
SOUTH AFRICA / JUDGMENT

N.C.O and Another v D.O and Another (A244/2019) [2020] ZAWCHC 35 (12 May 2020) [2020] ZAWCHC 35

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete, L Nuku, E D Wille

CASE / FILE NUMBER

A244/2019

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IN

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

Case

no: A244/2019

Court a quo case numbers: 11045/2013

21628/2014

21629/2014

In

the matter between: N
C
O First
Appellant
APPLE
TREE GUEST HOUSE
CC Second
Appellant
v
D
O First
Respondent/Cross-Appellant
STELLENBOSCH
MUNICIPALITY Second
Respondent

Coram: Justice J Cloete, Justice L Nuku et Justice E D Wille

Heard: 31 January 2020 – supplementary notes delivered on 14 and 26
February 2020
Delivered
electronically: 13 May 2020

JUDGMENT

CLOETE J (NUKU et WILLE JJ CONCURRING):

Introduction

[1] This appeal and cross-appeal are before us with leave granted by the trial court on 28 June 2018. Mrs N C O (as plaintiff) issued summons against Mr D O (as defendant) on 12 July 2013 for a decree of divorce and further relief. After protracted and acrimonious litigation, including two opposed applications by Mr D O to evict Mrs N C O from her residence (‘the Digteby property’) and her guesthouse business (Apple Tree Guest House CC) from another property (‘the P Street property’)[1], the trial court handed down judgment, including the following order, on 15 May 2018:

‘(i) a decree of divorce is granted;

(ii) a property partnership existed between the parties in respect of the Digteby property.

(iii) the property partnership in respect of the Digteby property be liquidated, and that the partnership estate be divided between the parties equally.

(iv) A practicing chartered accountant to be nominated by the chairperson of the South African Institute of Chartered Accountants (which person is hereinafter referred to as “the liquidator”) is hereby appointed to liquidate the partnership and who shall:

- (a) Determine the net value of all the partnership assets as at date of dissolution; and
- (b) To sell or distribute the assets of the partnership between the parties or pay to either party such money as may be necessary so that each party is possessed of assets and/or money equal in value to his/her 50% share of the partnership estate.
- (v) For the purposes of giving effect to paragraph (iii) above, the liquidator shall have the powers and duties as set out in Annexure

“A” hereto. [2]

(vi) The defendant is ordered to pay the plaintiff R15 000.00 per month as maintenance until her death, remarriage or until she commences living with a romantic partner.[3]

(vii) The amount of R15 000.00 shall increase on each anniversary date of the final order of divorce in accordance with such increase as may have occurred in the consumer price index in respect of the Republic of South Africa, as notified by the Director of Statistics or his equivalent for the persons in the middle income group.

(viii) Until such time as the partnership assets have been wound up by the liquidator, the plaintiff shall be entitled to remain in occupation of the Digteby property provided that the plaintiff shall make payment of the mortgage bond instalments over the properties [sic] but which will be credited to the plaintiff's account and taken into account when the partnership is liquidated.

(ix) The eviction application brought under WCHC C/No. 21629/2014 [the Digteby property] is dismissed with costs.

(x) The eviction application in terms of WCHC C/No. 21628/2014 [the P Street property] is postponed sine die. The defendant may reissue the guest house with a fresh notice of termination of authority to occupy the P street property and afford it a reasonable period, not less than 6 calendar months, to vacate the property.

(xi) Should the guest house fail to vacate the P street property after receiving the notice of termination of authority then the defendant may approach this court for an eviction order on the same papers, duly supplemented, if needs be.

(xii) Costs of this divorce action shall be payable by the defendant on a party-party scale.'

[2] On 5 June 2018 the parties delivered their respective notices for leave to appeal. On the same date Mrs N C O brought an application in terms of uniform rule 42, in which she contended that there were various patent omissions in the order of 15 May 2018 and thus sought additional relief. In essence, she asked for the costs of two opposed interlocutory applications in the eviction matters (which the parties agreed in an order granted by Koen AJ on 23 March 2016 would stand over for determination at trial)[4]; declaratory orders that she owns the contents of the Digteby property and that Apple Tree Guest House CC owns those at the P Street

property; and costs of the main action to include those of two counsel as well as the qualifying fees of the three experts appointed

by her, namely Ms Hofmeyr (clinical and industrial psychologist), Professor Terblanche (registered professional valuer) and Mr Charl Du Plessis of Munro Actuaries.[5]

- [3] This application was opposed by Mr D O and on 28 June 2018 the trial court handed down a further judgment in which it varied its earlier order to include the costs of two counsel and the qualifying fees of Ms Hofmeyr and Munro Actuaries. It held that the declaratory orders sought in respect of the contents of the two immovable properties ‘...is an issue best dealt with in an appeal process, given the decision which the Court has made in respect of its finding of property partnerships and the eviction applications’. The balance of the relief was refused and each party ordered to pay their own costs of the application.
- [4] For convenience, and unless otherwise indicated, I will refer to Mrs N C O as ‘the plaintiff’, Mr D O as ‘the defendant’ and Apple Tree Guest House CC as ‘the guest house’. The Stellenbosch Municipality, which was cited as second respondent in the eviction applications, elected not to participate in any of the proceedings and no further reference will be made to it given the conclusion reached hereunder.
- [5] The order granting leave to appeal and cross-appeal purported to limit the grounds of appeal to those contained in the parties’ respective notices.[6] No reasons were provided, but in any event the remarks of Theron JA (as she then was) in *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another*[7] are apposite:

‘[19] At the hearing of this appeal, the court raised a ‘new issue’ with counsel, namely, whether Ms Mkhwanazi’s claim ought to have been based on the *rei vindicatio*. It does not appear that this issue was dealt with by the parties in the high court. It certainly was not addressed in the judgment of the high court. After the hearing of the matter, the parties were invited to make further submissions on whether the claim was vindicatory in nature and whether this ‘new issue’ could be raised at this stage of the proceedings.

- [20] In considering the role of the court, it is appropriate to have regard to the well-known dictum of Curlewis JA in *R v Hepworth* to the effect that a criminal trial is not a game and a judge’s position is not merely that of an umpire to ensure that the rules of the game are observed by both sides. The learned judge added that a ‘judge is an administrator of justice’ who has to see that justice is done. While these remarks were made in the context of a criminal trial they are equally applicable in civil proceedings and in my view, accord with the principle of legality. The essential function of an appeal court is to determine whether the court below came to a correct conclusion. For this reason the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed. In fact, in such a situation the appeal court is bound to deal with it as to ignore it may ‘amount to the confirmation by it of a decision clearly wrong’, and not performing its essential function. This in turn would infringe upon the principle of legality...’

[6] The ‘new’ issue which reared its head during the appeal pertains to the entitlement or otherwise of the defendant to enforce an accrual claim against the plaintiff, if the result on appeal means that the plaintiff’s estate has shown a greater accrual than his estate. Although the trial court found that ‘...the defendant has not pursued an accrual claim against the plaintiff’s estate’, [8] it made no order to this effect. In any event, given the legal position, such an order would not have addressed the salient issue,

namely whether the defendant renounced such a claim as pleaded by the plaintiff. This is what led to an invitation to counsel to deliver supplementary notes, which they duly did. I will return to this later.

[7] Apart from that issue, those central to the appeal and cross-appeal relate to the trial court’s findings in respect of the existence or otherwise of a property partnership; the plaintiff’s personal maintenance entitlement as well as the *dum casta* proviso; the declarators in respect of the contents of the two immovable properties; the eviction applications; and aspects pertaining to costs.

Relevant

Background

[8] The parties were married to each other on 8 December 2001 at Midrand, Gauteng, out of community of property by antenuptial contract incorporating the accrual system specified in Chapter 1 of the Matrimonial Property Act 88 of 1984. At the time the plaintiff, who has years of experience in the hospitality industry, was 50 years old and already financially dependent on the defendant who had set her up in a small tourism business. [9] The defendant was 49 years old and a successful attorney and businessman. No children were born of the marriage.

[9] In the antenuptial contract the plaintiff declared the commencement value of her estate to be R200 000 and the defendant declared his to be R7.5 million although during his testimony he was unable to explain in a cogent manner how he arrived at this figure. [10] In addition each party declared various assets to be excluded from the accrual. Relevant for present purposes is the defendant’s

exclusion of his immovable property at [...] P Street, Stellenbosch (‘the P Street property’).

