REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION, GEORGE)

HIGH COURT CASE NO: 13622/2011

MAGISTRATE'S COURT CASE NO: 36/2009

In the matter between:

S B Plaintiff

and

R B Defendant

Court: Justice J Cloete

Heard: 4, 6 and 7 March 2013, 5 August 2013, 3, 5 and 6 March 2014

Delivered: 16 April 2014

JUDGMENT

CLOETE J:

Introduction

[1] This is a divorce action. The parties were married on 26 September 1998 out of community of property by antenuptial contract with the express exclusion of the accrual system. The antenuptial contract was not made available during the trial, but there was no indication from either party that it is anything other than the standard form contract which also excludes community of property and profit and loss. There are no children born of the marriage.

[2] The parties separated permanently during November 2008, and it is common cause that the marriage has irretrievably broken down. The plaintiff (the wife) issued summons in May 2009. The trial commenced in March 2013 but was bedevilled by delays and amendments to pleadings. Most of the evidence was led, and the trial eventually concluded, during March 2014.

[3] Apart from seeking a decree of divorce the plaintiff advances various claims against the defendant. The first claim is that during the marriage the parties agreed to form a joint estate, and that the plaintiff is thus entitled to 50% thereof; alternatively, that on the basis of a contract concluded during the marriage, she is entitled to 50% of the value of the defendant's estate. The second claim, which is advanced as an alternative to the first, is for an order declaring that a partnership was formed during the marriage for the purpose of a commercial enterprise, namely the buying and selling of immovable properties, coupled with the usual consequential relief. The third claim, which the plaintiff now accepts can only be

advanced as a further alternative to the first claim, is for payment of R135 000 which is a portion of the sale proceeds of a Toyota RAV vehicle which the defendant is alleged to have donated to her during the marriage. The fourth claim is for nominal maintenance from the defendant, which I accept is until the plaintiff's death or remarriage, whichever occurs first, given that no evidence was led to the contrary.

The evidence

[4] The only witnesses who testified were the parties themselves. At the outset it must be stated that the plaintiff impressed as an honest witness who did not attempt to embellish her version. The same cannot be said of the defendant who came across as arrogant, evasive and at times downright untruthful. There is no doubt that where the plaintiff's version differed from the defendant's, it is her version which must be preferred.

[5] According to the plaintiff she agreed to her ex-husband being awarded custody of their two very young children for the sake of her marriage to the defendant. She accepted this arrangement because at the time the parties lived in close proximity to her ex-husband and the children in Johannesburg. However at a stage after their divorce was finalised, the ex-husband and children moved to George and thereafter to Knysna. This caused the plaintiff a great deal of unhappiness and emotional pain. Although she was cross-examined on sensitive and highly personal issues concerning the sexual aspects of the parties' relationship in an apparent effort to both embarrass her and to place the full

responsibility for the breakdown of the marriage on her shoulders, it was the defendant's subsequent evidence that the major problem throughout the marriage was the plaintiff's difficulty in dealing with the loss of her children. He gave no evidence whatsoever about the parties' sexual relationship; nor did he even imply that it had in any way contributed to the breakdown of the marriage.

[6] The marriage was a stormy one, although the defendant sought to downplay this. It was characterised by frequent bouts of excessive drinking which invariably erupted into violent altercations. The plaintiff's evidence was that she endured physical, verbal and mental abuse. The defendant tried to portray the plaintiff as an equal participant in the abuse which he similarly sought to minimise. In any event it was the testimony of both parties that between 1998 and 2004 the plaintiff left the defendant on various occasions, and that she left him again in June 2004 with the intention never to return. At the time the defendant was the owner of two immovable properties, one in Skeerpoort which was the parties' home, and the other in Plettenberg Bay, which was their holiday home and which had been purchased specifically to enable the plaintiff to spend time close to her children.

[7] On 28 June 2004 the defendant wrote the plaintiff a letter, the body of which is as follows:

'My darling [S]
This is a first for me in that I've never put my feelings down on paper! Especially one that will be such a long letter.

This is the most important thing I've ever written down. I do not function without you. My mind cannot think of anything except you. I cannot sleep, cannot eat (lost 4 kgs) cannot concentrate.

Let me start off by telling you that you were absolutely right by leaving me. I had no right, or place to treat you like I did. I was a bastard and deserved it. I never realised just how much you did for me or gave me until you left. You have scared the shit out of me! I think this was the shock that I needed. I am a useless arsehole without you and this is why I have devised this plan to win you back. No me ME, ME, ME. It will be US and not ME, OURS & NOT MINE.

There are a lot of different areas where I need to change and adapt and I <u>DO</u> know that I can. I'm gonna list them all to let you know how committed I am to this marriage and relationship. You are the best thing that has ever happened to me and you mean more to me than life itself. I consider it a privilege to be your hubby.

