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

REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/5018A

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

……………………… ………………………
DATE SIGNATURE

In the matter between:

FB APPELLANT

AND

FR RESPONDENT

JUDGMENT

(Coram Matojane, Sutherland et Siwendu JJ)

Headnote – interpretation of clause excluding assets from accrual in an ante-nuptial marriage contract –

The principal controversy was whether the text meant that the shareholding in two companies which the husband either held or had rights to at the commencement of the marriage were alone excluded, or whether additional shares in those two companies acquired after the marriage were also excluded from the accrual – the husband made no allegation that he relied on the latter shares having been acquired by virtue of them being the fruits of the earlier shareholding within the meaning of section 4 of the Matrimonial Propertry Act

The majority judgment (Sutherland and Matojane JJ) held that the shares acquired after the marriage were not included, both on a texual appreciation and having regard tro the implications of section 4 of the Matrimonial Property Act on the intention of the contracting parties which, properly interpreted, meant that the exclusion of assets acquired after marriage was wholly inconsistent with the purpose of the statute; the contrary view of the writer, Schafer, being rejected.

The Minority judgment (Siwendu J) held that the evidence adduced on affidavit and the terms of the statrement of case placed before the trial court did not afford a court a sufficient basis upon which to decide the issue and that the matter ought to have been referred back to the trial court

Order: The appeal was upheld and a declaration made accordingly.

Sutherland J:

Introduction

[1] The controversy before the court is about the meaning of clause 4 of an ante-nuptial contract. The clause reads:

> "That the assets of the Husband which are listed hereunder and all liabilities presently associated therewith or any other asset acquired by the Husband by virtue of his

possession or former possession of such asset shall not be taken into account as part of the Husband's Estate at either the commencement or dissolution of the marriage.

4.1 All shares and loan accounts in Rand Building Hydraulic (Pty) Limited. [RBH]

4.2 All shares and loan accounts in National Re Investments (Pty) Limited."[NRI]

[2] The dispute between the parties is about whether certain of the assets that the husband possesses at the dissolution of the marriage, which he did not possess at the commencement of the marriage, are excluded by this clause.

[3] The bare facts are these:

3.1. At the commencement of the marriage, the husband possessed:

3.1.1. 220 of 1000 issued shares in RBH plus a credit balance loan account

3.1.2. A right as beneficial owner to 21 of 100 shares in NRI, plus a credit balance loan account.

3.1.3. It is common cause these assets were excluded.

3.2. At the dissolution of the marriage, the husband possessed:

3.2.1 The entire shareholdings in RBH plus a credit balance loan account greater than initially.

3.2.2. The entire shareholdings in NRI plus a credit balance loan account greater than initially.

[4] The critical question is: Are the additional shares over and above what the husband possessed at the commencement *also* excluded?

[5] There is a controversy about whether the words used in the clause evidences an intention to exclude assets that were acquired in the future; i.e. after the commencement of the marriage. The additional shares possessed at the dissolution are assets acquired after the commencement of the marriage and during its existence.

[6] I have read the judgment of my colleague Siwendu J. We disagree on the outcome of the case. I understand our points of departure to be twofold; first, the meaning to be attributed to the text of the clause, and second, as to whether it is lawful to exclude, in an Ante Nuptial contract establishing an accrual regime, assets acquired in the future; i.e after the commencement of the marriage.

[7] I deal first with the text of clause 4 and thereafter with the application and significance of section 4(1)(b) ii of the Matrimonial Property Act 88 of 1984 (MPA).

An analysis of the text of clause 4.

[8] Several components of the text in the clause have triggered distinct debates. These are dealt with in turn.

[9] First, it is appropriate to examine the structure of the clause.

9.1. The two sub-paragraphs serve to identify the assets. In context, they serve no other purpose. Notably, neither is a self- standing sentence; i.e. one would not write those words independently of other words. Indeed, they are not proper sentences, lacking a verb, or a subject or an object. Accordingly, they are demonstrably subordinate clauses. A subordinate clause can only have a meaning in the context of the primary clause.

9.2. The primary clause is the preamble. In that text, there is a reference to the two subordinate clauses. The words that connect the primary and subordinate clauses are:

> "That the assets of the husband which are listed hereunder…."

For illustration purposes, the primary clause could have written to incorporate the substance of the subordinate clauses thus:

> "*That the assets of the husband,* [i.e.] *all shares and loan accounts in RBH and all shares and loan accounts in NRI*, and all liabilities associated therewith or any other asset acquired by the husband shall not be taken into account as part of the husband's estate at either the commencement or dissolution of the marriage."

