Editorial note: Certain information has been redacted from this judgment in compliance with the law.

**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA,**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 37350/2015**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... .....
DATE SIGNATURE

In the matter between:

**V S** Plaintiff

and

**S S** Defendant

(born L)

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**JUDGMENT**

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**MIA, AJ**

[1] The plaintiff, a 34 year old businessman issued summons for divorce from his wife, a 34 year old PhD student. The parties were married out of community of property in terms of an antenuptial contract the terms which excluded the accrual system as envisaged in Chapter 1 of the Matrimonial Property Act 1984. The antenuptial agreement made provision for medical aid on the most comprehensive medical aid

during the marriage and upon dissolution that the plaintiff pay the defendant R2 million duly adjusted for inflation within five days of the date of dissolution of the marriage as well as medical aid for life. The plaintiff seeks forfeiture of the above benefits. I am indebted and grateful to counsel on both sides for the comprehensive heads of argument, the thorough submissions and the records made available which have made my deliberation herein easier.

[2] The defendant defended the action and instituted a counter claim seeking the enforcement of the antenuptial contract as well as maintenance in the amount of R 25, 000.00 for life. In April 2018 the defendant amended her counter claim to include a claim for Western and Indian jewellery alternately the payment of R43, 000.00 in respect of the Western jewellery and R500, 000.00 in respect of the Indian jewellery. This claim was abandoned at the close of the plaintiff's case and before the defendant commenced leading evidence. The defendant brought a third Rule 43 application on the day before the matter proceeded for a contribution towards her costs as well as the costs of her experts. The application was opposed and the defendant did not persist with the application. I am required to determine the costs of this application as well.

[3] The remaining issues in dispute were as follows:

3.1 The reasons for the breakdown of the marriage and the relevance of this to the defendant's claim for spousal maintenance;

3.2 The defendant's claim for spousal maintenance as specified in prayer 3 of her counter claim. This includes her entitlement to maintenance as well as the duration and quantum of maintenance;

3.3 the defendant's claim for the enforcement of the terms of the antenuptial contract;

3.4 the plaintiff's claim against the defendant for forfeiture of benefits of the marriage out of community of property, which benefits are contained in clauses 5.1,5.2,5.3 of the antenuptial contract;

3.5 which party should pay the costs of the action.

[4] It was common cause between the parties:

4.1 the parties signed an antenuptial agreement in terms whereof, as provided in Chapter 1 of the Matrimonial Property Act, Act 88 of 1984 as amended, the accrual system was excluded;

4.2 no children were born of the marriage;

4.3 the parties do not share the common home since September 2015;

4.4 the marriage has broken down irretrievably and there is no prospect of restoring the relationship;

4.5 the parties agree a decree of divorce should be issued;

4.6 the adapted value of the donation of R2 million contained in paragraph 5.1 of the antenuptial contract amounts to R2 396 360.00 as at 1 June 2018.

[5] The parties married on 24 November 2014 out of community of property in terms of an antenuptial contract which excluded the accrual system, after a very brief courtship. The defendant was graduating In December that year and wished to graduate as Mrs S. The summons was issued in October 2015 before the parties' first wedding

anniversary. However the incidents relating to the irreconcilable breakdown commenced from approximately July 2015 to September 2015. During this period there were periods of separation, counselling and in October 2015 it appears the trust and willingness to forge ahead together had been compromised to the point where it was no longer possible to continue in the marriage.

[6] The evidence indicated that the antenuptial contract was proposed by the defendant in view of the parties' disparity in assets. The plaintiff at the time owned a 15% share in the family business which included: Varun Import Export CC, a close corporation entity which imports clothing for a retail store; interests in hotel properties in South Africa; as well as various other investments. The plaintiff earns an amount of R30,000.00 from the close corporation. He had an amount of approximately R150,000.00 in an account after transferring a substantial amount to the close corporation which carried the costs of building the home the couple lived in. The plaintiff also has access to a credit card with a limit of R180, 000.00 which is utilised by himself, his father, mother and the defendant whilst she was living with the plaintiff. The expenses are reconciled at the end of each month and allocated to company expenses or the plaintiff or his father's loan account with the close corporation.