[10] In January 2003 the defendant received a windfall from one of his business deals and a plot was purchased in Sandton and registered

jointly in the parties’ names. A residence was constructed thereon, and the parties lived in this property as their matrimonial

home until a decision was made for the plaintiff to relocate to Stellenbosch to run a guesthouse from the P Street property (the idea being that the defendant would follow her).

- [11] In January 2008 the plaintiff moved to Stellenbosch. The P Street property was completely redeveloped and was being run as a guesthouse by the plaintiff and her son, M V, since about September 2008. Although this property has remained registered in the defendant's name, the guesthouse operation itself is conducted through the close corporation, Apple Tree Guest House CC, in which the plaintiff holds a 51% members interest and M V 49%.
- [12] In November 2008 a further plot was purchased in Stellenbosch (the Digteby property) and, unbeknown to the plaintiff, was registered only in the defendant's name at his instance. It is however common cause that the net proceeds of the sale of the Sandton property (including the plaintiff's 50% registered share) were later appropriated by the defendant towards the cost of constructing a residence on the Digteby property.

Construction took place during 2011 and the plaintiff has been the primary occupant of this property since about October 2011. It is these three properties which form the subject matter of the property partnership dispute.

[13] In her further amended particulars of claim the plaintiff pleaded as follows:

'8. During or about January 2003, and at or near Johannesburg, Plaintiff and Defendant, each acting personally, concluded a tacit agreement of partnership with the following terms:

8.1 the parties would collaborate in the development of the properties in paragraph 9 below with the common object of making a profit;

8.2 the Plaintiff would contribute her skills, labour and services to such enterprise, and the Defendant would provide the necessary

capital investment; and

8.3 the enterprise would be carried on for the joint and equal benefit of the Plaintiff and the Defendant who would use profits to accumulate assets.

9. Pursuant to such agreement of partnership –

The Sandton Property

9.1 The parties built a residential home at 12 Chateaux d'Vieux, Sandton;

9.2 The Plaintiff contributed her skill, labour and services to the development of the property;

9.3 The Defendant provided the capital investment and the property was registered in both of the parties' names;

9.4 The Sandton Property was sold for a profit in November 2010 and the capital was reinvested in the development of 22 Digteby Estate, referred to below;

The P Property

9.5 The parties redeveloped the property at P Street, Stellenbosch, registered in Defendant's name, from a residential dwelling

into a property for commercial purposes;

9.6 Plaintiff contributed her skill, labour and services to transform the property;

9.7 The Defendant provided the capital investment for the redevelopment;

9.8 A commercial enterprise is conducted on the property by the Apple Tree Guest House CC (Registration number: CK1997/048168/23) of which the Plaintiff has a 51% member's interest and her son M V has a 49% member's interest;

The Digteby Property

9.9 The parties built a residential home at [...] Digteby Estate, Vlottenburg Road, Stellenbosch, registered in the name of the

Defendant;

9.10 The Plaintiff contributed her skill, labour and services to the development of the property;

9.11 The Plaintiff provided capital investment to the development comprising:

9.11.1 Her proceeds from the sale of the Sandton Property;

9.11.2 her profits/salary from the Apple Tree Guest House;

9.12 The Defendant provided the remaining capital investment for the development of the property;

10. The parties developed such properties for their joint and equal benefit, with the object of making a profit. Plaintiff avers that the assets of the partnership include the values of the following immovable properties registered in the name of the Defendant:

10.1 Erf [...] Stellenbosch, in the Municipality and Division of Stellenbosch, Western Cape Province (P Street, Dennesig, Stellenbosch); and

10.2 Erf [...] Vlottenburg, in the Municipality and Division of Stellenbosch, Western Cape Province ([...] Digteby Estate, Vlottenburg Road, Stellenbosch); ...

Forfeiture

12. In the event that it is found that a property partnership existed between the parties as contended for by the Plaintiff as referred to in paragraphs 8 – 10 above, and in which event the accrual in the Plaintiff's estate is greater than the accrual in the Defendant's estate, then the Plaintiff pleads that the Defendant formally agreed (as recorded in the pre-trial minute dated 12 September 2016 and signed by both parties), that in his plea he renounced any right to claim payment from the Plaintiff of one half of the difference of the accrual between the respective estates of the

parties, and therefore he will not enforce the terms of the antenuptial contract...' [emphasis supplied]

[14] In his consequentially amended plea, the defendant denied the existence of a property partnership and further pleaded as follows:

'9. AD SUB-PARAGRAPHS 9.1 TO 9.4 [the Sandton property]

9.1 In and during early 2003 and at Sandton, the parties acting personally, entered into an oral agreement in terms whereof the defendant agreed to fund and acquire an immovable property in Sandton on which their matrimonial home would be constructed ("the Sandton property agreement").

9.2 The material express, alternatively implied, further alternatively tacit terms and/or conditions of the Sandton property agreement were as follows:

9.2.1 The immovable property would be registered in the joint names of the parties;

9.2.2 The Defendant would pay all amounts in respect of the acquisition of the immovable property and the development of the matrimonial home thereon;

9.2.3 The matrimonial home would be designed and constructed by the necessary experts in the building industry;

9.2.4 Upon completion of the construction of the matrimonial home, the parties would take occupation thereof;

9.2.5 In the event of the parties selling the property, the Defendant, having taken the financial risk, would assume all the proceeds

including all profits, if any, derived therefrom.

9.3 Pursuant to the Sandton property agreement:

9.3.1 the Defendant identified a residential immovable property, namely Erf 623, Beverley Extension 40, situated at 12 Chateaux d'Vieux, Sandton, being sold off-plan based on plans and structural drawings depicting a proposed residential dwelling to be constructed thereon by the developer ("the Sandton property");

9.3.2 on or about 20 May 2003, the Sandton property was registered in the joint names of the parties;

9.3.3 the Defendant paid a deposit in respect of the Sandton property and obtained a loan for part of the cost of the construction of the matrimonial home thereon, which loan was secured by the registration of a mortgage bond against the Sandton property;

9.3.4 the developer, DRH Projects (Pty) Limited, constructed the matrimonial home on the Sandton property;

9.3.5 the Defendant effected payments in respect of the construction of the matrimonial home and the monthly repayments in respect of the loan referred to in paragraph 9.3.3 above;

9.3.6 the Plaintiff selected certain colour schemes, fixtures and fittings, furniture and effects for the matrimonial home and the Defendant paid therefor;

9.3.7 upon completion of the construction and furnishing of the matrimonial home, the parties took occupation thereof;

9.3.8 on or about 24 September 2010, the matrimonial home was sold and the Defendant derived the proceeds thereof.

9.4 Save as aforesaid, the Defendant denies each and every remaining allegation herein contained as if specifically traversed and puts the Plaintiff to the proof thereof.

10. AD SUB-PARAGRAPHS 9.5 TO 9.8 [the P Street property]

10.1 The parties are married out of community of property, subject to the accrual system.

10.2 At the time of the parties' marriage, the Defendant was the registered owner of an immovable property, namely Erf [...],

Stellenbosch situated at P Street, Stellenbosch ("the P Street property").

10.3 In terms of clause 5 of the antenuptial contract entered into between the parties, a copy whereof is annexed to the Plaintiff's

Particulars of Claim marked "A", it was agreed that certain assets owned by the Defendant would be excluded in determining the accrual of his estate, which assets included inter alia the P Street property.

10.4 During or about 2007 and at Sandton, the parties, acting personally, entered into an oral agreement ("the guesthouse agreement"), the material express, alternatively implied, further alternatively tacit terms and/or conditions whereof were:

10.4.1 the Defendant would renovate the P Street property for the purpose of a guesthouse business being conducted thereon;

10.4.2 the necessary experts in the building industry would be employed to perform the necessary renovations;

10.4.3 the Plaintiff would select certain finishes, fixtures and fittings and all furniture, effects and appliances required for the conduct of a guesthouse on the P Street property;

10.4.4 the Defendant would pay for the costs of the said renovation, furniture, effects and appliances;

10.4.5 upon completion of the renovations and furnishing of the property, the Plaintiff would:

10.4.5.1 rent from the Defendant and conduct the business of a guest house at the P Street property;

10.4.5.2 pay:

10.4.5.2.1 the Defendant's monthly mortgage bond instalments;

10.4.5.2.2 rates and taxes;

10.4.5.2.3 municipal costs;

in respect of the P Street property until such time as the guesthouse business derived a profit;

10.4.5.3 in addition to the rates and taxes and municipal costs, pay a market-related rental to the Defendant from the date upon which the guesthouse business started deriving a profit;

10.4.5.4 contribute towards the parties' joint household expenses from the income derived from the guesthouse business.

