REPUBLIC OF SOUTH AFRICA

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

CASE NO 32624/2015

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

Date: ....

In the matter between:

MANELIS, DOMINIQUE CAMILLA Plaintiff

and

MANELIS, CONSTANTINOS CHARLES Defendant

JUDGMENT

STRYDOM J:

Introduction

[1] This is a divorce action where the parties entered into an antenuptial contract which incorporated the accrual system.

[2] The matter was heard for many days in open court and legal costs sky rocketed. At the conclusion there could hardly be any winner. The court had to adjudicate two Rule 43(6) applications for a contribution towards the costs of the plaintiff. The court obtained insight into the extent of legal costs incurred by both parties. A substantial portion of these costs were incurred by the parties in presenting expert evidence to court. Their reports were updated as more information became available. As a result of postponements, *inter alia,* caused by the Covid-19 pandemic, the date of the final divorce order kept on moving forward affecting valuations. Consumer Price Index ("CPI") adjustments had to be made to figures. The court on more than one occasion suggested to the legal representatives of the parties to consider settlement, but to no avail. All of this resulted in extensive legal expenses being incurred, roughly estimated to be in the region of well over R20 million. According to the affidavits in the Rule 43(6) applications and evidence led during the trial, this left the plaintiff with debt and substantially lowered the value of the estate of the defendant at the date of divorce.

[3] In this action the plaintiff sued the defendant for a divorce and ancillary relief. The defendant counterclaimed but, for purposes of this judgment,

the only outstanding issues pertain to the accrual of the defendant's estate. The commencement value is disputed. So is the value of defendant's estate at the dissolution of the marriage. The question is: has the estate of the defendant increased in value, beyond the CPI adjustment of the commencement value, to such an extent that the plaintiff is entitled to half of such accrued estate of the defendant?

[4] The court previously, by consent between the parties, made an order in terms of which the parties were divorced as at 24 March 2022. The order also dealt with issues relating to the minor child of the parties.

[5] What should be determined by this court in terms of the order already made was whether or not an accrual is payable by the defendant to the plaintiff in terms of the provisions of the antenuptial contract concluded between the parties, as read with the provisions of the Matrimonial Property Act 88 of 1984 ("the Matrimonial Property Act"), as well as the costs which was reserved for judgment.

[6] The plaintiff and the defendant were married on 30 April 2009 at Johannesburg, out of community of property, in terms of an antenuptial contract which incorporated the accrual system as provided for in Chapter 1 of the Matrimonial Property Act.

[7] In terms of section 3(1) of the Matrimonial Property Act:

> *"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."*

[8] The parties were *ad idem* that the relevant date on which the accrual should be established would be the date of the dissolution of the marriage which, *in casu*, was on 24 March 2022.

[9] In terms of section 4(1)(a) of the Matrimonial Property Act, "*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.*"

[10] Sub-section (b)(iii) of the same section provides for the determination of the accrual of the estate of a spouse as follows:

> *"[T]he net value of that estate at the commencement of his marriage is calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the weighted average of the consumer price index as published from time to time in the Gazette serves as prima facie proof of any change in the value of money."*

[11] It is common cause between the parties that at the conclusion of the marriage on 30 April 2009, the defendant declared a commencement value of his estate in the ante-nuptial contract in an amount of R68 746 000. The plaintiff declared the commencement value of her estate to be nil. The parties signed the ante-nuptial contract which was given a protocol number and was duly registered.

[12] It became common cause between the parties that the adjusted commencement value, applying CPI on the amount of R68 746 000,

would have been R129 875 461 shortly before the order for divorce was granted. Mr Sacks, the plaintiff's expert witness confirmed this. This concession was made in relation to the accrued estate of the defendant on 18 March 2022, six days prior to the divorce order being granted. The adjusted commencement value would have been a little bit more after the further six days, but for purposes of this judgment it is not necessary to make that calculation. The reason for this is that it became common cause that the net asset value of the defendant's estate as at date of divorce would not have exceed the amount of R129 875 461.

[13] Plaintiff disputed the accuracy of the commencement value declared by the defendant. What has become of importance for decision in this matter was whether the declared commencement value of R68 746 000 could be challenged by the plaintiff. Only if the plaintiff could do this, whereby the commencement value was substantially lowered, a possibility of an accrual claim could exist.

[14] It is the case for the plaintiff that she was entitled to prove that the declared commencement value of the defendant was substantially less than what was declared by the defendant when the antenuptial contract was signed. It was her case that when this reduced commencement value, even if adjusted with CPI, is established it will show an accrual. As her own estate remained at *nil* she would be entitled to 50% of the accrual of the defendant's estate.

The pleadings

[15] It was the case on behalf of the defendant that the court should find that the commencement value of the defendant's estate was in fact R68 746 000, not only on the basis that such a finding is supported by the principles of law laid down by the courts, i.e. that the declared commencement value is conclusive proof of such value, but also that it was supported by the facts proven at the trial.

[16] The court was asked on behalf of the defendant to find that the declared commencement value of the defendant's estate, adjusted by the weighted average of the CPI as contemplated in law, would amount to R129 875 461 as at 18 March 2022. There is no dispute between the parties that the commencement value should be adjusted according to CPI. The dispute relates to which commencement value the CPI should be applied: the declared value or the adjusted value once proven to be the actual and correct commencement value?

[17] In her particulars of claim the plaintiff sought an order for the defendant to furnish a statement of account supported by documents as to the commencement value of his estate and to debate same with the plaintiff. The plaintiff did not persist in this claim but persisted in her claim that the defendant pay to the plaintiff half the difference between the accrual in value of the estates of the parties. As the pleadings stood when this matter was heard, apart from the defendant seeking a decree of divorce, the defendant sought for the dismissal of the plaintiff's claim for an accrual payment and for costs, including the costs of two counsel. Approximately

a week before the trial, the defendant abandoned his claim based on a finding that the estate of the plaintiff showed an accrual.

[18] The plaintiff sought an order for the defendant to make payment to the plaintiff of half of the difference between the accrual in value of the estate of the parties, which amount, according to the plaintiff, is half of R36 443 443.00, being the amount of R18 221 722.00. This amount was calculated by Mr Sacks, the plaintiff's forensic accounting expert, as at 23 September 2021. As stated the first question for decision would be which commencement value should be applied. Should the court find that the declared commencement value should remain extant, it will mean that the plaintiff must fail in her claim as the commencement value, CPI adjusted, would not exceed the value of the estate of the defendant at date of divorce. Should the court, however, find that the commencement value should be adjusted lower, the possibility exists that the plaintiff has a claim depending on the net value of the accrued estate of the defendant at the dissolution of the marriage.

[19] In the plaintiff's amended plea to the defendant's counterclaim, the plaintiff denied that the declaration made by the defendant as to his net asset value at the date of signature of the ante-nuptial contract was *"accurate".* Before the amendment, there was an averment that the declaration of the commencement value of the defendant was "*false*". As part of an amendment reference to this word "*false*" was deleted and the court need not consider the impact of the word *"false*" previously referred to in the plea. What the court will weigh up is why the word "*false*" was deleted as

this may be an indication that the plaintiff in her pleadings was not alleging intentional wrongdoing.

[20] The relevant portions of the plaintiff's amended plea to the defendant's amended counterclaim reads as follows:

> "*7.1 The plaintiff admits that the defendant declared a starting value in the Antenuptial Contract an amount of R68 746 000 but denies that the declaration made by the defendant as to his net asset value as at the date of signature of the Antenuptial Contract was accurate as has been pleaded in paragraph 10 of the particulars of claim. The defendant's accrual is to be calculated accordingly so as to determine the amount that he is indebted to the plaintiff."*

[21] The defendant denied the averments contained in paragraph 7 of the plaintiff's amended plea and the plaintiff was put to the proof thereof. Accordingly, the plaintiff bears the onus to prove the quantum of any accrual payable to her. It was submitted on behalf of the defendant that the plaintiff has not discharged this onus.

[22] What has become clear is that a finding on the amount of the commencement value which should be applied will determine the outcome of this matter. A legal question arises whether, and under what circumstances, a party to an antenuptial contract would be entitled to challenge the amount of a declared commencement value contained in an antenuptial contract signed by the parties.

Legal issues: Commencement value of the defendant's estate

[23] Section 6 of the Matrimonial Property Act provides:

"6. Proof of commencement value of estate –

(1) *Where a party to an intended marriage has not for the purpose of proof of the net value of his estate at the commencement of his marriage declared that value in the antenuptial contract concerned, he may for such a purpose declare that value before the marriage is entered into or within six months thereafter in a statement, which shall be signed by the other party, and cause this statement to be attested by a notary and filed with the copy of the antenuptial contract of the parties in the protocol of the notary before whom the antenuptial contract was executed.*

(2) *A notary attesting such a statement shall furnish the parties with a certified copy thereof on which he shall certify that the original is kept in his protocol together with a copy of the antenuptial contract of the parties or, if he is not the notary before whom the antenuptial contract was executed, he shall send the original statement by registered post to the notary in whose protocol the antenuptial contract is kept, or to the custodian of his protocol, as the case may be, and the last-mentioned notary or that custodian shall keep the original statement together with a copy of the antenuptial contract of the parties in his protocol.*

(3) *An antenuptial contract contemplated in subsection (1) or a certified copy thereof, or a statement signed and attested in terms of subsection (1) or a certified copy thereof contemplated in subsection (2), serves as prima facie proof of the net value of the estate of the spouse concerned at the commencement of his marriage.* (My underlining)

(4) *The net value of the estate of a spouse at the commencement of his marriage is deemed to be nil if –*

(a) the liabilities of that spouse exceeds his assets at such commencement;

(b) that value was not declared in his antenuptial contract or in a statement in terms of subsection (1) and the contrary is not proved."

[24] On a reading of section 6(1) together with section 6(3) it is clear that there is reference in subsection (3) to an antenuptial contract contemplated in

subsection (1). What should then be considered is what kind of antenuptial contract is contemplated in section 6(1).

[25] On a proper reading of section 6(1), it is clear that the antenuptial contract referred to in section 6(1) is an antenuptial contract where no declaration of a commencement value was made in such antenuptial contract. Conversely, it does not cover a situation where such a declaration was made as in *casu*. The plaintiff declared a *nil* figure and the defendant declared the amount of R68 746 000. In such a case, the reference in section 6(3) to *prima facie* proof of the net value of the estate of the spouse concerned at the commencement of his marriage would not be applicable where indeed a commencement value was declared. This would beg the question what the evidential value of the amount declared in an antenuptial contract would be? Would the declared value be conclusive, as would be the case in any contractual scenario, or will it only serve as *prima facie* proof of such value?

[26] There have been conflicting judgments regarding the interpretation of section 6 and whether the declared commencement value serves as *prima facie* proof thereof only or would it be conclusive.[1]

[27] In *TN v NN*[2], following *Thomas v Thomas*[3], it was found by Binns-Ward J that the intention of the legislator concerning section 6 of the Matrimonial Property Act was "*… that whatever might have been declared or not*

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1 See *Olivier v Olivier* 1998 (1) SA 550 (D); *Jones and Another v Beatty NO and others* 1998 (3) SA 1097 (T) at 1101A-C; *Thomas v Thomas* [1999] 3 All SA 192 (NC); *TN v NN and others* 2018 (4) SA 316 (WCC); *HE v SE* 2019 JDR 0995 (KZP).

2 Fn 1 above.

3 Fn 1 above.

declared by the spouses, it should always be open to any interested party (including the spouses themselves) to prove the actual commencement values of their respective estates."[4]

[28] The court in *Thomas v Thomas,* referencing *Olivier v Olivier*[5] found that the reference to "*an ante-nuptial contract contemplated in subsection (1)*" was inserted by the legislator *per incuriam.*[6]

[29] In the *Jones*[7] matter MacArthur J in this Division found that section 6(3) of the Matrimonial Property Act has no application where the parties declared the commencement values of their estates in their ante nuptial contracts.

[30] In the matter of *Erasmus v Erasmus N.O*[8] Fourie AJ (as he then was) aligned himself with the decision in *Thomas v Thomas*.

[31] At the commencement of this matter, the court was referred to the case of *M v M*[9], a decision in this Division by Opperman AJ (as she then was) wherein she held that the declared commencement value in an antenuptial contract constituted conclusive proof of such value and not merely *prima facie* proof. In such a case reliance could not be placed on section 6(3) of the Matrimonial Property Act.[10] The learned judge found

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4 *TN supra* at para 18.
5 Fn 1 above.
6 *Thomas* at 198.
7 Fn 1 above at 1100G-I.
8 (54914/2014) 2016] ZAGPPHC 968 (24 November 2016).
9 (62488/15) [2016] ZAGPPHC 1220 (1 December 2016).
10 After considering section 2 read with section 6 of the Matrimonial Property Act the court in M v M found the sections to be applicable in the following situations: *"59.1 Where the parties are married out of community of property but are silent about whether or not the accrual system is applicable, such marriage is subject to the accrual system (Section2). In such circumstances the question will arise what the commencement value of the respective estates were. The presumption that the commencement values is nil*

that the legislator has clearly not curtailed or removed the parties' contractual freedom. They can regulate their affairs as they deemed fit as long as their agreement bears constitutional scrutiny it will be enforced and respected by our courts.[11] The court also reaffirmed that the antenuptial contract, as in the case of any other contract, could always be attacked on the recognised grounds of misrepresentation, duress, undue influence, etc.[12]

[32] In the plaintiff's heads of argument, the court was asked to follow the decisions of *Thomas, TN v NN* and *HE v SE supra.* As stated hereinbefore, these decisions found that the declared commencement value would only establish *prima facie* evidence of this value and that it would always be open to a party to prove the actual commencement value.

