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Republic of South Africa

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

Case No: 18159/2013

Before: The Hon. Mr Justice Binns-Ward
Dates of hearing: 19-22 February 2018
Date of judgment: 12 March 2018

In the matter between:

T. N.	Plaintiff
and	
N. G. (formerly) N. (now G.)	First Defendant
N. G. N. N.O.	Second Defendant
G. F. R. N.O.	Third Defendant
T. N. N.O.	Fourth Defendant
THE MASTER OF THE HIGH COURT	Fifth Defendant

Judgment

[1] In this action the plaintiff claimed a decree of divorce dissolving her marriage with the first defendant.[1] She also sought personal maintenance and orders relating to the care, guardianship and maintenance of the minor child born of the marriage, S..

[2] It was common ground that the parties' marriage relationship has broken down irretrievably. During the trial the first defendant made an open tender in respect of the care and maintenance of S., essentially in accordance with the terms of the relief that had been sought in that respect in the summons. Also during the trial, the plaintiff abandoned her claim for personal maintenance, save for the matter of her accommodation expenses until the proprietary consequences of the dissolution of the marriage have been determined and implemented. In that regard too the first defendant made an open tender during the trial.

[3] The plaintiff also sought certain relief related to the M. M. N. Family Trust (IT [...]) and the S. N. Family Trust (IT [...]). It was in that connection that second to fifth defendants were joined as parties to the proceedings. Early in her case the plaintiff informed the court that she was not persisting in seeking that relief. No more therefore needs to be said about it.

The plaintiff's claim in terms of s 6(3) of the Matrimonial Property Act 88 of 1984

[4] In the result the only substantive matter remaining in dispute that required determination bore on the operation of the accrual system for the purpose of settling the proprietary consequences of the divorce. The matter in issue was the value of the first defendant's estate at the commencement of the marriage.

[5] The parties were married out of community property by antenuptial contract. The contract provided as follows in the pertinent respect:

> 2. The accrual system referred to in Chapter 1 of Act 88 of 1984 ("the Act") [the Matrimonial Property Act] (but excluding any amendments thereto) shall apply to the intended marriage between the parties.
>
> 3. For the purposes of Section 6 of the Act the nett values of the estates of the parties at the commencement of their intended marriage are hereby declared to be as follows;

[1] It emerged during the evidence that subsequent to the commencement of the action the first defendant has changed his surname from Nongogo to Guzana.

3.1 That of **N.** [the first defendant] R3 000 000 and Estate does not include assets inherited and Professional Businesses e.g. Legal Practice are equally excluded as part of the estate (*sic*).

3.2 That of **T.** [the plaintiff] R650 000.

[6] Section 6 of the Matrimonial Property Act provides as follows insofar as currently relevant:

> **6. Proof of commencement value of estate.—**
>
> (1) Where a party to an intended marriage does not for the purpose of proof of the net value of his estate at the commencement of his marriage declare that value in the antenuptial contract concerned, he may for such purpose declare that value before the marriage is entered into or within six months thereafter in a statement, which shall be signed by the other party, and cause the statement to be attested by a notary and filed with the copy of the antenuptial contract of the parties in the protocol of the notary before whom the antenuptial contract was executed.
>
> (2) …
>
> (3) An antenuptial contract contemplated in subsection (1) or a certified copy thereof, or a statement signed and attested in terms of subsection (1) or a certified copy thereof contemplated in subsection (2), serves as *prima facie* proof of the net value of the estate of the spouse concerned at the commencement of his marriage.
>
> (4) The net value of the estate of a spouse at the commencement of his marriage is deemed to be nil if—
>
> (*a*) the liabilities of that spouse exceed his assets at such commencement;
>
> (*b*) that value was not declared in his antenuptial contract or in a statement in terms of subsection (1) and the contrary is not proved.

[7] In paras. 22.5 and 22.6 of her particulars of claim, as amended, the plaintiff pleaded as follows:

22.5 The plaintiff avers that the declared net value of the first defendant's estate at the commencement of the marriage contained in the antenuptial contract was incorrect and that such net value was no more than R750 000 as at the date of the conclusion of the antenuptial contract and/or the marriage.