[7] The defendant owned a flat in Faerie Glen which was rented out when she moved in with the plaintiff as well as a small motor vehicle which served her needs as a student. The plaintiff paid an amount of R6700 to the defendant each month which he intended to be paid into the defendant's bond during periods when the defendant's property remained unoccupied and she had no tenant to cover the bond. He also paid the outstanding rates and taxes in the amount of R13, 000.00 when the property was sold to ensure the property could be transferred

to the new owner. The defendant sold the property after the parties separated and retained the proceeds of the sale of the property. It was evident that there was a huge difference in the asset value of the plaintiff and defendant.

[8] Both the plaintiff and the defendant are academically accomplished graduates. The plaintiff studied a business oriented degree at a university in the United States of America. The defendant was reading for her Master's degree at the date of their marriage. She went on to pursue her PhD studies which she is due to complete in June 2019. The completion of her studies is delayed by six months later than originally envisaged. According to the plaintiff's industrial psychologist's report and her consultation with the defendant's supervisor this is as a result of the defendant's change in her course of study and had less to do with her medical condition. The defendant is registered with the disability unit at the University of Pretoria and appears to be accommodated in her course due to her medical condition.

[9] The plaintiff has been diagnosed with multiple sclerosis and takes medication for this disease. The plaintiff's mother testified that she paid for his medication on a monthly basis. Whilst there was a lack of clarity regarding what the source of funds were for the medication it was evident that this was not a cost covered by the plaintiff's medical aid. This appears to be paid either by the plaintiff's mother or the close corporation by way of credit card. It is possible that once the credit card statement is reconciled such expense was allocated to the plaintiff's parent's expense. What is clear however is that the medical aid does not pay this expense, nor does the plaintiff pay for this monthly expense of R23, 000.00 from his own income of R30, 000.00.

[10] The defendant was diagnosed with Idiopathic Inter-cranial Hypertension (IIH) some time prior to meeting the plaintiff. She had a lumbar peritoneal shunt inserted to alleviate the symptoms she experienced due to her medical condition. She requires medical attention in the event the shunt becomes blocked or requires revision. When she is admitted to hospital for such medical procedures or surgeries she requires a recuperation period of four to ten weeks. She envisages this will impact on her future employability and thus claims future maintenance in the amount R25, 400.00 per month alternatively rehabilitive maintenance or token maintenance.

**FORFEITURE**

[11] The plaintiff seeks forfeiture of the matrimonial benefits as contained in clauses 5.1, 5.2 and 5.3 of the antenuptial contract which provide:

> "SETTLEMENT
>
> In the event of the dissolution of the marriage for any reason whatsoever, it is agree that the following provisions shall apply to the dissolution of the marriage, unless otherwise determined by the High Court of South Africa or other applicable court at the time-
>
> 5.1 the Husband shall, within (five) days after the date of the dissolution of the marriage, pay the Wife an amount of R2, 000, 000.00(two million rand) ( which amount shall be adjust for inflation, *mutatis mutandis,* in accordance with Section 4(1)(b)(iii) of the Act) by electronic transfer of immediately available and freely transferable funds, free of any deductions or set-off whatsoever, in the currency of the Republic of South Africa, into a bank account nominated by the Wife in writing; and
>
> 5.2 the Husband shall remain liable for the Wife's medical aid scheme referred to in clause 4. The Husband shall pay all premiums due in respect of such medical aid policy and the Husband shall comply with all of the conditions to which the liability of the medical aid service provider under the applicable medical policy will be subject. The Husband shall not do anything or omit to do anything which could directly or indirectly cause the cancellation

of the said medical aid policy, the repudiation of any claims thereunder, or the medical aid scheme provider not to renew such policy in the future or only renewing such policy on more onerous terms; and

5.3 notwithstanding anything to the contrary contained in the Husbands will at the time of his death, in the event that the Husband dies after the dissolution of the marriage but before the Wife's death, the Husband's deceased estate shall be liable to the Wife for an aggregate amount equivalent to the 5(five) years worth of premiums in respect of the Wife's medical aid policy payable at the time of the Husband's death, which amount shall be immediately payable upon the Husband's death by electronic transfer of immediately available and freely transferrable funds, free of any deductions or set-off whatsoever, in the currency of the Republic of South Africa, into a bank account nominated by the Wife in writing"