[33] It was argued that the plaintiff will place reliance on the matter of *M v M,* which, on a proper reading of the case, contradicts the other cases the plaintiff relies upon. In the heads of argument, the court was not informed how this matter would support the plaintiff's contention that the commencement value could always be proven to be different from what

will kick in (Section 6(4)) but this will only constitute prima facie proof and the parties will be entitled to dispute the correctness thereof; 59.2 Where the parties are married out of community of property and expressly include the accrual system but are silent in respect of the commencement values, the situation will be as follows: The commencement value of the respective estates is deemed to be nil (Section 6(4)). Such commencement values will only constitute prima facie proof.59.3 Where the parties get married out of community of property, expressly include the accrual system and agree and record commencement values, the situation will be as follows: These agreed commencement values constitute conclusive proof of the commencement values. The parties are precluded from relying on the provisions of Section 6"

11 *M v M supra* at para 61.
12 *M v M supra* at para 58.

was agreed upon. The plaintiff, wrongly so in my view, placed reliance on this case and consequently did not distinguish this decision from her case or indicated why this case was wrongly decided. This wrong reading of *M v M* may explain why the plaintiff failed to plead fraud or any other form of misrepresentation to attack the antenuptial contract.

[34] It was further argued that on the evidence of the plaintiff she merely accepted the commencement value without any input from her side. This being the case the commencement value only served as *prima facie* evidence of the value. This argument ignores the very nature of a contract and its consequences. Plaintiff through appending her signature to the antenuptial contract accepted its terms.

[35] At the commencement of this case it appeared that the parties were not aware of the fact that the matter of *M v M* went on appeal to the Full Court of this Division. The matter was referred to as *Maxted v Maxted* in the appeal judgment. The Full Court upheld the decision of Opperman AJ (as she then was).[13] The Full Court went a step further to indicate that the legislator did not mistakenly refer to the phrase "an *antenuptial contract contemplated in subsection (1)*" as the legislator clearly also distinguished between the same two instances in section 21(2)(c) of the Matrimonial Property Act, as are referred to in section 6(1). First, a situation where the parties declared the value in the notarial contract or, second, where the parties declared the value in a statement as provided for in section 6. According to the Full Court decision section 21(2)(c) makes it clear that

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[13] *Maxted v Maxted* Case no A193/2017. This unreported judgment was delivered 13 September 2019.

section 6 only applies to those instances where parties at first did not declare a commencement value and in a later statement declared such value.[14] According to the Full Court the legislator's awareness of this distinction dispels the argument that the legislator *per incuriam* inserted the reference *"as contemplated in subsection (1)"* in section 6(3).

[36] No legal argument was advanced by the plaintiff why this Court will not be bound by, and should not follow, the Full Court's decision.

[37] For purposes of this judgment I do not intend to consider the full reasoning of Opperman AJ or that of the Full Court suffice to say that I am in agreement therewith. On the level of the interpretation of the relevant sections in the Matrimonial Property Act, my view is that these courts were correct in their findings. I am in any event bound by the Full Court's decision. In the Opperman AJ judgment she discussed the relevant judgments and convincingly differs from the judgments which found that the stated commencement values only established *prima facie* proof of such values. She correctly in my view, provided an interpretation which does not lead to an absurdity as was found to be the case in *Thomas v Thomas.* She found that section 6(3) applies to:

> "*63.1. antenuptial contracts in which there is no declaration of the commencement value and the deeming provision thus has application (Section 6(4)); or*
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> *63.2. the situation where there was a unilateral statement made by one of the parties, either prior to the marriage ceremony or within a period of 6 months thereafter, in which event section 6(3) applies to such unilateral statement or declaration.*"[15]

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14 See para 26.1 of the full bench decision.

15 *M v M supra* at para 63.

[38] Opperman AJ found that in the case where there is a declaration of a commencement value in an antenuptial contract entered into by parties, it is done by way of a bilateral consensual act whilst in the case envisaged in section 6(1) the declaration is a unilateral act. This explains why in the latter case the declared value, even if it is *nil*, only establishes *prima facie* proof of the value. I am in full agreement with this reasoning and conclusion. Moreover, a Full Court in this Division, upheld the decision. It is thus settled law, in this Division, that the plaintiff is bound to the agreed commencement value in the antenuptial contract and cannot lead any evidence to amend the commencement value unless a case was made out for contractual remedies pursuant to misrepresentation, duress or undue influence, or the like. The remedy of rectification would also be available if the requirements for such a rectification of an antenuptial contract are met. Rectification was never sought by the plaintiff and nothing further needs to be said in this regard.

[39] What also should be noted in the Opperman AJ judgment is that the Court distinguished between commencement values declared which represent the *"objective value"* and the "*subjective agreement".*[16] The court used an example which opened the door for declaring a value which does not present the objective value. This is precisely what happened in *M v M* where the defendant decided for unknown reasons, to declare a commencement value of *nil* whilst he had valuable assets at the commencement of the marriage. *In casu,* the alleged situation is the opposite. The plaintiff alleges that the defendant overstated his

[16] *M v M* at para 60.

commencement value. The principle, however, remains the same and the question arises to what extent is it expected of a party to declare a commencement value which is objectively correct. One can imagine that in many cases a party will declare a value which he or she, in their own minds, think to be the correct value whilst the objective value may differ substantially. In such a case the declared value may be inaccurate but it was accepted by the other party. Should a party, however, knowingly and with the intention to defraud his or her future spouse declare a value higher than the true value of assets then common law remedies are available to such defrauded spouse.

[40] In all cases referred to, it was acknowledged that a declared commencement value could always be attacked on the recognised grounds for setting aside a contract available in common law. In *Olivier v Olivier*[17] it was found as follows:

> *"The written document is conclusive proof of the terms of their agreement and it can only be attacked on the recognised grounds of misrepresentation, duress, undue influence, etc. If the contract does not correctly reflect the agreement between the parties due to common error then rectification can of course also be sought. This is the position at common law and no authority need to be quoted for such basic a principle."*[18]

[41] Having found that the declaration of the amount of R68 746 000 would serve as conclusive proof of the commencement value of the defendant, the question then arises whether the plaintiff could, and in fact did, challenge the commencement value on recognised common law grounds.

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[17] *Olivier v Olivier supra*.

[18] At 555D-E/F.

[42] During the opening address on behalf of the defendant it was pertinently stated that the defendant objects to any evidence led which is aimed at challenging the correctness of the commencement value. This objection was raised in the context of any evidence to show that the commencement value is different from what was declared in the antenuptial contract and not against evidence to prove misrepresentation or fraud. This was not the pleaded case. Plaintiff's counsel indicated that the plaintiff will present evidence to prove that the commencement value was overstated and incorrect. The court ruled that it will allow evidence to prove the commencement on the basis that the admissibility of this evidence would be decided as part of the judgment at the conclusion of the matter.

[43] As indicated, the legal position in this Division is that the commencement value is conclusive unless attacked on common law grounds. For that reason, the court will not consider the evidence which was led to prove the inaccuracy of such value.

[44] It was submitted on behalf of the defendant that the plaintiff did not plead fraud or any one of the recognised grounds for setting aside the declared commencement value. This is indeed correct. In the plaintiff's plea to the defendant's counterclaim it was denied and pleaded that the commencement value was accurate. If the plaintiff wanted to rely on fraud she should have pleaded it pertinently. In fact, through the amendment by deletion of the word "*false*", which is in any event not necessarily an averment of fraud, to a denial of the accuracy of the commencement

value, which is further removed from meaning fraud than "*false*", plaintiff indicated in her pleading that she would not rely on fraud or intentional misstatement.

[45] In *Absa Bank Ltd v Moore and Another*[19] Cameron J remarked with reference to fraudulent transactions as follows: *"Fraud unravels all directly within its compass, but only between victim and the perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties."*[20] There can be no doubt about the correctness of this finding. If a party wants to show that an amount contained in a contract, such as an antenuptial contract, was declared and inserted by a party to the contract with the intention to defraud or mislead the other party, the affected party could challenge the validity of such contract or part thereof. But, it is established law that a party wishing to rely on intentional misrepresentation, which in effect is a fraud, must not only plead it but also prove it clearly and distinctly.[21] The onus is the ordinary civil onus, bearing in mind that fraud is not easily inferred.[22]

[46] It has been found that in certain circumstances evidence led at a trial can cure the fact that a case was not specifically pleaded. In *E C Chenia and Sons CC v Lame & van Blerk*[23] with reference to *Robinson v Randfontein Estates GM Co Ltd*[24] where it was found that "*parties should be kept*

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19 2017 (1) SA 255 CC.
20 At para 39.
21 *Courtney-Clarke v Bassingthwaighte* 1991 (1) SA 684 (Nm) at 689F.
22 *Gilbey Distillers & Vintners (Pty) Ltd v Morris N.O* 1990 (2) SA 217 (SE).
23 2006 (4) SA 574 (SCA).
24 1925 AD 173 at 198.

strictly to their pleadings"[25], Brand JA found that evidence may go beyond pleadings if the opposing party is not prejudiced thereby.[26]

[47] Fraud and misrepresentation are serious allegations and in my view, if a party is not alerted through a stated case in a pleading that such allegations forms part of a plaintiff's case, then the opposing party will be prejudiced if faced with such allegations during trial. Most importantly an objection to this evidence was raised. The defendant has not testified in this case and his decision could have been different if he had to defend himself against allegations of fraud.

[48] In light of the Full Court's decision the Court must find that the declared commencement value of R68 746 000 constitutes conclusive proof of such value. Any evidence to prove a lesser value becomes irrelevant. Evidence was lead during the trial which focused on the alleged objective commencement value of the defendant's estate. In retrospect, this legal issue should have been decided separately but at the commencement of the trial there was no agreement between the parties in this regard. Mr Joubert, acting for defendant, only after a lunch break, during which *M v M* was further considered, suggested that this issue should be separated and decided upfront. This was a somewhat belated application and the trial was ready to proceed. On that basis, the objection to evidence was noted but the court ruled that the matter must proceed. Moreover, the evidence of the witnesses was going to cover many other aspects apart from evidence pertaining to the commencement value. Even if the

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[25] *Robinson* at 198. Also *E C Chenia* at paras 11-12.

[26] *E C Chenia* at para 13. See also *Van Mentz v Provident Assurance Corporation of Africa Ltd 1961 (1) SA 115 (A) at 122 and PAF v SCF (788/2020 [2022] ZASCA 101 at para [30] and [31]*

commencement value was as stated in the antenuptial contract, CPI adjusted, the possibility existed that the plaintiff could have proven an accrual beyond this value. Only later during the trial it became evident that if the commencement value stood as declared that the plaintiff would not have been able to prove an accrual claim.

Evidence on what the Antenuptial Contract comprised of

[49] Although this issue is closely linked to the commencement value the court will nevertheless make findings in this regard as it relates to credibility of witnesses.

[50] The plaintiff testified and called 3 witnesses which included her mother, Ms Toner, and two expert witnesses, Mr Oberholzer, a property valuation expert and Mr Sacks, a forensic accountant.

[51] According to the plaintiff's testimony she was informed by the defendant that she would need to sign an antenuptial contract and it was suggested that she speak to Ms Georgina Manelis, the wife of the defendant's brother, Mr Vasilios Manelis ("Mr V Manelis"), who recently got married to him. It was arranged that the plaintiff and the defendant meet at the offices of Kokinis Attorneys. On 29 April 2009 they met Mrs Kokinis who was responsible for attending to the antenuptial contract.

[52] Plaintiff testified that at the offices she was met with *a fait accompli* and all that was expected of her was to sign the antenuptial contract. Her *nil* value was already filled in as well as the R68 746 000.00 commencement value of the defendant. She signed the contract. She mentioned that

there was a separate document referred to in evidence as *"the alternative schedule"* at the meeting. She did not understand the values contained in the schedule. She testified that this schedule was attached to the antenuptial contract, a copy of which she took home. She initially stated that there was no discussion to explain the marriage regime but she later conceded that Ms Kokinis explained to her how the accrual system works.