22.6 The plaintiff accordingly avers that any accrual calculation in terms of section 4 of the Matrimonial Property Act … ("the MPA") must be based on the fact that the net value of the first defendant's estate as recorded in the antenuptial contract and/or at the commencement of the marriage was and ought to have been no more than R750 000,

> and the plaintiff intends leading evidence to rebut the prima facie value of R3 000 000.00 contained in the antenuptial contract, as per section 6(3) of the MPA.

Arising out of those allegations the plaintiff sought the following relief in prayer 6 of her summons (as amended):

> Implementation of the provisions of the Antenuptial contract between the parties taking into account the actual net value of the first defendant's estate as set out in paragraphs 22.5 - 22.6 above; and insofar as might be necessary rectifying the antenuptial contract by deleting the sum of R3 000 000 in clause 3.1 thereof and substituting it with the sum of R750 000.

She also included the customary prayer for 'further and/or alternative relief'.

[8] Close attention to subsections 6(1) and (3) of the Matrimonial Property Act shows that read together they are ineptly worded. If read literally the antenuptial contract referred to in the opening phrase of s 6(3) would appear to cross-reference to an antenuptial contract in which a party has not made a declaration of value, for that is the type of antenuptial contract with which s 6(1) deals. But such a reading, which was applied in *Jones and another v Beatty NO and others* 1998 (3) SA 1097 (T), at 1100I-J, calls into question the very purpose of s 6(3). The unhappy wording of the provisions has given rise to conflicting judgments on their proper construction.

[9] *Olivier v Olivier* 1998 (1) SA 550 (D) concerned a case in which both of the parties had declared in their antenuptial contract that the commencement values of their respective estates were nil. In the subsequent divorce proceedings, in which the wife sought implementation of the accrual system by payment to her by her husband of half of the difference between the accrued value of her estate and the accrued value of his estate, the husband pleaded that he had in fact been possessed of an estate of value at the commencement of the marriage and, relying on s 6(3) of the Matrimonial Property Act, sought an order declaring that his estate had shown no accrual, alternatively a lesser accrual than that of his wife.

[10] PC Combrinck J held that there was no basis in law for the husband's invocation of s 6(3). The learned judge found that s 6(3) was of no application in a case where the parties had expressly declared the value of their estates. He held that a declaration of value in an antenuptial contract was contractually binding and conclusive, at least *inter partes*. Accordingly, if the declaration was not correct it could be attacked only on the well-recognised grounds of misrepresentation, duress, undue influence etc. Rectification could also be sought if the declaration had been incorrect due to common

error. Combrinck J concluded that s 6(3) was only for the benefit of third parties, such as heirs, who might have an interest in impugning the asset values stated in an antenuptial contract or postnuptial statement.

[11] Buys J, however, interpreted the provisions differently in *Thomas v Thomas* [1999] 3 All SA 192 (NC). That matter concerned an opposed application to amend a pleading in a divorce action in which the plaintiff had initially admitted that the net value of his estate at the commencement of the marriage had been as recorded in the parties' antenuptial contract. The proposed amendment involved the withdrawal of the aforementioned admission. It was predicated on the recent realisation by the plaintiff that the stated values of two farms that had been recorded in the contract as being part of his assets had in fact been materially understated. The learned judge identified that the matter raised the antecedent question whether the net values of the spouses' assets as recorded in their antenuptial contract constituted conclusive proof thereof, or whether, by reason of s 6(3), it was merely prima facie proof; in other words, a stated value that was amenable to correction or rebuttal.

[12] The judge undertook a contextual assessment of the purpose of s 6 within the scheme of the accrual system provided for in terms of ss 2 to 4 of the statute. He concluded that it was clearly evident that the provision for stating the net asset values of the parties' estates in an antenuptial contract providing for the accrual system or in a statement made after the marriage as provided in s 6(1) was to serve as proof of such values. He considered, however, that the effect of s 6(3) was that the probative effect of such declarations or statements was to be only prima facie, and therefore subject to rebuttal by any interested party. Such 'interested party' might include either of the spouses or any legally interested third party. The learned judge considered that when the parties to a marriage declare the values of their respective estates at the commencement of the union for the purposes of the accrual system they are not reaching agreement on such values, but merely fixing and recording a value that both of them accept will stand as prima facie proof thereof.

