IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 2400/2010

J C (Born P) Plaintiff

And

G C Defendant

Court: Acting Judge J I Cloete

Heard: 23, 24, 28, 29, 30, 31 May 2012 and 12 June 2012

Delivered: 24 July 2012

JUDGMENT

CLOETE AJ:

Introduction

[1] This is a divorce action. The parties were married on 25 September 2004 out of community of property by antenuptual contract with the accrual system. They have one minor child, a son born on 20 February 2006. They separated permanently in December 2009 and are *ad idem* that their marriage has irretrievably broken down.

[2] As a result of agreement reached on a number of issues during a pre-trial conference and the trial itself (including detailed arrangements relating to the parties' minor child), the only matters which still require determination are:

(a) the date upon which the defendant shall commence payment of maintenance for the minor child;

(b) the declaratory relief sought by the defendant in relation to the ownership of two farms, a farming operation and certain cash;

(c) the determination of the accrual and how it is to be paid in accordance with s 10 of the Matrimonial Property Act No 88 of 1984 *('the Act);* and

(d) costs.

[3] During February 2012 the plaintiff delivered an open tender in terms of rule 34(1) of the uniform rules of court. In addition to what was tendered in respect of the minor child, she consented to an order directing her to pay to the defendant an amount equal to one half of the difference between the accrual of the respective estates of the parties in accordance with s 3 of the Act. She also sought an order deferring satisfaction of the defendant's accrual claim by way of payment to be made by a date or dates determined by the court in accordance with s 10 of the Act. Finally she tendered payment of the defendant's costs up to that date. The defendant did not accept the plaintiff's tender.

[4] The terms of the agreement ultimately reached regarding the minor child during the pre-trial conference which I held in open court (since the defendant was by that stage unrepresented) were either substantially similar or identical to those contained in the plaintiff's tender. These are incorporated in the annexed order. It is common cause that the defendant is unemployed and without any apparent source of income. It was for this reason that the plaintiff in her tender proposed that the defendant would commence payment of maintenance for the child as from the month following payment to the defendant of his share of the accrual. I did not understand the defendant to seriously object to this proposal and he did not place anything before me to

suggest that another arrangement should apply. His *'objection',* such as it was, appeared to centre rather on his version that he is entitled to the bulk of the plaintiff's assets, which he alleged she holds on his behalf as nominee. I explained to him that irrespective of which version I found to be correct, it was common cause that he would be paid a substantial capital sum from which he would be able to fulfil his maintenance obligations. The defendant appeared to accept this and made no further submissions in this regard.

[5] The defendant's claim as pleaded for rectification of the parties' antenuptial contract was abandoned by him during the pre-trial conference on the basis that the legal representatives who had drafted the relevant pleading on his behalf had misunderstood his instructions. Instead he claimed that what the parties had in fact agreed at the time of conclusion of the antenuptial contract was that the sum of R1 million which each declared as being the net value of their respective estates at the commencement of the marriage would be *'excluded'* from the accrual, as would his *'inheritance'* (which is dealt with below), and that all other assets acquired by either party during the marriage would be divided equally upon termination thereof.

[6] However, by way of a separate additional claim, the defendant's case as pleaded (and in his evidence in chief) was that he is in fact the *'beneficial owner"* of substantial assets in the plaintiff's estate (namely two farms and a farming operation) on the basis that he was solely responsible for funding the acquisition thereof apparently from assets which he claims were excluded from the accrual, either by way of his R1 million *'commencement value'* in the antenuptial contract, or his *'inheritance'.*

[7] To compound the confusion in his case the defendant also sought an order declaring him to

be the beneficial owner of the sum of R200 000 cash which he alleged the plaintiff as nominee invested on his behalf, prior to the marriage, despite it emerging during the course of his testimony that this amount was neither included in his *'commencement value'* of R1 million, nor did it form part of his *'inheritance'.*

[8] The plaintiff accepted for purposes of the divorce action that there had been no accrual in the defendant's estate. The defendant accepted that the current value of the plaintiff's R1 million *'commencement value'* in the antenuptial contract is R1.6 million in accordance with the provisions of s 4(1)(b)(iii) of the Act. The parties also eventually reached agreement on the values of all of the assets and liabilities in the plaintiff's estate, save for the values of certain oat hay bales and lucerne bales which form part of the farming operation and the quantity of some of the farming implements which had been included by the plaintiff's expert in the valuation of that operation. However the defendant subsequently failed to challenge the plaintiff's evidence in this regard and her version must accordingly be accepted.

[9] The defendant also challenged the existence of certain loans made by the plaintiff's father to her (although as I have said he accepted the values thereof for purposes of limiting the issues). Again however the defendant failed to cross-examine the plaintiff's father on this aspect and the latter's evidence relating to these loans, as well as that of the plaintiff (which was not challenged by the defendant in any material respect) must similarly be accepted.

[10] It was also agreed during the course of the trial that in the event of the plaintiff being successful, the following would be deducted from the amount which she would be obliged to pay to the defendant in order to satisfy his accrual claim, namely:

(a) furniture and household effects valued by the defendant at R12 000 which were purchased for him by the plaintiff and which are still in his possession;
(b) the value of the Toyota Fortuner vehicle of R220 000 (which is in the defendant's possession and which he wishes to retain - the plaintiff will settle the balance due on the vehicle of R188 000); and
(c) the amount of R150 000 previously advanced by the plaintiff to the defendant on account of his accrual claim in respect of his legal costs.

[11] The defendant accepted that he bore both the onus on the outstanding issues as well as the duty to begin. The defendant testified as did the plaintiff and her father. In deaing with the evidence I will focus on that which is relevant to the central dispute, namely whether the defendant is entitled to the bulk of the plaintiff's assets or whether - as claimed by the plaintiff - the provisions of the antenuptial contract should simply be implemented.