[53] The plaintiff introduced the *alternative schedule* into evidence. The defendant led no evidence concerning this document and as part of his case disavowed all knowledge about it. The plaintiff testified that the defendant brought it to the offices of Ms Kokinis. She said it was attached to the antenuptial contract and stapled onto it. Ms Kokinis said she never saw this *alternative schedule* and if such document was brought to her office she would have taken note of it. There is no reference to this attachment in the antenuptial contract and if it was given to her she would have kept a copy in her file. She would never attach schedules to her antenuptial contracts. In court it was pointed out that the original antenuptial contract presented in court did not have markings to indicate that it had been stapled to the contract. On this evidence the Court is satisfied that this document, printed on 29 April 2009, did not form part of the antenuptial contract.

[54] The plaintiff, whose evidence can otherwise not be faulted, must have been mistaken in this regard. The antenuptial contract was signed during April 2009 and the parties separated 6 years thereafter. She testified about what transpired in that office another 5 years later. Given such

passage of time any person's memory may fade as what exactly was said on the occasion and what exactly transpired.

[55] The Court is of the view that Ms Kokinis was also a credible witness and for that reason, the Court will have to consider the probabilities to come to a finding on what transpired in the offices of Ms Kokinis. The reason being that the plaintiff made pertinent statements about what transpired in the office of Ms Kokinis contrary to the evidence of Ms Kokinis.

[56] Ms Kokinis made contemporaneous notes in her file which she brought to court. She, for instance, had an unsigned draft antenuptial contract in her file where the amount of R68 746 000 was filled in by manuscript. She confirmed it was not her handwriting but filled in by the defendant at the meeting. She testified that the defendant phoned his brother Mr V Manelis, whilst he was in the boardroom and that he obtained the commencement value from his brother over the phone. This version was corroborated by Mr V Manelis during his testimony. Her contemporaneous notes, *inter alia,* stated that no document was given to show how the calculation was made. The mere suggestion that Ms Kokinis would falsify her file notes to bolster the case of defendant is highly improbable and is rejected. The probabilities favour the version of Ms Kokinis which would mean that the *"alternative schedule"* did not form part of the antenuptial contract.

[57] In my view she was an objective witness and she could refresh her memory from her notes. The suggestion that she was not independent as her firm did some work for Navada Construction (an entity in which the

defendant held no interest in) many years' prior, is rejected. This off course does not mean that one of the parties could have brought the *alternative schedule* to the offices of Ms Kokinis without showing it to her. All what the court finds is that the plaintiff failed to prove, on a balance of probabilities, that the *alternative schedule* formed part of the antenuptial contract.

The "*alternative schedule*" observation

[58] The Court finds it necessary to make one further observation pertaining to this *alternative schedule.* Without making a finding in this regard, as the *alternative schedule* has only a bearing on the commencement value which has been dealt with already in this judgment, it seems highly unlikely that the plaintiff was the author of the *alternative schedule.* What is contained in this document about the assets of the defendant would, on the probabilities, not have fallen within the knowledge of the plaintiff but rather in the knowledge of defendant. Specifically, the valuations of the various entities. This would be an indication that the defendant was the author of this *alternative schedule.* This probability is countered by the fact that the *alternative schedule* included motor vehicles not owned by the defendant at the stage when this schedule was purportedly drafted. It is unlikely that the defendant would have included assets he did not own but the court have no knowledge in this regard as the defendant elected not to testify to disavow any knowledge about this schedule whilst defendant suggested it originated from the defendant.

[59] The amount mentioned in the *alternative schedule* as the net commencement value of the estate of the defendant corresponds with the amount contained in the antenuptial contract as the commencement value. Strangely, this figure also corresponds with the figure mentioned in the Personal Balance Sheet of the defendant as at 1 April 2009, ("the 2009 balance sheet") a document, according to the date mentioned therein, which was compiled by Mr V Manelis on 15 April 2009. According to the dates appearing on these documents the balance sheet preceded the date when the *alternative schedule* was printed.

[60] Some of the figures and assets mentioned in these documents differ however. But the totals are the same. This is a strange state of affairs never explained in evidence. The suggestion in evidence and argument that the 2009 balance sheet was concocted to correspond with the figure on the *alternative schedule* has, in my view, not been proven on a balance of probabilities. I will deal with the evidence of Mr V Manelis later in this judgment. The Court decided to mention this aspect, but for purposes of this judgment, it makes no difference in light of the finding that the commencement value of R 68 746 000 had to be accepted by this Court.

Alienation of assets affecting the accrual calculation not pleaded

[61] What the court will now deal with, as a further reason for its finding in this matter, is whether the plaintiff succeeded in proving an accrual of the estate of the defendant, even if the commencement value which the plaintiff submitted should have been accepted by this court, is applied.

[62] Evidence was led and calculations made on behalf of the parties to show the value of the defendant's estate at the dissolution of the marriage. Through evidence and cross examination of the defendant's witnesses, the plaintiff raised issues pertaining to the inaccuracy of the figures relied on by the defendant, the fabrication of evidence was suggested, allegations of the dissipation of assets were made, that entities were the *alter ego* of the defendant, the impartiality of the defendant's witnesses and allegations of a large scale conspiracy between the Manelis family, and expert witnesses, to deprive plaintiff to receive payment of her lawful portion of the accrued estate of the defendant. All of this suggested fraud and/or misrepresentation but yet this was not her pleaded case. Nothing was pleaded to the effect that entities were the *alter ego* of defendant and that transactions should ignored and the value of assets should be included in the accrual calculations. It was not the pleaded case of the plaintiff that the defendant dissipated any assets to devaluate the value of the defendant's estate with the sole purpose of reducing the respondent's accrual claim.

[63] This Court enquired from the plaintiff's counsel if there were any allegations regarding dissipation of assets mentioned in the pleadings. It was confirmed that it was not pleaded. It was submitted on behalf of the defendant that in such a case, the issue of dissipation of assets does not and cannot arise. The question then arises how a court should deal with these allegations not being pleaded. These issues were ventilated in evidence. The defendant did not object to evidence being led pertaining to the value of defendant's estate at the date of dissolution of the marriage

as was the case with reference to the commencement value. The evidence was ultimately aimed at proving the value of the plaintiff's estate at the dissolution of the marriage.

[64] In my view, despite the fact that these alienations and consequences thereof were not referred to in the pleadings, as one would have expected, the issues were ventilated fully during pre-trial meetings between experts and in evidence before this court.[27] There was no objection to the admission of the evidence pertaining to the value of the defendant's estate at the dissolution of the marriage. Defendant was not taken by surprise and was not prejudiced. Accordingly, the court will consider the issue whether the alienation of assets were done with the sole purpose of reducing the plaintiff's accrual claim. The Court will bear in mind that as far as the value of the defendant's estate at dissolution of the marriage is concerned, the evidence presented by the plaintiff was that assets were sold off with the intent to frustrate plaintiff's accrual claim. This would entail an intent to deprive the plaintiff of what is due to her. The evidence presented by the defendant was that these transactions were conducted in the ordinary cause and for value. The issues were covered by evidence without objection.

[65] This is different from the alleged misrepresentation pertaining to the amount declared in the antenuptial contract as a commencement value. In that instance there was an objection to the evidence, although the issue was whether this declared value was conclusive or subject to proof otherwise. The enquiry the court is now dealing with is the value of the

[27] See Shill v Milner 1937 AD (A) at 105; PAF v SCF, supra, at para [31]

defendant's estate at the dissolution of the marriage. This is a broad enquiry which was extensively covered in evidence by both parties.

[66] The case of the plaintiff was not that these other parties to transactions were not legally in existence. The case of the plaintiff was rather whether the alienations took place with the intention to frustrate the accrual claim of the plaintiff. For that reason, the court will be in a position to consider these transactions without the opposite parties to these transactions being cited as parties in this divorce. A decision in this matter would not affect the third parties who will not have a direct and substantial interest in the outcome of this matter.

[67] In evidence allegations were made that the Peter Manelis Family Trust was the *alter ego* of the defendant and that an entity called Navada Construction was similarly so. Although the word "*sham"* was used the evidence was not aimed at alleging that these entities did not legally existed. The attack was aimed to go behind the trust or corporate form, or to *"pierce their veneer*" by adding into the accrual calculation the value of assets disposed to by defendant to these entities. [28]

Legal basis for the claim to include the value alienated assets

[68] In PAF v SCF (788/2020) [2022] ZASCA 101, a judgment of the Supreme Court of Appeal delivered on 22 June 2022, the court dealt with a situation where assets which were vested in a trust was included in the calculation

[28] A distinction should be drawn between a Trust being a sham altogether and to go behind the trust form. See: *Van Zyl and Others NNO v Kaye NO and Others 2014 (4) SA 452 WCC at para [16], [19] and [21]; RP v DP 2014 (6) SA 243 ECP; BC v CC and Others 2012 (5) SA 562 ECD; PACF v SCF, supra, at para [26]*

of the accrual pursuant to a finding that the trust form was abused. The pleadings in that matter made reference to the disposal of an asset by way of donation. The same applied in the matter of BC v CC[29] and RP v DP[30] where the issue of inclusion of certain trust assets were referred to in the pleadings. In PAF v SCF it was not a case of an issue not having be pleaded at all. It was just wrongly pleaded. The Supreme Court of Appeal nevertheless pointed out that a court has inherent jurisdiction to decide a matter even where an issue has not be pleaded, provided that such matter was ventilated before it and further provided that a party is not prejudiced by the enlargement of issues.[31] To decide prejudice the legal basis for including assets which were alienated to third parties should be considered.

[69] It was found in PAF v SCF that the legal basis for a claim to include assets which were alienated is the following: "*Although the accrual claim only arises at the dissolution of the marriage, both parties acquire a protectable contingent right against each other during the subsistence of the marriage, which the law will protect in circumstances of irregularity and lack of bona fides. Thus, upon vesting of such right, there is an obligation on both spouses to satisfy the accrual claim (hence to share in their respective gains) at the dissolution of their marriage. Furthermore, s 7 of the MPA obliges both spouses to furnish 'full particulars of the value' of their estates. Therefore, an accurate reflection of the parties' respective*

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29 Supra, at para [18]

30 Supra, at para [58]

31 PAF v SCF, supra, at para [31]

accrual is necessary to give effect to the intention behind the legislature's provision of the accrual system in the first place."[32]

[70] The SCA went further to find in para [36] as follows:

"Accordingly, where there is an allegation that one of the spouses had sought to evade this obligation by abusing the trust form, for example, by transferring assets to a trust in order to reduce the value of their estate, and thus their accrual liability, a court is not precluded from enquiring into that issue. It is empowered to conduct an in-depth examination of the facts to determine whether trust form had been abused. If this is established in that factual enquiry, the court is empowered to pierce the trust veneer, and order that the value of such assets be taken into account in the calculation of the accrual. This power is not based on the authority of the MPA or in the exercise of a statutory discretion, but on the basis that a factual enquiry has revealed trust form abuse, upon which the piercing of the trust veneer follows."

[71] The cases referred to mostly dealt with trusts, but in my view, the same principles will apply in relation to alienations to other entities or persons. The question will remain whether an alienation was made with the specific intention to frustrate a spouses claim to share in the accrual of the other spouse. If so, it will be in breach of a protectable contingent right which parties married in terms of the accrual system will have. In such a case a court will consider the evidence and if the conclusion is reached that the alienation was made with this intention then a court will include the value

[32] PAF v SCF at para [35]

of such alienation into the accrual calculation. If some value was received pursuant to such an alienation then such value should be brought into the equation when calculating the value of the estate of the relevant party. If a reduced value was received this may have a bearing on the enquiry what the intention of the alienator was when the alienation took place.

[72] In JA v DA[33] this issue concerning the alienation of assets by a spouse, not necessarily within the ambit of a trust, was discussed *obiter dictum* by Sutherland J (as he then was). The court distinguished between sham disposals and alienations recognised by law and the implications on the estate of the alienator. A sham disposal is fraudulently motivated and the law does not recognise this transaction. A sham leaves the alienator spouse in *de facto* control over the asset and as such, the asset can be determined and valued as if it remained in the alienator spouse's hands. In effect what the court would find in such a case is that there was no transaction at all, only window dressing, and the asset remained in the

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[33] 2014 (6) SA 233 (GJ) Sutherland J (as he then was) referred to typical examples of alienations of assets by a spouse that would, potentially, form part of an estate that would owe a payment to the other upon dissolution of the marriage. He stated thus:

"[24] There are several distinct possible kinds of disposal of assets by an alienator spouse. They are not susceptible to a one-size-fits-all solution. The leading typical examples include:

24.1 A sham disposal in order to deprive the beneficiary spouse of any accrual on dissolution, motivated by a fraudulent motive which the law will not recognise as an effective alienation. The sham leaves the alienator spouse in de facto control over the assets and, as such, the assets can be determined and valued as if it remain in the alienator spouse's hands. Naturally the fact of the sham must be proven by evidence.

24.2 An alienation which is recognised by law but tainted with fraud by the alienator spouse and a third party with guilty knowledge. There is no remedy akin to those available on insolvency in terms of ss 26, 29 and 30 of the Insolvency Act 24 of 1936 in respect of deemed disposals for no value or undue preference.