[13] The judgments in both *Olivier* and *Thomas* found that sensible effect could not be given to s 6 on a strictly literal reading. They both found that the words '*contemplated in subsection (1)*' in s 6(3) had been inserted per *incuriam*. In consequence, both judgments declined to follow the construction of the provision applied in *Jones* supra. I find myself in respectful agreement with those findings.

[14] On the point of difference between the two judgments I am in essential agreement with the judgment of Buys J, and respectfully disagree with the construction in *Olivier* that s 6(3) is only for the benefit of third parties when the commencement values have been stated in an antenuptial contract.

[15] In my view it is evident when one considers the provisions of chapter I of the Matrimonial Property Act as a whole that the legislature contemplated a system of accrual determined by objective criteria, save where the parties might otherwise contractually agree – for example by agreeing that an inheritance should be included in the calculation of an accrual, rather than excluded as is the default position in terms of s 5. The accrual system as provided for in terms of the chapter works on the basis set out in ss 2-5 of the Act.[2] Section 4 provides in general terms that '[t]*he accrual of the*

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[2] Sections 2 to 5 provide:

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.
3 Accrual system
(1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.
(2) Subject to the provisions of section 8 (1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.
4 Accrual of estate
(1) (a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.
(b) In the determination of the accrual of the estate of a spouse-
(i) any amount which accrued to that estate by way of damages, other than damages for patrimonial loss, is left out of account;
(ii) an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;
(iii) the net value of that estate at the commencement of his marriage is calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the weighted average of the consumer price index as published from time to time in the Gazette serves as prima facie proof of any change in the value of money.
(2) The accrual of the estate of a deceased spouse is determined before effect is given to any testamentary disposition, donation mortis causa or succession out of that estate in terms of the law of intestate succession.
5 Inheritances, legacies and donations excluded from accrual
(1) An inheritance, a legacy or a donation which accrues to a spouse during the subsistence of his marriage, as well as any other asset which he acquired by virtue of his possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of his estate, except in so far

estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage'. Its more specific provisions provide for what is ordinarily to be included in or left out for the purposes of determining the accrual and how the effect of inflation is to be accommodated in calculating the accrual. The respective net values at the commencement and dissolution of the marriage are matters of objective fact, not matters to be determined by agreement. It is not open to the parties by means of a declaration to invent the objectively determinable facts by declaring or stating fictitious values. The way in which they are entitled *by agreement* to alter the ordinary operation of the accrual system is by excluding or including specified types of assets that ordinarily would be included or excluded in terms of the statute for the purpose of determining the respective accruals; *not* by misrepresenting or misstating the objectively determinable commencement values.

[16] The object of s 6, as its sub-heading proclaims, is to regulate and facilitate *the proof* of the commencement values of the spouses' respective estates. It affords an evidential status to the declaration by the parties in their antenuptial contracts or their postnuptial statements of the commencement values of their respective estates. Having regard to the very lengthy period that will often intervene between the commencement and the ending of a marriage, and the evidential difficulties that are therefore often likely to arise in regard to the proof of the commencement values of the spouses' respective estates, the statutory provision of various presumptions was only sensible and pragmatic.

[17] However, as indeed identified by Buys J in *Thomas*, it is clear from the absence of any practical distinction between a 'statement' in terms of s 6(1) and a declaration in the body of an antenuptial contract that the legislature did not intend a declaration in an antenuptial contract to have binding contractual effect regardless of the objectively determinable facts. Furthermore, as also pointed out by Buys J, the evident legislative intention in s 6(3) is underscored by the provisions of s 6(4)(b), which permit of a

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as the spouses may agree otherwise in their antenuptial contract or in so far as the testator or donor may stipulate otherwise.
(2) In the determination of the accrual of the estate of a spouse a donation between spouses, other than a donation mortis causa, is not taken into account either as part of the estate of the donor or as part of the estate of the donee.

negation of the prima facie deeming effect of a failure by the parties to declare the commencement value of their respective estates.

