23] An undated letter addressed by defendant to Yvonne which defendant testified had been prepared, if not sent (defendant could not recall) after plaintiff left the former common home in January 2010. reads as follows:

'My Euro investment of €79 495 plus interest of €1 090 matures on 2010/01/05 Kindly re-invest the above amounts for a further six months at 1.5% interest as telephonically arranged with yourself today. Please confirm the new capital amount and new date of maturity via e-mail.'

[24] Defendant was unable to provide any satisfactory explanations for the following:

[24.1] That the amounts referred to by him in the two communications to Yvonne differ;

[24.2] That the dates of maturity of the investments differ, [24.3] That the interest rates differ:

[24.4.] That if. as alleged by defendant, the second communication to Yvonne was a follow-up to his first communication since she had failed to respond thereto, why no reference was made in the second communication to his earlier communication to Yvonne.

[25] Accordingly, the overwhelming probabilities are that the amounts of €77 570.00 and €79 495.00 are indeed two different investments. It is also noted that defendant did not dispute the interest component on the investment of €79 495.00.

[26] There is: however, some doubt as to whether the amount at (g) of €30 000.00 is included in the amount at (f) of €47 300.00. Plaintiff produced a written advice from CIB Bank dated 2 December 2009 confirming that the amount of €47 300.00 had been invested on that date for

a six month period expiring on 2 June 2010. Plaintiff did not seriously challenge defendant's evidence that he arrived in Hungary on 2 December 2009 with an additional amount of approximately €30 000.00 to invest with the aforesaid bank. Plaintiff was unable to produce any independent documentation in respect of the amount at (g) of €30 000.00 and was forced to rely on information provided by defendant in this regard in the pleadings. Whilst it is so that defendant's evidence in this regard could best be described as vague and evasive, and it is clear that defendant himself did not produce a shred of documentation in support of his allegation, the fact of the matter is that plaintiff bears the onus to establish the extent of the defendant's investments in Hungary and it is my view that in respect of the amount of €30 000 00, she has been unable to do so. Accordingly, in this regard, this court is obliged to give defendant the benefit of the doubt.

[27] I accordingly conclude that the total value of defendants investments in Hungary is €256 553. In argument plaintiffs counsel submitted that this court should apply an exchange rate of R9.18 to the Euro which submission was not challenged by defendant's counsel in his argument. I thus find that the value of defendant's total investments in Hungary, in rand terms, is R2.355.156.54.

DEFENDANT'S CLAIM FOR FORFEITURE

[28] In *June Sinclair: An Introduction to the Matrimonial Property Act 1984* the learned author at p33 describes a marriage according to the accrual system as follows:

> *'During marriage the spouses would be fully independent and there will be complete separation of property. On dissolution of the marriage gains made during its subsistence will be shared unless the accrual system is expressly excluded in the antenuptial contract'*

At p37 the learned author states:

> *'Just as the right to share in the joint estate and the right to a marriage settlement in*

an antenuptial contract can be forfeited, so also is the right to share in the accrual subject to the principle of forfeiture of benefits.'

[29] In *Cronje & Heaton: South African Family Law Second Edition* the learned authors at p97 describe the accrual system as follows:

The accrual system is ... founded on the notion that at the dissolution of a marriage out of community of property and community of profit of loss both spouses ought to share in the growth their estates have shown, without there having been a joint estate during the subsistence of the marriage.'

[30] At p98, the learned authors describe the accrual system as:

'A type of postponed community of profit. During the subsistence of the marriage it is out of community of property and community of profit and loss. Each spouse retains and controls his or her own estate but upon dissolution of the marriage., the spouse share equally in the accrual or growth their estates have shown during the subsistence of the marriage.'

|31] Accordingly, a marriage according to the accrual system results in an automatic sharing of nett gains accrued during the marriage, unless (a) the spouse who has an accrual claim is ordered to forfeit it, either wholly or in part, or (b) certain assets are excluded, either entirely or by way of their value as at the date of the marriage, in terms of the antenuptial contract itself. It is a *'system of deferred sharing of gains':* See *Bouberg's Law of Persons & the Family (2nd Edition)* at p203.

[32] Section of the Act provides as follows:

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

[33] It is common cause between the parties that, provided the assets which defendant seeks to exclude are not in fact found to be capable of exclusion by this court, it is plaintiff who has an accrual claim against defendant.