24.3 An alienation recognised by law tainted by the fraudulent intent of the alienator spouse but which alienation is to an innocent third party. The retrieval of an asset is not possible in such circumstances

24.4 An alienation recognised by law which is a bona fide disposal by the alienator spouse unmotivated by desire to spite the beneficiary spouse; examples may include tax planning schemes that transfer assets to trusts where neither spouse is a beneficiary, or a donation directly to their children, or sincerely conceived disposals to, say, religious causes, or a home for stray cats, or a refuge for lawyers in distress.

24.5 Alienation pursuant to gambling or poor business decisions."

estate of the alienator spouse all along. Naturally, the fact of the sham must be proven by evidence.

[73] Sutherland J asked the following question and provided some suggestions on how the alienation of assets should be dealt with:

> "[25] When upon the computation of the value of an estate the contention is advanced that assets that were previously in the alienator spouse's estate have been alienated to the prejudice of the beneficiary spouse's accrual expectations, is there a right breached and if so what is that right and is there a remedy?
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> [26] Obviously s 8 of the MPA addresses the predicament at a time during the marriage when an impugned disposition might be prevented (this is addressed hereinafter); but is there a remedy after the horses have bolted?
>
> [27] In a case where the asset has gone to an innocent third party, that asset probably cannot be retrieved. What is then possible to be done? Perhaps the value of the alienator spouse's estate must be deemed to include the value of maliciously disposed of asset. Thereafter, the accrual debt must be paid out of the remaining assets of the alienator's spouse, if any exist, and, if they are insufficient, the alienator spouse becomes a debtor to the beneficiary spouse for that value.
>
> [28] Such an approach resembles – in a sense – a sort of unjustified enrichment claim which a beneficiary spouse might have in that regard. In the context of unjustified enrichment, it might be supposed that spouses marrying under an accrual system thereby tacitly or impliedly assume reciprocal obligations not to frustrate or contradict the rationale of that regime, i.e. that they will build up a pool of wealth during their life together which though under separate control in their distinct estates, is available to be shared. In this sense, an accrual is never a fortuitous windfall. A deliberate disposition by one to prejudice the other is a frustration or contradiction of that tacit obligation. If this exposition has validity, then perhaps any disposition that merely has the effect of frustration, even if conceived bona fide, requires consent. These considerations invite contemplation of the presence of a fiduciary duty by spouses to one another.
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> [29] The issue must wait answers but, in my view, the answer cannot be to regard the date of litis contestatio from the date from which to compute the estates."

[74] The Supreme Court of Appeal in PAF v SCF now provided an answer to these questions. Intentional alienation of assets to reduce an accrual claim of a spouse may result in a finding that the value of such asset is deemed to be part of the estate of the alienator. In my view, within the trust context, in may not even be necessary to "*pierce the veil"* as the trust assets remain unaffected despite the abuse of the trust form, unless the

entire trust was a sham and the assets remained those of the alienator. The intention with which the alienation took place is the determining factor. If the intention was to frustrate the claim of a spouse the value of the asset will be deemed to be part of the alienator spouse.

The value of the defendant's estate at date of divorce

[75] In his second addendum report, the plaintiff's expert witness, a forensic accountant, Mr Sacks calculated the respondent's commencement value, CPI adjusted to be R 80 755 938 as at 1 September 2021. This figure would have been slightly higher at the date of divorce on 24 March 2022 which is 7 months later. Using a 4,5% annual CPI figure for a period of 7 months, an amount of approximately R2,1 million should be added to this figure. This would mean that the value of the commencement value on the date of divorce would have been approximately R 82,9 million rounded off. To sustain a claim for accrual the plaintiff had to prove that the accrued estate of the defendant exceeded this amount at the date of dissolution of the marriage.

[76] Mr Sack's starting point was to reduce the commencement value. The Court already found that this could not have been done. Mr Sacks calculated that the value of the accrued estate of the defendant at 1 September 2021 to be R117 199 381. After deduction of the adjusted commencement value of R 80 755 938 the balance was R 36 443 443. Half of this figure, according to Mr Sacks constituted the accrual claim of plaintiff in the amount of R 18 221 722.

[77] In contrast to this figure Mr V Manelis, the defendant's expert, calculated that there was no accrual. In his view the defendant's estate substantially declined. As at 4 October 2021 the value of his estate had declined to the value of R11 508 897. This would mean that there is a substantial difference between the calculations of the parties' experts by the amount of R105 690 484. The difference is occasioned by the different valuation of the property owned by Eersbewoond Beleggings (Pty) Ltd ("Eersbewoond" or "Trust Centre") but even more so by "*adding back*" assets into the defendant's balance sheet allegedly sold by him. There was a clear difference of approach by Mr V Manelis and Mr Stride, the defendant's second expert, who accepted that defendant's assets were sold for value and the approach of Mr Sacks who did not accept any related parties' transactions. Although there were differences pertaining to the valuation of certain fixed assets this is not the main contributor to the substantial difference between the calculations of the defendant's possible accrual. The differences are to be ascribed to the methodology used by the experts. Mr Sacks received instructions to ignore related party transactions. A further reason for the huge difference between the figures lies in the commencement values applied.

[78] How the opinion of experts can differ to such extent is concerning, therefore the court will remind itself how to evaluate the evidence of expert witnesses. An expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her

expertise from other facts which have been admitted by the other party or established by admissible evidence.[34]

[79] Expert evidence must be evaluated in accordance with the principles enunciated by the Supreme Court of Appeal in *Michael and another v Linksfield Park Clinic (Pty) and another*.[35] The following was stated:

> "*… As a rule that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the court's reaching its own conclusion on the issues raised.*"[36]
>
> *…*
>
> "*That being so what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning.*"[37]

[80] In the matter of *PriceWaterhouse Coopers Inc. v National Potato Co-operative Ltd*[38] the court provided a summary of principles, with reference to various foreign cases, that should be observed and considered when dealing with the evidence of expert witnesses. For purposes of this judgment paragraphs [98] and [99] are quoted:

> *"[98] Courts in this and other jurisdictions have experienced problems with expert witnesses, sometimes unflatteringly described as 'hired guns'. In The Ikarian Reefer Cresswell J set out certain duties that an expert witness should observe when giving evidence. Pertinent to the evidence of Mr Collett in this case are the following:*
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> > *'The duties and responsibilities of expert witnesses in civil cases include the following:*

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[34] In this regard see *Coopers (South Africa) (Pty) Ltd V Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 371G; see also *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 772/3.

[35] 2001 (3) SA 1188 (SCA).

[36] At para 34.

[37] At para 36.

[38] [2015] 2 All SA 403 (SCA).

1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation …

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise … An expert witness in the High Court should never assume the role of advocate.
3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion. . .

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.'

These principles echo the point made by Diemont JA in Stock that:

'An expert … must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was.'

[99] Lastly when dealing with the approach to an expert witness I have found helpful the following passage from the judgment of Justice Marie St-Pierre in Widdrington:

'Legal principles and tools to assess credibility and reliability

[326] "Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist"

[327] "As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish".

[328] An opinion based on facts not in evidence has no value for the Court.

[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness's opinion.

[330] An expert witness's objectivity and the credibility of his opinions may be called into question, namely, where he or she:

- *accepts to perform his or her mandate in a restricted manner;*
- *presents a product influenced as to form or content by the exigencies of litigation;*
- *shows a lack of independence or a bias;*
- *has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;*
- *advocates the position of the party that retained his or her services; or*

- *selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services.'"* (footnotes omitted)

[81] Credibility of expert witnesses is not an issue in this matter. Mr Sacks was in my view a credible witness but so was the experts called on behalf of the defendant. On behalf of the plaintiff every opportunity was used to point out to the court that Mr V Manelis was the brother of the defendant and therefore not independent. He testified about factual issues and also as an expert. As far as the factual issues are concerned he, in his capacity as a chartered accountant, was responsible with dealing with accounting matters relating to the relevant entities mentioned in this matter. This included the Peter Manelis Family Trust ("PMF Trust") which is not a legal entity but where reference is made to *"entities*" in this judgment, the Trust will be included, Navada Construction (Pty) Ltd (Navada Construction), Eersbewoond Beleggings (Pty) Ltd ("Eersbewoond"), Brosman CC ("Brosman"), Orange County Investments (Pty) Ltd (previously a close corporation but referred to as "Orange County") and Applecart Properties 20 CC ("Applecart"). These are mostly property owning entities. He handled the bookkeeping of his and his brother's loan accounts in Navada Construction, loans relating to the purchase of classic motor vehicles, as well as personal loans. He also handled the books of the PMF Trust. He testified that he was responsible for the drafting of the defendant's 2009 balance sheet and subsequent balance sheets. In this capacity he was the person who was best positioned to testify about the financial position of the defendant. He has been in the commercial property business, the main business line of

Navada Construction, for which he was the chief financial officer for many years. The Court accepts his expertise as chartered accountant, company valuator and commercial property valuation expert. The same applies to his knowledge as to the value of classic cars. The Court could clearly observe his passion and knowledge for classic motor vehicles. Classic motor vehicles is a passion shared by the Manelis family for years. He is meticulous when it comes to these vehicles and his resentment was clear when the defendant made modifications to a classic car which changed the character of a classic vehicle.

[82] At all stages the court kept in mind that Mr V Manelis was the brother of the defendant and the court remains mindful of this fact. The court could not sense that he was subjectively adapting his evidence to the detriment of the plaintiff or that he was adapting his evidence to favour the defendant. In my view, he remained objective. He was a credible witness and his demeanour in court was that of a meticulous expert.

[83] Mr V Manelis was criticized and challenged for referring in the 2009 balance sheet of the defendant to the *annual financial statements* of Eersbewoond, Brosman, Applecart and Orange County, which annual financial statements were not yet finalised at that stage. He testified that he used the trial balances and annual financial statements in draft form appearing in the books of the relevant entities which corresponded with figures later included in the signed annual financial statement of said entities which were subsequently audited by independent auditors. In my view, these facts did not render his evidence untruthful or unreliable. The

attack on his credibility relating to the award he received from the South African Property Owners Association was unwarranted. It is the view of the Court that Mr V Manelis was a credible witness whose evidence was not influenced as to form and content by the exigencies of the litigation and that he provided the court with his objective and unbiased factual evidence and opinion.

[84] Mr V Manelis was responsible for many of the financial recordings of transactions in the financial books of the entities. From records of these entities he could compile spreadsheets, including those of the status of loan accounts. It was suggested that this was not reliable and that he should have conducted some form of audit to verify each transaction. Fact is, he had personal knowledge of these transactions. He explained that within the family, transactions were rarely conducted by way of cash transfers. Transactions were accounted for by way of book entries. In my view, there was nothing untoward about this. Figures in various loan accounts corresponded with and were cross-referenced. Double accounting entries were made. These loan account schedules were kept long before the marriage and were kept updated to the last rand. I am of the view that any suggestion that it was "*concocted*" should be rejected. This was not remotely possible as the figures corresponded with the audited financial statements where applicable. The Court is of the view that these loan account schedules should be accepted as correct. The manner in which these transactions between family members and their entities were recorded was described by the plaintiff to be "*convoluted*" but in my view this is how the Manelis family interacted with each other

doing their business. I am of the view that all of this was not done for purposes of this matter or to the detriment of the plaintiff.

[85] The evidence presented by the plaintiff and Mr V Manelis has shown a rift between the brothers which was caused primarily by the defendant's extensive spending and overreaching of his loan account in Navada Construction. Mr V Manelis was hard working and conservative in his approach to financial affairs whilst the defendant was luxuriating overseas and spending money. When defendant was busy renovating his house he and the plaintiff stayed with Mr V Manelis and his wife. The defendant did not come home one night and only returned the next day in a state of intoxication. Mr V Manelis supported the plaintiff against the defendant. The rift between the brothers had settled down by the time this matter was heard but in light of their serious previous differences, it is unlikely that Mr V Manelis would have come to court to proverbially "stick his neck out" for his brother. This rift between them will also explain why the two brothers decided to sever their business ties during 2012 to 2016. During this period, they hardly spoke and that would have made it difficult to co-owned property owning businesses. This rift between them was confirmed by the plaintiff who stated that at some stage, the defendant even stated that he wanted to kill his brother.

[86] The same applies to the evidence of Mr Haselau. He made a good impression on the Court and is without a doubt an expert in the field of the restoration, condition and value of classic cars. He was criticised for not presenting the individual files of all the vehicles he valuated to court. This,

in my view did not make his evidence less reliable. It was not for him to produce these schedules. In my view, his evidence on the value of classic cars and also his factual evidence about the condition of the 1972 Ferrari Daytona cannot be criticised despite the fact that he was at all relevant times in the employ of the father of the defendant. His evidence about the restoration of the Ferrari Daytona was detailed, supported by photos. He explained why the steering wheel of the Daytona was not original. This vehicle did not fall within the classification of being "*concours"* and was for that reason of lesser value.