I have been trying to remember all the things to write down as I drove all over Jo'burg today. O.K. here goes:-

1. *The drinking has to be reduced to a socially acceptable level. I think this is very important as most/all of our fights start because of alcohol. I can stop drinking altogether if you want. It's YOUR choice! To prove this I will take that injection that* [K] *took.*
2. *There will be no more verbal abuse, down-putting and just plain nastiness. You know, the type where you say "… arsehole".*
3. *I will buy you this Honda Luxline, instal a Nokia cell kit and register it in your name and give you an invoice stating that it's paid in full. And the papers.*
4. *This car is, however a "stop-gap" as I intend to buy you a 200 SX or Rav 4. Your choice! Again the rules as in #3 apply as far as title of the vehicle goes.*

5. *I have got to start being the father and step-parent that you are. You are shining example in this area and all I've ever been is a bastard. Although our recent trip to Plett showed you I can do it. I have attached a little note from* [B] *that brought a tear to my eye. He is so sad about us. He loves you to death.*
6. *I will start a Trust Fund, this month, for* [C] *and* [T]*. This is to save for a university education if either/both can qualify. I will put R500 p.m. in this account and to show you commitment I will let you have all the passwords and I will not be able to draw from it. Only you can (although I hope you wont!). If neither child goes to university then at least we can use the money to buy them furniture or whatever to get them going in adult life.*
7. *I offered you the other day, half ownership on both of the houses. Well that's not a good enough deal if you ask me! I think we should change our marriage status to community of property. Now, I don't know the law but surely we can amend the certificate somehow? That way you have half of everything. Like I said OURS, OURS, OURS not MINE, MINE, MINE!*
8. *I will pay the servants. That's not your problem anymore.*
9. *I will pay all costs for the pets. This includes the horses. I love them too so why should you take all the costs? This includes vets fees, doggie parlour, food, every bloody thing! You will never spend another cent on our animals.*
10. *Standard Bank Gold Card returned. No questions.*
11. *Standard Bank Petrol Card. You'll never pay for petrol again.*
12. *Cell phone account. You'll never pay for a call again.*
13. *You'll love this one!*

    I will fly the kids (or we go there) every six weeks. This means that you will see the kids nearly 9 times a year as opposed to 3 to 4 at the moment. If I could do more in this area I would [S].
14. *VINYLWORLD. Again your choice. Whatever you wanna do, I'll back you.*
15. *WORK. Ah now there's a subject. What do you wanna do? If you wanna work a 40 hour week or just 3 x mornings it's your choice. You can work for* [R]*, me, anyone, up to you. If I was you I would spend more time on your hobbies 'cos you won't have to worry about the money.*
16. *Why don't we "date" again. Lets go to movies and go dancing. I mean, lets face it, you can almost dance as good as me!*

17. *The next summer in Europe (2005) I will take you there. We will go to Cardiff too to see where your dad lived. I'm sure* [R] *can accommodate us.*
18. *I know you gave the kids to* [C] *for us and we both know that there's not much we can do to get them back but if we see the slightest chink in his armour we'll nail him. On this though I can give no guarantees.*
19. *I will copy the "swinging" pics onto a c.d. and give it to you. You can then do what you will with it. All other porn will be deleted.*
20. *The building alterations will be carried out as per your instructions.* [J] *has already started painting.*
21. *All of what I have proposed here can be legally endorsed by a lawyer of your choice at my expense.*
22. *If there's anything I've left out please let me know. I have done this whole thing for one reason. I love you and I'm so sorry.'*

[emphasis supplied]

[8] The plaintiff responded by letter to the defendant on the same day, as follows:-

Dear [B]

When I started reading your letter I burst into tears because, besides the financial security I needed, all these things is (sic) *what was lacking in our marriage. You know, when I met you, I fell so head over heels in love with you, and over the years getting to know you better, I started to see another side of you I didn't like at all, but you still had my love, and I was prepared to overlook all those things. The fighting, the jelously* (sic) *the violence, the mental intimidation, all of those. I pretended they never happened and carried on loving you. But recently I seem to have changed inside of me. I started thinking that this is not what I want anymore.*

All your offers are very genourous (sorry 4 the spellig (sic) *) and I can see that you mean them, but can you follow through? You cannot change who you are inside* [B] *and I'm very sceptical. I cannot let you or me go through this again. I have had a lot of time to think of many things, where I would like to go and how I*

am gonna get there. I really want to go to Knysna to be with my kids, my heart is aching for them. I have such a huge problem with them battling away while I was so "comfortable" with you. I want to be able to offer them a better life and have all the things I have. I need to make amends! I've never forgiven myself for giving them up. NEVER!!! And I feel that they need me so much!

I have found such strength in me that I thought I never had. I haven't once doubted my decision to leave you [B]*. Like I said before, it's as though my whole system has totally shut you out, like it's just tripped and for me to come back & accept your offers would be false and not my personality.*

I think that you need to concentrate more on your "changing" than on your financial promises, because anybody with money can offer that! If you were ever to win my heart back, you have to show me that you can change, you would have to join me and my children in Knysna and not living with us either, but visiting us & proving you have changed.