[34} Accordingly, as a matter of fact, in the event that defendant does not succeed in persuading this court that the assets which he seeks to exclude should be so excluded, plaintiff will be benefitted by virtue of her accrual claim. In *Wjjker v Wijker* 1993 (4) SA 720 (A) at 727E the court put it thus:

> *'It is obvious from the wording of this section* [and here the court was referring to s 9(1) of the Divorce Act 70 of 1979. which applies equally to s 9 of the Act] *that the first step is to determine whether or not the party against whom the order is sought will in fact be benefitted. That will be purely a factual issue. Once that has been established the trial court must determine, having regard to the factors mentioned in this section, whether or not that party will in relation to the other be unduly benefitted 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.'*

[35] Section 9(1) of the Divorce Act 70 of 1979 reads as follows:

> *'When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefitted.'*

[36] It is clear from the judgment of the court in *Botha v Botha* **2006 (4) SA 144 (SCA)** at **146G-147C** that a court may not have regard to <u>any other factors</u> in exercising its value judgment as to whether a forfeiture order should be granted:

> *'The three factors governing the value judgment to be made by the trial court in terms of s 9(1) thus fall within a relatively narrow ambit: they are limited to (a) the duration of the marriage: (b) the circumstances which gave rise to the breakdown thereof: and (c) any substantial misconduct on the part of either of the parties. Conspicuously absent from s 9 is a catch-all phrase, permitting the court, in addition to the factors listed, to have regard to any other factor. (Compare, in this regard, the wording of s 7(2) of the Divorce Act dealing with maintenance orders upon divorce which, apart from the fact that the list of relevant factors is significantly longer, also entitles the court to have regard to "any other factor which in the opinion of the court should be taken into account". So, too, in terms ofs 7(5), the list of factors which must be taken into account by a court in the determination of which assets should be transferred by one spouse to the other upon divorce, when the circumstances set out in ss 7(3) and (4) justify the making of such a "redistribution order" also expressly includes "any other factor which should in the opinion of the court be taken into account"). The trial court may therefore not have regard to any factors other than those listed in s 9(1) in determining whether or not the spouse against whom the forfeiture is claimed will in relation to the other spouse, be unduly benefitted if such an order is not made.'*

[37] The three factors mentioned in the section should not be considered cumulatively: See *Wijker* **supra at 729E; and**

> Too *much importance should- however, not be attached to misconduct which is not of a serious nature. In regard to a court's assessment of a party's misconduct as a relevant factor under subsections (2) and (3) of s 7 of the Divorce Act... Botha J A made the following remarks in Beaumont v Beaumont 1987(1) SA 967(A) at 994...:*
>
> *'... (I)n my opinion the* **court** *is entitled, in terms of the wide words of para (d) of ss (5) that I have quoted, to take a party's misconduct into account even when only a*

redistribution order is being considered under ss (3). and where no maintenance order under ss (2) is made. But I should add at once that I am convinced that our courts will adopt a conservative approach in assessing a party's misconduct as a relevant factor, whether under ss (2) or ss (3) ... In many, probably most, cases, both parties will be to blame, in the sense of having contributed to the breakdown of the marriage .. In such cases, where there is no conspicuous disparity between the conduct of the one party and that of the other our courts will not indulge in an exercise to apportion the fault of the parties, and thus nullify the advantages of the 'no fault' system of divorce."

These remarks apply with equal validity when a court, in considehng the circumstances which gave rise to the breakdown of the marhage, also assesses a party's misconduct as a *relevant factor.'*

See *Wijker* **supra at 730B-F.**

[38] In the instant matter, the duration of the marriage cannot be a relevant factor, as it is common cause between the parties that it is one of almost 26 years.