[10] The significance of examining the structure of the text is that the conclusion must be reached that the words: "That the assets of the husband <u>which are listed hereunder"</u> govern the subordinate clauses. The implications of this analysis are that:

10.1. The introductory phrase, i.e. 'The assets of the husband' can only mean assets that he at that time possessed; i.e. at the commencement of the marriage.

10.2. The phrase "which are listed hereunder" must be subject to that assertion; i.e. assets which he already possesses.

10.3. The phrases in the subordinate clauses do not and cannot contemplate assets yet to be acquired; the word "all" must be understood to mean "all of the husband's shares etc" not "all the shares in the company". Were the meaning to be attributed to the subordinate clauses to be different, the text would not make sense.

[11] Accordingly, what was excluded from the accrual were the existing assets of the husband, as defined, being all of his interest that he possessed in the two companies as at the commencement of the marriage.

[12] It is in this respect that the judgment of my colleague Siwendu J and this judgment differ: in the judgment of Siwendu J, at [12] and [20] she recognises the

validity of excluding an asset yet to be acquired through the mechanism of clause 4 and concludes that the sub-clauses govern the introductory phrase in the primary clause. I disagree.

[13] It has been suggested that a construction of the text of clause 4 evidences an intention to use the phrase “All Shares..” to contemplate a wide class of asset, including contingent rights to assets yet to be acquired, because, as agreed in the stated case, the right of the husband to shares in NRI, as at the commencement of the marriage, was merely beneficial ownership. I do not agree with this construction. The critical fact, in my view, is the existence of a right at the commencement of the marriage. If the husband has a right to become a registered shareholder at a later time or realised only at a later time, that right and its fruits; i.e. fulfilment of the right to the shares, is what is contemplated as the asset being excluded. As addressed hereafter, section 4(1) (b) (ii) deals expressly with that consequence.

[14] The phrase: “…and all liabilities presently[1] associated therewith…” is thought to have an impact on the controversy. In my view, this is misplaced. There are three aspects to consider.

[15] First, the identified assets are shares and loan accounts. What generically could constitute a liability associated with either? There are two scenarios.

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[1] The use of the word “presently” bears mention. It is plain to me that the word meant to used was “at Present’, rather than presently. However, the misuse of “presently” to mean “at present” is so common place in South African English usage that the two are virtually interchangeable. The word “presently” according to the pedants means “in a moment’ or “just now”. Plainly that meaning cannot be attributed to the phrase: “presently associated therewith”

15.1. Debts owed by the husband: It is possible to own shares for which you have not yet paid the price. That debt is an associated liability. Loan accounts can stand in debit or credit, depending on whether the company owes you money or the other way around. The phrase, in context, if it alluded to debit balances, immunised the wife's share of the accrual from any liability to be reconciled with any outstanding indebtedness that might remain extant upon dissolution of the marriage.

15.2. Debts owed by the companies to the husband: This takes the form of credit balances. The money owed to the husband at the time of the commencement of the marriage is said in the Stated Case, to be less than the sum owed to him as at the dissolution. This 'asset' would have been fluid over time during the marriage. The qualification "presently associated therewith" serves to determine the exclusion of the value of the credit balance, if any, as at the commencement of the marriage. If a greater sum was standing to his credit at the dissolution, the difference would not be excluded. The use of the qualifier "presently" is superfluous but serves to emphasise this construction.

[16] Second, the use of the present tense evinces, in this example, an acknowledgement by the drafter of the clause that it was an existing liability being contemplated. Not too much ought to be made of the tense employed in the text;

generally, it can be and often is neutral. In this case, it is Section 4(1)(b)ii which is the true source of the impossibility of providing for a future asset to be excluded, and in a similar vein, the parties also cannot choose any timing for the exclusion of an asset because the MPA determines that.

[17] Third, it has also been suggested that the primary clause in its use of the phrase "….all liabilities associated therewith…." qualifies the phrase which follows immediately; i.e "…. or any other asset acquired …" In my view this is incorrect. The text has not been punctuated. There are several places where commas would have been useful. Optimally, a comma should have been inserted between "therewith" and "or". However, punctuated or not, the subclause following on "or" cannot be subordinate to the former sub-clause. Indeed, the second subclause addresses a distinct topic and uses text that has been lifted from section 4(1)(b)(ii). The significance of this is the incorporation of a phrase from the section which signifies that subordination of clause 4 to that section was intended.