[87] The evidence of Mr Ulrich Joubert cannot and was not seriously challenged. The court accepts his evidence about the Consumer Price Index, his views on economic forecasts as well as his evidence that the Covid-19 pandemic had a marked negative effect on the value of certain types of commercial properties.

[88] The defendant also called Mr Stride, a chartered accountant, to counter the evidence of Mr Sacks with emphasis on the valuations for the accrual calculation at the dissolution of the marriage. His evidence was presented to show that the estate of the defendant has shown no accrual contrary to what was found by Mr Sacks. He used the accounts prepared by Mr V Manelis, which accounts were accepted by independent auditors who signed off annual financial statements. Mr Stride was asked to consider the methodology used by Mr Sacks in reaching his conclusion that the defendant's estate has shown an accrual. He determined that the accrual by Mr Sacks was a fiction, more particularly because of the restrictive

instructions provided to him and by "*adding back*" assets previously sold by the defendant for value. His evidence was further that Mr Sacks ignored certain liabilities.

[89] The evidence and credibility of Mr Stride was attacked on the basis that he was not independent. He knew the Manelis family. The version he gave was that he met the father of the defendant in 1958 and after that date had no dealings with the Manelis family whatsoever. This angle of attack was baseless. He was criticised for not knowing the extent of his fees in this matter. Again, an attack without merit. Is it expected of an expert to know at any given time the exact extent and amount of his fees charged? I would say no. It was suggested to him during cross examination that he should not have accepted the figures of Mr V Manelis but should have verified such figures. These figures appeared in the annual financial statements of the various entities, albeit, in some instances in draft form. In my view, he could use these figures. The plaintiff did not show these figures to be wrong, although it was argued that all figures over years were concocted. On the probabilities this cannot be accepted. For years before the marriage the Manelis family utilised loan accounts to reflect transactions between them. The notion that an entire book keeping system, including audited financial statements, were manipulated to avoid the defendant paying the plaintiff half of his accrued estate is farfetched and falls to be rejected.

[90] Even more baseless was the suggestion made to Mr Stride that he was a hired gun who had been hired to provide a veneer of respectable

objectivity in an attempt to lend credibility to the findings of Mr V Manelis. Mr Stride is without a doubt an expert with extensive experience and has shown his independence during his testimony, by for instance stating that in his view, the R1 000 000 deposit apparently lost on the Rolls Royce deal was a hoax. I agree with his sentiment as far as this is concerned. It was stated as a fact that his report was typed by the defendant's legal team. These serious allegations of wrongdoing were denied by Mr Stride. Extracts from the record of proceedings were provided to him by the legal team. Quite understandably, Mr Stride took exception to these allegations that he was a hired gun without forming his own independent and expert views. The ambit of the brief received by Mr Stride was limited to some extent. He was told to accept the commencement value as it stood. He was asked to consider the expert opinion of Mr Sacks and how he arrived at his figures. He was not instructed how he should do his calculations. He formed his own views relating to the accrual of the defendant's estate at the dissolution of the marriage and used financial documents provided to him. He was not asked to do an audit of the various entities the defendant was involved with. The ambit of his brief will explain why he did not consider the commencement value and why he focused on the Eersbewoond valuation at date of the dissolution of the marriage. How he can be criticised for not looking into the commencement value is not clear. If his brief was not to do this, then it cannot be expected of him to do so. The submission made on behalf of the plaintiff that Mr Stride had to be reminded about his first expert report dated 15 May 2017 was well taken but in my view, it is clear that he only got involved more extensively at a

later stage when he compiled two detailed reports. This aspect in my view did not affect his credibility or his reliability.

[91] What needs to be considered next is whether the critique expressed by Mr Stride against the manner in which Mr Sacks arrived at his accrual calculations has merit.

[92] The Court at this stage is dealing with the question whether the plaintiff has proven the alleged accrual of the defendant's estate at the dissolution of the marriage. What needs to be proven is the value of the defendant's estate as at dissolution of the marriage. The onus in this regard is squarely on the plaintiff. For this reason, the findings and testimony of Mr Sacks is what concerns the Court at this stage and whether it should be accepted, on a balance of probabilities, when compared to the findings of Mr Stride and Mr V Manelis. What the Court needs to consider, however, is the criticism expressed by Mr Stride pertaining to the findings of Mr Sacks. If the criticism is substantially fair and warranted it will place a question mark over the final figure arrived at by Mr Sacks.

[93] Again, it should be stated that Mr Sacks impressed the Court in the witness stand. He was well prepared and credible. What should be considered is the reliability of his figures if tested against the criticism levelled against his methodology. At the same time, the veracity of the criticism of Mr Stride must be considered. His findings should also be considered in relation to the factual and legal basis for including into the calculation the value of certain assets alienated.

[94] Mr Sacks arrived at his figure by using the valuations of Mr Jan Oberholzer, the property valuation expert of the defendant. Mr Oberholzer was also a credible witness with extended experience in the field of property valuations. The methods he used was the acceptable standard for property valuations. Where he and Mr V Manelis differed was that the latter could apply his more direct and personal knowledge about specific properties. Each individual valuation should be considered to come to a finding in this matter. In some instances, the value differences are not so far apart that it could have a determinative effect on the findings of this Court. As the Court is dealing with the value at dissolution of the marriage, the valuation of the equity in Eersbewoond at such date will become relevant. Here, the experts of the parties differed substantially. I will refer to this aspect later in this judgment.

[95] Mr Sacks included in his calculation of the defendant's accrual at dissolution of the marriage, the value of properties as established by Mr Oberholzer, CPI adjusted where applicable, which appeared in the defendant's 1 April 2009 balance sheet. Despite it being the case of the defendant that the majority of properties were already sold, Mr Sacks either ignored the transactions and used the most current valuations of the properties or he took the value at the date of disposing of the assets and kept it in the balance sheet of the defendant, CPI adjusted, where he was of the view it should be adjusted as such. In this process, related party transactions and loan accounts were criticised and ignored.

[96] The court needs to consider the methodology, instructions and assumptions used by Mr Sacks to get to his figures. His mandate from the attorneys of the plaintiff will also be considered. In his addendum report, dated 2 June 2020 the following is regarding his mandate:

> "*5. For purposes of determining the accrual, the true/factual value of any assets that were disposed of/sold by the Defendant (during the subsistence of the marriage) to related parties for inadequate value are deemed to be part of his estate for purposes of calculating the accrual.*
>
> *6. We have been instructed by the Plaintiff that she separated from the Defendant in or around June 2015. This date is relevant as the Defendant disposed of significant assets to related parties around this time period (as detailed in this report).*"

[97] A further example of the instructions received by Mr Sacks, which pertain too many of his findings, is to be found in paragraph 67 and 68 of his first addendum report. This related to the drawdown of the full FNB facility of Eersbewoond, during August 2019, where monies were advanced to Navada Construction on loan. Mr Sacks concluded that Navada Construction was the *alter ego* of the defendant. He wrote as follows:

> "*67. The only reasonable conclusion that can be drawn is that the Defendant has manipulated his financial position (primarily through loans between Eersbewoond and Navada) to present a lower accrual value.*
>
> *68. As a result, we have been instructed to ignore the FNB loan drawn down by Eersbewoond at August 2019 and the loans between Eersbewoond and Navada.*"

[98] During the trial the Court was concerned about these instructions received by the expert as it had a huge impact on his final figures. These issues had to be decided by the court first. Mr Sacks was performing his investigation in line with instructions provided. The Court raised this

concern by questioning Mr Sacks on this issue. Although Mr Sacks testified that he agreed with the instructions, it is the view of this Court that it was not for the expert to decide whether dissipation had occurred but for the Court to decide whether it indeed took place and whether it was fraudulently done so as to prevent a payment to the plaintiff. The concern was strengthened by Mr Sacks' view that Navada Construction was the *alter ego* of the defendant. Navada Construction is not a party before this Court. The Court was further concerned how liabilities were ignored. A loan made, for whatever reason, could not have lowered the value of the equity of an entity as the loan made would remain as a loan receivable and as such, an asset.

[99] Mr Sacks confirmed during his testimony that he "*added back"* related party transactions to determine the accrual for reason that some of these transactions took place around the time when the marriage of the parties broke up. To some extent he assumed the role of advocate for the plaintiff. He ignored Mr V Manelis's reasons for these transactions, being that he and the defendant were severing their business ties as a result of a rift between them. Certainly, the reason for selling off assets was a matter for the Court to consider and not for the expert.

[100] The defendant attacked Mr Sack's evidence, methods used and conclusions on several grounds. Some of these points are in line with the concerns raised by the Court during evidence of this witness. Mr Stride criticized the evidence of Mr Sacks on various grounds. In his report it was stated as follows:

100.1 Mr Sacks included the current value of related party transactions and then, negligently, omitted to deduct the consideration that the defendant had already received in respect of those transactions.

100.2 Mr Sacks was aware that the defendant had received certain distributions from the PMF Trust and then, purely on the basis that those distributions had not been disclosed (which was denied by the defendant), Mr Sacks included the CPI adjusted values of those distributions, thus falsely inflating the accrual.

100.3 Mr Sacks was aware that the defendant had received the proceeds of the sale of certain investments and the sale of certain motor vehicles, but nevertheless included the CPI adjusted values in the accrual, thus falsely increasing the accrual.

100.4 Mr Sacks, without qualification, used professional valuations that had themselves been qualified for the determination of the value of certain of the defendant's property interests, but failed to deduct the respective entities' liabilities, save for an amount determined by him in respect of Eersbewoond. Mr Sacks also failed to take into account the fact that the property interests were held in limited liability companies or in close corporations and did not value those interests nor took into account any restraints on the transfer thereof that may have been incorporated in shareholders' agreements or the close

corporations' association agreements. In his opinion, it is impossible to sell a 50% interest in a close corporation at anything near the net tangible value, save for a related party transaction.

100.5 Mr Sacks, without supporting evidence, drew misleading inferences that book entries and loan transactions were used to decrease the value of the defendant's estate. Save for those entries relating to expenses or losses to be borne by the defendant, the transactions cannot reduce the value of the defendant's estate.

100.6 Mr Sacks did not conduct his mandate with due professional care, nor did he comply with relevant international standards of auditing and made comments and expressed opinions without any supporting documentary evidence. Mr Sacks explained to the Court that he included amounts in the accrual, if he thought there was merit in doing so.

100.7 In his opinion, Mr Sacks did not act as an independent expert should and, as presented, his evidence could cause the Court to be misled.

[101] The Court will consider these points of criticism in relation to the more valuable assets, which according to Mr Sacks, either still formed part of the estate of the defendant or the true value thereof, later in this judgment. The observation this Court can make at this stage is that the calculation of the accrual of the estate of the defendant by Mr Sacks did not take into

account monies spent by the defendant and the plaintiff on extensive holiday trips all over the world from 2009 to 2015, nor was any provision made for payment of legal expenses by the defendant, of which R 3 150 000 was paid to the plaintiff as a contribution towards her costs. Also, none of the expenses paid in terms of Rule 43 orders pertaining to maintenance were considered. These amounts were substantial.

[102] According to the accrual calculation of Mr Sacks dated 1 September 2021, the value of the estate of defendant amounted to R117 199 381. Below is a schedule to indicate how the amount was calculated and arrived at:

Description	**Accrual calculation at 1 September 2021**
Assets values not adjusted from CESA first report:	57,786,728
Personal & Classic motor vehicles	11,141,000
Brosman	7,625,739
Applicant	9,012,108
Orange County	19,593,913
"PM Loan B"	10,413,968
Revised asset values:	44,816,374
Revised Eersbewoond	40,712,401
Revised proceeds from sale personal residence	4,108,408
Revised Eersbewoond loan at 1 September 2021	(4,435)
Additional items added to accrual	17,213,071
Proceeds from sale of Silver State	2,476,318
Proceeds from sale of Ferrari F430	2,121,238
Proceeds from sale of Ferrari 348	884,440
Proceeds from sale of Porsche	1,079,323
Distribution from the Peter Manelis Trust on 28 February 2011	5,158,197
Distribution from the Peter Manelis Trust on 29 February 2012	5,493,557
Add/Deduct other assets / liabilities for Defendant per VM report Annexure H:	(46,523)
Adjustment required:	(2,570,268)
Deduction: "Loan receivable from Peter Manelis – Loan A	

(Classic Cars)"	
Defendant's financial position at 31 March 2020	117,199,381
Less recalculated commencement value at 1 April 2009	80,755,938
ACCRUAL CALCULATION	36,755,938
Therefore 50% attributable to the Plaintiff	18,221,722

[103] These figures should be considered having regard to how Mr Sacks arrived at them, whether the methods followed were legally tenable, the opposing views and calculations of Mr V Manelis and the veracity of the criticism levelled by Mr Stride.