[12] Section 9(1) of the Divorce Act, Act 70 of 1979 (the Divorce Act) provides:

**"9 Forfeiture of patrimonial benefits of marriage**

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

[13] The plaintiff sought forfeiture of benefits in terms of section 9(1) of the Divorce Act and relied on the short duration of the marriage and the grounds pleaded in paragraph 6 of the plaintiff's particulars of claim. The latter was not pursued with much vigour as it was the plaintiff's case that the marriage broke down for numerous reasons which both parties contributed to. Further, that attempts to resolve the issues and effect a reconciliation failed. The plaintiff adopts a fault neutral

approach and proceeded from the basis that the parties both failed. Ms de Wet argued that the failure to succeed in overcoming their problems could not be placed at the door of either party alone. Thus the plaintiff relied on the short duration of the marriage as the ground for forfeiture.

[14] The parties were married on 24 November 2014 and separated finally in September 2015. In essence they spent eight months as a newly wedded couple before the daily grind of life challenged the foundation of their marriage. During this time the plaintiff worked in the family business. The defendant was engaged in her studies. There is evidence that she assisted with running errands for the plaintiff as well as for the close corporation such as buying stationery supplies etc. from time to time. The defendant maintains she assisted in the business of the close corporation by measuring items and packing samples. This however did not occur over any significant period as the defendant resumed her studies to complete her PhD. Studies.

[15] In determining whether there is a substantial benefit this must be answered on the facts. In Wijker *v Wijker* 1993(4) SA 720 (A) Van Coller AJA stated at 727:

> "It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be purely a factual issue. Once that has been established the trial Court must determine, having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefited if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial Court after having considered the facts falling within the compass of the three factors mentioned in the section.
>
> ….. **It is only after the Court has concluded that a party would be unduly benefited that it is empowered to order a forfeiture of benefits**, and in making this decision it exercises a discretion in the

narrower sense. It is difficult to visualise circumstances where a Court would then decide not to grant a forfeiture order. This discretionary power may be more apparent than real but it is not an issue in this appeal and no more need be said about it."

[16] Ms de Wet argued for forfeiture based on various cases, *Binda v Binda* 1993(2) SA 123 (W), *Wijker* above, *Engelbrecht v Engelbrecht* 1989(1) SA 597 (C), and *Klerck v Klerck* 1991(1) SA 265 (W) that not all three factors are required to be present cumulatively. Hence the plaintiff's reliance on the short duration of the marriage. Reliance on this individual ground as opposed to all three grounds cumulatively is supported by the decision of Kriegler in *Klerck* above. In *Wijker* above at p 729, Van Coller AJA refers to Kriegler's rejection of the argument that all three factors ought to be present in Klerck and states:

> "In rejecting this argument Kriegler J dealt fully with the wording and context of the section and said the following at 269D-G:
>
> 'Bowendien, en laastens, meen ek dat die interpretasie waarvoor mnr *Kruger* betoog, geweld doen aan die woorde van die subartikel soos hulle daar staan. Dit is wel so dat die drietal faktore gekoppel word deur die koppelwoord "en". 'n Mens kan jou egter nie blindstaar op daardie koppelwoord nie. Wat die Wetgewer duidelik met sy woordkeuse aandui, is dat die Hof die drie genoemde faktore in ag moet neem. Ek weet van geen taalkundige manier om drie faktore te noem wat saam in een verband genoem word, anders as om hulle met 'n "en" te koppel nie. Die Wetgewer wou juis nie die koppelwoord "of" gebruik nie omdat hy aan die Hof die opdrag wou gee om breed en wyd te kyk na die drie kategorieë faktore. *Non constat* egter, dat as een van hulle ontbreek, die diskresie te niet gaan. As dit die bedoeling van die Wetgewer was, dan kon daardie bedoeling baie maklik deur ander woordkeuse so uitgespel gewees het.
>
> Myns insiens is die duidelike betekenis van die woorde wat die Wetgewer gebruik het dat ek myself moet afvra of daar *in casu* onbehoorlik bevoordeling van die eiseres sal wees indien daar nie 'n verbeuringsbevel gemaak word nie. Ten einde daardie vraag te beantwoord, moet ek kyk na die duur van die huwelik, die

verbrokkelingsomstandighede en, indien teenwoordig, wesenlike wangedrag aan die kant van óf eiseres, óf verweerder, óf albei.'