10.5 Pursuant to the guesthouse agreement:

10.5.1 the Defendant appointed the necessary experts in the building industry who duly renovated the P Street property for the purpose of a guesthouse business being conducted thereon;

10.5.2 the Plaintiff selected certain finishes, fixtures, fittings, furniture, effects and appliances of her choice for the P Street

property;

10.5.3 the Defendant paid the costs of the renovations including the furniture, fittings, effects and appliances selected by the

Plaintiff;

10.5.4 the Plaintiff:

10.5.4.1 as legally structured and as funded by the Defendant, conducted the guesthouse business using a close corporation as the vehicle to conduct such business, namely Apple Tree Guest House CC ("the CC");

10.5.4.2 at her election, chose to allocate a 49% member's interest in the CC to her son Mr M V, and the Defendant paid for the acquisition, commercialisation and the operation of the CC in order to assist the Plaintiff...

11. AD SUB-PARAGRAPHS 9.9 TO 9.12 [the Digteby property]

11.1 The Defendant repeats paragraphs 9.1 to 9.3 above.

11.2 On or about 5 November 2008, the Defendant purchased an immovable property, namely Erf [...] Vlottenburg, Stellenbosch, situated at [...] Digteby Estate, Vlottenburg, (“the Digteby property”) for the purpose of constructing thereon:

11.2.1 a matrimonial home to be occupied by the parties; and

11.2.2 an office from which the Defendant would conduct his law practice.

11.3 Pursuant to purchasing the Digteby property, the Defendant engaged the necessary experts in the building industry to design and construct the envisaged matrimonial home and office referred to above.

11.4 In and during 2009:

11.4.1 the Plaintiff had, unbeknown to the Defendant, formed an adulterous relationship with Mr H J K (“Mr K”), whose full and further names are unknown to the Defendant, and had no intention of occupying the Digteby property with the Defendant;

11.4.2 the Plaintiff, unbeknown to the Defendant, intended to institute divorce proceedings against the Defendant...

14. AD PARAGRAPH 12 [Forfeiture]

14.1 At the pre-trial conference held on 7 September 2016 between the Defendant and the legal representatives of the parties, the

Plaintiff’s legal representatives enquired whether the Defendant intends to persist with a claim for payment by the Plaintiff to the Defendant of one-half of the difference between the accrual of the respective estates of the parties in the event of the

above Honourable Court finding that a property partnership exists between the parties (“the Plaintiff’s enquiry”).

14.2 In response to the Plaintiff’s enquiry the Defendant:

14.2.1 referred the Plaintiff to his plea to the Plaintiff’s Particulars of Claim; and

14.2.2 pointed out that in his plea to the Plaintiff’s Particulars of Claim he has not claimed payment from the Plaintiff of one-half of the difference between the accrual between the respective estates of the parties,

(“the Defendant’s response”).

14.3 The Plaintiff’s enquiry and the Defendant’s response are recorded in paragraph 9.1 of the pre-trial minute dated 12 September

2016. Annexed hereto marked “DP1” is a copy of the relevant page of the pre-trial minute comprising paragraph 9.1 thereof.

14.4 Save as aforesaid, the Defendant denies each and every allegation herein contained as if specifically traversed and puts the Plaintiff to the proof thereof.’

[15] To this it must be added that, in his plea, the defendant disavowed liability for any claim by the plaintiff to the Digteby property on the basis of the alleged “fraudulent non-disclosure” of her relationship with Mr H K. He also disavowed liability for any claim by the plaintiff to the P Street property, on the grounds of what he contended were breaches of their agreement and which amounted to a failure by the plaintiff (and not the guesthouse) to pay expenses such as rental. [11]

The trial court’s credibility findings

[16] In its main judgment the trial court found that neither party impressed as witnesses, based on its view that the plaintiff had a tendency to adapt her version ‘depending on whom her audience was’ whereas the defendant ‘was an evasive and argumentative witness with some of the answers he provided being illogical and coming across as contrived’. The trial court’s finding in relation to the plaintiff appears to have been based on the following paragraphs of the judgment:

‘19. In her unsolicited letter to the Femina magazine, the plaintiff intimated that it was her decision to relocate to Stellenbosch and to open a guest house. In her evidence before me she testified that it was the defendant’s idea that they open a guest house and that she agreed thereto because she was determined to please the defendant.

20. Furthermore, when she applied for vehicle financing, she furnished a different schedule of her income and expenses to that furnished in respect of her claim for maintenance before me. The plaintiff admitted that she was economical with the truth in this regard.

21. When the plaintiff wanted money for an air-conditioner, she signed off her letter to the defendant “From your hot family in Stellenbosch”. The plaintiff testified that “...I was then very nice to him, because I wanted the money for the air-conditioning.”’

[17] Having reached this conclusion, the trial court stated:

‘23. Therefore, I relied heavily on the documentation placed at my disposal and on the probabilities which were supported by common cause facts in reaching the decisions which I have.’

[18] It is thus apparent that the trial court’s factual findings did not depend upon the parties’ credibility but rather on inferences drawn from other facts. To this extent it is permissible for us, as a court of appeal, to form a different view on credibility without first having to be convinced that the trial court erred in this regard.[12]

Assessment of the relevant evidence against the trial court’s findings

- [19] The trial court refused the qualifying fees of the plaintiff's expert, Professor Terblanche, on the basis that it '...did not find his evidence particularly helpful...he was clearly biased...and the court did not depend or rely, nor was the court assisted in his evidence in coming to the decision and the orders which it did'. [13] No reasons were given for the finding of bias and it is difficult to detect any such bias on a reading of Terblanche's testimony.
- [20] Before us it was undisputed that Terblanche is not only an expert, but was also the only witness who gave evidence on the values of the immovable properties alleged to comprise the property partnership, as well as the defendant's farm in Tulbagh (the latter was also excluded from the accrual). Both parties adopted these values during the trial.
- [21] Moreover the trial court must have had regard to Terblanche's evidence in reaching its conclusion that the plaintiff was entitled to maintenance of R15 000 per month, given its express reference to 'the evidence presented' and s 7(2) of the Divorce Act 70 of 1979 [14] which makes it incumbent upon a court, in the absence of a written agreement between parties, to have regard inter alia to their existing or prospective means to determine an entitlement to maintenance, including its quantum and duration. It is trite that "means" include not only income but assets.
- [22] With reference to his expert summary, Terblanche testified that the Digteby property has a value of R5 million (excluding its contents). The P Street property, if sold together with the guesthouse (and its contents) as a going concern, has a value of R7.2 million, whereas without the guesthouse, its value (as a residential property only) is R4.2 million. He valued the Tulbagh farm at R4.3 million.
- [23] According to Terblanche however, the guesthouse has no independent value if not "linked" to an immovable property. No expert evidence was led by the defendant to refute this, and the defendant's version that the guesthouse would retain its "value" [15] if operated from another, unidentified property, was rejected by Terblanche:
- '...I can't see it... that's not my speciality but... as far as I can see... and what I got from the [financial] statements, there's nothing else of value in the CC.' [16]
- [24] In this regard, it is common cause that no formal lease was concluded between the defendant and the guesthouse and therefore no lease exists to which a value could be attributed for purposes of selling it as a going concern separately from the P Street property.
- [25] Terblanche was cross-examined about whether the guesthouse nonetheless has an independent goodwill for valuation purposes. He agreed that, if properly run, such a business will establish goodwill and therefore increase in value, but at the same time explained (and this was accepted by the defendant's counsel) that he is not an expert in this particular field. Given his admitted lack of expertise, coupled with the defendant's failure to call an expert on goodwill, there is no evidence from which one can draw a conclusion on this aspect.

[26] The materially undisputed evidence of Ms Hofmeyr (including the contents of her report) was that the plaintiff, who was 66 years

of age at the time of the trial, cannot be considered a candidate for employment in the formal labour market as she has already reached normal retirement age. In the event that she is able to secure employment in the informal sector, she would have to overcome

perceived bias associated with her age. Depending on her health and the impact of her osteoarthritis, it may be assumed that the

plaintiff could continue to earn income as a guesthouse operator for a further four years, until 70 years of age. If the plaintiff was unable to continue to operate the guesthouse from the P Street property (whether as a result of eviction or sale following upon a finding of a property partnership), the plaintiff would have to find alternative employment where, at best, she will be able to earn a gross monthly income of between R8 000 and R15 000 per month. The approach adopted by the plaintiff's counsel during the trial that it would be fair to take the average of these two amounts and peg the plaintiff's earning potential at R11 500 per month is sensible and appropriate.