[12] The antenuptial contract concluded by the parties on 23 September 2004 does not contain any unusual provisions. It incorporates all of the standard terms applicable to the accrual system. The parties merely declared the net value of their respective estates at the commencement of their marriage to be R1 million each. No assets were to be excluded, other than inheritances, legacies or donations accruing to either party during the marriage (as provided in s 5 of the Act) and non-patrimonial damages accruing to either party during the subsistence thereof (as provided in s 4(1)(b)(i) of the Act).

[13] Although the exact circumstances under which the parties attended on the attorney and notary who prepared the antenuptial contract were in dispute, both parties testified that the

different matrimonial property regimes had been fully explained to them, and that they had ultimately agreed upon the application of the accrual system. During the course of the trial however, the defendant sought to rely on his own interpretation thereof which - although he was not consistent in his testimony on this aspect - appeared to boil down to his understanding that each party would inject R1 million into the marriage and that the aforementioned sums would revert to each party should the marriage terminate. In the event of either party failing to inject his or her capital sum then the other would nonetheless, on termination of the marriage, be repaid his or her capital injection. All other assets accrued during the marriage, apart from *'his'* inheritance, would be shared equally upon dissolution.

[14] The defendant explained that he felt aggrieved since the plaintiff had failed to inject her full capital share (although the parties differed on the detail, it emerged that the defendant accepted that a substantial portion of the capital owned by the plaintiff at the time of the marriage was lost due to a failed investment).

[15] To my mind however nothing really turns on this since, even on the plaintiff's version - and as will appear below - the defendant is entitled to assets and cash of just under R2,5 million in satisfaction of his accrual claim, which more than compensates for his initial capital injection.

[16] I thus turn to deal with the central dispute.

The Central Dispute

[17] The defendant is clearly intelligent and despite being of Italian origin has a good command of the English language.

[18] He testified that at the time of the marriage he owned immovable property in StAgata, Italy, which is situated in close proximity to Sorrento. This immovable property was comprised of two portions, namely a flat with a value of €90 000 and a shop with a value of €50 000. The amount of €140 000 equated to roughly R1 million at the time, being his commencement value reflected in the antenuptial contract.

[19] It was the defendant's dream to live in South Africa, to buy a farm here and to farm while raising a family. About one year into the marriage (during the latter part of 2005) the defendant located a potential farm, being Portion 61 of Rietvallei Farm also known as Driefontein Farm *{'Driefontein)* in the Ceres district. The selling price of Driefontein was R1.7 million including certain machinery and livestock. The parties viewed Driefontein together and were impressed by its beauty and location. It was decided that an offer would be made to purchase the farm.

[20] The defendant said that at the time his property in Italy, which had been substantially upgraded, was ready to be sold as two separate units. He expected to fetch about R1 million from the sale of these units which he would utilise on account of the purchase price of Driefontein. The plaintiff was to use her R1 million for the balance. It transpired however that the plaintiff was unable to access these funds (as I have said, the investment had failed). It was then agreed that, apart from a sum of R70 000 which the plaintiff borrowed from her father to pay the deposit, the balance of the purchase price would be funded entirely by the defendant.

[21] According to the defendant he was informed by both the plaintiff and her father that he was not permitted to own immovable property in South Africa for so long as he was not a permanent resident in this country. He had applied, or intended to apply, for such residency. It

was thus agreed that Driefontein would be registered in the plaintiff's name until such time as the defendant secured his permanent residence status, whereupon Driefontein would be transferred into his name.

[22] The defendant said that he accordingly transferred €250 000 from Italy to South Africa on 14 October 2005. This equated to roughly R2 million at the time and secured the purchase of Driefontein. Of this amount, €50 000 comprised the net proceeds of the sale of the shop portion of his immovable property in Italy, and the balance *'inherited'* funds. On 28 December 2005 he transferred a further €40 000 - which he said were also inherited funds - since he wished to buy the plaintiff, who was pregnant at the time, a safe and reliable vehicle.

[23] During 2006 a neighbouring farm, being Portion 76 of Rietvallei Farm, also known as Rietvallei Farm *{'Rietvallei)* came up for sale on auction. A decision was made to purchase this farm as well. The price secured was R1 030 000 excluding auctioneer's fees, taxes and transfer costs, resulting in a total purchase cost of R1.2 million. The defendant testified that by that stage the flat portion of his immovable property in Italy had been sold for €90 000 and this amount, together with further funds which he had inherited of about €110 000, were transferred by him to South Africa on 4 April 2006. Of these funds the defendant utilised a portion to purchase Rietvallei which was then also registered in the plaintiff's name for the same reason and on the same terms as those pertaining to Driefontein. The balance of the purchase cost was paid from a portion of the proceeds of the sale of another immovable property, being Portion 135, Farm 811, Teslaarsdal, Theewaterskloof *{'Theewaterskloof).*

[24] As regards this latter property the defendant testified as follows. During 2003, thus prior to the marriage, he had an amount of R220 000 invested at what was then known as BOE Bank.

He was receiving interest on this investment at 12% per annum. The plaintiff convinced him to withdraw R200 000 of this amount and to hand it over to her to invest on his behalf, promising him a return of 24% per annum. Accordingly on 29 December 2003 he withdrew R200 000 from this investment by way of a cheque -which his own bank records show was drawn in his favour and not the plaintiff's - and which she then, according to him, deposited into her own bank account in his presence.

[25] Shortly after the parties' marriage and during the latter part of 2004 the defendant - as part of his lifelong dream to own a farm - decided to purchase Theewaterskloof which was on the market for sale at a price of R250 000. It was a piece of undeveloped land comprising 12.8 hectares. He informed the plaintiff that he required her to repay the sum of R200 000 plus interest accrued thereon at 24% per annum to him. This would have amounted to about R254 000. This the plaintiff was unable to do since it had been invested in the same failed venture as her funds. She then borrowed R250 000 from her father to enable the defendant to purchase Theewaterskloof which was registered in her name, again for the same reason and on the same terms as those relating to Driefontein and Rietvallei. Theewaterskloof was subsequently sold for R650 000 net of estate agent's commission. The plaintiff repaid the loan from her father (the defendant complained since he felt that these funds should have been paid to him) - according to the defendant with interest, although the unchallenged evidence of the plaintiff and her father was that no interest was paid -and the balance of the proceeds were appropriated on account of the purchase cost of Rietvallei.