[104] The Court already alluded to the rift between the two brothers, a fact which is common cause. Mr V Manelis made it clear that the two brothers wanted to sever their ties in relation to mutual holdings. This rift took place during 2012 when the parties were still married. The defendant and Mr V Manelis held stakes together in Eersbewoond, Brosman and Orange County. In Eersbewoond the defendant held 98% of the shares and his brother 2%. In Brosman and Orange County the two brothers were equal stakeholders. Mr V Manelis obtained the 50% members' interest in Orange County from defendant and they both sold their 50% stake in Brosman to the PMF Trust. One of the contentious points in this matter was whether the members' interests were sold for full value or not.

[105] Mr Sacks found that the timing of these transaction, more or less at the same time of the break-up between the parties, coupled with the alleged insufficient value received by the defendant and the fact that these

transactions were between related parties rendered these transactions not at commercial arms-length, and that the sale was one of "*convenience"* for the defendant. He calculated the accrual of the defendant's estate as if these transactions never took place and the value of the assets sold still formed part of the defendant's balance sheet. This view raises various questions. As far as the timing of the transactions is concerned, this Court is not convinced that the probabilities favour a finding that the sale was orchestrated to dissipate assets. Why would the defendant enrich his brother at his own expense if he disliked him so much at that stage? According to the evidence of Mr V Manelis, the Brosman and Orange County transactions took place by late 2014 but was finalized during 2015. At this stage plaintiff and defendant were still together, went on holiday overseas and even planned a further child. Plaintiff was given a Ferrari during May 2015. The written agreements would have taken a while to draft and were only signed on 3 July 2015, shortly after the separation. In my view the reasons for these transactions were not proven to be a dissipation of assets but rather took place as part of the process of severing business ties between the two brothers. The Court accepts the factual evidence of Mr V Manelis in this regard. These transactions were without a doubt related party transactions as the two shareholders were brothers and there was also a connection between the defendant and the PMF Trust. The defendant was a beneficiary in his father's trust.

[106] In my view, the defendant has shown that he sold his members interest at value, even if the Court accepts that it was a reduced value, and further,

that he received such value in the amount of R2 645 842,14. This amount was credited to his loan account in the PMF Trust. The value of a members' interest in an entity would not be calculated with reference to the value of the property owned by the entity only, but would be valued considering the entire members' interest. This would mean that Brosman's liabilities should have been considered. The payment was not in cash but by way of book entries. Again, in my view, there was nothing wrong with this. If it was aimed at some form of fraudulent dissipation of assets one would not have expected entries in the books of all relevant entities to have been made.

[107] The evidence indicated a dispute between the experts pertaining to the sufficiency of value received by the defendant. Defendant obtained R 2 645 842,14 which was credited to his loan account in the PMF Trust. Mr Sacks found that 50% of the value of the property owned by Brosman was R 7 200 000 and that this should have been received by the defendant. He adjusted this figure with CPI and included this as an asset in the estate of the defendant at 1 September 2021.

[108] The calculation conducted by Mr V Manelis corresponds with the figure contained in the written agreement entered into between the defendant and the PMF Trust dated 3 July 2015. A detailed calculation was done taking the balance sheet of Brosman dated 1 March 2015 into consideration. What was valued was not only the value of the property but the value of the members' interest the defendant held in Brosman. Assets minus liabilities gives members' interest. This figure, which corresponded

with the annual financial statements of Brosman for the tax year ending February 2016 was used in the calculation of the members' interest. From this amount of R 3 224 524.10 the value of land and building must be deducted, plus other items, but then the current value of the land and building should be added back. Mr V Manelis calculated the value to be R 6 000 000. All of this ended in a market valuation of 100% members' interest in the amount of R 5 291 684, half of which amounted to the selling price of 50% members' interest. Capital gains tax was paid on this figure.

[109] Mr Sacks used the value of the Brosman property and not the members' interest. He used the valuation of Mr Oberholzer as at July 2015 which amounted to R 15 600 000. For the valuation as at 31 March 2020, he used the lower valuation by Mr Oberholzer as at March 2020. R 14 400 000 was used, 50% of which was R 7 200 000. To this figure a CPI increase was added to provide a figure of R 7 625 736. These figures ignored the liabilities of Brosman at any stage. As at 1 March 2015, Brosman had liabilities in the amount of R 1 399 656,27. In the accrual calculation the proceeds of the sale which were debited in the loan account of the defendant held in the PMF Trust were also ignored. This resulted in an incorrect calculation of the value of the members' interest at the time of selling such interest, but also the accrual calculation at the dissolution of the marriage as the defendant obtained the proceeds to his credit.

[110] But the more substantial difference lies in the valuation of the property of Brosman. R 6 000 000 versus R 15 600 000. Mr Oberholzer used the Income Capitalisation Approach to determine the value of the property and the market value, based on market data and actual revenue. The income approach provides an indication of value by converting future cash flow to a single current value. The Capitalisation Rate ("CAP rate") is determined by referring to market transactions involving comparable properties based on information derived from market analysis.

[111] The big difference between the valuations can be ascribed to the different CAP rates applied by Mr V Manelis and Mr Oberholzer during 2015 and 2020. Mr Oberholzer applied 11,5% CAP rate for both years. This was based on comparing the properties and taking the lease agreement with the Provincial Government into account. Mr V Manelis applied a 30% CAP rate during 2015. This he did by considering the situation pertaining to each tenant. He testified that the building had 3 key tenants during 2015. The Provincial Government, Nedbank and First National Bank ("FNB"). Nedbank had already given notice at that time and he was of the view that FNB would not have renewed its lease. He realised that it would be difficult to get new tenants as the banks occupied deep space whereas other tenants would not take up such space. He regarded the property market in that area to be broken. The banks were migrating to a new modern shopping mall which opened in Alberton, the Newmarket Mall. He was aware that the Standard Bank Building close by could not obtain new tenants after Standard Bank moved out. It still remained vacant. Other buildings across the road were also standing vacant. He testified that the

figure of R132 per square meter taken by Mr Oberholzer was far from correct. If property owners in that area found tenants, they could get R50 per square meter. The CAP rate used by Mr V Manelis to determine the value of the property owned by Brosman appears to be high but what Mr V Manelis did was to consider the occupation rate from 2015 going forward. The view he took has been proven to be correct. After Nedbank left FNB followed suit. After they left, the space remained vacant for years until it was occupied by a Chinese clothing shop.

[112] In summary, Mr V Manelis has extensive knowledge of the property market relating to properties in the Voortrekker Road area of Alberton. He could see what was happening in the property market as a result of the Newmarket Mall. His family has owned 3 buildings in that area for years. He was in a better position than Mr Oberholzer to value properties in the area. His view to use a high CAP rate has been proven to be justified. He was in my view correct to refer to a broken property market. Rental space in that area still remains vacant. The Standard Bank building is a good example. Whilst the rental income during 2015 for the Brosman property was still intact, it collapsed soon thereafter, save for rental paid by the Provincial Government. All of this must have had a huge impact on property values and in my view, the approach of Mr Oberholzer was too "*business as usual*" orientated.

[113] Accordingly, the court finds that despite the fact that the sale of the Brosman members' interest was a related party transaction, the valuation of the property, to wit, R 6 000 000 was not so unrealistic that one can

conclude that it was a disguised dissipation of an asset by the defendant to the detriment of the plaintiff. If one sells a members' interest to an existing member who has a preferential right to buy, it will in any event affect the selling price.

[114] In my view, Mr Sacks could not have included the amount of R 7 200 000, CPI adjusted, in the accrual calculation of the defendant. Mr Sacks could not have "*added back*" this amount but rather had to consider the value received and whether this value was still an asset in the estate of the defendant.

[115] The court will now deal with the Orange County property.

[116] When the defendant sold his members interest in Orange County on 3 July 2015 to GVM Investments 2 Trust, a trust in which the defendant held no interest but which was controlled by Mr V Manelis, he obtained R 2 428 500 for his 50% interest. The property value calculated by Mr V Manelis at that stage was R 21 916 000 and that of Mr Oberholzer R31 100 000. If this latter value is compared to the value which Mr Oberholzer ascribed to this property during 2009, some R13 700 000, it represents an increase of 134% over six years without any addition or alteration to the property. According to Mr V Manelis this property decrease by 17% in value since 2009. The plaintiff, in my view, has failed to prove on a balance of probabilities that Mr Oberholzer's property valuation during 2015 was to be preferred over the property valuation of Mr V Manelis. Mr Oberholzer used a CAP rate of 11% and Mr V Manelis used a rate of 14%. Mr V Manelis explained why the property in fact

decreased in value as a result of expropriation of a portion of the land and the opening of a competing shopping centre nearby. This explains the higher CAP rate resulting in a lower valuation. Although the valuation of Mr Manelis was less than the valuation of Mr Sacks, this, in my view, is not an indication that this related party transaction was not at arms-length. At the time Mr V Manelis did a full valuation which was accepted by the brothers amidst a rift between them. During 2015 Orange County still carried substantial liabilities, amounting to approximately R 17 000 000 which rendered 50% of the net value to be R 2 428 500. This value was received by the defendant.

[117] In my view, Mr Sacks could not have concluded that this was a sale of "*convenience*" for the same reasons mentioned in relation to the Brosman property. The fact that the two transactions took place at the same time is not an indication of dissipation as it could equally have been part of the unbundling process of assets between the two brothers. At the same time defendant obtained the shares owned by Mr V Manelis in Eersbewoond making him the sole shareholder.

[118] Mr Sacks calculated a negative share value using the valuation of Mr Oberholzer in the amount of R13 700 000 as at 2009. To achieve this, he took into account the liabilities of Orange County. How a share can be worth less than *nil* is not clear. Be that as it may, when the transaction took place there still existed liabilities on the balance sheet of Orange County. A FNB loan in the region of R12 000 000 and a loan of approximately R 5 500 000 owed to Navada Construction. These loans

were, after the sale and after Navada Group Investments 2 (Pty) Ltd became the 100% shareholder of Orange County (now a private company) ultimately replaced by a loan from Navada Group Investments 2 (Pty) Ltd as part of a loan consolidation. This entity was controlled by Mr V Manelis and had nothing to do with the defendant. The defendant also had no control over Navada Construction and it was not his *alter ego* as was found by Mr Sacks, alternatively, as he was instructed to accept. After the consolidation of the liabilities, Orange County no longer was indebted to FNB or to Navada Construction. These debts were repaid to these entities but was replaced with a new debt owed to a different party. The liability continued to exist. Mr Sacks' conclusion that Orange County was loaded with debt thus extracting all equity value within the property has no merit. He has also failed to bring into the equation that vacant land in the amount of R10 000 000 was obtained by Orange County during 2017. In my view, Mr Sacks could not have concluded that this loan was not a commercial arms-length financial arrangement. This had nothing to do with the defendant and he had no interest in Navada Group Investments 2 (Pty) Ltd.

[119] Despite this, Mr Sacks included in the final accrual calculation 50% of the full property value, to wit, R37 000 000, half of which amounted to R18 500 000, as if this is still an asset of the defendant. To have done this, it must be accepted that the liabilities of Orange County just vanished into thin air. Mr Sacks acknowledged in his report that the FNB loan was repaid. It was not paid by the defendant as he no longer had a members' interest. It was not paid by Orange County but was paid by entities that

the defendant had nothing to do with. Fact is, the debt still existed and could not be ignored.

[120] In my view there is no basis to include any value in the defendant's estate of any holdings in Orange County as at date of dissolution of the marriage. The defendant has sold his members' interest for value. If anything had to be included it was the proceeds received, if it still existed. Moreover, even if the sale is to be ignored, which in my view it could not, the liabilities of Orange County could not have been ignored to calculate the net asset value of a members' interest.

[121] What Mr Sacks did was to find that a dissipation took place and merely added the value as found by Mr Oberholzer, CPI adjusted in the accrual calculation. He deemed the assets to still be part of the estate of the defendant. It cannot be found that the transaction was a sham and that the defendant never disposed of his members' interest. A sale took place.

[122] In my view the criticism levelled by Mr Stride in this regard is founded. As pointed out before, Mr Sacks was instructed by legal advisers not to accept these related party transactions. Mr Sacks merely went ahead to include the value of these assets into the accrual calculation.

[123] What Mr Sacks did, whether he was instructed or decided himself to do so, he "added-back" the value, which according to his findings should have been the sale value. This means that although the defendant no longer owned the asset, the monetary value of the asset was added into his balance sheet for accrual purposes. The amount already received by the defendant reflected in his loan account was ignored.

[124] As far as Brosman and Orange County is concerned, these assets, amounting to R27 219 652, as per the accrual calculation of Mr Sacks dated 1 September 2021, should not have been included in the estate of the defendant.

[125] This method of determining the accrual has a bearing on some of the other assets included in the accrual calculation of Mr Sacks.