[27] Both parties gave extensive evidence. No purpose would be served in setting it out in detail. Rather, the focus will be on the plaintiff's version, which was materially consistent throughout, as well as the correspondence emanating from the defendant himself and the significant concessions which he eventually made under cross-examination.

[28] As far as credibility is concerned, the plaintiff was a far better witness than the defendant. Although garrulous at times, she was honest. She candidly made concessions, for example, in relation to the Femina magazine article (a marketing exercise for the guesthouse) and her application for vehicle finance at a time when the defendant had cut her off financially. She accepted that, as she put it, she had been somewhat economical with the truth by not disclosing all of her monthly expenses to the financial institution concerned. These, along with the "air conditioner incident" relied upon by the trial court, pertained to peripheral issues and had no direct bearing on those before it. At the very least, in my view, they did not justify its somewhat damning credibility finding against the plaintiff. Although she was subjected to cross-examination for almost three days, she did not waver on the essential issues, and her testimony was also largely supported by her affidavit evidence in the eviction proceedings.

[29] On the other hand it can safely be said that the defendant, as found by the trial court, was an extremely poor witness, who repeatedly tailored his version, at times to the point of absurdity. He tried in vain to portray himself as an innocent victim; he refused to make obvious concessions; and his behaviour during the litigation as well as his testimony demonstrated him to be a vindictive, embittered individual with limited insight who, when the shoe pinched, had little hesitation in resorting to downright dishonesty. Where his version differed from the plaintiff's, hers is accepted and his is rejected.

[30] The evidence in relation to the alleged property partnership may be dealt with as follows. During 2003 (about two years after the marriage) the defendant was due to receive a payment of R1 million from a business deal. According to the plaintiff, he told her that they would select an immovable property:

‘So he said to me, “Let’s pick up the Saturday newspaper”, where all the properties were advertised in: We’re going out to go choose a property. You will build it. I will register 50% of this in your name. This will be a property partnership and I want no part of this. I am going to make the money, I’ve got to work long hours and all I want to know, the day that you move you SMS me which home to come to. I want no part of the moving.’[17]

[31] This set the stage for what followed. In her amended particulars of claim the plaintiff relied on a tacit agreement concluded in 2003. Some criticism may be levelled against her, given her evidence referred to above in respect of the Sandton property. However, it became clear during the rest of her testimony that, insofar as the P Street and Digteby properties were concerned, what transpired flowed from the pleaded 2003 agreement. Moreover, it was borne out by the defendant’s own communications.

[32] In relation to the Sandton property (which the defendant himself caused to be registered jointly in their names) the evidence

established that the defendant, who worked long hours in his law practice, relied on the plaintiff to oversee construction of the

residence. She obtained quotations; was primarily responsible for liaising with the developer; initiated changes to the standard

building plan including structural alterations and finishes (it was bought on a plot and plan basis); visited the site almost daily;

co-ordinated construction of the heated pool and landscaping of the garden; and decorated the finished product. On the other hand the defendant covered the all the financial costs, with the plaintiff ensuring that the costs of the project nonetheless fell within the budget stipulated by him.

[33] Her role is possibly best described by the defendant himself in regard to his own involvement in property developments prior to the marriage:

‘I developed them all, but in conjunction... with specialist experts. You can’t just get up in the morning and build and

develop... But insofar as I could be the developer I developed all of the properties.’[18]

[34] The defendant sought to persuade the trial court that the Sandton property did not achieve a profit when it was ultimately sold in September 2010. To this end he crafted a schedule of costs and expenses[19] which, he maintained, he was entitled to be refunded upon transfer to the purchaser. Unsurprisingly the total exceeded the full net proceeds paid into his bank account by the transferring attorneys of R1 118 928.49 on 8 December 2010.

[35] During his cross-examination it was demonstrated that many of the items on the defendant's schedule were baseless. More

pertinently however, there was no evidence to suggest that he ever raised with the plaintiff (or anyone else) his "entitlement"

to such "repayment" at any stage prior to receipt of such proceeds, nor indeed until well after he appropriated the plaintiff's net half share towards the cost of the Digteby property. The plaintiff's evidence that the defendant misrepresented to her that the Digteby property would be purchased in their joint names, and persuaded her to agree that her share should therefore be paid into his account (as it too would be a joint investment) was not engaged with sufficiently and accordingly remains unchallenged.

[36] The defendant tried to hide behind discussions between the parties prior to him taking transfer of the Digteby property that it might possibly be registered in a trust of which they would be equal beneficiaries. According to the defendant, his underlying motivation for the proposed trust was to shield him from having to pay the plaintiff anything if she became romantically involved with someone else. This of course presupposes that she was entitled to something in the first place, which is at odds with his version that she had no such entitlement. It is also common cause that the trust option did not materialise. Moreover the defendant's purported motivation is also belied by his own correspondence to which I refer below.

[37] The evidence also established that the P Street property was extensively renovated from mid-2007 until about July 2008. The

plaintiff travelled to Stellenbosch on a regular basis to perform the same role as she had in respect of the Sandton property, finally relocating permanently to rented accommodation in Stellenbosch, funded by the defendant, in January 2008.

[38] It would seem that M V, who moved to Stellenbosch in October 2007, was initially more physically hands-on than the plaintiff before she also relocated, but it is undisputed that she and M V worked together as a team in constant contact, and the defendant himself acknowledged her expertise as well as M V's natural talent.

[39] Other than again funding the actual cost of the project, the defendant had almost no involvement, although he attempted to paint a different picture. This is demonstrated in a letter to him of 20 December 2007 from the builder, Hinkone Property Developments CC, requesting an extension of the completion date:

‘...As we have not communicated that much directly with you, we just think that you should know the following... As we are not certain what [M V] has communicated to you – in fact we have not received any communication from you of anything in particular that you were

unhappy about...’[20]

[40] It is common cause that it was the defendant’s suggestion that the guesthouse business be operated through the vehicle of a close corporation; that he set this up; and that at no stage did he object to the plaintiff sharing membership thereof with M V, to his exclusion. In the eviction proceedings the defendant maintained that he had wanted no part of the business, given that his

relationship with it was to be strictly one of landlord and tenant.

[41] There are two fundamental difficulties with this version. The first is that in the same proceedings, which the defendant launched in December 2014 (and thus 6 years after the guesthouse commenced business) he gave a completely contradictory account:

‘It is not disputed that the Apple Tree Guest House CC is today a viable concern. It is also not disputed that I have to date not taken any profit whatsoever from my investment, either by way of rental, profit share or otherwise. Rather, same has been taken entirely by [the plaintiff] and M V, to my exclusion.’[21] [emphasis supplied]

[42] The second is contained in one of the defendant’s own letters to the plaintiff dated 31 March 2010 after she informed him that she wanted a divorce, and in which he wrote:

‘Once the guesthouse is on its feet, and you earn reasonable income, you can pay a reasonable rental based on 50% of the value of the property... With regard to the guesthouse, given its popularity occasioned by your and M’s input to date, the “status

quo” should continue. I will continue to support you and M in accordance with my underlying objective, namely to build collective

value, for the long term... As you have requested, I am happy to conclude an appropriate lease agreement with you...’[22]

[43] In its judgment[23] the trial court found that the reference to a reasonable rental based on 50% of the value of the property pertained to a different property which the defendant, in the same letter, proposed the parties should purchase (also in a trust and as equal beneficiaries, using inter alia their joint proceeds upon sale of the Sandton property to fund it). On appeal before us it was common cause that the trial court erred in this regard and that the defendant was indeed referring to the P Street property.

[44] This must surely be the clearest indication that the defendant himself viewed the plaintiff as a 50% co-owner of the P Street

property, notwithstanding its exclusion from his estate for accrual purposes as well as remaining registered only in his name. While an asset excluded from the accrual remains excluded for that purpose, there is no logical, rational or lawful reason why, at that party's election, it cannot form part of a property partnership *stante matrimonio*.

[45] The offer to enter into a lease based on a rental for 50% of the value of the P Street property also serves to demonstrate that, on the defendant's own thinking, a partnership existed in respect of that property as well. If the defendant's claim that his relationship with the guesthouse was strictly one of landlord and tenant is to be believed, the unanswered question is why he was content to sit back for 18 months (i.e. September 2008 until March

2010) without insisting on a formal lease, and without ensuring that the required payments pleaded by him were made.