[18] The very evident intention is that whatever might have been declared, or not declared by the spouses, it should always be open to any interested party (including the spouses themselves) to prove the actual commencement values of their respective estates. And that if such party should succeed in doing so, the proven actual value would prevail against the declared, stated or deemed value.

[19] In the result the submission by Ms *Segal*, who appeared for the defendants, that it was incumbent on the plaintiff to seek and obtain the rectification of the parties' antenuptial contract to be able to challenge the declared commencement value of the first defendant's estate cannot be sustained. Nonetheless, the plaintiff bore the onus of proving her contention that the declared commencement value of the first defendant's estate was in an amount different from the declared value. The effect of s 6 is that the declared value is presumed to be correct unless proved otherwise.

[20] Despite having been legally represented in the matter until two months before the trial, the plaintiff does not appear to have prepared herself well for the task of discharging the onus of proving her allegations. She was able to substantiate her claim only on the basis of her very generalised testimony and she was not equipped by trial particulars or discovered documents to challenge the countervailing evidence of the first respondent by effective cross-examination. It does seem possible that the commencement value of the first defendant's estate may have been overstated at R3 million, but I am unable to find on a balance probability that this has been proven to be actually so.

[21] The plaintiff succeeded in establishing that the property at Fort Beaufort owned by the first defendant at the commencement of the marriage had been inherited from his mother, and therefore fell, in terms of the antenuptial contract, to be excluded from the declared value. She also succeeded in establishing by way of her own evidence and concessions extracted from the first defendant under cross-examination that there was no net value in the property at Bellville registered in his name at the time because it was fully bonded. The net value of a two-bedroomed apartment that the defendant owned in Rondebosch, and which he had purchased for approximately R240 000 six years earlier with a mortgage loan, is also unlikely to have exceeded R500 000. The

BMW motor vehicle that he drove was leased by the law practice in which he is a partner. To the extent that it represented any value in his estate, which is doubtful, it was in any event excluded from the computation by the terms of the antenuptial contract. Making allowance for some furniture and the value of an old Mazda bakkie that he had purchased for R45 000 and to which he had effected some improvements, one is still left with an approximate sum far short of the declared total net value of the first defendant's estate.

[22] The first defendant testified, however, that the balance of his estate at the commencement of the marriage had comprised of approximately R1 million that he held in cash, a share portfolio that obviously constantly varied in value with movements on the stock market, but to which he ascribed, based on vague recollection, a value of about R650 000, and a provident fund investment and two retirement annuities about which he was unable to provide meaningful particularity, but which, for all one knows, might have brought the net value of his estate up to the declared value of R3 million.

[23] Had the plaintiff been properly prepared for trial she would have been in a position either to realise that her claim was misconceived, or to effectively deal with the first defendant's vague and unsubstantiated evidence. She was not. In consequence she failed to discharge the onus with which she was burdened. By contrast, the vagueness of the first defendant's evidence could not redound against him because he bore no burden of proof.

[24] The plaintiff's claim predicated on the allegations in para. 22.5 and 22.6 of her particulars of claim therefore cannot succeed. The prima facie probative effect of the declaration by the first defendant in the parties' antenuptial contract of the commencement value of his estate has not been rebutted.

The quantification of the accrual claim by a referee appointed in terms of s 38 of the Superior Courts Act 10 of 2013

[25] An accrual claim sounding in money was not part of the plaintiff's case. She merely asked for an order directing that the accrual system be implemented on the basis of a determination that the commencement value of the first defendant's estate was R750 000, and not R3 million, as declared. Such an order, without more, would, in the absence of an agreed accounting and settlement between the parties, necessitate further

litigation to determine the amount of the monetary payment to be made in implementation of the order and by which of the parties it fell to be made.