[18] The text of the primary clause includes the phrase "…at either the commencement or dissolution of the marriage." In the judgment a quo, a significance was attributed to this choice of words. In my view this was misplaced. This phrase derives not from a choice by the contracting parties, but rather, is merely part of the text lifted straight out of section 4(1)(b)(ii) of the MPA. Accordingly, its usage cannot be a clue as to the subjective intentions of the contracting parties; rather the whole of the phrase lifted out of the section is what the parties must be held to have intended. The

implication of that choice is that the contracting parties intended to frame their agreement to comply with the section, the true point of significance.

The implications of section 4(1)(b)(ii) of the Matrimonial Property Act 88 of 1984.

[19] In order to address the significance of the statutory infrastructure of the accrual regime, it is necessary to examine the relevant passages in sections 2 - 5.

> "**2 Marriages subject to accrual system**
> Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, except in so far as that system is expressly excluded by the antenuptial contract.
> **3 Accrual system**
> (1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.
> (2) …..
> **4 Accrual of estate**
> (1) *(a)* The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.
> *(b)* In the determination of the accrual of the estate of a spouse-
> (i) any amount which accrued to that estate by way of damages, other than damages for patrimonial loss, is left out of account;
> (ii) an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by

virtue of his possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;

(iii) …..

(2) ….

5 Inheritances, legacies and donations excluded from accrual

(1) An inheritance, a legacy or a donation which accrues to a spouse during the of his marriage, as well as any other asset which he acquired by virtue of his possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of his estate, except in so far as the spouses may agree otherwise in their antenuptial contract or in so far as the testator or donor may stipulate otherwise.

(2)…..."

[Underlining supplied]

[20] In my view, it is fundamentally incompatible with the accrual regime that assets acquired after the commencement of the marriage can be excluded in anticipation of acquisition. Section 5 of the MPA provides for certain special cases where assets acquired after commencement of the marriage are *ex-lege* excluded.

[21] It is readily apparent that a portion of the controversial clause 4, is a repetition of the provisions of section 4(1)(b)ii of the Matrimonial Property Act 88 of 1984. The lifted portion can be illustrated thus:

"In the determination of the accrual of the estate of a spouse an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as *any other asset* which he acquired *by virtue of his possession or former possession of the first- mentioned asset, is not taken into account as part of that estate at the commencement or dissolution of his marriage."*

[22] That clause 4 invokes this section is significant. What the text of the clause can mean cannot differ from what the text of the section means. Purposively interpreted, the section, in the context of the MPA, is a component of a scheme to facilitate married couples maintaining separate estates during the existence of the marriage, but, compelling a calculation to take place upon dissolution to share in equal parts the wealth acquired by each of them during the marriage. If a married couple agrees, they can exclude, in terms of section 4(1)(b)ii, assets which each of them possesses as at the commencement of the marriage from such 'accrual'.

[23] Importantly, married couples cannot, pursuant to section 4(1)(b)ii, have both an accrual during the marriage and exclude wealth or assets acquired by either of them in the future; i.e. during the marriage. There is only one moment at which any asset of a spouse can be excluded and that is at the commencement of the marriage. Section 4(1)(b)ii allows no other act or timing of exclusion.

[24] It follows that when persons contemplating marriage expressly invoke section 4(1)(b)ii they are not free to design a regime in terms of which assets which may be acquired in the future can be excluded from the accrual. No clause in an Ante Nuptial Contract addressing the exclusion of assets can validly contradict that principle, and the text of any clause must be read in this context. Moreover, the text of clause 4, as addressed above, cannot be read to mean that assets to be acquired in the future are sought to be excluded.

[25] The primary example of an asset that does not exist at the commencement of the marriage which can be excluded is an asset which derives: " …by virtue of his possession or former possession of the first mentioned asset…". In this case, it is plain that no claim by the respondent relies on that mechanism. Any *additional shares* acquired are not, without more, to be understood to derive from the consequence of the growth of the *initial assets*. In this case, the point to emphasise is that *each share is an asset* and the companies, *per se,* in which the shares exist are not assets of the husband. If the husband sought to justify the acquisition of the additional shareholding as having been the fruits of the initial shareholding, it was incumbent on him to allege that, which would have precipitated a forensic enquiry to decide a disputed fact, not result in a stated case. The onus is on he who claims an exclusion to prove it.[2] An absence of even such an averment that the additional shares are the progeny of the initial asset eliminates that *causa.*

[26] The allusion in an argument on behalf of the respondent to the views of the author Schafer, bears mention.[3] Shafer opines that an asset *yet to be acquired* can be excluded, though she thinks the position is unclear. She writes:

> "An asset can also be expressly excluded from the accrual system in the antenuptial contract. This asset, as well as any other asset which the spouse acquired by virtue of his or her possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or at the dissolution of the marriage.
>
> <u>"It is not clear from the Act whether this provision only applies to assets already forming part of the particular spouse's estate or whether it also applies to future</u>

[2] See: MB v DB 2013 (6) SA 86 (KZN) at 95H.
[3] Family Law Service B14.