[46] The plaintiff's version of a very loose arrangement, namely that the guesthouse would pay the bond instalments, rates and utilities, as and when it could, is far more probable. It is also consistent with her version that the agreed purpose of the guesthouse operation was to provide her with an income generating lifestyle for the ultimate purpose of selling the business and property together as a going concern and sharing the profits equally, in furtherance of the partnership agreement concluded in 2003.

[47] In its main judgment the trial court found that the P Street property did not form part of the property partnership. This was in accordance with its apparent approach that the plaintiff was required to prove a separate agreement in respect of each property, which was not her case.

[48] In reaching this finding the trial court also relied on the defendant's sole application in 2005 for guesthouse rights; his sole applications for a liquor licence for the guesthouse in 2007 and 2013 in which it was reflected that he was the owner of the property; and the plaintiff's concession in cross-examination that '...the CC occupies P Street and on Duncan's election'.

[49] It appears that the trial court misconstrued this concession. It is clear from this passage of the evidence that the concession was made in the context of the guesthouse business having a value independent from the P Street property:

'Apple Tree Guest House and P Street go hand in hand together. It is one business. We cannot say the property or the CC, it is one business... the CC is worth nothing, the property is worth nothing, together that is where the value is.

But is... the CC a tenant or not, that's the question... The CC occupies P Street and on Duncan's election.'[24]

[50] Taken in its proper context, the plaintiff was trying to explain that the guesthouse occupied P Street because the defendant wanted it to do so, in order to achieve the joint ultimate goal and not, as found by the trial court, that this necessarily implied that his permission was required for the guesthouse to occupy the property.

- [51] As far as the applications for guesthouse rights and a liquor licence are concerned, I also hold a different view. The defendant, as sole registered owner, was required to sign the applications and correctly reflect his legal title to the authorities. This was merely an administrative requirement. He was also required to set out the basis upon which the guesthouse had occupancy. Whether or not this was as a “tenant” is a red herring. It was never the plaintiff’s case that the close corporation had concluded a property partnership with the defendant, but rather that she personally had done so.
- [52] The defendant travelled intermittently to Stellenbosch during 2008 and 2009. It is common cause that at the end of 2009 or early 2010 he returned permanently to Gauteng. The plaintiff learnt of his permanent return upon enquiry from his personal assistant. In March 2010 she consulted an attorney about a divorce. Shortly thereafter she informed the defendant. He requested her to hold off for 6 months so that he could make her a proposal. She agreed and his letter to her of 31 March 2010 (and subsequent communications) followed. There is no mention made in any of these communications of a wish to reconcile or to work on the marriage, which the defendant was ultimately constrained to concede.
- [53] The defendant nonetheless tried to pin the blame for the breakdown of the marriage on the romantic relationship which the plaintiff formed with K. It is however clear from the evidence that the parties experienced significant marital difficulties prior thereto. The defendant himself testified that from 2008 the plaintiff ‘...used to complain about the distance relationship and I couldn’t address the distance relationship’.[25] The plaintiff advanced additional reasons, but in my view what is important for present purposes is the undisputed fact that the

marriage was already in serious trouble, if not already broken down, by the beginning of 2010. The defendant speculated that the plaintiff embarked on her relationship with K in the first half of 2009 (at a stage he suggested it was mid-2009), but conceded that he had no evidence that this was the case. In addition, the probabilities favour the plaintiff’s version (as well as K’s) that it commenced during mid-2010. This fits in with the defendant’s permanent return to Gauteng in early 2010, the consultation which the plaintiff had shortly thereafter with an attorney, the defendant requesting 6 months to formulate a proposal, and his email to the plaintiff of 31 March 2010.

- [54] The first divorce summons was issued on 25 August 2010[26] and served on the defendant. On 30 September 2010 the defendant wrote again to the plaintiff.[27] She referred to it as the ‘high road/low road’ letter. He referred to it as his ‘grovelling’ letter. It commences with the following introduction:

- ‘1. You want a divorce. To this end you have instituted action and applied for relief in terms of rule 43.
2. To avoid litigation, you have requested me to provide you with a written settlement proposal.

3. Given the current structure of our affairs a number of options exist. I will set out the various options, as I see it, and the underlying rationale.
4. As agreed, please suspend the litigation proceedings pending the outcome of our settlement discussions...'

[55] Despite his subsequent protestations to the contrary, this letter was undoubtedly written by the defendant in contemplation of divorce. It is too lengthy to set out in full in this judgment. In a nutshell, the defendant explained that the parties were in the 'investment phase', the first of two stages, with the other being the 'profit taking phase'. He sought to persuade the plaintiff to stick with their joint plan despite her intention to divorce, stating that, if she did so '...by the middle of 2011, or as and when the Digteby property is completed... Digteby and P Street will be paid off... we will have two substantial investments... once the two properties in question have been completed and paid off, real decisions can be made as to the further commercialisation of the opportunities for our collective benefit...'

[56] Part of the proposal was that:

'As you are aware, it was always my intention to include you in the Digteby investment... I would like you to complete the building

of the residence at Digteby. The funds are available from the sale of [the Sandton property]... In all cases I am happy to peg the investment and split the proceeds derived in due course... if you attend to the building at Digteby, you will naturally keep the household furniture.'

[57] It is common cause that the plaintiff accepted the defendant's proposal to attend to the building of the residence at the Digteby property in accordance with their prior *modus operandi*. Building commenced in January 2011 and was completed in about October

2011. Upon completion, the plaintiff took occupation and continues to reside there. Although the defendant claimed that she and K resided there together, he was unable to adduce any evidence to this effect. A security guard at the Digteby Estate which the defendant threatened to call in support of this claim did not testify. Both the plaintiff and K consistently denied any such arrangement.

[58] The plaintiff also denied that she chose the 'high road' while at the same time deliberately concealing her relationship with K:

'This was a total business proposition. Our marriage had fallen apart. He'd already received the summons. He knew I was getting divorced and he was pressurising me to build the Digteby property because he said let's put our personal issues aside and let's carry on with our business property partnership. At that stage we were property partners...'[28]

[59] That the defendant shared the same view is evident from his subsequent letter to the plaintiff's attorney of 19 September 2012, after receiving the second divorce summons, wherein he stated that 'whilst I do not wish to litigate with Nolene, she must accept that I will not accept an erosion of value, mine or hers, and that I will take such steps as may be available to me to protect our collective estate against the erosion of value through litigation or other means'.[29]

[60] As is apparent from his plea, the defendant only relied on the so-called fraudulent non-disclosure of K in relation to the Digteby property. On his version, he discovered the relationship in June 2013 and it was confirmed to him in mediation during April 2014.[30] Even if one accepts that he felt betrayed and aggrieved by this discovery, the defendant must have decided to reconcile himself to it in the interests of joint commercial gain, because 8 months later, on 5 December 2014, he once again wrote to the plaintiff and M V to record the content of a discussion the previous day:

'2. My comments are as follows:

2.1 As discussed, I would wish to reinstate our property development activities i.e. in conjunction with you and M;

2.2 To this end we discussed inter alia that:

2.2.1 The Guesthouse property could be extended and funded (presumably) by way of the sale of Digteby and/or appropriate bond finance; or

2.2.2 That both properties could be sold and the proceeds deployed to fund new opportunities; or

2.2.3 That the Digteby property be leased out and both properties bonded to fund the development of new opportunities including possibly the extension of the Guesthouse...; or

2.2.4 Some combination of the above...'[31]

[61] The defendant proceeded to propose that both the guesthouse and Digteby be sold '...and a proper and professional commercial development be embarked upon, properly funded by the way of the sales and if necessary, additional bonds...'. He also proposed how the reinstated property development could be structured from a commercial point of view.

[62] Self-evidently, if there was no prior property partnership, there would be nothing to 'reinstate'. Significantly, not a murmur was made by the defendant in that letter about the plaintiff's so-called fraudulent non-disclosure or his reliance thereupon. The only reasonable inference is that this was an afterthought raised by the defendant for tactical purposes to avoid payment to the plaintiff.