I am in full agreement with these passages and in my judgment Leveson J in *Binda v Binda* 1993 (2) SA 123 (W) correctly held that the decision in *Matyila v Matyila (supra)* was clearly wrong. The context and the subject-matter make it abundantly clear that the Legislature could never have intended that the factors mentioned in the section should be considered cumulatively. As was pointed out by Leveson J in *Binda v Binda (supra* at 126A-B) the following statement by Innes CJ in *Barlin v Licensing Court for the Cape* 1924 AD 472 at 478 is apposite also with regard to the interpretation of the section here in issue:

'Now the words "and" and "or" are sometimes inaccurately used; and there are many cases in which one of them has been held to be the equivalent of the other. Much depends on the context and the subject-matter. I cannot think that in this instance the Legislature intended to make these provisions cumulative.'

[17] It is apparent from the antenuptial contract that the defendant will receive a benefit. In determining whether this benefit is undue I have had regard to the duration of the marriage. The parties spent eight months living together before finally separating. They entered into an agreement, providing that the amount of R2 million adjusted for inflation be paid to the defendant upon dissolution of the marriage. After a marriage of such short duration the above amount is not easily justified. This is so especially having regard to the purpose of the payment.

[18] The argument presented on behalf of the defendant was that the antenuptial contract was drafted at the defendant's instance. The underlying intention of the parties with regard to the R2 million adjusted for inflation was to place the defendant in a similar position in the event

that the parties after a period of time separate or get divorced. They estimated the value of R2 million as the appropriate value for the replacement of the flat and vehicle. This agreement took into account that the defendant would sell her flat in Faerie Glen and invest the proceeds into the parties' new home. The defendant did not however invest the proceeds of the sale of the flat into the parties' new home but retained the proceeds of the sale of the flat. The defendant kept the money after the sale of the flat and in addition continued to receive R6700.00 each month for a further three years.

[19] During the course of the marriage the plaintiff paid R6700.00 per month to the defendant which was intended to cover the bond. The defendant alleges that this was for her assistance rendered during the marriage to the plaintiff and the close corporation. If this was the position the money would have been paid from the close corporation rather than the plaintiff's post tax earnings. The plaintiff also paid R13, 000.00 to clear the arrear rates and taxes to ensure the property could be transferred. The defendant thus as a result of the marriage received the proceeds of the sale of the flat in Farie Glen, R13, 000.00 as the plaintiff paid the arrear rates and taxes. She received various gift items which included jewellery and a luxury branded watch in addition to the medical aid benefit and the contribution which covered her bond whilst she did not have a tenant before the flat was sold as reported to her Industrial Psychologist. The plaintiff also invited her to collect items she required from the couple's home.

[20] Whilst the defendant places the responsibility for the breakdown at the feet of the plaintiff it is evident from the record that both parties' conduct contributed to the breakdown of the relationship. The parties married after a short courtship and did not have sufficient time to get acquainted with each other or their families. Both parties had difficulty relating to their partner's parents and felt their partner's parent

interfered in their relationship, they did not feel comfortable in the home of their in –laws and displayed conduct which did not support the building of the new partnership and the joining of families. I thus am not able to attribute substantial misconduct to either party in these circumstances. The defendant under cross examination conceded that **both** the parties lost their way **focussed on the wrong things** and in so doing **lost their valuable relationship in the process**.