You know [B]*, have u asked yourself what is true love? Is it something you are only prepared to give someone who is with you, or is it something that is totally unconditional? When I asked u for the plotter so I can make some money you said no, it's almost like you want me to suffer without you. Like on one hand you have all these "gifts" with a carrot dangling and in the other, there's nothing and I have to choose. True love is not possesive* (sic) *or controlling, it's allowing that person the freedom to grow, and wishing them the best of everything, whether you have them or not!*

I need you to understand that the decision I made to leave you was not only my problems with you, but my need & desire to be with my children, full time. I can't be a holiday mom anymore, and I saw that in our last trip to Knysna. If I don't do this, I will <u>never</u> *be happy, I will never stop thinking how I could have done what I did. I am only here in Skeerpoort to try and get myself financially stable so I can offer & be an example to my children.*

If you can somehow see my heart, I hope you will understand, and who knows what's going to happen in the future, none of us do.

Now I have totally poured my heart out to you, and that's all I can offer you. If you would like to call me you can!'

[9] Although the defendant first testified that the plaintiff rejected the offers contained in his letter to her, he conceded under cross-examination that the opposite was in fact the case. He admitted that when he wrote her the letter he would have done anything to win her back; and that *'I would have offered her Australia if I had Australia to offer'.* He admitted that the *'plan'* contained in the letter was to offer the plaintiff *'financial reward for coming back'* as well as mending his ways. By "financial reward" he meant financial security. His evidence was also that he took up the plaintiff's invitation. He telephoned her, they met, and during that meeting he convinced the plaintiff to return and resume the marriage relationship on the basis of the promises and undertakings contained in his letter to her.

[10] The defendant admitted that it was on the strength of these promises and undertakings that the plaintiff returned and resumed the relationship; and that shortly thereafter they consulted with an attorney recommended to the plaintiff to establish whether they could formally change their matrimonial property regime to one in community of property. The parties were advised that they would need to get divorced and remarried in order to do so. It was the plaintiff's evidence that on the strength of this advice, which at the time was not an option for them, the parties immediately thereafter orally agreed that they would nonetheless henceforth continue with the marriage as if they were married in community of property. When asked during cross-examination to explain her understanding of being married in community of property, she replied that *'I understood that I*

would become half owner of everything plus a car. I accepted [the offer] *on that basis'.* She was asked whether her assets would also have been included in this arrangement. Her unchallenged response was that *'I didn't have any assets at that stage'.*

[11] The defendant gave contradictory versions on what transpired after receiving the attorney's advice. First, he testified that there was no further discussion on the issue and the parties *'just left it'*, implying that they continued with the marriage on the basis that it would remain one out of community of property. When pressed during cross-examination on how improbable this was, the defendant came up with another version, namely that he had already established on the day before the meeting with the attorney that a change of matrimonial property regime was *'not possible'*; and that in accompanying the plaintiff to the attorney he was simply *'going through the motions'* because he wanted the plaintiff to hear this from the attorney instead.

[12] The defendant nonetheless admitted that he fulfilled a number of the promises contained in his letter. He reduced his alcohol consumption to an acceptable level; he tempered his behaviour towards the plaintiff; he purchased a Toyota RAV in 2007 which was registered in her name; and as far as he could recall, he returned the plaintiff's bank cards to her and took over those running costs of the household to which he had referred. His evidence in this respect is consistent with that of the plaintiff's.

[13] The defendant however denied that by purchasing and registering the vehicle in the plaintiff's name he had any intention of passing ownership thereof to her. He claimed that he had only registered the vehicle in her name because she had a history of accumulating speeding fines which he was tired of having to pay. He did not explain why, if this were the case, he had never previously registered any of the vehicles which were used by the plaintiff, in her name. The plaintiff denied that she had such a history and testified that the defendant had never informed her that he had always intended to nonetheless retain ownership of the vehicle. As far as she was concerned he was simply fulfilling one of his promises contained in the letter which she had accepted.

[14] After resuming the marriage relationship the plaintiff qualified as an estate agent and became employed as such during 2006. Her evidence was that, consistent with the spirit of the agreement reached during June 2004, the parties together commenced what she referred to as *'property deals'*.

[15] Three immovable properties were purchased during 2006. The first was a plot, also in the Skeerpoort area, which was bought for the specific purpose of building a family home thereon. The purchase price was R415 000 and the property was registered jointly in their names. The second was a property in Westlake which was purchased for R420 000 and registered in the name of the plaintiff, who qualified for mortgage bond finance at a time when the defendant did not. The third was a property in Fouriesrus which was purchased for R1.1 million and registered in the defendant's name.

[16] It was the plaintiff's evidence that the parties jointly found the plot in Skeerpoort; and that a bond was registered over the property. The arrangement was that whoever could pay the bond instalments would do so; but the defendant in fact paid the majority thereof. The plot was sold by the parties in 2008 for R550 000. The net proceeds were paid into the defendant's money market account and used to fund their lifestyle.

[17] It was also the plaintiff's testimony that she sourced the Westlake property which fell within her sales area. The property was later sold by the parties during 2007 for R600 000 and again the proceeds were paid into the defendant's money market account and used for the same purpose.