- [63] The materially undisputed evidence of the plaintiff was that she reasonably requires R64 900 per month[32] as personal maintenance (until her death or remarriage, whichever occurs first). This includes provision for accommodation in a 'fairly small unit' in Stellenbosch at R20 000 per month.[33] The trial court awarded R15 000 per month in total, although it is unclear how it arrived at this amount.
- [64] In my view there are no items on the plaintiff's maintenance schedule which appear to be extravagant or unreasonable, save for the admitted duplication of R3 000 for credit card payments and clothing, and an allowance of R20 000 per month to accommodate herself elsewhere (whether purchased or rented). To my mind, it is fair and reasonable to allow for a lesser accommodation component of R15 000 per month. Accordingly a total sum of R8 000 falls to be deducted, leaving her claim at R56 900, rounded off to R57 000 per month.
- [65] From this must also be deducted the plaintiff's potential earnings of R11 500 per month in accordance with Ms Hofmeyr's testimony, leaving a net amount of R45 500.
- [66] The trial court correctly recognised that the plaintiff is entitled to personal maintenance. She has been financially dependent on the defendant in one way or another since before their marriage in 2001. Her age, health and earning capacity militate against any other reasonable conclusion.
- [67] The evidence also established that the plaintiff has no assets which could be invested or liquidated to contribute towards her financial support. The report of Munro Actuaries (which was admitted without objection) reflects that, given the plaintiff's age and life expectancy, she requires a capital sum of R1 400 700 to enable her to receive R10 000 per month.[34] Accordingly, to generate R45 500 per month, the plaintiff requires a capital sum of R6 303 150 (i.e. R1 400 700 x 4.5).
- [68] Given the evidence pertaining to the property partnership, the plaintiff discharged the onus of proving her entitlement to 50% of its net assets. The level of acrimony between the parties makes it necessary for the partnership to be terminated. It must be mentioned that on appeal before us, we were informed by the plaintiff's counsel that M V consented to the sale of the guesthouse as a going concern, and his written consent was subsequently provided. The plaintiff will thus receive approximately R5.2 million on the values adopted by the parties based on the evidence of Professor Terblanche, calculated as follows:

Description

Amount

§ Value of P Street property plus

guesthouse and contents as going concern

R7 200 000

§ Value of Digteby property (excluding contents)

R5 000 000

R12 200 000

. Less

§ 5% agent's commission on P

Street

R360 000

§ 5% agent's commission on Digteby

R250 000

§ Outstanding bond P Street

R500 000

§ Outstanding bond on Digteby

R560 000

§ Additional costs of sale of the properties

R100 000

.

R10 430 000

.

÷ 2 = R 5.2 million

[69] The evidence established that the plaintiff is indebted to Mr K in the sum of approximately R2 million in respect of loans advanced by him to enable her, inter alia, to fund the litigation against the defendant. However, given the costs order to which she is entitled (as set out below), the plaintiff should recover a substantial portion of this amount from the defendant. I will accordingly (and simply because there is no evidence to the contrary) assume that the plaintiff should receive about R5 million, leaving her with a shortfall of capital with which to maintain herself of R1 303 150 (i.e. R6 303 150 – R5 000 000). Adopting a robust approach, the plaintiff will thus have a shortfall in monthly maintenance of about R10 000 per month, which will need to escalate annually in accordance with inflation.

- [70] Cross-examination of the defendant revealed that he indeed does have some sources of income despite his attempts to conceal this. For example, he was driven to concede that he was paid R300 000 for the period June 2016 to June 2017, and that there was substantially more standing to the credit of his Investec account than he claimed.[35] Moreover, in addition to his share of the property partnership, the defendant is the owner of his farm in Tulbagh with a value of R4.3 million, and receives rental for a dwelling on the farm of R9 000 per month. He is thus able to afford payment of maintenance of R10 000 per month.
- [71] As far as the contents of the Digteby property are concerned, they must be awarded to the plaintiff as a result of her acceptance of the defendant's offer in his letter of 30 September 2010. The contents of the P Street property are reflected in the financial statements of the close corporation as its assets[36], and although the defendant purchased them, he has no corresponding loan account in his favour. In any event, given that the property and the guesthouse are to be sold as a going concern and the parties are to benefit equally (there being no suggestion that M V is to share therein), there can be no prejudice to the defendant if the guesthouse is sold together with its contents.

The dum casta proviso

- [72] The trial court held that the plaintiff is entitled to personal maintenance until her death, remarriage or until she commences living with a romantic partner. Although only contained in a footnote[37] it further stated that the plaintiff will be deemed to have commenced living with a romantic partner if the period of cohabitation exceeds 4 consecutive months. No reasons were given for imposing a dum casta proviso or the period stipulated.

- [73] In *EH v SH*[38] the Supreme Court of Appeal held that:

[11] Relying upon judgments such as *Dodo v Dodo* 1990 (2) SA 77 (W) at 89G; *Carstens v Carstens* 1985 (2) SA 351 (SE) at 353F; and *SP v HP* 2009 (5) SA 223 (O) para 10, it was argued, both in the high court and in the appellant's heads of argument, that it would be against public

policy for a woman to be supported by two men at the same time. While there are no doubt members of society who would endorse that view, it rather speaks of values from times past and I do not think in the modern, more liberal (some may say more "enlightened")

age in which we live, public policy demands that a person who cohabits with another should for that reason alone be barred from

claiming maintenance from his or her spouse. Each case must be determined by its own facts,...'

- [74] Those in the present matter militate against the making of such an order. Both the plaintiff and K testified that they have no intention of cohabiting and gave acceptable explanations. Both were adamant that, apart from funding certain holidays, K does not contribute towards the plaintiff's maintenance in any way. The defendant adduced no evidence of cohabitation, nor that K maintained the plaintiff as he alleged.

[75] This is not to say that circumstances may change in future. However, even if they do, and the plaintiff and K decide to live together, that is not the end of the matter as the Supreme Court of Appeal has pointed out. In any event, it is open to either party to approach a maintenance court in due course to vary or discharge the plaintiff's maintenance award in terms of s 6 of the Maintenance Act[39] on good cause shown.

Whether the defendant is entitled to institute an accrual claim against the plaintiff.

[76] The trial court reasoned that the defendant had not pursued an accrual claim because firstly, in his plea it was stated that he had not done so and secondly, there was no prayer in his plea to this effect.[40]

[77] It is convenient to deal with the second reason first. It is trite that if a defendant in an action claims positive relief from a plaintiff, that relief must be advanced by way of a counterclaim. Any prayer to this effect in a plea is simply incompetent.

[78] The first reason does not accord with the legal position. An accrual claim in terms of s 3 of the Matrimonial Property Act[41] comes into existence, and its value is thus determined, at the date of divorce: AB v JB.[42] Put differently, in terms of sections 3(1) and 3(2) a spouse becomes vested with a legally enforceable right to the accrual upon the granting of a divorce order, it being the moment when the contingent right becomes perfected.[43] The only exception is contained in s 8 of the Act which permits a spouse to approach court for immediate division of the accrual where the right to share in it at dissolution of the marriage may well be prejudiced by the other spouse's conduct or intended conduct. Section 8 has no application in the instant matter.

[79] What was also clarified by the Supreme Court of Appeal in AB v JB is that:

'[19] ...it is not 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 grant of a divorce order.'

[80] As set out above[44] the plaintiff pleaded that in the event of a property partnership being found to exist (in which event the accrual in her estate would be greater than the defendant's), the latter had formally agreed in a pre-trial minute dated 12 September 2016 that he renounced any right to claim payment thereof from the plaintiff. She sought the following order in this regard:

'h) ... in the event that the accrual in the Plaintiff's estate is greater than the accrual in the Defendant's estate,

then by agreement between the parties, the Defendant shall not enforce any claim that he may have in regard thereto.'

[81] In his plea the defendant referred to paragraph 9.1 of the relevant pre-trial minute, placing reliance thereon. The balance of the plaintiff's averments were denied.

[82] Significantly however the defendant failed to refer at all to paragraphs 9.2 and 9.3 of the same minute. It is appropriate to set out paragraph 9 in full:

‘9. DIVORCE – PLAINTIFF’S POSSIBLE AMENDMENT

9.1 The Defendant hereby reverts to the Plaintiff’s enquiry as to whether or not he intends persisting with an accrual claim against the Plaintiff’s estate in the event that the Court finds that a property partnership exists between the parties. The Defendant refers to his plea to the Plaintiff’s Particulars of Claim and points out that:

9.1.1 he has not claimed payment from the Plaintiff of one half of the difference of the accrual between the respective estates of the parties;

9.1.2 there is no “accrual claim” by the Defendant against the Plaintiff as suggested by the Plaintiff.

9.2 If the Defendant persists with an accrual claim in circumstances where the Court finds that a property partnership exists, the

Plaintiff intends amending her particulars of claim to introduce a forfeiture claim.

9.3 In the Defendant’s view it is unnecessary for the Plaintiff to amend her particulars of claim as the Defendant does not have “an accrual claim” against her.