[39] As to the circumstances which gave rise to the breakdown of the marriage, defendant in his claim in reconvention listed 17 grounds therefor. Of these 17 grounds:

[39.1.] Defendant did not testify at all regarding plaintiffs alleged intimate relationships with other women (which comprised three of such grounds) and it became clear, during the course of his cross examination, that this was nothing other than speculation on his part:

[39.2.] Defendant's evidence, despite what can best be described as certain gratuitously insulting remarks about plaintiff, contradicted, in the main, the allegations made by him in his claim in reconvention that plaintiff was volatile, domineering, manipulative, critical of defendant and financially irresponsible (which comprised five of such grounds). In this regard (a) Plaintiffs largely unchallenged evidence was that she worked almost throughout the marriage and made contributions towards the expenses of the household in accordance with her means, both from income and from capital; (b) defendant's counsel put it to plaintiff during cross examination that she was aware that the defendant himself did not wish to divorce when

plaintiff instituted these proceedings against him; (c) defendant testified in his evidence-in-chief that prior to the parties moving to Hout Bay in 2005/2006. the family had a *'baie sosiaal. baie rustig. goeie familie* /ewe' although defendant testified that at times plaintiff withdrew from him to the point where she did not communicate with him for days at a time, and that plaintiff became volatile during her monthly menstrual cycle.

However he was quick to emphasize that her conduct up until late November 2309 indicated that she was someone 'waf *baie gelukkig is',* and that it was only at this stage that it became apparent to him that plaintiff was unhappy in the marriage;

[39.3.] Defendant emphasized that what he perceived to be the difficulties in the marriage really only became apparent in late November 2009, i.e., almost 25 years into the marriage (this covered three of defendant's grounds). Further , one of the grounds alleged by defendant was that the marriage broke down as a result of plaintiff"s conduct subsequent to the institution of proceedings by plaintiff against him, which can hardly be a relevant factor for purposes of determination of a forfeiture claim;

[39.4.] Although defendant alleged that what also caused the breakdown of the marriage was plaintiffs conduct towards the children, particularly the parties daughter, Lisa, defendant himself in his evidence-in-chief stated that plaintiff *was 'n goeie ma vir Lisa en Margit En self teen my kinders het sy 90% van die tyd baie korrek opgetree* ...'. Defendant further testified that, in his view. Lisa's conduct (as opposed to plaintiffs) was the mam cause of the altercations which did take piace between plaintiff and Lisa and that he had at times himself intervened in support of plaintiff. Defendant did not deny that he himself had also had confrontations with Lisa. This evidence dispenses with two of defendant's grounds for the breakdown of the marriage;

[39.5.] The only other grounds advanced by defendant were that the parties no longer lived together as husband and wife (which is common cause), that there is no meaningful communication between them and that defendant has lost all interest in the continuation of the marriage.

[40] In my view, defendant has not come close to persuading this court that, in the circumstances of the instant matter, plaintiff should be ordered to forfeit her accrual claim.

WHETHER ANY OF DEFENDANT'S ASSETS SHOULD BE EXCLUDED FROM THE ACCRUAL CALCULATION AS A CONSEQUENCE OF THEM HAVING BEEN ACQUIRED WITH ASSETS WHICH WERE EXCLUDED BY HIM IN CLAUSE 5 OF THE ANTENUPTIAL CONTRACT

[41] Defendant's case on this aspect (although not pleaded as such and despite the fact that there is no claim for rectification before this court) boils down to the following:

[41.1.] The assets which were excluded by defendant from the accrual system at clause 5 of the antenuptial contract were:

> *'Kontant:R22 000.00*
>
> *Losgoed: R20 000.00'*

[41.2.] Included in the category of *'Losgoed'* of R20.000 were two Metropolitan Life policies owned by defendant as well as his pension interest by virtue of his employment at the University of Bophuthatswana (although defendant also owned a motor vehicle with a value of approximately R3.000 to R5.000 and furniture and household effects including a few Persian carpets);

[41.3.] Virtually defendant's entire estate has been acquired by him by virtue of his former possession of the two policies and his pension interest at the date of the marriage;

[41.4.] Accordingly, this court should order that plaintiff has no claim to almost all of the nett assets in defendant's estate (the precise extent to which plaintiff should have no claim was never properly placed before this court).

[42] In this regard, defendant relies on the provisions of s 4(1)(b)(ii) of the Act which, for sake of convenience is repeated hereunder;

> *•4. Accrual of Estate - (1)(a)...*
>
> *(b) in 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 assets 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;'*

[43] Although defendant's counsel argued that plaintiff bears the onus to establish that defendant's alleged excluded assets should form part of the accrual in his estate.
it is clear that defendant bears the onus to persuade this court that such assets should indeed be excluded from the accrual.