[18] The plaintiff's evidence was further that she sourced the Fouriesrus property. Improvements were effected thereto. She paid for the bond registration costs and electrical compliance certificate; and handled all of the accounts and payments involved in the renovation (although the cost was funded by the defendant) as well as contributing to its improvement in various other ways, including landscaping and planting the garden. The parties moved into the property for a short period in order for the plaintiff to prepare it for sale. She found the purchaser and it was sold for R1.7 million in 2007. The profit was split equally between the parties on the one hand and a third party who had physically attended to some of the renovation work on the other. Again the proceeds were paid into the defendant's money market account and utilised to fund the parties' lifestyle.

[19] It was the plaintiff's unchallenged evidence that there were three reasons why the parties married out of community of property with the exclusion of the accrual system. The first was that her former mother-in-law was engaged in litigation with her at the time. The second was that the defendant's former wife had received a substantial settlement in their divorce and the defendant did not want this to happen again. The third was that the plaintiff had wished to make it clear to the defendant that she was not marrying him for his money. The defendant's evidence was that he had previously been married in community of property and that he had taken legal advice to marry the plaintiff out of community of property.

[20] It was clear from the defendant's evidence that he is not someone who is careless with his assets and other financial resources, nor is he prone to sharing them willingly. The offers that he made to the plaintiff in his letter of June 2004, and the steps which he took thereafter to implement some of those offers, serve to emphasise just how desperate he was to secure the plaintiff's return to the marriage.

[21] It was nonetheless the defendant's version that it was irrelevant to him that the Skeerpoort plot, which he conceded was purchased to build the new family home, was registered in both parties' names, because *'I never dealt with this, she did, it really didn't matter while we were married if it was in both of our names, I paid for it and I sold it'.* He then changed his version, claiming that he had not known that the plot had been registered in their joint names until his current lawyer had pointed this out to him. He made these claims despite

conceding that he had signed the relevant transfer documents and that the plaintiff had also *'probably'* done so, although according to him he could not remember. Further, and despite his earlier evidence about taking over various financial responsibilities of the household as promised, as well as both parties' testimony that the defendant paid the bulk of the running costs of the household, he nonetheless denied that he had used the funds in his money market account to fund their lifestyle. His evidence was that although the funds in that account were used almost exclusively for these expenses (given that, on his own version, his income was almost non-existent by that stage) the funds were nonetheless only *'for me, it was my money'.*

[22] Needless to say this version then also changed. The defendant claimed that he thought that some of the proceeds of the sale of the Skeerpoort plot had been paid into the bond over the Plettenberg Bay property, and thereafter withdrawn to pay for part of the purchase price of the Westlake property, which had been registered in the plaintiff's name. His evidence was that the proceeds of the Westlake property were paid into the money market account because this was his money, despite his earlier concession that it would not have been possible to purchase the Westlake property at all without the plaintiff's assistance, given that he did not qualify at the time for bond finance.

[23] The defendant conceded that the plaintiff had sourced the Fouriesrus property. He denied that the plaintiff had made the contributions to that property about which she had testified. To the extent however that she might have done so,

those contributions were irrelevant because *'that's what wives do… I provided the lifestyle, I don't give her money for planting a few plants and the keeping of the lawn'.*

[24] From June 2004 the parties' marriage improved significantly and remained this way for some time. They decided to relocate permanently to Plettenberg Bay. The common home in Skeerpoort was sold, and in June 2007 the parties moved into the Plettenberg Bay property.

[25] This property (in which the defendant still resides) has a separate self-contained unit which is rented out. The rental income has been the defendant's sole source of income since June 2007. The plaintiff continued to work as an estate agent for a short period and then took over the letting of the unit on a full-time basis. There was no evidence that the defendant remunerated her for this. The parties' household and other expenses were funded partly by the rental income but supplemented to a significant extent by the monies which had by then accumulated in the money market account.

[26] The plaintiff's evidence was that when they moved to Plettenberg Bay there was about R2 million in this account. According to the defendant, by November 2008 when the parties separated permanently, some R900 000 was left. This has now reduced to about R270 000 because he has incurred legal costs of R250 000, purchased himself a vehicle and *'the rest is gone because I earn less than the cost of living is'*.

[27] It was the plaintiff's evidence that after the move to Plettenberg Bay she suggested that the RAV vehicle be sold. There was insufficient parking for guests renting the self-catering unit and the parties already had another vehicle as well as a motorbike for their use. The defendant agreed that this was a good idea and the plaintiff sold the vehicle for R145 000. The defendant suggested that the proceeds of the sale should also be put into the money market account, because the more funds in the account, the greater the interest that the parties would earn thereon. The plaintiff agreed and, after keeping R10 000, she paid over the balance of R135 000. The defendant's version however is that the proceeds of the vehicle were only paid in the first instance to the plaintiff because the vehicle was registered in her name. She thereafter transferred the proceeds to him because he was the owner thereof. He went even further with this improbable version, denying that the plaintiff had retained any portion of the proceeds at all *'because it was not hers to take'*.

[28] The marriage again began to deteriorate in the time that followed the parties' move to Plettenberg Bay. The plaintiff left the defendant for a period of about four months during 2008 but thereafter returned to him. After a serious incident of abuse at the hands of the defendant in November 2008 (which the defendant denied) the plaintiff packed two suitcases and left the defendant for good.