[26] It has in fact even been debated whether a claim for payment in terms of the accrual system can properly be entertained as part of a divorce action. Section 3 of the Matrimonial Property Act provides that the claim arises at the dissolution of the marriage, which implies that it may be made only after a divorce order has been granted. It was for that reason that Olivier J held in *Le Roux v Le Roux* [2010] JOL 26003 (NCK) that the plaintiff was not entitled to proceed with her claim for payment under the accrual system as part of the divorce proceedings. However, that approach was distinguished on grounds of pragmatism (or as it was expressed in the judgment by Sutherland J, '*for policy reasons*') in *JA v DA* 2014 (6) SA 233 (GJ). In the latter matter, after referring to the judgment in *Le Roux*, the learned judge proceeded as follows at para. 19-20:

> … If applied literally, this means that a litigant must engage in two distinct actions, the first for divorce and the second for an order pursuant to s 3 of the MPA.
>
> [20] Without challenging the correctness of the finding that enforceability must await the date of dissolution, it does not seem to me inappropriate to sue for both a divorce and an order pursuant to s 3 of the MPA in a single action, in which the accrual order is made dependent upon the granting of a divorce order. For policy reasons, if no other, and the obvious saving of costs and avoidance of delay, the double-barrelled approach is preferable, a view shared by Olivier J but which he reluctantly disavowed because of what, in his view, would be infidelity to the provisions of s 3. The pleading of circumspect prayers could probably overcome that danger of infidelity. Practical factors alone ought to determine whether any post-dissolution revisions to provisional calculations become necessary.

[27] The remarks from Sutherland J's judgment in *JA v DA* quoted above were obiter, as the sole question in the case was the date upon which the exit values of the parties' estates fell to be calculated for accrual purposes. The question was whether it was the date on which the divorce order was granted, or on which pleadings in the divorce action closed. The quoted remarks were, however, nonetheless mentioned with approval by Tsoka AJA, also in an obiter dictum, in *AB v JB* 2016 (5) SA 211 (SCA), at para 19.[3]

[3] Also reported on SAFLII *sub nom Brookstein v Brookstein* [2016] ZASCA 40.

[28] The issue whether the accrual claim can be determined within the ambit of the divorce proceedings arises squarely in the current case because, notwithstanding the position on the pleadings described earlier,[4] the first defendant's counsel handed up a draft order that provided for the appointment of a referee in terms of s 38 of the Superior Courts Act 10 of 2013 to attend to the calculation of the accrual award. The plaintiff, during her evidence, consented to the appointment of a referee for this purpose, as proposed. The parties by their conduct thereby signified that they wanted the accrual claim determined within the ambit of the divorce action. The implication must follow because any matter referred by a court to a referee in terms of s 38 must relate to a question for determination in the proceedings pending before the court that directs the referral. This is so because the referee's findings fall to be adopted as findings by the court '*in the proceedings in question*'[5], and may be the basis of a consequent order.[6] As mentioned, the alternative would be for fresh proceedings to be instituted to decide the question.

[29] I consider that in the peculiar circumstances it would be to inappropriately elevate form above substance to decline to decide the case in accordance with the parties' common desire to have the accrual claim determined only because the pleadings have not been brought formally into line with it. I respectfully agree with the approach enunciated in *JA v DA* supra, loc. cit., and for the reasons stated there. In the circumstances I am willing to accede to the parties' request that the order to be given at this stage of the proceedings should incorporate a referral of the matter of the quantification of the accrual claim to a referee for enquiry and report in terms of s 38 of the Superior Court Act. Granting such an order would be covered by the prayer for 'further relief'. The referee's appointment will be regulated substantially in accordance with the proposal set out in the draft order handed up by the first defendant's counsel.

Costs

[4] At paragraph [25] above.

[5] See s 38(2) of the Superior Courts Act.

[6] An informative discussion of the history of the procedure currently provided for in s 38 of the Superior Courts Act and of the juristic character of the referee's role is to be found in *Wright v Wright and Another* [2012] ZAGPJHC 250; 2013 (3) SA 360 (GSJ).

[30] Ms *Segal* argued that the plaintiff should be ordered to pay the first to third defendants' costs of suit. I am not persuaded, however, that such an unqualified order would be fair or just in the circumstances.