[83] It is common cause that the minute was signed by the plaintiff’s legal representative and the defendant personally (seemingly at a stage when he was still representing himself). He was content to both initial and sign that minute recording his representations to the plaintiff. Paragraph 9.2 pertinently drew to his attention that if he intended persisting with an accrual claim in circumstances where a property partnership was found to exist, the plaintiff would amend her particulars of claim to plead forfeiture. His unequivocal

response to the plaintiff, recorded in paragraph 9.3, was that it was unnecessary for her to amend her claim because he did not have ‘an accrual claim’ against her.

[84] There can be no doubt that the plaintiff relied on this representation in good faith, believing the defendant to have renounced any claim, because the issue of forfeiture was not canvassed at all during her testimony and it is most unlikely that it would not have been, had the defendant played open cards. This includes the plaintiff’s cross-examination.

[85] The first time this issue was raised was during the defendant’s cross-examination. It is necessary to quote from the relevant passage in the record at some length:

‘MS BUIKMAN: Mr D O, in the event that it is found that there was in fact a property partnership by this Court, and in the event that it is found that Mrs N C O benefited from this partnership to the tune of some R4-million – R4.5-million nett of the properties... Yes. Yes.

...you have conceded in your plea that you will not seek any claim thereto pursuant to your accrual claim. --- I don't think that's entirely true, but there's a bit of confusion going down there. I think that wasn't to do with the accrual, as I recall. I thought you wanted me to waive any back rentals.

Alright, Mr D O, let's go there. Have a look at your pleadings. The pleadings, please. ...

So that is the accrual claim. It's not any arrears. What are you referring to today. --- I thought there was a debate about arrears as well, but that's a forfeiture. If I could just ... (intervention)

Do you see that? --- Yes, I read it here, forfeiture, ja. ...

MS GEORGIOU: May I interrupt? This is also a matter for argument. The pleadings we can argue.

MS BUIKMAN: He's an attorney.

MS GEORGIOU: That's been pleaded clearly as to what the plaintiff contends, what the defendant contends, the relevant page of the pretrial conference ... has been annexed, and perhaps we should address that in argument as well. --- Ja, it's in argument.

The plaintiff requested and the defendant ... (inaudible) to concede that he would waive... Does he intend to persist on his accrual claim? The defendant's response: There is no accrual claimed in the plea. And then the plaintiff pleads: The defendant, at the conference, waived his right to claim. So, M'Lady, that is a very clear argument, based on the pleadings.

COURT: Perhaps that is legal argument. ...

MS BUIKMAN: Well, M'Lady, that's not entirely correct. Because, at the end of the day, the forfeiture provisions are in fact pleaded. I take my learned friend's point and I take Your Ladyship's point. We can argue that in due course. It's just that the plaintiff does rather change his attitude throughout with regard to what is on offer and what is not. But, in any event, be that as it may, he's bound by those pleadings.

COURT: He is bound by what's in his pleadings.

MS BUIKMAN: So I'm not going to anymore – any further in that. But that, M'Lady, is not – that was formally recorded in the pretrial, so I'm not going to take that further. But that was, in fact, resolved, M'Lady. Be that as it may. So, M'Lady, I will not press that. ...'

[86] During the appeal we were informed that this issue was argued (it would seem on the pleadings) at the end of the trial, which is presumably why the trial court made the finding that the defendant had not 'pursued' an accrual claim against the plaintiff's estate. Given however that it made no order in this regard, the defendant remained at liberty to maintain his silence to his advantage, because it was consequently not necessary for him to cross-appeal this "finding". It was only during the appeal, after we pressed his counsel for an unequivocal answer, that for the first time he disclosed his intention that he may pursue such a claim.

[87] There are two further reasons why the defendant should be barred from pursuing such a claim. The first is that, as previously stated, s 7(2) of the Divorce Act requires a court to have regard to the factors listed therein to determine, inter alia, the quantum of a maintenance award, which of necessity involves an examination of the financial resources which will be available to a claimant post-divorce. A maintenance award is thus predicated inter alia on the value of the capital sum or other assets which the claimant is to receive as a consequence of the divorce.

[88] In the context of an application for the joinder of a trust to a divorce action, the court in *VW v VW and Others*[45] agreed that although the right to share in the accrual only arises at dissolution of the marriage, the adjudication of the accrual could not be conveniently separated from the claim for personal maintenance. In *ST v CT*[46] the Supreme Court of Appeal adopted the same approach:

‘[11] ...This necessitates a consideration of the respondent’s maintenance claim... we find it convenient to deal first with the difficult question of the claim for accrual, since that determination will directly affect the question whether any maintenance should be paid to the respondent, and, if so, in what amount...’

[89] The second reason is that it is clear from the wording of s 7 of the Divorce Act itself that it is only the court seized with the divorce which is empowered to make a personal maintenance order:

‘7. Division of assets and maintenance of parties.---(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 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.’ [emphasis supplied]

[90] This was confirmed by the Supreme Court of Appeal in *ST v CT*:

‘[174]... It was pointed out in *Schutte* that, unlike in England, here a divorced spouse has no statutory remedy if no order for maintenance is granted upon divorce. Section 7(2) was enacted (and before it, s 10 of the Matrimonial Affairs Act) to provide a statutory right to a spouse to obtain a maintenance order upon divorce...’

[91] Moreover, as a matter of logic, it is appropriate for the divorce court to deal with an accrual claim which either spouse advances

against the other when confronted with a claim for personal maintenance, since it may well find that the spouse claiming maintenance is not entitled to any maintenance at all, given that his or her means are, or will be, sufficient to maintain him or herself. However, it could hardly then be open to the other spouse, free of any maintenance award against him or her, and who did not claim the accrual at the time of the divorce, to later institute proceedings for this purpose.

[92] This would severely prejudice the other spouse, who in such later proceedings would be precluded from instituting a counterclaim for maintenance. It may also have the unintended consequence of permitting the separation of an issue (i.e. the determination of the accrual) in the absence of any prior notice as well as leave first being obtained from a court.

The eviction applications and aspects pertaining to costs

[93] The papers in the eviction proceedings run to 672 pages, including those relating to the opposed interlocutory applications. From the evidence adduced at the trial, it is clear that the defendant failed to disclose all of the material facts in his founding affidavits. In addition, it was only after being confronted with the plaintiff's answering affidavit that he deposed to a lengthy replying affidavit (112 pages excluding annexures), replete with new and/or argumentative material.

[94] In similar vein the defendant caused the plaintiff to incur considerable expense in fending off his irregular rule 35(12) notice

and subsequent rule 35(14) application, which included her having to apply to have the notice set aside as an irregular step.

[95] Given the proven facts, both eviction applications fall to be dismissed and, in the particular circumstances, the plaintiff is entitled, not only to the costs of the eviction proceedings themselves, but also to those pertaining to the interlocutory applications.

[96] The plaintiff, for the reasons set out earlier, is also entitled to the qualifying fees of Professor Terblanche. As far as the costs of the rule 42 application are concerned, I am not inclined to interfere with the trial court's order, since I am not persuaded that it failed to exercise its discretion judiciously when it ordered that each party should pay their own costs.

[97] The following order is made:

1. Save for the costs order in the rule 42 application, the appeal succeeds with costs, including those of two counsel where employed.
2. The cross-appeal is dismissed with costs, including those of two counsel where employed.
3. The order of the court a quo is set aside and replaced with the following:

(i) The bonds of marriage subsisting between the plaintiff and the defendant be and are hereby dissolved.

(ii) It is declared that a property partnership exists between the plaintiff and defendant, the assets of which are the following:

- (a) Erf [...] Stellenbosch (P Street, Dennesig, Stellenbosch) – “the P Street property” – as well as the assets (including all movables) and goodwill of the guesthouse operated therefrom by Apple Tree Guest House CC, which shall all together be regarded as a going concern; and
- (b) Erf [...] Vlottenburg ([...] Digteby Estate, Vlottenburg Road, Stellenbosch) excluding any movables situated thereon (‘the

Digteby property’).

(iii) The property partnership is hereby dissolved, and shall be liquidated on the terms set out below.

(iv) A practicing chartered accountant shall, within one month from date of this order, be nominated by the Chairperson of the South African Institute of Chartered Accountants (which person is hereinafter referred to as “the liquidator”) and is hereby appointed to liquidate the partnership and who shall:

- (a) Determine the net value of all the partnership assets as at date of dissolution; and
- (b) Sell or distribute the partnership assets between the plaintiff and defendant, or pay to either of them such money as may be necessary,

so that each is possessed of assets and/or money equal in value to his or her 50% share of the net, after deduction of costs, fees and expenses stipulated in Annexure “A” hereto as well as any amounts paid by the plaintiff in terms of paragraph (viii) below.