> assets which are identified but which have not yet been acquired at the commencement of the marriage. It is arguably the better view that the provision must include the latter category of assets. Regardless of what interpretation is followed, it is clear that the Act does not make provision for the parties to agree, during the existence of the marriage, to exclude any assets from the accrual which have not already been mentioned in the antenuptial contract."
>
> (Underlining supplied)

[27] This view is neither substantiated nor reasoned. In my view, it cannot be the preferable meaning. It would make a nonsense of the accrual system if assets in respect of which *no rights existed at the commencement of the marriage* could be excluded in anticipation of acquisition in the future. A potential spouse could, on this thesis, exclude everything he would acquire in future and produce a hollow "accrual".

[28] It is possible to exclude an asset to which a spouse may have a contingent right. Section 5 addresses this very issue in respect of certain classes; ie inheritances, legacies and donations. Benefits may accrue to persons from their status as beneficiaries of a Discretionary Trust.[4] These benefits from a Trust can be excluded on the premise that it is the status as beneficiary that confers a right, which is the right being excluded. However, to exclude an asset in respect a mere *spes*, i.e. the hope or aspiration to buy out one's partners' shares cannot be excluded.

[29] Furthermore, it is notable that Section 4(1)(b)ii is cast as a deviation from the general accrual regime, and does so within a limited scope; i.e. you *exclude* assets

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[4] See REM v VM 2017 (3) SA 371 (SCA)

rather than specify what assets are *included*. A strict interpretation of what is excluded would in such a context be warranted and consistent with the onus to prove an exclusion.

The approach of the Court to a stated case

[30] For the reasons given, the question of interrogating the stated case and contemplating a referral back does not, in my view, arise.

Conclusions

[31] In my view, on the stated case, a declarator should follow that only the assets possessed at the commencement of the marriage, being the 220 shares in RBH and the 21 shares in NRI, plus the value of the credit balances of the two loan accounts, as at that date, fall to be excluded.

[32] The valuation of the assets was no part of the question posed to the court.

The Order

It is ordered that:

1. The appeal be upheld with costs, including the costs of two counsel.

2. (i) The difference in the issued share capital now owned by the plaintiff in Rand building Hydraulics (Pty) Ltd and National Reinvestments (Pty) Ltd and that which was owned by him at the date of the conclusion of the date of the marriage, and,

(ii) the difference between the credit balances now due to the plaintiff under the loan accounts in Rand building Hydraulics (Pty) Ltd and National Reinvestments (Pty) Ltd and the credit balances which were due to him thereunder at the time of date of the marriage,

are subject to the accrual sharing and the value to be ascribed to these differences is to be taken into account in the reckoning in determining the defendant's entitlement in terms chapter 1 of Act 88 of 197

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Sutherland J

I agree.

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Matojane J

Siwendu J (Dissenting):

[1] This appeal concerns the disputed interpretation of an antenuptial contract (ANC) entered by the appellant and the respondent. The appellant and the respondent were married to one another on the 20th February 1993 in terms of an ante-nuptial contract incorporating the accrual system. Divorce proceedings are pending, and the parties agreed to approach the court on a separated issue for the proper interpretation of the ANC to determine the assets to be taken into the reckoning of accrual calculation.

[2] It is common cause that at the date of the ANC, the respondent held shares in Rand Building Hydraulics (Pty) Ltd (RBH) and had *"beneficial ownership"* of shares in National Reinvestment (Pty) Limited (NR). Of the authorised share-capital comprising 4000 shares in RBH, having a par value of R100 per share, 1000 shares were in issue. The respondent held 220 shares of the issued shares. The respondent took transfer of 21 shares in NR in January 1994, a year after their marriage. Between April 1997 to October 1998 he had increased his shareholding in two tranches, from 220 shares to 310 shares, and later acquired the entire issued share capital comprising of 690 shares. He subsequently acquired the entire issued share capital in NR in two tranches, namely 9 shares on 7 April 1997 and a further 69 shares in October 1998 respectively.