[31] Costs fall to be decided judicially in the exercise by the court of a broad discretion in the strict sense of the concept. The general rule that costs should follow the result does not always work satisfactorily in matrimonial proceedings, and particularly when the interests of the parties' children fall to be addressed as part of the issues for determination. In the current case the contentious issues became very much narrowed only during the course of the trial. So, for example, the matters concerning the care and maintenance of S. were settled by the plaintiff's acceptance of a tender made by the first defendant during the course of the hearing.[7] Appropriate provision for the plaintiff's costs of accommodation pending the final determination of the accrual claim was also made only during the course of the trial. Against that, I take into account that the plaintiff only abandoned her apparently ill-conceived claims in respect of the trusts at the beginning of the trial. The defendant trustees were represented by the same legal representatives as those who represented the first defendant in his personal capacity. And the trusts are of the sort that have been labelled as 'family trusts'.[8] It does not seem to me that the claims against the trustees would have contributed materially to the overall costs of the litigation. I think it would also be appropriate, in what were primarily matrimonial and family law proceedings, to take into account the apparent inequality of the financial means of the parties. The first defendant is a well-established senior attorney and self-described entrepreneur, whereas the plaintiff is a middle ranking civil servant dependent upon a comparatively modest salary. She has incurred substantial debt in respect of legal expenses leading up to the trial. To burden her with the liability to pay the first defendant's costs of suit would work unduly harshly in the circumstances and, having regard to her role as primary caregiver, would also probably redound negatively against the material best interests of the parties' minor child.

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[7] Consider the discussion in AC Cilliers, *The Law of Costs* (LexisNexis loose-leaf edition, Issue 36) at §12.11A.

8 *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) at para. 17 and *Land and Agricultural Bank of South Africa v Parker and Others* [2004] 4 All SA 261 (SCA); 2005 (2) SA 77; [2004] ZASCA 56, at para. 25-27.

[32] For these reasons, save in respect of the costs incurred in respect of proceedings on Wednesday 21 February 2018 (with which I shall deal presently), I am disposed to make no order as to costs.

[33] The plaintiff failed to attend court on the third day of the trial. She emailed a doctor's certificate to the court registrar on the morning of 21 February. The certificate stated that the plaintiff was not fit to attend work on that day, but would be able to return to work the following day. The certificate gave no particulars of the nature of the plaintiff's illness and stated that they could be provided only with the patient's consent. The plaintiff, however, made herself uncontactable, and it was not possible to obtain her consent for particulars of the doctor's diagnosis to be obtained.

[34] The court was left with no choice in the circumstances, despite the opaqueness of the explanation for the plaintiff's absence, but to postpone proceedings to the following day. On that day the plaintiff once again failed to appear and the matter was stood down so that the first defendant's attorney might subpoena the doctor who had issued the certificate to attend court that afternoon to give evidence concerning the apparent reason for her absence. In the course of further investigation by the attorney while the matter was standing down, it was discovered that the plaintiff was actually at her place of work in a building less than 100 metres from the seat of the court. It was also learned that she had been there on the previous day, and moreover at the time of the morning when proceedings had been set to resume at the commencement of the third day of the trial. She could therefore as easily have been at court as at her office. Soon after these discoveries had been made, and after the first defendant had obtained an order directing the security personnel at the plaintiff's place of work to attend court to testify in accordance with their surveillance information as to the plaintiff's comings and goings on 21 and 22 February, the plaintiff arrived at court shortly before midday and the hearing was able to be resumed and completed on that day.

[35] The plaintiff endeavoured to explain her absences. I do not find it necessary to go into the particulars. Suffice it to say the explanation was wholly unsatisfactory. There was no reason why the plaintiff could not have attended at court on 21 February, if only to explain that she was not well. She was in the immediate precinct having travelled all the way into the city from Bellville to collect some files on which she was working. Her claim that she had not appreciated that the trial would be continuing on

22 February was risible. Her failure to make any enquiries as to what was to happen as a consequence of her absence on 21 February showed a lack of bona fides.

[36] I have therefore determined that the plaintiff should bear the wasted costs incurred by the first defendant in respect of the aborted hearing on 21 February 2018 and in respect of the attendances of the first defendant's attorney on 22 February 2018 to ascertain her whereabouts.