[26] The defendant's evidence in chief regarding the funds which he claimed to have inherited was as follows. His late father passed away during 1995 without leaving a will, and was survived by the defendant's mother, the defendant himself and his three siblings. After his

father's death the defendant's mother (who subsequently also passed away) told him that his father had left her and the four children money, although she did not tell him how much she, he or any of his siblings had inherited. He did not claim his inheritance at that stage since he was engaged at the time in a protracted divorce from his first wife.

[27] When the defendant wished to purchase Driefontein some ten years later and it became apparent that the plaintiff would not be able to contribute to the purchase price, he approached his mother, and in his words *'begged'* her to pay over his inheritance to him. His share, so she apparently told him, was to have been €380 000, but - and he was unable to explain why - she gave him €400 000. The money was paid to him in cash which he then deposited into a bank account in Italy which he operated jointly with one of his sisters, and subsequently transferred it in tranches to South Africa, namely €200 00 on 14 October 2005 (together with the proceeds of the sale of the shop portion of €50 000); €40 000 on 28 December 2005; and €110 000 (along with the proceeds of the sale of the flat portion of €90 000) on 4 April 2006. Other transfers were also made to South Africa totalling €30 000 for living expenses, thus an aggregate sum of €380 000 (the defendant did not testify about the balance of his inheritance of €20 000, nor was he able to provide any proof of the cash of €400 000 initially deposited into the bank account in Italy).

[28] In his later evidence in chief the defendant testified that in fact both Driefontein and Rietvallei were registered in a close corporation but that the plaintiff had told him that both of them were members of that close corporation, which it was common cause was initially Tradelander 24 CC, the name of which was subsequently changed to Driefontein Boerdery CC.

[29] The plaintiffs version differed markedly from that of the defendant's in a number of material respects.

[30] She testified that during December 2003 the parties had, over dinner with friends, been told by a Johan Jacobs about the property consortium investment scheme (which ultimately collapsed). She referred to this scheme as the *'PPIC investment'.*

[31] At that time the parties, who worked on the same cruise liner, were about to return to work to complete their final contracts before marrying and settling permanently in South Africa. The defendant found the PPIC investment an attractive option since it would generate high returns and suggested to the plaintiff that she should sell the two flats which she owned and invest the proceeds in the scheme. He also proposed that any additional cash which either might have be similarly invested so as to enable the parties to comfortably cover their future living expenses. The defendant was 47 years old at the time and had worked on ships and cruise liners since he was a teenager. He was ready to settle down. The plaintiff, although 24 years of age, also wished to do so.

[32] Following the defendant's suggestion the plaintiff placed both of the flats that she owned on the market. They sold quickly and the full net proceeds, together with cash which she held in a bank account, were paid directly by her into the PPIC investment, namely R417 324.79 on 6 June 2004 and R700 000 on 23 September 2004. The plaintiff produced a PPIC investment statement reflecting these deposits. Also reflected on the statement was a payment directly into the PPIC investment of R182 190 on 26 October 2004. The plaintiff testified that this payment had been made directly by the defendant out of his own funds. She denied that the defendant had ever handed to her the cheque of R200 000 drawn in his favour (on his own

version) from his BOE Bank account to invest in the PPIC investment on his behalf, whether during December 2003 or otherwise. She correctly pointed out that she would not have been able to deposit a cheque drawn in favour of the defendant into her own bank account. She said that he had utilised a portion of the R200 000 as payment for her engagement ring and that he had paid the balance of about R182 000 directly into PPIC investment approximately a month after the marriage.

[33] During his cross-examination of the plaintiff the defendant confirmed that they had attended a dinner at which Johan Jacobs was present. He was unable to shake the plaintiff's version regarding the PPIC investment, nor was he successful in challenging her evidence about her contributions to that investment. He put to her that her engagement ring had cost R33 000. This she denied, stating that it had cost R17 000 and pointed out that this tallied with her version that R182 190 of the R200 000 which the defendant had withdrawn had been paid by him into the PPIC investment in October 2004. Certainly her evidence was consistent with the entries reflected on the PPIC statement and the defendant was unable to adduce any evidence to suggest the contrary, nor was he able to refute the plaintiff's testimony that the parties' PPIC investment did not even exist in 2003. The PPIC investment statement itself reflects that the date of commencement of the investment was 6 June 2004, being the same date on which the plaintiff had paid the sum of R417 324.79 into that investment. Moreover the plaintiff was consistent and reliable in her testimony and I accept her version.

[34] The plaintiff testified that immediately after their marriage the parties resided for a period rent free at her father's holiday home at Onrus. During an outing to nearby Hermanus she saw a board advertising properties for sale in the Theewaterskloof area. It was in fact always her dream, and not that of the defendant's who preferred city life, to live in a rural setting. She was interested in the Theewaterskloof area which at the time was largely undeveloped and in fairly

close proximity to her family's holiday home. She confirmed that the purchase price of the property in which she was interested (open land with a small dam) was R250 000. Neither party had any readily available cash since it had all been placed in the PPIC investment and the defendant still needed to renovate his immovable property in Italy in order to place, it in a marketable condition. (According to the plaintiff at that stage the defendant's property was barely habitable or fit for occupation). The plaintiff was however able to scrape together the deposit required of R26 000 and approached her father for a loan for the balance to which he agreed. The plaintiff produced a copy of her father's bank statement (confirmed by the latter in his evidence) reflecting a payment of R224 200 on 24 January 2005, which was the date upon which transfer of the property took place into the plaintiff's name.