[29] It is against this background that I now turn to consider the plaintiff's various proprietary claims against the defendant. Her claim for nominal maintenance is dealt with thereafter.

The first main claim for a division of the joint estate

[30] J Heaton: South African Family Law (3rd ed) p103 explains the principle of immutability in South African matrimonial property law as follows:

> *'Until the commencement of the Matrimonial Property Act 88 of 1984, the immutability principle applied in our matrimonial property law. This meant that once a marriage had been entered into, the matrimonial property system chosen by the spouses remained fixed and could not be changed. (*Union Government (Minister of Finance) v Larkan *1916 AD 212;* Honey v Honey *1992 (3) SA 609 (W).) This rule had serious disadvantages as it often happens that the financial position of spouses changes to such an extent during their marriage that the system they initially chose becomes totally inappropriate. For this reason, the legislator relaxed the immutability principle in the Matrimonial Property Act by creating several mechanisms for effecting a postnuptial change of the matrimonial property system.*
>
> *Firstly, for a limited period, which has expired, certain spouses were permitted to incorporate the accrual system into their marriage out of community of property simply by concluding a registered notarial contract…*
>
> *Secondly, in limited circumstances, the court has the power to order the immediate division of the spouses' matrimonial property and to change the couple's matrimonial property system at the request of one of the spouses. Section 20 of the Matrimonial Property Act empowers the court to order the immediate division of the joint estate and to change the spouses' matrimonial property system if the conduct of one of them seriously prejudices or will seriously prejudice the interests of the other spouse in the joint estate. Section 8 of the Act confers a similar power on the court in respect of immediate division of the accrual…*
>
> *The last mechanism for alteration of the matrimonial property system which the Matrimonial Property Act introduced is the joint application to court in terms of section 21(1) for permission to change the matrimonial property system…'*
>
> [emphasis supplied]

[31] Having married during 1998, the proprietary consequences of the parties' marriage are governed by the Matrimonial Property Act 88 of 1984 (*'the Act'*) which came into effect on 1 November 1984, and more particularly s 2 thereof, which provides that:

> *'**2. Marriages subject to accrual system.**—Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, except in so far as that system is expressly excluded by the antenuptial contract.'*

[32] Because of their choice of matrimonial property system at the commencement of the marriage as well as the facts of this matter, the plaintiff, in order to protect her rights under the June 2004 agreement, could obviously not have invoked the remedies provided in s 20 (i.e. the immediate division of a joint estate) or s 8 (i.e. the immediate division of the accrual whether in accordance with the antenuptial contract or on any other basis that the court may deem just). The only step that she could have taken under the Act, and only with the full co-operation of the defendant, is that contained in s 21(1), namely:

> *'**21. Change of matrimonial property system.**—(1) A husband and wife, whether married before or after the commencement of this Act, may <u>jointly</u> apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that—*
> *(a) there are sound reasons for the proposed change;*

(b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and

(c) no other person will be prejudiced by the proposed change,

order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit.'

[emphasis supplied]

[33] However, because the parties never applied to court as envisaged in s 21(1), the plaintiff is hit by the immutability principle and is left without any remedy to enforce the June 2004 agreement. The absurdity of this consequence is demonstrated *inter alia* by the decision in *Honey v Honey* 1992 (3) SA 609 (W). In that case the parties were married out of community of property by antenuptial contract, but with the inclusion of the accrual system. They thereafter concluded a postnuptial contract which purported to exclude the accrual system. Although notarially executed, the postnuptial contract was not sanctioned by court order in terms of s 21(1). The wife later instituted divorce proceedings and the court found that the postnuptial contract was invalid and unenforceable, not only against third parties but also *inter se*, because the immutability principle trumps, and renders void, any postnuptial variation of a matrimonial property system not sanctioned by court order under s 21(1) of the Act.

[34] The absurdity of the effect of the current legislative scheme is also highlighted by the following. First, for marriages concluded out of community of property by antenuptial contract prior to 1 November 1984, spouses have the statutory

remedy of s 7(3) of the Divorce Act 70 of 1979 (which was initially added by s 36(b) of the self-same Matrimonial Property Act). This remedy recognises and entrenches the *'just and equitable'* principle and allows a court, on certain grounds, to order a redistribution of assets between spouses on divorce. By contrast, as correctly pointed out by J Sinclair: The Law of Marriage (vol 1) p200, this judicial discretion has at the same time been dispensed with for civil marriages concluded by antenuptial contract with the exclusion of the accrual system after 1 November 1984. Second, although the s 7(3) remedy is not available to parties to such a marriage, in *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) at para [44] it was held that it is effectively available to those who conclude customary law marriages, irrespective of the date of such a marriage. Third, the Supreme Court of Appeal in *Butters v Mncora* 2012 (4) SA 1 (SCA) recognised that, even where parties cohabit but never marry, a tacit universal partnership may be found to exist. Therefore, a party to such a relationship could be in a better position than one who has concluded a civil marriage after 1 November 1984 by antenuptial contract with the exclusion of the accrual system, as is evidenced by the authorities referred to below.