Order

[37] The following order is made:

1. A decree of divorce dissolving the bonds of marriage between the plaintiff and the first defendant is granted.

2. The plaintiff and the first defendant are declared to be co-holders of full parental responsibilities and rights in respect of the minor child, S. N. ("***the minor child***"), born on […] 2008, as provided for in sub-secs 18 (2) - (5) of the Children's Act 38 of 2005, subject to the provisions of the Parenting Plan ("***the Parenting Plan***") annexed, marked "**X**", to the plaintiff's particulars of claim, save that the word '*mother*' in paragraph 2.1.1 (c) thereof shall be read as '*father*', and save further that the resumption of access to the minor child by the first defendant as provided for in the Parenting Plan shall occur under the supervision of a clinical psychologist jointly appointed by the parties, or failing that, by the facilitator appointed in terms of the Parenting Plan.

3. The first defendant is ordered to contribute towards the maintenance of the minor child as follows:

3.1. By paying to the plaintiff the sum of R6 500.00 (six thousand five hundred rand) per month on or before the first day of the month following the grant of the decree of divorce, and thereafter on or before the first day of each and every succeeding month until the said child attains the age of majority.

3.2. The amount to be paid in terms of paragraph 3.1 above shall be deposited by the first defendant into a bank account designated by the plaintiff in writing, and shall be increased annually on the anniversary date of the

date of the grant of the decree of divorce in line with the annual increase in the consumer price index ('CPI') during the preceding year as published in the Government Gazette from time to time,.

3.3. By retaining the minor child until she attains the age of majority or becomes self-supporting, whichever occurs later, as a dependent on his current medical aid scheme which provides comprehensive cover to the minor child. (The first defendant is ordered to provide the plaintiff with the minor child's medical aid card within 5 (five) days of the date of the grant of this order.)

3.4. Subject to paragraph 4 below, and should the medical expenses incurred in respect of the minor child exceed the limits of the medical aid cover provided for her, by bearing the costs in respect of all medical, dental, surgical, hospital, ophthalmic, orthodontic, ophthalmological and other medical treatment reasonably required by the minor child, including but not limited to sums payable to a physiotherapist, psychiatrist, physician, psychologist, as well as all prescribed pharmaceutical expenses, including chronic medication, incurred on prescription, and the reasonable costs of spectacles and/or contact lenses, provided that, save in the case of emergencies, the plaintiff must first obtain the first defendant's prior approval therefor, which approval shall not be withheld.

3.5. Paying the minor child's primary and high school educational costs, including her school fees at Curro School, or any similar school, as well as the costs of her reasonable extramural activities and the equipment and attire required by her therefor, together with her prescribed school uniforms, prescribed books and stationery, local tours, school excursions and local camps.

3.6. Paying for the minor child's tertiary education fees, as well as board and lodging at such tertiary education institution, if applicable, in the event that the minor child demonstrates the aptitude and desire to pursue any recognised tertiary education qualification, and for so long as the minor child while undergoing such tertiary education is promoted to the next

academic year.

4. In the event that the plaintiff incurs any expenditure by paying for any medical expenses for the minor child upfront in the case of an emergency or when it cannot reasonably be expected of her first to obtain the first defendant's prior approval, and such expenses are not covered by the medical aid cover provided, she shall forthwith provide a copy of the relevant invoice/s and proof of payment to the first defendant via email, who shall reimburse her within five (5) calendar days of presentation of such invoice and proof of payment thereof.

5. In the event of the first defendant ceasing to be a member of his current medical aid scheme during the currency of his obligation under paragraph 3.3 above, he shall ensure that the minor child is at all times, and without interruption, registered as a medical aid beneficiary with equivalent benefits to those currently provided in terms of the comprehensive cover afforded by the medical aid scheme of which he is currently a member and shall be solely responsible for payment of the premiums in respect of such medical aid cover.

6. The parties shall not be precluded from approaching the relevant Maintenance Court for a variation of the maintenance set out in paragraphs 3 to 5 above by virtue of any subsequent change of circumstances after the making of this order.