[35] The plaintiff said that Theewaterskloof was registered in her name for convenience sake only since the defendant had no interest in matters of an administrative nature. The defendant himself confirmed that he left all administrative tasks to the plaintiff throughout the marriage. The plaintiff was clear that she never regarded Theewaterskloof as hers alone but, as with the other properties which were subsequently acquired, that of the parties jointly. She was adamant that there had never been any discussion about transferring the property into the defendant's name, nor had either she or her father (again, confirmed by the latter during his testimony) ever informed the plaintiff that he was not permitted to own immovable property in South Africa without permanent residency status. The plaintiff said that if anything, she probably knew less about the rights of foreigners owning property in South Africa than the defendant, and neither did her father. The plaintiff's father testified that he was not acquainted with the legal position relating to foreigners but that he understood that foreigners could in fact own immovable property in South Africa without having permanent residency status. The defendant did not challenge the evidence of the plaintiff's father on this issue.

[36] The plaintiff testified that during May 2005 and when the parties were still living in Onrus she came across the advertisement for the sale of Driefontein in a local newspaper. She confirmed that after the parties had viewed the farm a decision was made to purchase it. The seller had told them that he had another potential buyer and the defendant thus felt that they should not delay in making an offer. At that stage the parties were in the same financial position as they were when Theewaterskloof was purchased. The plaintiff thus again contacted her father. She told him that she would sell Theewaterskloof and utilise the proceeds on account of the purchase price of Driefontein. She asked him if he would loan the balance and he again agreed. He suggested however that she negotiate a reduction of the deposit required of R150 000 to R70 000 and that the two transfers be linked to avoid cash flow difficulties, which the plaintiff succeeded in doing, resulting also in a delayed transfer date of December 2005. This was confirmed by the plaintiff's father in his evidence and that evidence was not challenged by the defendant.

[37] The parties also agreed that they would travel to Italy in order to attend to renovation of the defendant's immovable property so that the two units could be sold and the proceeds thereof also utilised towards the purchase price of Driefontein and attendant costs (which as I have said amounted to a total of R1.7 million). They left South Africa within two weeks of signing the deed of sale and paying the deposit for Driefontein.

[38] Prior to their departure the plaintiff withdrew R50 000 from the PPIC investment (the only amount that she ever recovered from that investment) and her father gave her €2000. Both of these amounts were utilised by her on renovations to the defendant's property and on

living expenses while the parties were in Italy. Her father also paid for the parties' return flights to Italy. This evidence was confirmed by the plaintiff's father in his testimony. They stayed in Italy for some months attending to extensive, although largely cosmetic, renovations. The plaintiff, who had by then fallen pregnant, returned to South Africa shortly before Christmas in 2005 and the defendant followed not too long thereafter.

[39] The plaintiff's testimony about her financial and physical contributions to the renovations of the Italian property was hotly contested by the defendant who in essence claimed that she had made no meaningful contribution at all. He did however concede that extensive renovations had taken place after Driefontein was purchased and that these had significantly improved the value of both units. To my mind who exactly contributed what to these renovations is largely irrelevant since the parties are married according to the accrual system and neither made any claim for forfeiture of the other's right to share in the accrual. There was thus no obligation on either party to prove the value of their contributions to the estate of the other.

[40] The parties also differed in their testimony on the size of each of the flat and the shop portions. According to the plaintiff the shop portion was significantly smaller than the flat portion, which comprised of a living area, two bedrooms, a kitchen and bathroom, an outside terrace and a large parking area. The photographs tendered by the plaintiff in evidence bore this out. The defendant claimed that the two portions were of similar size. He initially testified that the size of the shop portion was $40m^2$ but later conceded, when confronted with a copy of the relevant sale agreement, that it was in fact $32m^2$. The defendant belatedly sought to introduce an architect's drawing reflecting the size of the flat but the plaintiff objected on the basis that the defendant was unable to prove the veracity of this document. Strangely, although the defendant was able to produce the sale agreement relating to the shop portion

which reflected both its sale price and size, he was unable to produce a sale agreement relating to the flat portion which indicated not only its size but also its alleged sale price. However he explained to me that the flat itself measured roughly 45m^2, the terrace about 12m^2, and the outside parking area about 30m^2, thus a total of some 87m^2.

[41] The parties were in agreement that the shop portion sold during 2005 for €50 000 and that the flat portion sold thereafter, also during 2005. Where they differed completely was on the sale price for the flat portion. The defendant claimed that the flat portion had sold for only €90 000. The plaintiff testified that the defendant told her that he was placing the flat portion on the market for €480 000. She also personally saw the advertisement for the sale of the flat for this amount at the premises of the Italian estate agent concerned. The defendant later told her that he had secured a purchaser but that the latter was unable to meet his asking price. The defendant had thus decided to agree on a price of €450 000, with a large deposit of €250 000 and the balance of €200 000 to be paid on registration of transfer which would take place at a delayed date.

[42] The sale agreement relating to the shop portion reflected a registration date of 30 September 2005. According to the plaintiff the full amount of the purchase price was paid on registration of transfer. This was not disputed by the defendant. The alleged sale agreement relating to the flat portion reflected a registration date of 13 March 2006. The bank statements produced by the defendant reflecting the transfers of the various amounts by him to South Africa showed (as I said earlier) €250 000 on 14 October 2005 (a few weeks after registration of transfer of the shop portion) and €200 000 on 4 April 2006 (a few weeks after registration of transfer of the flat portion). These dates correspond with the plaintiff's version.

[43] The defendant nonetheless remained adamant that the flat portion was sold for only €90 000 and that the balance of the funds not emanating from the sale of the two portions comprised his *'inheritance'.* He conceded however that he had never informed the plaintiff of the inheritance, whether before or during the marriage, claiming that he did not consider this to have been necessary since, according to him, the plaintiff's father is a *'multi-millionaire'.*

[44] During his cross-examination by the plaintiff's counsel the defendant testified that his late father had retired at the age of 65 after having spent his entire working life employed as a cabin steward on various cruise liners. After his retirement he received a pension (his only source of income) of €1 300 per month. The defendant's late mother had never been employed during her marriage. The family had lived for many years in a rented, government subsidised flat in Sorrento along with their children and later with some of their children, their spouses and their children.