[35] The *Honey* decision cannot be criticised in the current legislative milieu and was approved in *EA v EC* [2012] ZAGPJHC 219 (25 October 2012) at para [11] within the context of a claim based on a tacit universal partnership. Similar findings have been made in *JW v CW* 2012 (2) SA 529 (NCK) at para [29], cited with approval in *Smalberger v Stols* [2012] ZAECPEHC 80 (13 November 2012).

[36] In *JW v CW* the court held at para [29] that:

> *'The problem is, however, that the alleged agreement* [of a tacit universal partnership] *would in my view have amounted to a revocation, or at the very least an amendment, of the very essence of the antenuptial contract in this case. That could not have been done, even with* "the mutual consent of the parties" *without an order of court.'*

[37] The result is that because the plaintiff: (a) married the defendant; (b) after the commencement of the Act; (c) out of community of property by antenuptial contract with the express exclusion of the accrual system; and (d) received wrong legal advice about how to change the parties' matrimonial property system pursuant to an express agreement reached during the marriage, the current legislative scheme prevents this court from coming to her assistance. To my mind this flies in the face of the equality principle enshrined in s 9 of the Bill of Rights, and provides a classic example of how a party to a civil marriage can be unfairly discriminated against purely on the arbitrary basis of the date of that marriage. The plaintiff has not attacked the constitutionality of the Act, but it seems to me that legislative reform is required to bring our matrimonial property law in line with the Constitution. That having been said, I am left with no option but to dismiss the plaintiff's claim on this ground.

The alternative to the first main claim, i.e. to 50% of the value of the defendant's estate

[38] This claim is premised on the allegation in the plaintiff's pleadings that in the June 2004 letter the defendant promised her one half of the value of his estate if she resumed the marriage relationship with him, alternatively that he would share his estate equally with the plaintiff, so it would seem, with no strings attached.

[39] There are various fundamental difficulties with this claim. First, it is not supported by the content of the June 2004 letter itself, which makes it clear that it was rather the defendant's intention to entice the plaintiff to return to him with an offer to change the parties' matrimonial property system to that of community of property. This is what the plaintiff accepted. Second, the claim is not supported by the plaintiff's own testimony. While I accept that she had no assets at the time of the June 2004 agreement, this does not translate into an agreement that she would only ever share in the defendant's estate, and that he would never at any stage in the future share in hers.

[40] Third, even if one could conceivably stretch the defendant's offer to the extent proposed by the plaintiff, he never offered her value *per se*, but rather an effective equal share in assets, and, logic dictates, liabilities.

[41] It was submitted on behalf of the plaintiff that there is a difference between an agreement to change the matrimonial property regime and an agreement reached *stante matrimonio* that one spouse will share in the assets, or estate, of

the other. However, for the reasons already given, the plaintiff has failed to prove the existence of any such agreement; and her claim for 50% of the value of the defendant's estate must thus also fail.

The second claim for a declaration of the existence of a partnership

[42] This claim is advanced as an alternative to the first main claim. It is premised on the allegation that during the marriage the parties commenced for their joint benefit a business buying and selling immovable property and that *'to facilitate this* [they] *entered into a tacit partnership agreement'*. The claim as pleaded was not based on the June 2004 agreement, although it was the plaintiff's evidence that the property deals embarked upon were in pursuance of the spirit of that agreement. This evidence is consistent with the plaintiff's failure to distinguish in her testimony between the June 2004 agreement and any other agreement which the parties might separately have reached.

[43] The essential elements of a partnership are that: (a) each party contributes, or undertakes to contribute, money, labour or skill; (b) the business of the partnership is conducted for their joint benefit; and (c) the purpose is to make a profit: *Butters* at para [11].

[44] The plaintiff, understandably, relies on a purely commercial partnership or enterprise. If she had contended that the property deals formed part of a universal partnership, she would similarly have been non-suited by the immutability principle, as was held in *EA v EC*, *JW v CW* and *Smalberger v Stols*.

[45] Again, the plaintiff faces certain fundamental difficulties with this claim. First, the evidence has established an agreement concluded during June 2004 that the parties would henceforth have a joint estate. That being the case, they would share equally in the profits and losses of that *'estate'.* An agreement in these terms is entirely inconsistent with an alleged later agreement to form a separate, stand alone partnership in terms of which profits (and losses) would be equally shared. Indeed, it is difficult to understand why, on the proven facts, the parties would ever have considered it necessary to conclude such a separate partnership agreement.

[46] Second, the plaintiff's case as pleaded was not supported by her testimony in a material respect. She had alleged that the parties contributed their *'labour, services and skills'* in equal shares to the former common home in Skeerpoort as well, which the defendant had already acquired in 2002. This was one of the two immovable properties to which he had referred in his letter to the plaintiff of June 2004. The plaintiff had also alleged that the parties expended a sum of approximately R250 000 on improvements to that property. However the plaintiff's evidence revealed that her only *'contribution'* to the property had been to find a purchaser when it was sold during 2006 without her taking any commission. Her evidence was further that she had only referred to this property in a schedule produced by her during her testimony because the defendant had offered her one half thereof in his letter of June 2004. Furthermore, the clear tenor of her evidence regarding the three properties acquired during 2006 was

that they were purchased pursuant to the June 2004 agreement, and not as a result of a specific, separate agreement.