[21] The short duration of the marriage is thus the only factor which informs my decision that it would result in an undue benefit to the defendant to expect the plaintiff to pay the amount of R2 million adjusted for inflation after a union which lasted eight months and to hold the plaintiff responsible for the defendant's medical insurance for life or for 5 years after his demise. Both parties were aware of the health condition of the other at the time of the marriage. Both expressed the desire to realise their full potential despite their physical health challenges. The defendant's changed view in this regard despite her accomplishments academically and the expert evidence regarding her academic abilities places an undue burden on the plaintiff which is not justified after a marriage of such short duration. A clean break is desirable and is supported in our law. In Klerck at p 273 E-F Kriegler states:

> " Bowendien, soos in die onlangse Appèlhof-beslissing in *Beaumont v Beaumont* 1987 (1) SA 967 (A) opnuut beklemtoon is, is daar baie deug in die skoon-breuk-beginsel. Dit word ook weerspieël in die bepalings van arts 7 en 9 van Wet 70 van 1979. Dit is vir die betrokkenes en vir die samelewing ongewens dat voormalige egliede tot in lengte van dae deur een of ander finansiële verpligting aan mekaar geketting bly. Dit is in die belang van almal dat daar tussen hierdie partye 'n skoon breuk gemaak word."

Similarly, it is in the interests of both parties herein that there is a clean break after such a short duration of marriage and in view of the defendant's health condition being a pre-existing condition which she

managed before the marriage there is no reason that the plaintiff be burdened therewith post the divorce.

**DEFENDANT'S MAINTENANCE CLAIM**

[22] I turn now to the defendant's claim for spousal maintenance. The defendant based her claim for spousal maintenance on the fact that she suffers from IIH and had a peritoneal shunt inserted. This requires revision in the event it becomes blocked. She contends that she requires an unpredictable amount of surgeries yearly to either revise or replace the distal portion. Thereafter she requires a period of four to ten weeks to recuperate. The defendant's claim was based on her not being able to resume work after these surgeries. It was contended that it impacted on her ability to resume normal activities which include resuming her studies and in the future it will impact on her work abilities, her employability and her promotion prospects.

[23] The Divorce Act provides in section 7(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 breakdown 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 remarriage of the party in whose favour the order is given, whichever event may first occur. "

[24] Mr Naude appearing for the defendant argued that the Court had a wide discretion to grant maintenance which included the time and period and that no single factor ought to predominate. The defendant was required to establish a need to be supported. (*EH v SH* 2012(4) SA 164 (SCA). In considering the defendant's requirements he argued that all the plaintiff's financial resources were to be taken into account which included capital, income from other sources, gains and benefits received as well as any money that may be available to the plaintiff. (Heaton, J( ed): *The law of Divorce and Dissolution of Life Partnerships in South Africa*, Juta (2014) p 128, par 2.3).

[25] Mr Naude referred to a number of decisions to assist this Court in coming to a decision herein. In referring to *Pommerel v Pommerel* 1990 (1) SA 998 (E), he argued that a woman's ability to earn an income does not disentitle her to maintenance since the reasonableness of her decision not to work must be considered in light of factors such as her age, state of health and qualifications, when she was last employed, the duration of the marriage, the standard of living of the parties during the marriage and her commitment to care of young children and others. He also referred to the decision of *Pillay v Pillay* 2004(4) SA 81 (SEC) where the court granted an order for rehabilitative maintenance after a marriage of only fifteen months.

[26] The defendant indicated that she had the amount of R10, 250.00 available as a result of a University of Pretoria bursary valued at R85, 000.00 a National Research Foundation bursary valued at R120, 000.00. Tuition of R17,000.00 was paid in 2018 and she paid her mother an amount of R65,000.00 in 2018 as well. Thus she had R123, 000.00 available for 2018. She contends the funding was linked to a research position and that future funding is scarce, suggesting that she may not secure funding in 2019. During the Rule 43 launched in March 2016 the defendant however indicated that she intended continuing

with her studies to obtain post-doctoral work at the University of Pretoria. Despite being registered with the disability unit there was no evidence that the defendant was given special treatment with regard to her study program. She was able to catch up when she missed out due to ill health or as a result of doctor's appointments.

[27] The joint expert minutes indicate that in future the defendant would as a result of her health condition be unable to maintain herself for the full period of her life. This is however one factor which is to be taken into account when determining whether future maintenance is applicable. Ms Talmud (Talmud) testified that the defendant would enjoy more success if self-employed where she could regulate her work pace. Talmud's positive view with regard to the defendant finding suitable employment is shared by the defendant's supervisor Dr Newton who also shared that the defendant would be able to secure further funding to complete her studies in 2019.