[45] Initially the defendant claimed that the €400 000 which he allegedly received as his *'share'* of the inheritance had been left to him by his father. When questioned on how his father would have been able to have accumulated, on his earnings and while supporting a family without owning any property, a sum of that size (which only constituted the defendant's share and did not take into account the shares of his mother and three siblings) the defendant suddenly remembered that about five years prior to his death his late father had won the Italian lottery. He was unable to say how much his father had won, claiming that although it had been a wonderful day in their lives, the amount of his late father's winnings had never been disclosed to him. He conceded that he had never informed the plaintiff of his late father's winnings.

[46] The defendant then again changed his version, testifying that his *'inheritance'* had been

left to him by both his father and his mother's family although he had no idea how much had accrued to him from each of these sources and was unable to provide any detail whatsoever.

[47] The defendant was also unable to provide a single shred of evidence as to how much each of his siblings had received, claiming that he had never discussed this with any of them. He said that his mother had stored this considerable sum of money in cash in her government subsidised rented flat and, as I have said, he was unable to produce a single document reflecting the deposits relating to his inheritance into the joint bank account which he operated with one of his sisters.

[48] The defendant's evidence as to when he became aware of his inheritance was wholly inconsistent. He first said that his mother had told him about his inheritance after the marriage during 2005 when he wanted to purchase Driefontein. This contradicted his evidence in chief when he had said that he had known about his inheritance since his late father's death ten years earlier but had not claimed it because of his prior protracted divorce from his former wife. When this was pointed out to him he then said that he had first heard about his inheritance after the marriage. Finally he said that he was unable to recall precisely when he had become aware of his inheritance.

[49] In my view not only is the defendant's version utterly improbable, the fact of the matter is that even if an inheritance from his late father existed, on his own version, it had accrued to him before the parties' marriage, whether he only claimed it after the marriage or not. Accordingly his *'inheritance'* does not fall to be excluded from the accrual since only inheritances which accrue to a spouse during the subsistence of a marriage are excluded from the accrual in accordance with s 5 of the Act. Further the defendant's late father died without

leaving a will (and there would thus have been no provision in any testamentary instrument for his inheritance to have been excluded from any form of accrual sharing); the defendant's case as pleaded made no mention of any inheritance; there is no claim by the defendant for rectification of the antenuptial contract to exclude any pre-existing inheritance *(Olivier v Olivier* 1998(1) *SA 550 (DCLD) 555 D-F);* and the defendant has never suggested that the funds allegedly given to him by his mother during the marriage were donated by her to him. Finally the defendant was unable to explain why the two portions of his immovable property in Italy had been sold for exactly the same amount as the value which he had placed upon them of €140 000 at the time of the marriage, prior to the substantial renovations which had been effected thereto and which, on the defendant's own version, had greatly increased their value. Simply put, the defendant has completely failed to discharge the onus which rests upon him in this regard and the plaintiff's version is accepted.

[50] I return to the purchase of Driefontein. The plaintiff agreed that a portion of the €250 000 remitted by the defendant to South Africa in October 2005 was appropriated towards the purchase price of that property. She testified that her accountant at the time recommended that for tax reasons the farm should be registered in a close corporation. This she discussed with the defendant and he agreed. Again, for sake of convenience, she was registered as the sole member of that close corporation (which as I have said was initially Tradelander 24 CC and subsequent to a name change, Driefontein Boerdery CC).

[51] Here again the defendant materially contradicted himself in his testimony. He claimed that the plaintiff had told him that he was a member of the close corporation. He had only established a few weeks prior to the trial that he was not a member. He then changed his evidence, saying that he had become aware of this a few months prior to the trial. He then

again changed his evidence, testifying that he had become aware of this during 2010 at the outset of the divorce proceedings when the plaintiff's erstwhile attorney had informed him that she was the sole member thereof.

[52] The defendant was then confronted with an affidavit deposed to by him on 9 February 2011 in support of an application to set aside a protection order which the plaintiff had obtained against him on the ground of domestic violence. In that affidavit he stated that 7 *was also advised that a close corporation should purchase the properties in order to safeguard our interest. We registered the close corporation with the respondent* [i.e. the plaintiff] *as only member and accordingly the farms were purchased by the close corporation...'.*

[53] During cross-examination the plaintiff's counsel raised with the defendant the circumstances leading to his divorce from his former wife, a Columbian national. According to the defendant, during their marriage they had lived in Columbia for 5 ***VT.*** years during which period they had operated three businesses, namely a restaurant and two discotheques. He had been told by her and her father that as a foreigner he could not register any of these businesses in his name and they were thus registered in his former wife's name, with a written side agreement in which she acknowledged that the defendant was in fact the owner thereof. His former wife then left him for someone else, taking the written side agreement with her and leaving him without any record thereof. In so doing she succeeded in stripping him of his assets, a matter about which he was still very aggrieved.

[54] The defendant was asked if that was indeed the case why he had not taken the trouble to verify the correctness of the misrepresentations which he claimed had been made to him by the plaintiff and her father relating to ownership of immovable property by foreigners in South

Africa. In response the best that he could proffer was that he had trusted the plaintiff (a highly unlikely explanation in the circumstances) and that in his mind there was a distinction to be drawn between ownership of a business (which had been the case in Columbia) and ownership of immovable property.

[55] However, the weight of the evidence - and in particular the contents of the defendant's own affidavit in the domestic violence proceedings - indicates the contrary. He sought to explain this away by claiming that he thought that only the Driefontein farming operation was to have been registered in the close corporation; again this assertion was shown to be untruthful when he was forced to concede that at the time the Driefontein farm was registered in the close corporation the parties had not even commenced their farming operation thereon. It seemed to me that the defendant's allegations were nothing more than a fruitless attempt to bolster his claim to *'beneficial ownership'* of the farms and farming operation. His assertions were entirely unsubstantiated. His version is rejected and I accept the evidence of both the plaintiff and her father in this regard.