[47] Any suggestion that the agreement to enter into such a partnership constituted a tacit term of the June 2004 agreement would be futile. In *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd and Others* 2008 (3) SA 544 (SCA) at para [12] it was held that:

> *'A tacit term is*
>
> *an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances.* [Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration *1974 (3) SA 506 (A) at 531H*].
>
> *As the inference is also drawn from the express terms of the agreement between the parties it is hardly imaginable that a term contrary to the valid, express terms would be inferred…'*

[48] Put simply, the plaintiff's alternative claim based on a tacit partnership agreement is neither supported by the terms of the proven agreement nor by the objective facts, irrespective of whether the equities lie with the plaintiff. In *Northern Estate and Trust Administrators v Agricultural and Rural Development Corporation* (117/13) [2013] ZASCA 174 (28 November 2013) it was again stressed at para [13] that in order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended, and did in fact, contract on the terms alleged. This the plaintiff failed to do. It follows that this claim must also fail.

The third claim for payment of R135 000

[49] It is not in dispute that the defendant offered to purchase the plaintiff a vehicle (one choice being a Toyota RAV) in his letter of June 2004. The evidence established that the plaintiff accepted that offer in addition to the offer to form a joint estate; and that the defendant thereafter purchased the Toyota RAV and registered it in the plaintiff's name. It is also common cause that when the plaintiff sold the vehicle during 2008, at least R135 000 of the sale proceeds were paid over by her to the defendant.

[50] In his plea in relation to this claim, the defendant denied that he had made a donation to the plaintiff which was capable of acceptance by her. This stance was neither canvassed nor advanced in any way during the trial and I accept that it was abandoned. The defendant rather adopted the position that, despite the overwhelming evidence to the contrary, he nonetheless intended retaining ownership of the vehicle at all times.

[51] I have already canvassed the evidence on this aspect and it is not necessary to repeat it. What should be mentioned however is the plaintiff's evidence that during the four month separation in 2008 she received no financial assistance from the defendant (although he claimed to have settled a debt incurred by her upon her return). The vehicle was sold during 2008; the plaintiff was not supported financially by the defendant for a period of four months thereafter, or at all since November 2008. The probabilities are thus that the plaintiff has not

benefitted in any way from the amount of R135 000 paid over by her to the defendant.

[52] Further, the defendant never took issue with the plaintiff's testimony that the donation of the vehicle was in addition to the offer about the formation of a joint estate. As matters transpired the joint estate was never legally formed. Donations between parties to a marriage in community of property are invalid and unenforceable (because property cannot pass where everything is owned in common: Boberg's Law of Persons and the Family 2nd ed p186). However, donations between spouses married out of community of property are indeed valid in terms of s 22 of the Act. The defendant cannot have it both ways.

[53] I am accordingly persuaded that the plaintiff is entitled to this leg of the relief sought by her.

The claim for nominal or token maintenance

[54] Ss 7 (1) and (2) of the Divorce Act 70 of 1979 (*'the Divorce Act'*) provide that:

> *'(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.*
>
> *(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the*

> *age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or re-marriage of the party in whose favour the order is given, whichever event may first occur.'*

[S 7(3) is, as already mentioned, not relevant for present purposes.]

[55] The plaintiff has assets to the value of R60 000 (a 2000 model Audi motor vehicle and music equipment) and liabilities of R94 354. It should be noted that of these liabilities, R54 000 is a loan from her current boyfriend. There was no indication from the evidence that the boyfriend would not at some stage call upon the plaintiff to pay back this loan. There was furthermore no evidence as to the permanency of the plaintiff's relationship with her current boyfriend, although the defendant himself volunteered during his testimony that the plaintiff has left her current boyfriend once before. On this basis I accept that the loan of R54 000 should be regarded as a liability in the plaintiff's estate. The plaintiff's liabilities thus exceed her assets to the extent of some R34 000.

[56] On the other hand the defendant is the owner of the Plettenberg Bay property. According to him, although the property has a municipal value of R2.5 million it is not worth more than R2 million. He is also the owner of a motor vehicle with a value of R150 000, furniture and fittings (which the defendant valued at 1 March 2013 at R180 000) and has funds in his money market account of R270 000. His

total assets are thus valued at R2.6 million. His only liability is the amount owing on the bond registered over the Plettenberg Bay property of R85 000. His net estate is thus at least R2 515 000.

[57] The plaintiff is currently employed as a partner in an estate agency in Knysna. She earns a monthly salary of R10 000, from which she pays her own secretary's salary of R3 000 per month. In addition she generates an average monthly income of R3 000 as a vocalist. The plaintiff also has a potential projected income by way of a share in the profits earned by the agency of R15 000 per month. This brings the total before tax to an amount of R25 000 of which at least R15 000 is uncertain. Her current monthly expenditure is R10 348, but excludes a host of items such as provision for retirement, clothing, comprehensive medical cover, maintenance or replacement of her vehicle, entertainment and holidays. It is clear that she lives frugally and tries to live within her means. This is in stark contrast to the lifestyle she enjoyed whilst living with the defendant. The defendant himself made mention of this lifestyle on a few occasions during his evidence.