[3] The Appellant claims that:

[3.1] the difference in the issued share capital owned by the Respondent in RBH and NR at the date of the dissolution of the marriage and that owned by him at the date of the ANC or the date of the marriage; and

[3.2] the differences between the credit balances under the loan accounts in RBH and NR and those credit balances that were due to him at the time of the ANC, alternatively, the date of the marriage, are subject to accrual sharing.

[4] This contention was dismissed by Wright J. He held that it was clear from the wording of Clause 4 of the ANC that the shares and loan accounts held by the respondent both at the commencement and dissolution of the marriage were to be excluded from consideration for accrual purposes. The learned judge held that the words *"dissolution"* and *"and all liabilities presently associated there with"* in the ANC indicate that the parties intended to limit the exclusion by defining more closely the scope of the assets to be excluded at the commencement of the marriage. The words were intended and had the effect of narrowing the exclusion by qualifying the assets subject to exclusion.

[5] Before dealing with the issues, it is necessary to make general observations of the ANC. It is a concise contract comprising two pages. Other than the net asset value of the respective estates declared by both parties, namely; (R300 000,00 in respect of the respondent and R 81 000.00 in respect of the appellant), it has no other provisions in respect of their respective assets. The main provision regulating the accrual is in clause 4, the subject of the disputed interpretation.

[6] Clause 4 reads as follows:

4 That the ***assets*** *of the Husband* ***which are listed hereunder and all liabilities presently associated therewith or any other asset acquired by the Husband by virtue of his possession or former possession*** *of such asset shall not be taken into account as part of the Husband's Estate at either the commencement or dissolution of the marriage.*

4.1 All shares and loan accounts in Rand Building Hydraulic (Pty) Limited

4.2 All shares and loan accounts in National Re Investments (Pty) Limited

[7] In terms of section 3 of the MPA, a spouse acquires a right to claim accrual at the dissolution of marriage unless a court orders an immediate and prior division under section 8. It is now settled that the net value of the accrual of a spouse is determined at dissolution (grant of the divorce) in terms of section 4. As observed by the court a quo, the wording of Clause 4 of the ANC mirrors section 4 (1)(b) of the MPA which reads:

> "*In the determination of the accrual of the estate of a spouse an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his possession or former possession of the first- mentioned asset, is not taken into account as part of that estate at the commencement or dissolution of his marriage.*"

[8] The issue in this appeal is whether the parties intended through Clauses 4.1 and 4.2 to exclude from the accrual those shares acquired by the respondent after the date of the marriage. In addition, if those shares do not represent a growth in the assets held by the

respondent, it is whether their acquisition constitutes an acquisition of a future asset, and, consequently, their exclusion is impermissible under Section 4 (1)(b)(ii) of the MPA. The question whether the ANC has an impermissible exclusion was raised in a cursory manner during the appeal. Both parties approached the matter as a dispute that involves an interpretation of the ANC. There was agreement that the purpose of Clause 4 was to define the assets that were not the subject of the accrual.

[9] Before us Mr Farber SC, argued that the court should have found that the assets listed in Clause 4 were confined to the respondents' shares and credit balances under the loan accounts either at the date of the ANC, alternatively, the date of the marriage because:

[9.1] the words *"at commencement and or dissolution of the marriage"* were not intended to be a bridge or hit or define the nature or composition of the assets in question. The words *"at commencement and or dissolution of the marriage"* do not serve to amplify upon that which has been excluded. Both parties agree on this score that the phrase "*at the commencement and dissolution of the marriage"* has no bearing on the actual definition of the asset to be excluded.

[9.2] Notionally, a single asset may be excluded under Section 4 of the MPA. What is the subject of exclusion might differ in quality and extent at dissolution when compared to the situation at commencement.

[10] The pillar of Mr Farber's argument is based on the interpretation of the first part of clause 4, which for convenience I refer to as "*the opening clause".* He argued that the words, "*the assets of the husband"* and *"all liabilities presently associated there with"*, were cast

in the present tense. Therefore, they refer to shares and loan accounts which were extent and constituted assets in the estate of the husband at the time of the conclusion of the ANC or the marriage.

[11] To buttress this argument, he submitted that the words *"present liabilities associated there with*" qualify the scope of the excluded assets. According to this argument, the reference to *"assets which are listed hereunder"* is constrained by the reference to *"the liabilities presently associated therewith"* because the ANC could not have referred to liabilities in respect of which there were no assets and/or to assets which did not exist at the time. He argued that one cannot exclude from the operation of the accrual at the commencement of the marriage that which did not exist as an asset in the hands of the husband at the time of the marriage. Therefore, this court must confine the assets to those in respect of which the husband had incurred a liability at the time of the antenuptial contract or marriage.