[126] For instance, in the accrual calculation dated 1 September 2021 under the heading "*Personal and Classic motor vehicles*" the amount of R 11 141 000 was included. This amount was arrived at by Mr Sacks by re-valuating some of the vehicles with reference to a booklet called *Hagerty.* By his own admission, Mr Sacks was not a motor vehicle expert but pointed out that the defendant also used this booklet for valuations. He never saw any of the vehicles to establish condition. This was in contrast with the evidence of Mr Haselau, the restoration specialist witness called by the defendant. He was in the employ of Peter and Dawn Manelis, the defendant's parents. It was argued that he was not independent. In my view despite not being independent, he was a good and reliable witness. He was prepared to make concessions when the circumstances required same. The Court never gained the impression that he was adjusting his evidence to assist the defendant at the cost of the plaintiff. It is also my view that he is a true expert in his field and an expert witness on which the Court could place reliance. His expertise and experience and the fact that he worked with these vehicles placed him in a position to provide valuable input to this Court.

[127] It became common knowledge that the plaintiff and the defendant were preparing themselves to immigrate to the United States of America during or about 2014. During that time, the house they were living in situated at 29 Fleur Street ("Fleur Street") was sold for R 6 500 000. This is a date before the parties' separation. In Mr Sacks' first experts' report it was stated by him as follows: "*Accrual calculation - we have been instructed that the proceeds from the sale should be added to the assets of Defendant for accrual purposes, adjusted for CPI.*" [Underlined for emphasis] The court notes the instruction which Mr Sacks received but the question remains whether the receipt of the proceeds could, CPI adjusted, be included in the defendant's estate some 7 years after the transaction.

[128] The defendant received an amount of R 6 109 449,50 into his Standard Bank account after the sale of the house and on 17 December 2014, an amount of R5,8 million was transferred into a money market account and later back to the defendant's personal account. Payments were made utilising these funds to pay attorneys, R1,7 million for purchase of a property in a company called Silver States; R1 million to KB Motors for a Rolls Royce; R 903 490 to Eersbewoond, a transfer of R 641 000; a further transfer of R 657 665,58 for vehicle finance; R 500 000 to Scuderia South Africa; and R100 000 to one N Rigos. The proceeds from the sale of the house was utilised in full within 6 months thereafter. Explanations backed by bank transfers on how these funds were disbursed were provided to Mr Sacks during the meeting of experts. The fact is that the money was utilised and, in my view, the plaintiff failed to prove that the

funds were dissipated or, for that matter, are still available in some form or the other. It was not established by the plaintiff that these funds were distributed or hidden to negatively affect the plaintiff's accrual claim. The payment for the Rolls Royce remained suspicious as it is highly improbable that such an amount would have been forfeited for cancelling a purchase. Fact of the matter is, the plaintiff did not prove that these funds where dissipated to lower her accrual claim, alternatively, are still in existence therefore forming part of defendant's estate. Mere proof of the receipt of funds by the defendant during the course of the marriage is not proof of the continued existence of these funds many years later. The only reasonable inference, considering the probabilities, is also not that these funds are still part of the estate of the defendant. The evidence rather painted a different picture. Another fact that bears mentioning again is that the defendant and the plaintiff lived on a very high scale travelling the world. These travels must have cost them a substantial amount.

[129] Mr Sacks acted on instructions to include the majority of the proceeds for the sale of the house on Fleur Street, later disbursed as shown, in the estate of the defendant, after a CPI adjustment. In my view this could not have been done. Mr Sacks later accepted that a Ferrari 348 was bought with the proceeds of Fleur Street and adjusted the inclusion of the proceeds, CPI adjusted, to R 4 108 408. This caused on overstatement of the estate of the defendant at the dissolution of the marriage.

[130] The Court has referred to the classic cars owned by the defendant and will now deal therewith in more detail. The defendant's classic cars sold to

his mother during October/November 2014. This included the sale of a Ferrari Daytona, which by far was the most valuable vehicle. This is a date before the separation of the parties at a time when the parties intended to immigrate to America. Mr Sacks expressed the opinion that these vehicles were sold below actual value, to a related party, and therefore evidence an attempt to get rid of assets to the detriment of the plaintiff's accrual claim. Mr Sacks, as was pointed out above, is not an expert on classic vehicles and based his findings of a value guide book called "*Hagerty*".

[131] Four cars were sold with a total disposal value of R 4 760 000, including the Ferrari Daytona for R 4 160 000. According to Mr Sacks the Ferrari was worth R 8 740 709 and therefore sold for 110% under value. This car was bought by the defendant through loan finance provided by his father during April 2007 for R 1 900 000. A full record of the loan facility referred to as "PM-CCM Loan A" was made available to Mr Sacks reflecting the transactions and balances of the loan account from time to time.

[132] In the expert reports of Mr Sacks, he stated as follows:

> "*For purposes of determining the accrual, the true/factual value of any assets that were disposed of/sold by the defendant (during the subsistence of the marriage) to related parties for inadequate value are deemed to be part of his estate for the purposes of calculating the accrual.*"

[133] In his report and evidence he repeatedly said that he was instructed to ignore related party transactions but to do his calculations as if the assets were still owned by the defendant. This instruction came from the plaintiff's legal team.

[134] Mr Sacks opined that this transaction was not at arms-length, and that it is likely that it was one of convenience for the defendant to dissipate a high value asset. Mr Sacks regarded, correctly so, that this was also as a related party transaction and referred in his report to International Standard of Auditing (ISA) 550 Related Parties which determines as follows: "*The audit of related party transactions is an essential part of an audit of financial statements. Although such transactions are a common feature of business, they may give rise to specific risks of material misstatement of the financial statements. Including the risk of fraud, because of the nature of related party relationships.*"

[135] ISA 550 deals with auditing of financial records. An auditor must be on the lookout for suspicious related party transactions and can query such transactions. An auditor in my view, cannot make a conclusive finding on the veracity of such a transaction and simply ignore it. It was for the Court to decide whether such transaction could stand scrutiny. The Court is of the view that Mr Sacks could not have made the finding of dissipation, which is in essence, fraudulent behaviour. On the evidence in this matter, the Court cannot conclude that this transaction was entered into with the sole purpose to negatively affecting the accrual claim of the plaintiff. The evidence was that the parties were planning to leave the country at that stage and was still married. Defendant needed money as his loan account in Navada Construction was too high. Mr Sacks stated that this related party transaction was done "*in the months leading up to the* ***separation*** *of the Defendant from the Plaintiff*". At that stage Mr Sacks would not have known whether the defendant was considering divorcing

the plaintiff. The fact that the transactions were conducted without the flowing of cash is irrelevant. The vehicles were bought through funds made available on loan from a related party by entries in a loan account. Similarly so when it was sold.

[136] Moreover, I accept the evidence of Mr Haselau, bearing in mind that he is not an independent witness. He testified that the condition of the Ferrari Daytona was not perfect (concours) and extensive work had to be done on this vehicle. His evidence was corroborated by Mr V Manelis, whom I find to be an expert on the value of classic cars. This vehicle was not sold for less than its reasonable value at the time. In my view, Ms Sacks could not have "*added back"* the value of the classic cars into the estate of the defendant and could not have included in the accrual calculation the current value of these vehicles.

[137] In Mr Sack's revised accrual calculation, he added R 10 413 968 under the heading "PM Loan B" after applying CPI. Reference is made to Table 8A which is a calculation of "*other assets*" which included "PM Loan B". These figures were accepted on face value taken from the defendant's 1 April 2017 balance sheet. "PM Loan B" stood in the amount of R 8 755 257. To calculate this amount Mr Sacks used the defendant's 1 April 2017 balance sheet. This figure was CPI adjusted to the figure of R 10 413 968. Accordingly, Mr Sacks concluded that "PM Loan B" remained stagnant and continued to be a substantial asset in the estate of the defendant from 1 April 2017 to 1 September 2021. This in my view cannot be accepted. The loan account schedule, as testified to by Mr V Manelis,

has shown that the defendant was owed R 4 298 285 by 23 April 2020. By 31 May 2020 this situation changed as the "PM Loan B" now stood at *nil.* The credit balance of this loan was transferred into the defendant's Navada Construction loan account to pay off his loan account.

[138] Mr Sacks was not prepared to accept the loan schedules and payment for legal costs reflected therein. His view was stated to be as follows: "… *that these legal costs are simply descriptions in the loan schedules (between related parties) prepared by the Defendant's brother and are not supported by supporting invoices and payment records. Therefore, at this stage, it cannot be confirmed (with specific regard to the legal costs) if these amounts are valid or legitimate disbursements by Navada on behalf of the Defendant or simply further book entries to diminish the value of loan assets of the Defendant (of the Defendant's evident accrual value).*"

[139] In my view, the stance taken has the attributes of a conspiracy theory which is not supported by the evidence. It was common cause between the parties that the legal expenses in this matter became enormous. The plaintiff was paid a contribution towards her costs by the defendant in the amount of R 3 150 000, although she demanded over R13 000 000. It was shown by the defendant that certain payments were made to Mr Stride. Even the amount paid by defendant to the knowledge of Mr Sacks was ignored.

[140] The Court should note that the schedules setting out the loan accounts of the defendant in the PMF Trust and Navada Construction have been kept for many years, in one instance since the year 2000, and cannot be

criticised as the figures appearing therein were kept long before the marriage of the parties and stand scrutiny when compared to entries in other financial records and bank statements, where applicable. Any suggestion that an entire bookkeeping system, cross reference through many records, was manipulated to avoid an accrual payment to the plaintiff is rejected outright.

[141] The Court accepts these schedules and the figures appearing therein. Mr V Manelis was responsible for the entries on these schedules and the Court accepts his evidence in this regard.

[142] Closely related to these loan accounts are the two distributions from the PMF Trust received by the defendant included by Mr Sacks in his accrual calculation. These distributions were made on 28 February 2011 and 29 February 2012 in the amounts, respectively, of R 3 100 000 and R 3 500 000. Mr Sacks included these trust distributions, CPI adjusted, in the accrual of the defendant as if these funds were still intact and available to the defendant forming part of his estate almost 10 years later. He accepted book entries in this regard but he was not prepared to accept other entries. These entries correspond with entries made in the books of all entities and should, in my view, have been accepted by Mr Sacks. By adding these distributions into the estate of the defendant for the accrual calculation evinces a forced attempt to increase the estate of the defendant to create an accrual.

[143] The first distribution was used by the defendant to settle his loan account in Navada Construction which took over his home loan. On 1 October

2011 the defendant was indebted to Navada Construction in the amount of R 3 491 271. This amount came about as a result of the transfer of the Bosman debt, renovations to the residence of the defendant, for the Ferrari 430 and other drawings. The second distribution was immediately used to cover his debt. All of this was included in books of account at the time of the transactions and should not have been ignored by Mr Sacks.

[144] Mr Sacks also included R 9 012 108 in relation to Applecart in his calculation. The equity in this entity was sold by the defendant to Mr Konstas in the middle of 2013 and a remaining portion was sold during 2014 whilst the parties were married and travelled the world. According to Mr V Manelis, he had personal knowledge of Applecart and was responsible for its financial bookkeeping. He testified that the transaction was orally concluded, although there was a previous written draft agreement containing the incorrect selling price. The purchase price was paid in a series of cash payments, as well as paying an amount of R 3 081 734 into the defendant's loan account in Navada Construction. Mr V Manelis traced these payments in bank accounts and confirmed payment into the loan account of Navada Construction. A certain portion was never paid and was set-off against a claim by Mr Konstas.

[145] Mr Sacks included the proceeds of R 6 600 000, CPI adjusted from 2014, in relation to the Applecart sale in the accrual calculation on the basis that the sale has not been disclosed in the balance sheet of the defendant. He noted he was instructed to do this. In my view, the plaintiff failed to prove that the proceeds of this sale should be included in the estate of

defendant at the dissolution of the marriage. This is again an example where Mr Sacks deemed that the proceeds were still an asset in the estate of the defendant.

[146] An example of adding the proceeds of a sale twice in Mr Sack's accrual calculation is to be found with reference to the sale of the Silver State property. Mr Sacks added as an asset R2 350 266, CPI adjusted to R 2 476 318, but also added R1 996 754 in respect of Eersbewoond loan account. Mr V Manelis has shown that the R1 996 754 was paid into the defendant's loan account in Eersbewoond. Mr Sack's reply to these points raised was to point out that Mr V Manelis is not an independent expert as he is the brother of the defendant. In my view, it is not for one expert to make a comment on the independence of another expert. It is for a court to make a decision in this regard. By taking this stance Mr Sacks failed to remain uninfluenced as to form or content by the exigencies of the litigation.

[147] The further objection raised by Mr Sack was that the report by Mr V Manelis is wholly absent of supporting documents or corroborating information. This kind of critic is more in line with what is expected of an expert but, in this instance holds no water as Mr V Manelis drafted the schedules through his personal knowledge of the transactions. His evidence was always stated to be factual as well as of expert nature. When he testified about the accounting issues and the flow of funds, this is factual evidence. A Court must consider the veracity of the evidence. The Court has already found Mr V Manelis to be a credible witness.