[44] As to defendant's pension interest at the date of the marriage, at best for him, the value of such pension interest was R176.32 plus an equivalent contribution by his employer, thus R352.64. Indeed, defendants counsel, whilst cross examining plaintiff, put it thus:

> *'En die verweerder sal getuig by het n pensioen gehad by Bophuthatswana alhoewel op daardie stadium was dit niks werd nie.'* (my emphasis)

[45] Defendant was unable to explain to this court why no specific reference was made to his pension interest in clause 5 of the antenuptial contract As plaintiffs counsel argued, when one looks at the clear wording of clause 5, the excluded assets are divided into two distinct groups, namely. *'Kontant'* en *'Losgoed'.* In order to successfully contend that the pension interest forms part of the so-called *'Losgoed'.* it must be defendants case that *'Losgoed'* is used as a synonym for *'movable property'* It simply cannot be that the defendant's pension interest forms part of the so-called *'Losgoed'.* If this was the case, it would not have been necessary for defendant to draw a distinction between *'Kontant'* and *'Losgoed',* inasmuch as cash is also regarded as movable property.

[46] in light of the wording of clause 5 itself, it is clear that the defendant's argument cannot hold water. If clause 5 had stipulated that defendant's 'total movable assets' were excluded, then this court could possibly have accepted defendant's argument. I must emphasize however that defendant made no claim for rectification of the provisions of clause 5 to amend the wording thereof and accordingly he is bound by the clear wording of clause 5 itself. To my mind, there is no merit whatsoever in defendant's argument that his pension interest formed part of the *'Losgoed'* in clause 5 of the antenuptial contract.

[47] As to the two policies, the same considerations must apply, and I similarly find that such policies as defendant might have had at the date of the marriage do not form part of the *'Losgoed'* referred to at clause 5 of the antenuptial contract. Further, and with regard to these policies, defendant's evidence was less than satisfactory. He testified that he was the owner of two such policies. He gave evidence that he surrendered both policies subsequent to the marriage, receiving R100.000 for the first in 1991 and R80.000 for the second in 1993. He testified that he had attempted to obtain documentation from Metropolitan Life in support of his averments but that he had been informed by the aforesaid company that it no longer had any records relating to these policies.

[48] Under cross examination, defendant was confronted with certain documentation obtained by plaintiff from Metropolitan Life under *subpoena duces tecum.* The documentation subpoenaed clearly shows the following:

[48.1.] That Metropolitan Life indeed has the necessary historical records;

[48.2.] The records of that company show that defendant has only ever been the owner of one such policy. This was confirmed in an e-mail dated 30 November 2010 addressed to the plaintiffs attorney by Metropolitan Life, the content of which reads as follows:

> *'The entry date of this policy was November 1969 and the premium at inception was R10.00 ... We viewed our records on both ID numbers and and only found the one*

policy number 4400913906 linked to J M.'

[48.3.] Policy number 4400913906 was surrendered by defendant on 28 November 1991 and the nett proceeds of such policy, which were paid to defendant, amounted only to R8,887.74, which amount bears no relation to the two amounts contended by defendant totalling R180,000.

[49] Defendant's evidence on this aspect must thus be rejected entirely. Although defendant's counsel sought to persuade the court to exclude the subpoenaed documentation on the ground that it constituted hearsay evidence, to my mind it clearly does not. particularly if regard is had to paragraph 13 of the Minute of the Rule 37 meeting held on 19 August 2010, in which the parties agreed that:

> •*STATUS VAN BEWYSMATERIAAL*
>
> *Alle dokumentasie sal aanvaar word om te wees wat die* [sic] *voorgee om te wees, tensy spesifiek in twyfel getrek deur die teenkant en in welke geval die document bewys moet word.'*

[50] It is noted that defendant did not object to the production of the subpoenaed documents, and accordingly, it was not necessary for plaintiff to prove their authenticity.

[51] During the course of argument, defendant's counsel conceded that *that the policies are also included in clause* 5 *was an idea that manifested itself duhng the proceedings to refer to them as forming part of the "Losgoed"* in this regard, he was clearly referring to defendant..

[52] As pointed out by plaintiffs counsel, if defendant fails to discharge the onus of proving that his (on his own version) valueless pension and policy at the date of the marriage formed part of *'Losgoed*[1] in clause 5 of the antenuptial contract, it is not necessary for this court to embark on a detailed analysis of how the proceeds thereof were utilised by defendant.