[12] Ms Nathan SC for the respondent on the other hand contended that the nub of the issue concerns the question: *"what shares have been excluded?"* She argued that the clause amplified by the appellant is not material to the determination of "*what assets"* are excluded. The subject of the exclusion is clearly defined in the ANC as "***All Shares and loan accounts*** in *Rand Building Hydraulic (Pty) Limited and* ***All shares and loan accounts*** *in National Re Investments (Pty) Limited". [emphasis added].* No extrinsic evidence is required to interpret the clause. The ANC did not specify the number of shares to be excluded but instead referred to ***"All Shares****".*

[13] She argued that the purpose of the ANC is to provide for the exclusion of an asset and the growth, if any, at the time of the commencement of the marriage, and for determining accrual, at the dissolution of the marriage. The argument by the respondent is that in the context of the whole clause, it makes it clear that *all the shares* at the commencement and dissolution are excluded. Ms Nathan SC submitted that the relevance of the phrase is intended to accommodate the potential growth and is intended to include the growth in the asset. A different interpretation would render the provision meaningless if an asset were to be excluded at the commencement of the marriage but not at the dissolution.

[14] In so far as the meaning of the phrase "*liabilities presently associated therewith"* is concerned, the respondent claims it has no bearing on the definition of the asset. It merely qualifies the liabilities. It does not confine the meaning and reference to *"all shares*" to the shares held at the time of the commencement of the marriage.

[15] The source of the irreconcilable and competing interpretation is that the appellant places emphasis on *"liabilities presently associated therewith"* and submits that *"presently*" qualifies the meaning of *"all shares"*. She contends that the word "*all shares*" should be restrictively interpreted to mean *"100 shares"* and *"21 Shares"* held and/ or beneficially owned at the time of the marriage in respect of both companies. On the face of it, the shares appear to be nominal to warrant exclusion in the ANC. On the other hand, if the interpretation proffered by the respondent is correct, it seems inconsistent to refer to liabilities associated with the shares at the time of the marriage, only to exclude the

liabilities associated with the subsequent acquisition at the dissolution of the marriage. Ms Nathan SC conceded that the practical effect of the latter exclusion results in a complicated calculation of the accrual. Nevertheless, she contended that if liabilities in respect of the shares acquired after the marriage were excluded at the dissolution of the marriage, that would benefit the appellant.

[16] I have applied the trite principles in *Natal Municipal Pension Fund v Endumeni Municipality*[5] *to* the ordinary language and words used in the ANC as the starting point to ascertain the meaning intended by the parties. I am also of the view that the cardinal rule of interpretation is that, a unitary approach must be adopted because it is presumed that parties intended that the words used should be afforded meaning and not be interpreted in a manner that renders them nugatory, inoperative, invalid or meaningless. This appraoch is apposite in this case. I have in addition considered the approach to be adopted to the interpretation of the "opening clause" of clause 4 the ANC. That the clause mirrors section 4 of the MPA fortifies its general nature.

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[5] Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the **language** of the provision itself' read in **context** and having regard to **the purpose of the provision** and the background to the preparation and production of the document.

See also - Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016 (1) SA 578 (SCA)

[17] In my view, the words *"the assets of the husband listed hereunder"* hints at the general and/or opening nature of the clause. This means it was not intended to override the specific provisions and stipulations in clauses 4.1 and 4.2 of the ANC. Accordingly, the presumption that, a general provision in a statute or document cannot trump or derogate from special provisions applies[6]. Consistent with this view, the words *"all shares"* in clauses 4.1 and 4.2 are cast wide. The words must be read in conjunction with the phrase *"the assets of the husband listed hereunder".* The noun *"shares"* clearly refers to a genus of assets or asset class subject to exclusion from the ANC. The use of the determiner *"all"* before *"shares"*, has significance. The argument by the appellant would only be sustainable if there was no determiner or description of the shares to be excluded as *"all shares".*

[18] I favor the unitary approach to interpretation referred to in para 16 above. When inquiry to the meaning to be ascribed to the phrase, "*any asset acquired by virtue of the possession"* was raised with Mr Farber SC, he submitted that the matter would have been different if the items excluded were sold and the proceeds derived therefrom were utilised to acquire a different asset. He submitted that this was not the respondent's case and it was not the case the appellant was called to meet. Relying on *MD v DB*, he argued that the respondent bore the onus to prove that he acquired the assets by virtue of his earlier possession and the respondent has done neither. This principle is also confirmed in *AM V JM*, by Cloete AJ [7].