[28] It was evident from the defendant's evidence she was not comfortable in the S residence and in view of the short duration of the marriage it can hardly be argued that she became accustomed to the lavish lifestyle she ascribed to the S family. On the defendant's own evidence she was less anxious and more comfortable in her mother's home to which she returned after she separated from the plaintiff. There are no children born of the marriage and there is no need for the defendant to be out of work as a result of child caring responsibilities.

[29] The defendant is relatively young and has pursued her academic studies with discipline and drive. Despite her medical condition she has gone into the *veld* to conduct field work, catching and releasing rodents. She was previously employed and received glowing references as a tutor *cum au-pair* before she commenced her studies. She expressed an intention to teach alternately to conduct research or

offer proof reading and editing services. Notwithstanding her registered disability she has managed to secure two bursaries for 2018. According to her supervisor she may secure funding for 2019 to complete her research in 2019. The evidence of Dr Woolf regarding her ability reflects an individual of above average intellectual and academic ability. This ability perhaps explains how she has managed to adjust to the academic requirements and the change in her studies with a disruption of only six months in light of her health and whilst going through a divorce. It is thus entirely foreseeable that a young woman, with a distinguished academic ability and a disability will qualify for financial aid in 2019.

[30] The defendant is required to prove the amount required as well as the resources she has at her disposal to determine her maintenance requirement. The amount of maintenance has changed from R17 625.00 noted in the first Rule 43 application, then R25 330.00 in the pre – trial held on 29 November 2016 and the amount was adjusted to R25 400.00 during the trial on 1 June 2018. The computation changed during the trial and on 1 June 2018 the defendant requested plaintiff to comment on the new list. The plaintiff denied that the list constituted the defendant's needs and responded that it did not accord with the bank statements as suggested by counsel. The defendant did not provide vouchers to support the amounts claimed.

[31] The defendant did not provide vouchers nor did she supplement her discovery so it is not possible to ascertain the funds she has access to such as in her money market account. She indicated that it was not possible to obtain the bank statements. The bank statements included and which form part of the record do not support the amount of the defendant's claim for maintenance and she has failed to prove the quantum claimed. I have already indicated that the standard that the defendant enjoyed whilst living with the S family was too brief a period

to be the standard of maintenance against which the defendant's needs are determined. Thus the various expenses referred to by defendant which plaintiff introduced the defendant to are of no consequence.

[32] Having regard to the resources the defendant has at her disposal I am aware of the two bursaries that she was awarded. The defendant has received a substantial number of gifts from the S family, gifts of great value. Of her own assets she had the proceeds of the flat that was sold which was retained by the defendant before transferring the money to her mother. The plaintiff also paid R13 000 to the defendant towards the overdue rates and taxes. The plaintiff also paid the defendant's medical aid payments for the past three years which is almost three years longer than the duration of the marriage.

[33] The defendant is in possession of a Patek Phillipe watch, a diamond ring valued at R 1250, 000.00, a gold chain from Dubai, tanzanite earrings, diamond hoop earrings, a Burberry coat, shoes from Italy, Desigual clothing, a designer handbag, a gold emerald/jade bracelet, a wedding dress valued at R46, 000.00. This does not include money in her account as the defendant failed to discover her money market account statements. The defendant indicated she intended selling her jewellery. This option is still available to her. She will also receive funding to complete her studies in 2019 according to Dr Newton. She is still able to work as an art model. Nothing prevents her from securing work as a tutor or editor of written work as envisaged, on a part time basis.

[34] The defendant's medical condition impedes the defendant's work opportunities on occasion. She testified how she was able to manage these to enable her to continue field work in the past and to continue

her academic work. The condition did not arise as a result of the plaintiff or the marriage. The plaintiff has to date displayed a liberal and big-hearted approach to the defendant's maintenance needs despite the short duration of the marriage. The plaintiff ought not to be burdened with the consequence of the defendant's pre-existing condition especially in light of the short duration of the marriage. In view of the above I am of the view that the defendant has not made out a case for a cash contribution toward maintenance in perpetuity nor for rehabilitative maintenance, nor for token maintenance. In view of the short duration of the marriage and the clean break principle I see no need for maintenance.