(v) For the purpose of giving effect to paragraph (iv) above, the liquidator shall have the powers and duties set out in Annexure “A”

hereto.

(vi) The defendant shall pay to the plaintiff the sum of R10 000 (ten thousand rands) per month as personal maintenance until her death or remarriage, whichever occurs first, payable in advance on the first day of each month following upon this order into a bank account nominated by the plaintiff.

(vii) The sum of R10 000 (ten thousand rands) aforesaid shall increase on each anniversary of the date of first payment stipulated in paragraph (vi) above in accordance with such increase as may have occurred in the consumer price index for the Republic of South Africa, as notified by the Director of Statistics or his or her equivalent, for persons in the middle income group.

(viii) Until such time as the partnership assets have been wound up by the liquidator, the plaintiff shall be entitled to remain in occupation

of the Digteby property, and the Apple Tree Guest House CC shall be entitled to remain in occupation of the P Street property, provided that the plaintiff shall make payment of the mortgage bond instalments over the properties (such mortgage bonds shall not be increased by the defendant without the plaintiff's prior written consent) but which payments shall be credited to the plaintiff and taken into account when the partnership is liquidated.

(ix) It is declared that the movable assets situated at the Digteby property are the sole and exclusive property of the plaintiff.

(x) The defendant is precluded from instituting any proceedings against the plaintiff in terms of section 3 of the Matrimonial Property Act 88 of 1984.

(xi) The eviction applications under case numbers 21628/2014 and 21629/2014 are dismissed with costs, such costs to include the costs of the opposed interlocutory applications in terms of rule 35 and rule 30, as well as the costs of two counsel where employed.

(xii) The costs of this divorce action shall be paid by the defendant on the party and party scale, including the costs of two counsel where employed as well as the qualifying fees of the plaintiff's expert witnesses Ms Hofmeyr, Professor Terblanche and Munro

Actuaries, but excluding the costs of the rule 42 application, in respect of which each party shall pay their own costs.'

J I CLOETE

I agree.

L NUKU

E D WILLE

ANNEXURE "A"

POWERS AND DUTIES OF THE LIQUIDATOR [AS SUBMITTED BY COUNSEL FOR THE PLAINTIFF WITHOUT ANY AMENDMENT SOUGHT BY EITHER PARTY]

1. To determine the value of the partnership assets;
2. To call upon either party to provide any books, documents or other information which he/she may reasonably require in order to determine the facts set out in paragraph 1 above;
3. To take control of all assets forming part of the partnership estate;

4. To engage the services of any suitably qualified person or persons to assist him in determining the proper value of any of the partnership assets and to pay such person the reasonable fees which may be charged by him.
5. The liquidator shall:
 - a. Afford both parties personally the opportunity to make representations to him about any matter relevant to his duties and to this order and to the identity of any purchaser, as well as the purchase price of any assets, including but not necessarily limited to –
 - i. The time and/or manner in which any assets should be realised;
 - ii. The price for which any asset should be realised;
 - iii. The sequence in which assets should be realised;
 - b. Give due consideration to the wishes of the parties pursuant to representations made by them and make such decision in respect thereof as he may deem fit;
 - c. Prepare such interim and/or final accounts between the parties as he may deem necessary from time to time;
 - d. Be entitled to realise any asset of the partnership estate either by public auction or private treaty and on such terms and conditions as may to him seem most beneficial;
 - e. Be entitled to sell any asset to either of the parties hereto for a price that he deems to be the trust market price (sic) of such asset;
 - f. Be entitled to postpone the realisation of any asset for a period not exceeding six months from the date when his appointment shall commence provided that he shall be entitled to postpone it for a period exceeding six months with the written consent of both parties;
 - g. Be entitled to sign any documents as may be necessary to effect transfer of any asset sold from the person in whose name it is registered to the purchaser thereof;
 - h. Not realise any asset without giving both parties three weeks' notice of his intention so to do;
 - i. Be entitled to apply to this court for any further directions that he shall or may consider necessary;
 - j. Be entitled to collect debts due to the partnership estate unless the same be disposed of by sale;
 - k. Be entitled to pay the liabilities of the partnership;
 - l. To pay the reasonable fees of the liquidator and to apportion such fees between the parties in the same proportion as they are entitled to the profits of the partnership;

- m. The liquidator's duties shall cease and determine immediately he has either realised and/or redistributed sufficient assets to pay to the plaintiff 50% of her due share, provided that despite the cessation of his duties as liquidator he shall nevertheless still be obliged to frame and submit to the parties the final partnership account;
- n. Be obliged to give both parties a first right, for a period of 10 days, to purchase any assets of the partnership on the same terms and at the same price, as he is able to obtain from any bona fide third party.
- 6. To prepare an account setting out the facts and circumstances determined by him/her as contemplated in paragraph 2 above, and setting out the intended manner of distribution of the assets of the partnership or the value thereof;
- 7. To engage the services of any suitably qualified person or persons to assist him in determining the proper value of any of the partnership assets and to pay such person the reasonable fees which may be charged by him.'

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- [1] The eviction applications were 'consolidated' with the divorce action by agreement in terms of an order of Koen AJ on 23 March 2016.
 - [2] Annexure "A" to the order is not relevant for present purposes.
 - [3] At fn 26 of the judgment, Record Vol 25, p2473, the trial court held that: 'The plaintiff would be deemed to be living with her romantic partner if she lives with him for a period longer than 4 consecutive months'.
 - [4] The same order referred to at fn 1 above.
 - [5] Mr Du Plessis was erroneously referred to in the trial court and its rule 42 judgment as Mr Munro.
 - [6] The plaintiff also delivered a supplementary notice of application for leave to appeal on 28 June 2018.
 - [7] 2014 (3) SA 96 (SCA) at paras [19] to [20].
 - [8] Para 92 of its main judgment, Record Vol 25, p2472.
 - [9] See, for example, the defendant's evidence in chief Record Vol 21, p2040.
 - [10] Record Vol 24, pp2364-2365.
 - [11] The defendant's plea runs to 26 pages.
 - [12] R v Dhlumayo and Another 1948 (2) SA 677 (A) at 706; Protea Assurance Co Ltd v Casey 1970 (2) SA 643 (A) at 648.
 - [13] Rule 42 judgment, Vol 27, p2634.

- [14] Main judgment, Vol 25, paras 94 and 102, pp2472 and 2473.
- [15] i.e. R3 million, being the difference between R7.2 million and R4.2 million.
- [16] Record Vol 15, p1464.
- [17] Record Vol 15, p1518.
- [18] Record Vol 21, p2036.
- [19] Record Vol 14, pp1382-1404. According to the defendant's counsel its total was in excess of R1.75 million.
- [20] Record Vol 12, pp1260-1261.
- [21] Record Vol 3, para 34, pp228-229.
- [22] Record Vol 4, pp337-338.
- [23] Paras [60] to [62], Record Vol 25, pp2464-2465.
- [24] Record Vol 19, p1895.
- [25] Record Vol 21, pp2073-4
- [26] Record Vol 12, p1203.
- [27] Record Vol 9, pp898-908.
- [28] Record Vol 19, p1867.
- [29] Record Vol 9, pp921-923.
- [30] His founding affidavit in the eviction proceedings, para 25, Record Vol 3, p226.
- [31] Record Vol 4, pp355-360.
- [32] Maintenance schedule and supporting documents, Record Vol 14, pp1377-1421.
- [33] Record Vol 16, p1602.
- [34] Record Vol 2, p200.
- [35] Record Vol 23, p2323 and Vol 24, pp2397-2399.
- [36] Record Vol 13, p1286.
- [37] See fn 3 above.
- [38] 2012 (4) SA 164 (SCA) at para [11].
- [39] No 99 of 1998.
- [40] Main judgment paras [90] – [92], Record Vol 25, pp2471-2472.

[41] No 88 of 1984.

[42] 2016 (5) SA 211 (SCA) at paras [15] – [20]; see also ST v CT 2018 (5) SA 479 (SCA) at para [17].

[43] JA v DA 2014 (6) SA 233 (GJ) at para [9]. See also MB v NB 2010 (3) SA 220 (GSJ) at paras [37] to [42].

[44] Para 12 of the amended particulars of claim, para 13 above.

[45] (627/2016) [2017] ZANCHC 26 (31 January 2017) at para [17].

[46] fn 42 above.

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