7. The party whose estate has accrued to a greater extent shall make payment to the other party of half the difference between the accrual in the parties' respective estates, calculated as at the date of the grant of this order, and with regard to the provisions of the antenuptial contract executed by the parties on 8 December 2005.

8. The parties are directed to endeavour to agree upon the calculation of the accrual claim debt (if any) within 30 (thirty) days of the date of this order. In the event that they are unable to reach agreement, then, in accordance with the first defendant's request and the plaintiff's consent:

8.1. A referee shall be appointed (in the manner set out below) in order to enquire into and report to this Court upon the valuation of the parties'

respective estates, and the computation of the accrual claim in accordance with the order made in paragraph 7 above.

8.2. The parties and/or their legal representatives must jointly address a letter to the South African Institute of Chartered Accountants ("***SAICA***"), to which letter a copy of this order must be annexed, requesting SAICA to nominate a chartered accountant with at least 15 years' experience ("***the chartered accountant'***), to act as a referee appointed in terms of s 38 of the Superior Courts Act 10 of 2013, to undertake the calculation of the value of the parties' respective estates and to determine the amount due in terms of paragraph 7 above.

8.3. SAICA must be requested to furnish the parties and/or their legal representatives with the details of the nominated chartered accountant together with a copy of his/her consent to accept the appointment.

8.4. In the event of the chartered accountant's acceptance of appointment failing for any reason, the parties and/or their legal representatives must jointly within 3 days of obtaining knowledge of such failure, follow the steps set out in clauses 8.2 and 8.3 until a successful appointment is obtained; failing which, and if a chartered accountant will not accept appointment, they must both state an account for debatement before the court for the purpose of the determination of the accrual claim in accordance with directions to be obtained on application to the presiding judge in chambers.

8.5. The referee appointed in terms of this paragraph shall have the power to procure the attendance before him or her of either of the parties and of any other person whose evidence is considered by the referee to be relevant and shall have the authority to examine any such person under oath and to require such person or any other person to produce any document or record; and in that connection the provisions of s 38(4) and (5) of the Superior Courts Act 10 of 2013 read with the Uniform Rules of Court in respect of action proceedings shall apply.

8.6. The referee shall file the original of his report of record with the Chief Registrar of the Court and on the same date deliver a copy thereof by

email to each of the parties or their legal representative at the email addresses to be provided by the parties to the referee for that purpose.

8.7. The remuneration of the referee shall be determined by agreement with the parties, failing which the referee shall be entitled to a reasonable remuneration and reimbursement of any reasonably incurred expenditure, such remuneration and expenditure to be subject to taxation by the taxing master as provided for in terms of s 38(6) of the Superior Courts Act.

8.8. Liability as between the parties for the referee's fees shall be determined by agreement between them, failing which agreement, by order of the Court made upon application by either party or the referee within 10 (ten) days of the delivery of the report on reasonable notice to the other party.

8.9. The parties are directed to give effect to the conclusion in the referee's report, provided that either or both of them may instead apply to the Court on notice within 10 (ten) days of the delivery of the report for any order of the nature contemplated in terms of s 38(1) of the Superior Courts Act.

9. Pending the determination and payment of the accrual (if any) as provided for in paragraph 8 above, the first defendant shall, with effect from the date upon which the plaintiff vacates the premises currently occupied by her at 3 Pine Street, Richwood, Bellville, make payment on first day of every month of an amount R10 000.00 by way of a contribution towards the cost of alternative accommodation for the plaintiff during the said period.

10. The plaintiff's claim in terms of s 6(3) of the Matrimonial Property Act 88 of 1984, as set forth in prayer 6 (as amended) read with paragraphs 22.5 and 22.6 of her amended particulars of claim, is dismissed.

11. Save that the plaintiff is ordered to pay the wasted costs incurred by the first defendant arising out of the postponement of the trial on 21 February 2018 and those incurred by him in respect of the attendances of his attorney on 22 February 2018 to ascertain the plaintiff's whereabouts, and save as otherwise might subsequently be ordered in terms of paragraph 8 above,

there shall be no order as to costs.

A.G. BINNS-WARD
Judge of the High Court