[35] I had posed a question to Ms de Wet regarding the circumstances of the *Pillay* matter above which the defendant relied on in comparison to the present matter. Ms de Wet conceded that there was no difference in that the unions were both of short duration and both afforded the defendant an opportunity to upskill to re-enter the workplace. I have had an opportunity to consider the circumstances of the two matters at length. I am of the view that whilst there are similarities in that the marriages were both of short duration, the circumstances in the present matter is distinguishable in that the defendant *in casu* is academically skilled having a Master's degree at the time of the marriage and was assessed as having a superior intellectual ability and has been employed as a tutor and *au pair*. The skills base of the defendant in the *Pillay* matter and that of the defendant vary vastly with defendant being advantaged academically and from a skills base and thus being better placed to enter the employment market by comparison. The defendant *in casu* is in a different skill category in comparison to the defendant in the *Pillay* matter. The defendant has not been disadvantaged as a consequence of the marriage, she was not prevented from working or improving her skills due to her being married to the plaintiff or her responsibilities in the marriage and consequently there is no need for rehabilitative maintenance. The defendant worked part time even whilst

she was ill, to generate an income to maintain herself prior to the marriage, there is no reason why she cannot do so again.

[36] The defendant has received maintenance payments for a period of almost three years after living with the plaintiff for a period of eight months. Both parties suggest delays at the behest of the other party. I can see no reason why the plaintiff would seek to delay going to trial and incur a maintenance obligation for almost three years after separating from the defendant.

[37] I turn now to the question of costs. The first issue was the Rule 43 application on 31 May 2016. Having regard to the facts herein the plaintiff was still paying the defendants medical aid premium. The plaintiff was still paying the defendant R 6700 which was terminated at the defendant's attorney's request. The plaintiff's attitude to continue to covering the defendant's costs for a reasonable period of time was clear. There was no need for an application to be launched without demand being made. The application was settled without the defendant pursuing her claim for a contribution toward her costs. In view hereof the defendant is liable for the costs of the application.

[38] The defendant brought a second Rule 43 application which the plaintiff complied with. The defendant brought a third Rule 43 application a day before the trial commenced seeking a daily contribution towards counsels' fee, her attorney's fee as well as experts' fees. There was no explanation offered for the late filing of the application or why the urgent relief was sought. No application was made for condonation or non- compliance with the rules. This application was opposed and the defendant did not persist with the application. The defendant did not call any of the experts except Mr Zeeman. The defendant also pursued a claim for western and eastern jewellery from the plaintiff well

knowing that the jewellery was a gift from her in laws which they would hand over to her as part of the ritual during the planned Hindu wedding ceremony which did not occur. It thus did not form part of the matrimonial action and was opportunistic. Consequently she did not pursue this claim after Mrs S testified. In view of the defendants conduct herein it is appropriate that she be ordered to pay the costs.

**COSTS**

[39] Section 10 of the Divorce Act provides:

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

[40] Both parties have been assisted by their respective parents in litigating the divorce action. The plaintiff is assisted by his father and the defendant by her mother. The plaintiff testified that the loan account was subrogated to creditors to ensure the viability of the close corporation. Mr Zeeman's evidence regarding the financial well being of the close corporation was based on insufficient information supplied alternately misinformation. His comments were thus of limited value until he was afforded the opportunity to consider the information in totality. I cannot ignore that the defendant has conducted this matter in a less than constructive manner. The claim for jewellery was misplaced and then abandoned. She pursued a claim for permanent maintenance after a marriage of short duration.

**ORDER**

[41] For the reasons above I make an order in terms of the draft attached marked "X":

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**S C MIA**
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Appearances:**

| | | |
|---|---|---|
| On behalf of the applicant | : | Adv S de Wet SC |
| Instructed by | : | Thomson Wilks Inc<br>Incorporating Adam Mitchell Attorney |
| On behalf of the respondent | : | Adv G Naude SC & Adv GT Kyriazis |
| Instructed by | : | Van Wyk Attorneys |
| Dates of hearing | : | 30-31 May; 1, 2, 5, 6,7June;<br>24- 25 July 2018 |
| Date of judgment | : | 12 September 2018 |