[53] Defendant's counsel also argued that defendant must have meant to include his pension interest in clause 5 by virtue of the fact that, as at the date of the parlies' marriage, the interest

which a spouse had in any pension fund was not deemed to form part of his or her assets upon divorce. To my mind, this makes no sense. As a pension interest was not deemed to form part of a spouse's assets upon divorce at the date of the parties' marriage, it would clearly not have been necessary for defendant to specifically exclude such a pension interest from the operation of the accrual as it would, as a matter of law. have fallen outside of the accrual had the marriage terminated prior to 1989 when the relevant amendment to the Divorce Act 70 of 1979 came into effect. Defendant's counsel's contention simply lends credence to plaintiffs argument that defendant could not have intended to specifically exclude his pension interest from the provisions of the accrual.

[54] In any event, defendant was unable to inform this court with any acceptable degree of clarity as to how the proceeds of his Metropolitan Life policy were appropriated. The same applies to his pension interest, to the extent that it could ever be regarded as relevant in light of the fact that, on his own version, it had 'no value' at the date of the marriage Indeed, defendant's evidence on these aspects was so vague and insubstantial that it placed this court in a position in which it is well nigh impossible to determine how such proceeds were in fact utilised.

[55] On defendant's own version, the only other *'Losgoed'* which he owned at the date of the marriage were a 1985 Nissan Exa motor vehicle with a value of between R3.000 to R5.000, certain furniture and household effects which included some Persian carpets, and cash of R22.000. Defendant testified that he subsequently donated the motor vehicle to his son, Peter, and accordingly, that asset can never be taken into account for purposes of an exclusion from the accrual. Insofar as furniture and household effects is concerned, the parties agreed prior to the commencement of the trial as to how such items would be divided between them, and neither requested this court to place any value on the items so divided, nor indeed to have regard to these items at all for purposes of calculation of the accrual.

[56] As to the cash of R22.000, defendant attempted to persuade this court that such sum was utilised towards the purchase of one of the Prins Street properties. Defendant however did not adduce any evidence as to how this specific cash amount was preserved and appropriated towards the purchase of any particular immovable property His own evidence

was to the effect that at the date of the marriage he only had a bank account at First National Bank which was not an investment account. He admitted that between the date of the mamage and the purchase of the first Prins Street property, he purchased a number of other assets but did not satisfactorily explain how these other assets were financed. He further admitted that he was obliged to repay to the Fidelity Fund an amount of approximately R60.000 within a few years after the marriage. His evidence was insufficient to place this court in a position to accept his contention that the specific amount of R22,000 reflected in clause 5 of the antenuptial contract (a) increased in value to the extent which he alleged it had; and (b) was indeed utilised by him towards the purchase of either the first or second Prins Street properties.

[57] Accordingly the defendant has failed to persuade me that any amount, or asset, must be excluded from the accrual in his estate by virtue of the provisions of clause 5 of the antenuptial contract.

[58] Defendant testified that he received an amount of R50.000 in 1996/1997 as payment of a claim for damages which he had instituted against the ANC Youth League and SASCO It was not clear from his evidence what portion of this amount related to damages for patrimonial loss (he testified that *'Dit is my kantoor wat aangevai was en so aan, wat ek ook ontvang net'* which seems to indicate that there may have been a measure of compensation for patrimonial loss) but later in his evidence testified that *'Dit is net oat my gevoelens was seergemaak'.*

[59] It is noted that in terms of s **4**(1)(b)(i) of the Act, only damages for non-patrimonial loss are left out of account in the calculation of the accrual in a spouses estate.

[60] The plaintiff accepted that the defendant had received a payment of R50.000 in 1996 in respect of a damages claim, but she was not asked any details about this payment under cross examination. Further, the defendant's claims on the pleadings do not include any reference to the proceeds of his damages claim being excluded from his estate for purposes of the accrual calculation. In argument, defendant's counsel submitted that the defendant's immovable property at 17 Scott Street, Gardens, Cape Town was to be excluded from the

accrual in his estate as it had been purchased with the fruits of the two Prins Street properties as well as the proceeds of defendant's damages claim of R50.000. However, this does not accord with the evidence given by defendant himself. He testified that the purchase price of the Scott Street property was funded *'uit die opbrengs van my huurgeld en my aftree pakket'.*

[61] Accordingly, I find that there is insufficient evidence before me to enable me to determine what portion, if any, of the sum of R50.000 should be excluded from defendant's estate.