[56] The plaintiff testified that the parties moved to Driefontein in January 2006 and commenced their farming operation about four months later. Rietvallei, the neighbouring farm, was purchased (and similarly registered in the close corporation) with funds provided by the defendant (a portion of the €200 000 transferred to South Africa in April 2006) and the net proceeds of Theewaterskloof after repayment of the initial loan of R224 200 to the plaintiff's father. She said that the transfer of Theewaterskloof was delayed beyond December 2005 which is why she was unable to carry out her original intention to use the proceeds thereof on account of the purchase price of Driefontein. This was not disputed by the defendant.

[57] The parties differed in their testimony as to which of them was the driving force behind the farming operation, with the plaintiff claiming that it was her and the defendant claiming that it was him. However in light of the findings that I have already made nothing much turns on this since their respective contributions are not relevant to the accrual system applicable to their marriage, which system must clearly be implemented on the proven facts of this matter.

Calculation of the accrual and manner of payment

[58] The parties agreed that the assets and liabilities of the close corporation would be regarded as being plaintiff's for purposes of the accrual. The defendant's entitlement to his share of the accrual in the plaintiff's estate, calculated on the basis of the agreed and proven values of the various assets and liabilities therein is as follows:

ASSETS

• Driefontein Farm		5 350 000.00
Rietvallei Farm	2 400 000.00	
• Farming operation and household contents (Exhibit E pp 80-81)		506 050.00
• Absa Bank account no. 4070251346		8 764.52
• Absa Bank account no. 9149387950		17 750.86
Toyota Fortuner	220 000.00	
		8 502 565.38

LESS LIABILITIES

• Owed to Absa Bank in respect of Toyota Fortuner	188 356.61

- Loans from plaintiff's father

  (Exhibit E pp 58, 60, 62, 64, 71,72, 97) 607 000.00

- Further loan from plaintiff's father

  (Exhibit E p 99) 200 000.00

- Absa Bank loan 664 829.58
- Various debts

(Exhibit E pp 25, 26, 27, 28, 30, 32, 72, 73) 283 193.73

6 559 185.46

LESS PLAINTIFF'S COMMENCEMENT VALUE & CPIX 1 600 000.00

4 959 185.46

LESS 50% 2 479 592.73

Due to defendant: **2 479 592.73**

[59] From the amount of R2 479 592.73 must be deducted:

(a) The value of the Toyota Fortuner which the defendant will retain of R220 000;

(b) The agreed amount of R12 000 in respect of movable items in his possession; and

(c) The advance already received by him on account of his accrual claim of R150 000;

leaving a balance due to the defendant of R2 097 592.73.

[60] The plaintiff testified that she would be able to pay R50 000 to the defendant within 48

hours of an order being made and the balance by not later than 60 days from the date of such order, since she needs time to secure the facility from which the balance will be paid. In my view this is a fair and reasonable request and I exercise my discretion accordingly in terms of s 10 of the Act.

[61] It should also be mentioned that additional amounts might fall to be deducted from the capital sum due by the plaintiff to the defendant pursuant to the agreement reached between the parties and incorporated at paragraph 3.8.15 of the attached order.

Costs

[62] Since the plaintiff has been successful in the relief sought by her, which was also contained in her rule 34(1) tender delivered prior to the trial, it is appropriate that costs should follow the result, such costs to include the qualifying costs of the plaintiff's experts Mr Marais and Mr Smit (the plaintiff's counsel informed me that the other experts whom she had intended to call, and whose testimony would have related to the minor child, had been appointed by the facilitator Ms Brand and that no order for costs was sought in respect of such experts).

Conclusion

[63] In the result I make the annexed order.

J I CLOETE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 2400/2010

Before the Honourable Ms Acting Justice J I Cloete
CAPE TOWN: 24 June 2012

In the matter between:

JEANNIE CANELLI (born PIENAAR) **Plaintiff**

and

GUISEPPE CANELLI **Defendant**

ORDER

Having heard Counsel for the Plaintiff and Defendant in person, IT IS

ORDERED THAT:

1. A decree of divorce is granted;

2. Plaintiff and Defendant shall act as co-guardians of the minor child born of their marriage, namely LUCA CANELLI (born on 20 February 2006) as contemplated in sections 18(2)(c), 18(3), 18(4) and 18(5) of the Children's Act 38 of 2005 *("Children's Act').*

3. Plaintiff and Defendant shall be co-holders of parental responsibilities and rights in respect of the minor child, as referred to in sections 18(2)(a) and 18(2)(b) of the

Children's Act, subject thereto that:

3.1. The minor child shall primarily reside with Plaintiff who shall be his primary carer. Plaintiff will be primarily responsible for his day-to-day care and the decisions relevant to his daily wellbeing and development on the basis as detailed hereunder;

3.2. Save as provided herein, decisions that affect the minor child's everyday care and routine are to be made by Plaintiff and when he is in the care of his father, Defendant shall make decisions with due regard to those decisions regarding his care, routine, structure, safety and stability as established by Plaintiff. In the event of a dispute, such decisions will be made by the facilitator;

3.3. Defendant shall have contact with the minor child as stipulated below, having due regard to his scholastic, social and extra-mural commitments and, in general, his best interests. Defendant shall partake in age appropriate activities during contact with the minor child which activities shall include those which the minor child would want to do with his father;

3.4. The following matters shall only be decided by means of a joint decision between the parents, and failing agreement, the directions of the facilitator:

3.4.1. Major decisions regarding the minor child's enrolment in any pre-school, school or tertiary education institution and after-care;

3.4.2. Elective medical treatment and serious medical procedures (not including day to day medical care) except in emergency cases where the on-duty parent will decide provided that the other parent is

informed as soon as possible;

3.4.3. Changes to the contact schedule;

3.4.4. The minor child's residency outside the Western Cape Province only insofar as it would affect contact arrangements.