[6] Generalia specialibus non derogant. (See S v Mhlungu 1995(2) SACR 277 (CC) at [113])

[7] The court held that: "Although the defendant's counsel argued that [the] plaintiff bears the onus to establish that the defendant's alleged excluded assets should form part of the accrual in his estate, it is clear that the defendant bears the onus to persuade this court that such assets should indeed be excluded from the accrual"

[19] It remained unclear whether the acquisition was because of *"ä growth*" in the respondent's assets. How the additional shares were acquired, and what contribution if any the appellant made towards their acquisition remained unaccounted and unclear throughout the appeal.

[20] An important consideration in this case also dovetails with the meaning to be ascribed to *"assets"* under the MPA. The legal meaning of *"assets"* includes tangible and intangible assets. I favor a wide scope and meaning which incorporates personal rights and intangible assets rather than a narrow one, subject to there being a determinable value. In this vein, curiously, in the stated case, the appellant accepted that the share-holding the respondent acquired in NRI, was *"beneficially owned*" by the respondent at the time of the marriage although the shares were registered in the respondent's name a year after the marriage.

[21] Objectively viewed, the acceptance by the appellant of the *"beneficial ownership"* (which is by its nature is a personal right accruing to the respondent) signals that when, the words *"assets", "assets listed hereunder"* and *"all shares*" are read in their context, the appellant accepted the wide scope and meaning *"assets"* conjure. In my view, given that the RBH and NR are private companies, subject to the facts made available, *"assets*" can include *contingent rights*, the respondent may have had in the two companies in respect of the shares at the time of the marriage. It is not clear on the facts presented

whether the respondent had a pre-existing option to acquire the additional shares, or a right of pre-emption to acquire the additional shares[8] at the time of the marriage.

[22] Mr Farber argued that to the extent that Clause 4 is capable of two different meanings, the court must give preference to the meaning which best promotes the objectives of accrual system[9]. This argument is based on the import of Section 4 (1)(b)(ii) and, purportedly the onus it was argued the respondent has, to prove the exclusions.

[23] The argument while seemingly flawless, presents the following difficulties:

[23.1] Section 4 (1)(b)(ii), is also based on considerations of *fairness* and is designed to recognize the contribution a spouse may have made to the growth of the estate of another[10]

[23.2] the vexed questions in the present case arise because to arrive at the contractual intention of the parties, the court must peel beyond the literal meaning of the words used. All the material known to those responsible must be provided to elucidate:

[23.2.1] the source of the right (s) in respect of the shares subsequently acquired;

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[9] "W V H 2017(1) SA 196 (WCC) Weinkove AJ where the court held that an ANC is a contract sui generis. Any pacta that finds its way into an ANC will always be subject to the test of public policy because ANC's are unique in the sense that they can only be executed in a prescribed manner and in a prescribed form because this is the very foundation of a contract of marriage. The legislator and courts have consistently monitored contracts of this nature. It is not helpful to refer to commercial contracts or to import the findings of the courts in those cases into ANC's as if ANC's stand on the same footing."

[10] This is consistent with my preference for a wide definition of assets rather than mere tangible assets to recognise human capital contribution to the growth of another's estate

[23.2.2] whether the right existed at the time of the marriage thereby leading to the subsequent acquisition of the shares and

[23.2.3] how the shares were acquired and paid for, all considered in the light of all relevant admissible evidence[11]; and

[23.2.4] what contribution if any the appellant made to the *"growth*"

[23.4] It is untimely to determine the issue solely on an onus to be discharged by the respondent. The issues are inextricably linked with the absent facts referred to as well as the absent evidence of the appellant's *own* contribution to the growth –

[23.5] Whether the parties concluded an ANC which had a term that is unenforceable or *ultra vires* the MPA was not an issue separated out for determination before Wright J nor was it the basis of the appeal.

[24] A question that arose is whether a party can exclude from the accrual regime an identified asset class which is to be acquired in the future from the ANC. This too was not argued before Wright J. I have no doubt that given the considerations of policy flowing from this question, both parties would have presented comprehensive facts and argument to address it.

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[11] Bothma- Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) para 12; See also Thoroughbred Breeders Association of South Africa v Price Waterhouse [2001] 4 All SA 161 (A) and Novartis SA (Pty)(Ltd) v Maphil Trading (Pty)(Ltd) (2016) (1) SA 111 SCA

[25] Upholding the appeal is inappropriate and untimely. Majiedt JA, writing for the SCA in *ST V CT* [12]points to Section 7 of the MPA[13] and the foremost duty to make full disclosure of relevant information albeit in the context of discovery and states that:

"As far as the accrual claim goes, full and proper disclosure, particularly of his financial affairs, was self-evidently required of the appellant. And s 7 of the MPA unequivocally required of the appellant 'to furnish full particulars of the value of [his] estate'. Discovery is not dictated by a litigant's view of what is relevant – it is a matter for the court, with reference to the pleadings.".