CALCULATION OF THE ACCRUAL

[62] In light of my findings and conclusions, I calculate the accruals in the respective estates of the parties to be as follows:

[62.1.] Plaintiff:

Allan Gray Retirement Annuity Fund	R193 565
The Amalgan Defined Contribution Provident Fund	R72 403
Total	R265 968
Less Loan from First National Bank	R50.000
Accrual in Plaintiffs estate	**R215 968**

[62.2.] Defendant:

16 Prins Street	R2 100 000
26 Prins Street	R1 530 000
17 Scott Street	R1 930 000
18 Rocklands	R3 150 000
Investments in Hungary	R2 355 156
Audi TT motor vehicle	R147 000
Mazda motor vehicle	R45 000
11 Elise Way, Hout Bay	R2 800 000
Total	14 057 156
Less: Inheritance	310 000
Accrual in Defendant's estate	**R13 747 156**

[63] One half of the difference in the accruals of the respective estates of the parties i.e., R 13 747 156 - R215 968, divided by 2 is R6 765 594.

[64] After deduction of the value of 16 Pnns Street of R2.1m and the R250.000 advanced on plaintiffs accrual claim already paid to her by defendant, I find that defendant must pay to plaintiff the sum of R4.415.594 in cash.

COSTS

[65] It is clear that plaintiff has been substantially successful in her claims and I see no reason why the defendant should not be ordered to pay her costs, including the costs of the urgent application launched by plaintiff under case number 20251/2010. In this regard, it is clear from the papers filed of record in that matter that it was only as a result of the urgent application that the nett proceeds of the sale of 26 Prins Street were held in trust by defendants attorneys pending finalisation of the divorce action between the parties and any further directions of this court. It is also clear that the postponement of the divorce action on 2 September 2010 was occasioned by defendant terminating the mandate of his legal representatives at the time and appointing new representatives. He should clearly bear the costs of the postponement in these circumstances.

ORDER

[66] In the result, I make the following order:

[66.1.] A Decree of Divorce between the parties is granted;

[66.2.] The value of the asset of the J M Family Trust must be taken into account in the assessment of the accrual of the estate of defendant for purposes of s 3(1) of the Matrimonial Property Act 88 of 1984;

[66.3.] Defendant shall pay to plaintiff the sum of R6J65.594 in respect of her accrual claim, such sum to be paid to plaintiff as follows:

[66.3.1.] Defendant shall immediately take all steps necessary to transfer to plaintiff the immovable property situated at 16 Prins Street Oranjezicht. Cape Town. The costs of registration of transfer thereof shall be borne by plaintiff. To this end, defendant shall sign all documentation necessary to give effect to the aforementioned transfer within seven(7) calendar days of being called upon by plaintiff's attorneys in writing to do so, failing which the registrar of this court is hereby authorised to sign all such documentation on defendant's

behalf;

[66.3.2] Plaintiff shall retain as her sole property the sum of R250.000 already paid to her by defendant as an advance on her accrual claim;

[66.3.3.] The balance of the sum due to plaintiff, namely. R4.415,594 shall be paid directly into such bank account as is nominated in writing by plaintiff within 60 calendar days from the date of this order, free of deduction or set off, and to this end. defendant shall instruct his attorneys of record to pay to plaintiff on account of the cash sum payable to her the full amount of the proceeds of the sale of the immovable property at 26 Prins Street which are currently held by them in trust on defendant's behalf;

[66.3.4.] Defendant shall forthwith sign all documentation necessary to transfer the Citroen motor vehicle registered in defendants name but in plaintiff's possession into the name of plaintiff within seven calendar days of being called upon by plaintiffs attorneys to do so in writing, failing which the registrar of this court is hereby authorised to sign also such documentation on his behalf and to instruct the licensing authorities to make available the relevant registration documents, alternatively copies thereof, to plaintiff in order to enable her to transfer the vehicle into her name;

[66.3.5.] Save as aforesaid, each party shall retain as his/her sole and exclusive property those assets currently in his/her possession and/or under his/her control.:

[66.4.] Defendant shall effect payment of plaintiffs costs, including the costs of the urgent application under case number 20251/2010 and the costs of the postponement of the divorce action on 2 September 2010 as taxed or agreed.

[66.5.] The terms of this order shall be binding upon defendant's estate.

J CLOETE, AJ