3.5. A case manager, Marietjie van der Heever, was appointed by the facilitator.

3.6. **General**

3.6.1. In the event of Plaintiff spending holidays with the minor child away from their home, she will provide Defendant or the facilitator with full details as to the address where the minor child will be as well as telephone numbers. Neither parent will be allowed to remove the minor child outside the borders of South Africa, without the facilitator's written consent;

3.6.2. If a party foregoes any number of contact days in order to accommodate work, personal or other arrangements, then such days will not fall into the contact period of the other parent as 'repayable', unless the parents agree or the facilitator determines otherwise;

3.6.3. The parties will respect the differences in the home routines of each parent whilst the minor child is in the care of the other parent, but this will not compromise his interests in respect of established routines or commitments;

3.6.4. The non-contact parent will not be entitled to visit the minor child at the home of the other

parent, unless the facilitator determines otherwise;

3.6.5. The parents will ensure that their alcohol consumption is kept to a minimum when the minor child is with them and that the minor child is not exposed to any age inappropriate visual or written media;

3.6.6. The parents shall refrain at all times from referring to the other party in negative terms in front of the minor child;

3.6.7. Having regard *inter alia* to the minor child's age and stages of development, his views will be taken into account in decisions regarding contact and his general wellbeing;

3.6.8. Plaintiff will take the minor child to school, activities or social commitments and collect him thereafter, until otherwise directed by the facilitator.

3.7. **Communication**

3.7.1. The parents will communicate by sms and e-mail. This shall not affect either party's right to have telephonic contact with the minor child as stipulated below;

3.7.2. If the parents are unable to communicate with each other, they shall correspond with each via the appointed case manager or facilitator;

3.7.3. Plaintiff will keep Defendant updated with the minor child's progress and activities by sending him copies of all relevant correspondence and school reports or communication, by e-mail. Plaintiff will also respect Defendant's presence during school activities or functions;

3.7.4. Neither party will approach the minor child's schoolteachers or meet with them without prior written confirmation to the other parent of such intended meeting in which case the other parent may elect to be present as well.

3.8. The Defendant's contact shall, for a period of at least 8 weeks as from 28 May 2012, be as detailed below and thereafter as determined by the facilitator in consultation with both parents, the minor child and relevant professionals:

3.8.1. Both parents will have telephonic contact with the minor child at all reasonable times and have contact with him on their birthdays, the minor child's birthday and on Mother's Day, Father's Day and every alternative Christmas Day;

3.8.2. Defendant will have contact with the minor child every Wednesday from 14h00 until 16h00, which contact will be supervised by the supervisor so appointed;

3.8.3. Mid-week contact shall be supervised by the case manager or any person nominated by the case manager;

3.8.4. The case manager has the discretion to direct the venue at which contact shall take place on Wednesdays;

3.8.5. Plaintiff will collect the minor child from school and drop him off for contact at the contact venue or at Defendant's residence, whereafter the minor child will again be collected by Plaintiff;

3.8.6. Defendant will have contact with the minor child during every alternative weekend on the Saturday from 09h00 until 12h00 which contact will be supervised as above, the first Saturday contact having taken place on Saturday 26 May 2012;

3.8.7. Plaintiff will take the minor child to the contact venue or Defendant's residence, whereafter the minor child will again be collected by Plaintiff;

3.8.8. The supervisor will report after each contact session to the facilitator regarding such contact;

3.8.9. Plaintiff shall attend therapy to assist her to cope with the trauma of the divorce;

3.8.10. The minor child shall immediately, and at least once per week, attend therapy with a qualified and experienced child therapist to be agreed upon by the parties and failing agreement, to be nominated by the facilitator;

3.8.11. Defendant shall immediately and regularly, on a weekly basis, attend parental guidance sessions with Mrs Karien Schoeman, in Wellington who will report to the case manager and facilitator after eight weeks regarding Defendant's ability to show insight into the needs and wellbeing of the minor child;

3.8.12. The contact regime shall be revised after eight weeks considering the input of Mrs Karien Schoeman, the minor child's therapist, the case manager and both parents;

3.8.13. Defendant shall pay for half of the costs of the case manager and for all costs related to parental guidance sessions with Mrs Karien Schoeman;

3.8.14. Defendant shall make a contribution towards the costs related to the issue of the directive in an amount of R2 500.00. A copy of the full account related to the costs of this directive shall be provided by the facilitator to both parties. It is recorded that the facilitator is willing to accept payment of R2 500.00 in two equal instalments;

3.8.15. Plaintiff has agreed that pending judgment herein to pay the costs referred to in paragraphs 3.8.13 and 3.8.14 above, and 4.2.19 below, on Defendant's behalf, as an advance on Defendant's accrual claim.

3.9. It is recorded that the parties have jointly appointed Adri Brand, an attorney of this Honourable Court, as facilitator in this matter, and agree that she continues to act in this capacity until she resigns, or both parties agree in writing that her appointment shall be terminated, alternatively until her mandate is terminated by an order of the High Court.

4. If the facilitator's appointment is terminated, she shall be substituted by another facilitator appointed by agreement, alternatively by FAMAC, and the provisions in regard to his/her appointment shall apply mutatis mutandis as set out herein:

4.1. Neither party may initiate court proceedings for the removal of a facilitator or bring to the court's attention any grievances regarding the performance or actions of a facilitator without first meeting and conferring with the facilitator in an effort to resolve the grievance;

4.2. The facilitator shall be authorised to:

4.2.1. Facilitate joint decisions in respect of the minor child;

4.2.2. Regulate, facilitate and review the contact arrangements in respect of the minor child;

4.2.3. Make recommendations in respect of any issue concerning the welfare and/or affecting the best interests of the minor child, other than issues relating to maintenance;

4.2.4. Issue directives binding on the parties on any issue referred to above subject to a court of competent jurisdiction overriding such directives;

4.2.5. Require the parties and/or the minor child to participate in psychological evaluations or assessments;

4.2.6. Insofar as the facilitator has the power to make decisions in respect of the minor child, the power shall be exercised in the best interests of the minor child and shall be binding on the parties, unless the High Court, who is upper guardian of minor children, orders otherwise;

4.2.7. The facilitator's services involve elements of mediation, expert opinion and counselling, but do not purely fall into any of these categories. The facilitator is not appointed as psychotherapist, a counsellor or attorney for the child or the

parties. No psychotherapist / patient or attorney / client relationship as created by this appointment or otherwise exists between the facilitator and any of the parties or the minor child;