"*The duty to make full and frank disclosure in these types of cases has also occupied the attention of the English courts. The applicable legislation contains similar requirements of financial disclosure as ours. In Livesey (formerly Jenkins) v Jenkins, Lord Brandon declared, with reference to this duty, that '. . . unless the parties make full disclosure of all material facts, the court cannot lawfully or, properly exercise [its] discretion'. That case concerned ancillary orders for financial provision and property adjustment after divorce and the duty to make full disclosure. And, in a more recent case on the same subject, Lord Sumption stated that '[t]he proper exercise of these powers calls for a considerable measure of candour by the parties in disclosing their financial affairs"*

[26] The narrowly framed stated case[14] absent the background and factual matrix limits the exercise expected of the court. Both parties approached the matter as a clear- cut

[12] ST and CT (1224/16) [2018] ZASCA 73 (30 May 2018)

[13] Section 7: Obligation to furnish particulars of value of estate – When it is necessary to determine the accrual of the estate of a spouse or deceased spouse, that spouse or the executor of the estate of the deceased spouse, as the case may be, shall within a reasonable time at the request of the other spouse or the executor of the estate of the other spouse, as the case may be, furnish full particulars of the value of that estate.'

[14] G4S Cash Solutions [SA] [PTY] Ltd v Zandspruit Cash and Carry [Pty] Ltd and another 2017 [2] SA 24 [SCA] at para 13 the court held that " whilst it is not for the court to prescribe to litigants whether or not or to what extent, they should present evidence, it seems to me that a party bearing the onus in a dispute regarding the proper interpretation of a contract should bear in mind that to simply rely on a linguistic interpretation alone may not

dispute about an interpretation of the ANC. Evidently, had the issue been determined in trial proceedings, the short-comings would have been cured by proper the discovery founded on the duty envisaged by Section 7 of the MPA. The interests of justice demand that the matter is referred to the court a quo to be decided on full and complete facts.

[27] A referral of a matter back for consideration is not uncommon. In *Minister of Police v Mboweni and Another*[15]*,* Wallis JA (citing Innes CJ in *Geldenhuys and Neethling v Beuthin 1981 AD 426 at 441 and Bane v D'Ambrosi)* points out that matters cannot be decided on assumptions nor can courts pronounce on abstract questions or advise

"*It is clear therefore that a special case must set out the agreed facts, not assumptions. The point was re-emphasised in Bane v D' Ambrosi where it was said that deciding such a case on assumptions defeats the purpose of the rule, which is to enable a case to be determined without the necessity of hearing all, or at least a major part of the evidence. A judge faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request."*

[28] Later, in *Feedpro Animal Nutrition (Pty) Ltd v Nienaber NO and Another* [16] *Setiloane AJA*

"While a court may in a stated case, in terms of rule 33 (3) of the Uniform rules draw any inference of fact from the agreed facts as if proved at the trial, the Rule presupposes that the agreed facts are adequately stated for determination of the issues in question. Where, as in this case, the agreed facts are discordant, ambivalent, and inadequately stated…the process of inferential reasoning has no place case…It would be impermissible for a court, which is adjudicating a dispute on a statement of agreed facts,

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suffice to discharge the onus. Therefore, if available, relevant evidence regarding the factual matrix in which the contract was concluded and the subsequent conduct of the parties should be called in aid of the interpretative process" [para 13]

[15] (657/2013) [2014] ZASCA 107

[16] (20866/2014) [2016] ZASCA 32 (23 March 2016)

to have regard to or assume facts, which fall outside the scope and ambit of the agreed facts"

[29] This case cries out for such an approach. Accordingly, the court a quo should have established the background and factual matrix referred in the judgment and declined a determination absent the facts which would yield an unjust result .

[30] In the result, I would propose the following order:

The appeal is dismissed;

[a] The order and the finding of the court a quo dismissing the declaration sought by the appellant is set aside;

[b] The matter is remitted to the court a quo for the determination of declaration in the light of the factual matrix and background referred in the judgment.

[c] Each party must pay its own costs.

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SIWENDU J

For the Appellant: G Farber SC,
With him Adv L Segal,
instructed by Larry Chimes Attorney.

For the Respondent: Adv Nathan SC,

instructed by Yammin Hammond Inc.