[58] The defendant's income consists of the rental from the self-catering unit which averages R9 000 per month, as well as interest on the funds in the money market account of approximately R300 per month. As previously mentioned, his testimony was that his expenses far exceed his income, although he did not testify about these expenses. His evidence was however that he is in the process of securing other homes in the area to rent on a holiday letting basis at a

commission of about 15% of the rental charged which, according to him, should provide him with a decent income.

[59] The plaintiff accepts that at present the defendant is unable to contribute towards her maintenance in any meaningful way. However she contends that, having regard to the factors in s 7(2) of the Divorce Act, the defendant should be ordered to pay to her nominal maintenance of R1 per month. This would enable her to approach the maintenance court if she is no longer in a position to earn income, or if the defendant's financial situation improves. Of course, it is not only the defendant's income which must be taken into account in such an enquiry, but also his assets.

[60] In *Schutte v Schutte* 1986 (1) SA 872 (AD) at 882D-E it was held that a spousal maintenance order cannot, in terms of s 7(2), be granted after the dissolution of a marriage. Accordingly, if nominal maintenance is not awarded to the plaintiff upon the granting of a decree of divorce, she will forgo any future claim to such maintenance. In *EH v SH* 2012 (4) SA 164 at para [11] the Supreme Court of Appeal held that public policy demands that a person who cohabits with another should not for that reason alone be barred from claiming maintenance from his or her spouse, and that each case must be determined on its own facts.

[61] In *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA) it was highlighted that where a court is satisfied that the one spouse is entitled to maintenance and the jurisdictional requirements as laid down in s 7(2) have been met, then it is

entitled to make an order which is "just". In *Buttner v Buttner* 2006 (3) SA 23 (SCA), it was stated at para [36] that s 7(2) requires the court to consider the factors listed therein in order to decide, firstly, whether a need for maintenance exists and, if so, by whom and to whom maintenance is to be paid; secondly, the amount to be paid; and thirdly, the period for which it is to be paid. It was emphasized that this does not, however, mean that in the exercise of its discretion in terms of s 7(2), a court is not competent to make an award of token maintenance, provided of course that the circumstances of the case render it just in light of the factors set out in s 7(2).

[62] I have already dealt with the existing and prospective means of each of the parties, as well as their respective earning capacities, financial needs and obligations. It is clear that the plaintiff has no financial provision for her retirement. She is almost 45 years old and the defendant is 55 years old. The parties lived together for most of the first ten years of their marriage and have been separated for the past 5 ½ years. Their standard of living during the marriage is highlighted by the contents of the defendant's own letter of June 2004. Although they cannot be described as wealthy, the parties certainly had an above average lifestyle, which included both a home and a holiday home in a sought after area, the stabling of horses and overseas trips. The defendant's conduct during the marriage was at times reprehensible. The parties' failure to invoke the remedy provided in s 21(1) of the Act, for reasons that cannot be laid at the door of the plaintiff, has resulted in severe prejudice to her. There was never a suggestion that the plaintiff had acted in anything but good faith in

resuming the marriage relationship in June 2004 on the strength of the promises and undertakings made to her by the defendant. To my mind, it would be grossly unjust to refuse the plaintiff token maintenance in these circumstances, and this claim must thus succeed.

Costs

[63] S 10 of the Divorce Act provides that:

> *'In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just and the court may order that the costs of the proceedings be apportioned between the parties.'*

[64] Although the plaintiff has only been partially successful in her claims, the other side of the coin is that the defendant has throughout this litigation adopted the attitude that the plaintiff is entitled to nothing at all. Much of the evidence led in respect of the unsuccessful claims was in any event relevant to those in which the plaintiff has succeeded. The award of nominal maintenance in her favour is a significant one. There is no doubt that the plaintiff would have walked away from this marriage with nothing had she not pursued this litigation. Having regard to the aforegoing, as well as all of the circumstances of this case, in the exercise of my discretion I consider it just that the defendant must bear the costs of this action.

Conclusion

[65] **In the result the following orders are made:**

1. **A decree of divorce is granted.**
2. **The defendant shall pay to the plaintiff the sum of R135 000 (one hundred and thirty-five thousand rands) together with interest thereon *a tempore morae* from date of service of the summons herein (i.e. 22 May 2009) until date of payment.**
3. **The defendant shall effect payment of maintenance in respect of the plaintiff personally in the sum of R1 (one rand) per month until her death or remarriage, whichever occurs first. To the extent that it may be considered necessary, the plaintiff is granted leave to approach a court of competent jurisdiction for an increase in such maintenance on good cause shown.**
4. **The balance of the plaintiff's claims are dismissed.**
5. **The defendant shall effect payment of the plaintiff's costs in these proceedings on the scale as between party and party as taxed or agreed, save for any prior costs orders which the plaintiff has been ordered to pay, and the defendant shall also bear the travel and accommodation costs of the plaintiff's counsel for attending the trial in Cape Town during March 2014.**

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J I CLOETE