4.2.8. If the parties are unable to reach agreement on any issue concerning contact and/or any joint issue where a joint decision is required in respect of the minor child, the dispute shall be referred to the facilitator (in writing, if so requested by the facilitator) who shall attempt to assist the parties to resolve the dispute as speedily as possible and without recourse to litigation;

4.2.9. If the facilitator, in the exercise of his/her sole discretion, regards the particular issue raised by one of the parties as trivial or unfounded, he/she is authorised to decline the referral of such issue;

4.2.10. If the facilitator is unable to resolve a dispute by way of facilitation, he/she may resolve the dispute by issuing a directive which shall be binding on the parties in the absence of any court order overriding such directive;

4.2.11. Each party and the minor child (if necessary) shall participate in the dispute resolution process as requested by the facilitator;

4.2.12. The facilitator shall conduct proceedings which are informal in nature and is entitled to receive information by means of telephone, correspondence, electronic mail, etc. The facilitator will use his/her discretion in considering the weight and sufficiency of the information provided and may expand the enquiry as he/she deems necessary;

4.2.13. The facilitator shall determine the protocol of all communications,

interviews and sessions, including who shall or may attend meetings. Legal representatives are not ordinarily entitled to attend such meetings, but a party shall be permitted to caucus with his/her legal representatives, either in person or by telephone during such meetings. The parties and their attorneys shall have the right to initiate or receive overall communication with the facilitator. Any party or counsellor may communicate in writing with the facilitator provided that copies are provided to the other party and if applicable, their legal representatives;

4.2.14. The facilitator may confer individually with the parties and with others, including but not limited to step parents, step siblings, extended family members and friends, permanent life partners, household members, school and educational personnel, care providers and health care providers for the minor child and therapists for the minor child, and the parties authorise such persons to provide information to the facilitator;

4.2.15. The parties shall not be entitled to insist that any meeting or session is tape recorded, videoed or recorded in any manner whatsoever;

4.2.16. No record need be kept by the facilitator, except the findings, decisions and directives of the facilitator;

4.2.17. The facilitator shall be entitled to engage the services of professionals to assist him/her in coming to a considered decision with the proviso that any substantial costs which are likely to be incurred in co-opting of professionals, shall be done with the consent of both parties;

4.2.18. In the event of the parties failing to participate in any facilitation/mediation process, despite having been requested to do so by the

facilitator, then and in such an event the facilitator shall be entitled to make a decision without the input of that party and his/her decision shall be binding on both parties as if they had both participated in such mediation/facilitation in the absence of any court order overriding such decision(s);

4.2.19. The costs of the sessions with the facilitator shall be borne by the parties on a 50/50 basis unless otherwise directed by the facilitator. The costs of the facilitator in respect of dealing with e-mails, faxes or telephone calls from a party shall be borne by the party concerned or as otherwise directed by the facilitator.

5. The Defendant shall maintain the minor child as from the 1st day of the month following payment to the defendant of his share of the accrual (as set out in para 6 below) until such time as the child becomes self-supporting by:

5.1. Paying to the Plaintiff the sum of R 2 000, 00 per month, on or before the first day of every month into such banking account as the Plaintiff may nominate in writing from time to time, by way of debit order, free of deduction or set-off;

5.2. Increasing the maintenance as aforestated, annually on the first day of the month succeeding the anniversary of the granting of the final order of divorce and every 12 months thereafter, in accordance with such rise as has occurred in the Consumer Price Index as notified by the Director of Statistics, or its equivalent, in respect of the Republic of South Africa based on the 12 urban areas for a period of one year expiring on the first day of the month preceding the date on which the Final Order of Divorce was granted;

5.3. Bearing 50% of the costs of all reasonable medical, dental, surgical, hospital, orthodontic, ophthalmic and therapeutic treatment or costs reasonably required by the minor child, including the cost of prescribed medication and the provision, where necessary, of spectacles and/or contact lenses;

5.4. Paying 50% of the cost of reasonable school fees (including private school fees) in respect of the minor child. This includes, inter alia, the cost of school outings, camps and school lunches, the cost of extra-curricular school and sport activities and the cost of extramural activities in which the minor child participates, including the cost of club fees and sport tours (including travel and accommodation expenses relating thereto), as well as the cost of school books, stationery, school uniforms, equipment and attire (including computers) relating to the minor child's education and the sporting and/or extramural activities (including music fees and equipment, tuition and exam fees) engaged in by him;

5.5. The parties shall bear a pro rata share of the cost of the minor child's tertiary education in accordance with their means, provided that he exhibits an aptitude or desire therefore and for as long as he applies himself with due diligence and continues to make satisfactory progress at such tertiary institution. The costs shall include, inter alia, the cost of all university fees and/or fees due to any tertiary institution and the costs of all books and equipment required for the courses undertaken by the child and his accommodation costs.

6. The plaintiff shall pay to the defendant the sum of R2 097 592.73 in respect of his accrual claim into such bank account as defendant may nominate in writing as follows:

6.1. R50 000 within 48 hours of this order being granted;

6.2. The balance of R2 047 592.73 not later than 60 days from date of granting of this order.

7. The plaintiff shall effect payment of the balance owing to Absa Bank in respect of the Toyota Fortuner vehicle currently in the defendant's possession and shall thereupon sign all documentation as may be required in order to effect transfer of the vehicle

into the name of the defendant at his costs. Such transfer shall take place within 30 days of this order. The defendant shall upon request sign all documentation necessary and effect payment of all amounts as may be required in order to effect such transfer. In the event of either party failing to sign all documentation necessary in order to give effect hereto, the Sheriff of the High Court Cape Town is hereby authorised to sign such documents on his/her behalf.

8. The defendant shall effect payment of the plaintiff's costs on the scale as between party and party, including the qualifying costs of her experts Mr Marais and Mr Smit as taxed or agreed.

BY ORDER OF COURT

COURT REGISTRAR