[148] The Court will now deal with the value of the equity in Eersbewoond at date of dissolution of the marriage. Mr Sacks included the amount of R38 439 459, CPI adjusted to 1 September 2021, in the amount of R 40 712 401 in his accrual calculation. Mr V Manelis included the amount of R18 200 000 as at 4 October 2021. There is approximately a R 22 000 000 difference.

[149] The property which is owned by Eersbewoond was valued by Mr Oberholzer during 2020 to be worth R42 000 000 and by a Mr De Klerk, R30 000 000, according to a joint meeting of experts. After a meeting this value was adjusted, respectively, to R 36 000 000 and R 33 000 000. A R3 000 000 difference. These valuations are therefore not the main contributor to the different values included in the accrual calculations of Mr Sacks on behalf of the plaintiff in the amount of R40 712 401, and by Mr V Manelis and Mr Stride, on behalf of defendant, in the amount of R 18 200 000.

[150] In his first addendum report, Mr Sacks noted that as at 19 July 2019 the bond account of Eersbewoond with FNB stood at a debit amount of R2 655 067,55. There was then a draw down on this facility in the amount of R 18 240 627,45 of which R 18 200 000 was immediately advanced to Navada Construction on loan. On this basis Mr Sacks concluded that Navada Construction was the *alter ego* of defendant. This was not the pleaded case and in my view, Mr Sacks could not have ignored this transaction. Mr Sacks concluded that the impact of the increased bond and payment to Navada Construction was to significantly diminishing the

equity value of the defendant's shareholding in Eersbewoond. The fact remains however, that the loan to Navada Construction would have remained an asset payable to Eersbewoond. Consequently, Mr Sack's view that the only reasonable conclusion which could be drawn is that the defendant had manipulated his financial position to present a lower accrual is not correct. According to Mr Sacks's report he was instructed to ignore the FNB loan drawn down by Eersbewoond at August 2019 and the loans between Eersbewoond and Navada Construction. According to the AFS of Eersbewoond for the year ending on 28 February 2019, Eersbewoond was indebted to Navada Construction in the amount of R 7 269 330. According to the evidence of Mr V Manelis this amount increased to R8 727 937 by the time of the payment of the R 18 200 000. A loan to Navada Construction in this amount would have settled the outstanding balance and would have left a credit balance, which should have been reflected by Mr Sacks as an asset of Eersbewoond.

[151] As previously found in this judgment, Mr Sacks could not have ignored transactions on instructions received as he regarded Navada Construction as the *alter ego* of the defendant. The liabilities of Eersbewoond could not have been ignored in the calculation of the value of defendant's equity in Eersbewoond. No case has been made out to lift the cor*porate veil* and to ignore the audited financial statements of the various entities. I am in agreement with the evidence of Mr V Manelis that by adding back R 20 121 145, Mr Sacks provides a skewed and inaccurate value of Eersbewoond. This will significantly lower the accrual calculation of the defendant.

[152] On amended Table 4 of Mr Sacks, three further items appear referring to motor vehicles sold by the defendant. Mr Sacks added the proceeds of these vehicles back as if the proceeds remained intact and still formed part of the assets of the defendant.

[153] As far as the Ferrari 348 is concerned, the proceeds of R700 000 were paid into the Eersbewoond account. This would have lowered or increased the defendant's loan account depending on a credit or debit balance. This transaction was reflected in the loan account of defendant in Eersbewoond. The loan account balance was included in the accrual calculations conducted by Mr V Manelis and Mr Stride. The same with the sale of the Porsche.

[154] The defendant have not proven that the sale of these motor vehicles were conducted to diminish the value of the estate of the defendant to unlawfully lower the amount payable to the plaintiff. Mr Sacks should have considered what has become of the proceeds of these sale rather than to simply have include the alleged value of these vehicles in the accrual calculation.

[155] There is no need for this Court to refer to further assets included in the accrual calculation of Mr Sacks as it will not have a significant impact on the accrual calculations.

[156] Reference was already made to the criticism which Mr Stride levelled against Mr Sacks's expert report. In Mr Stride's view there is no accrual. He found the determination by Mr Sacks to be a fiction. His criticism in my view has merit as was pointed out by this Court with reference to the

various transactions. In a nutshell, the major difference between the calculations by Mr Sacks on the one hand, and Mr Manelis and Mr Stride on the other lies in the rejection by Mr Sacks of an entire accounting system of the defendant and other entities which were meticulously kept by Mr V Manelis. Mr Stride did his calculations by accepting the accounting system of Mr V Manelis. As previously mentioned, Mr Sacks could not have ignored this accounting system, albeit, that in the majority of cases transactions were between related parties. Loan accounts were used between the role players and as Mr Stride testified there was nothing untoward about these financial transactions between family members and the entities they control.

[157] In evidence and in the expert report, Mr Stride has shown that Mr Sacks increased the accrual by reducing the commencement values by R24 191 000, and after CPI is applied, the prejudice suffered by the defendant would be R 41 614 280. I will not deal with this aspect for purposes of considering whether the plaintiff has proven an accrual at the dissolution of the marriage. The Court accepted, for argument purposes, the version of the plaintiff what the commencement value should have been. Plaintiff had to proof that the defendant's estate at dissolution of the marriage was more than about R 80 000 000. If the plaintiff could prove that the value of defendant's estate was more than this amount an accrual could have been proven, if not, there would have been no accrual.

[158] Mr Stride considered the manner in which Mr Sacks did his calculations to arrive at his figure of R117 199 381 (the value of defendant's estate at 1

September 2021) and indicated why this figure was substantially overstated. He explained the overstatements by accepting the accounting records of Mr V Manelis, which Mr Sacks, to a large extent was not prepared to accept. The Court already found this could not have been done. The accounting records were double-entry book entries. It was shown in this Court that for every debit there was a credit. The fact that a transaction was not immediately settled in cash was irrelevant.

[159] Mr Stride indicated that by not taking account of the values of related party transactions of the defendant's property interests and investments in classic vehicles, the accrual increased by R10 679 000 (CPI adjusted). Liabilities were ignored to the extent of R28 853 982 (CPI adjusted). Mr Sacks inflated the accrual by making certain errors, for instance, by ignoring legal expenses in the amount of R 11 645 089. The total of these errors amounted to R 20 731 232 (CPI adjusted). If these figures are added, the accrual has been overstated by R85 293 568.

[160] There is no need for this Court to calculate each figure to the last rand as the Court is satisfied that the extent of the overstatement of the accrual calculation by Mr Sacks is as such that the threshold amount of R80 000 000 was not even remotely proven. If the R117 199 381 figure by Mr Sacks is taken and the amount which Mr Stride calculated, to wit, R 85 293 568 is subtracted therefrom, it leaves the value of the defendant's estate in the amount of R 31 906 813. Mr V Manelis calculated the defendant's estate to be valued at R11 508 897 as at 4 October 2021. Again, the Court is not going to pronounce on the correctness of this

specific figure. The Court is satisfied that the figures used by Mr Stride and Mr V Manelis are those reflected in the books of account of the defendant and the various entities.

[161] In summary, the accrual calculation of Mr Sacks is not accepted by this Court. Mr Sacks had to calculate the value of the defendant's estate as of date of dissolution of the marriage (or for practical reasons as of a date shortly before the dissolution). He could not have deemed many assets, or proceeds of alienated assets to still have been part of the estate of the defendant.

[162] The plaintiff has failed to proof that defendant deliberately and intentionally disposed of assets to negatively affect the plaintiff's accrual claim.

[163] Ultimately, the remedies of a spouse in a case of alienation of assets remains difficult to prove. Especially when a divorce takes years to be finalized and information is provided piece meal. Perhaps legislative intervention needs to come to the assistance of a spouse claiming on the basis of an accrual. Section 8 of the Matrimonial Property Ac 88 of 1984 provides some remedy, but without a full and immediate disclosure by the spouses of their assets a party would not be in a position to approach a court.

[164] Having considered all the evidence, one thing stands out for this Court. After the marriage and even after the separation of the parties, the defendant made limited strides to increase his estate. He obtained 3 substantial trust distributions from his father's family trust totalling R

19 447 000. Of that he used R 12 847 000 to obtain 98% of the equity in Eersbewoond. The remainder was ultimately used to maintain a luxurious lifestyle. He bought a house and renovated it. He made some profit by selling this property. The same applies to his classic cars. What was shown was that he invested in properties which ended up in a "*broken*" property market, to use the description of Mr V Manelis. Properties in the main street of Alberton decreased in value when the Newmarket Mall was opened and the mid-city of Alberton deteriorated. Then came the Covid-19 pandemic that had a devastating effect on shopping centres. Mr Ulrich Joubert testified that the value of shopping centres could have dropped with anything from 10% to 20%. He also gave a negative prospect of economic growth due to a number of socio-economic aspects.

[165] The money spent on overseas trips was not calculated, nor estimated by Mr Sacks and the other experts but must have been exorbitant. These trips were confirmed by the plaintiff. She made it clear that she was used to a life of luxury and opulence. The parties drove around in expensive sports cars. The defendant bought the plaintiff a Ferrari 348 in May 2015. Since the inception of the marriage, the parties enjoyed holiday and business trips to Dubai, Greece, Cyprus, Paris, Spain, Venice, Mauritius, Australia, Fiji, Los Angeles, Las Vegas, London, Spain, Santorini, Hong Kong, Egypt and London. Some of these destinations more than once. Some of these trips lasted for weeks. The cost must have been enormous.

[166] When the parties started divorce proceedings, both went into the litigation process spending extensive amounts on litigation. None of this was included in the calculations by Mr Sacks. The source of the defendant's money for his litigation was his loan account within Navada Construction. When the debit on this account got too high, the monies obtained from assets sold had to be paid into this account. Ultimately, a loan against Eersbewoond had to be obtained to pay into this loan account.

[167] After their separation, the defendant had to pay maintenance *pendite lite* for his son and the plaintiff in the amount of R26 000 per month. He also had to pay maintenance for another child in euros.

[168] In my view, the plaintiff has failed to prove on a balance of probabilities that the estate of the defendant has shown an accrual beyond the threshold amount of approximately R80 000 000. In fact, without calculating the exact figure, the evidence of Mr V Manelis has shown that the value of the defendant's estate has decreased considerably since 2009.

[169] Much have been said and argued about the defendant not testifying in this matter. The bulk of the issues related to accounting and Mr V Manelis was the person who dealt with this. Ultimately, the onus to prove an accrual was on the plaintiff and the fact that the defendant did not testify could not be used to bolster the case for the plaintiff.

[170] Consequently, the plaintiff has failed to prove an accrual, even on the acceptance of the plaintiff's own alleged commencement value of approximately R 44 000 000.

[171] The plaintiff's claim stands to be dismissed.

[172] On behalf of the defendant, it was submitted that the Court should order a punitive cost order as the plaintiff's approach was neither *bona fide* nor reasonable. Although the evidence presented on behalf of the plaintiff, in my view, fell well short of establishing an accrual, the court cannot conclude that the litigation was conducted *mala fide* or was so unreasonable that a punitive cost order should be made. In the exercise of this Court's discretion, a party and party cost order should follow the result.

[173] In the bigger scheme of things, the counter-claim, which was withdrawn a few days before the matter commenced, would have had minimal effect on the costs in this matter, especially on trial. The Court is of a view that no cost order should be made in this regard.

The supplementary heads filed and the Constitutional challenge

[174] The judgment in this matter was reserved on 24 March 2021 after heads of argument were filed and oral argument presented. On 12 April 2022, the Court was presented with further legal submissions prepared by counsel for the plaintiff. The Court was not approached for consent to file further heads of argument. These heads were merely emailed to the Court and uploaded onto CaseLines. This might have been as a result of the plaintiff realising that this Court was bound by the Full Court's decision in *Maxted v Maxted.*[39] The plaintiff now introduced a new defence based on

[39] Fn 13 above.

a constitutional argument. In these heads of argument, a portion of which I will quote *verbatim,* the point of law raised was stated to be as follows:

> *"1. If a law permits a contracting party (A) to breach a contractual duty freely and voluntarily undertaken to another contracting party (B), then the law limits B's right to human dignity in section 10 of the Constitution of the Republic of South Africa, 1996. 2. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, as one does through contractual obligations, is the very essence of freedom and a vital part of dignity. 3. If the law permits a party to a contract, more particularly an ante-nuptial contract to inflate its commencement value, then that law permits that party to take advantage of and prejudice the other party thereto. 4. All contracts are premised upon principles of consensus and "sheer liberality". Therefore, the unilateral imposition of a commencement value by one party without agreement having been reached in this regard, implies that there has not been consensus and a meeting of the minds of the respective contractors (in this case the spouses) as to their respective commencement values in an ante-nuptial contract. 5. Therefore, if the law permits a party to impose an inflated commencement value that is blatantly, demonstrably and proven to be inflated and false, then the law limits a contractor's right to informed consensus. 6. If a law limits the right to consensual contracting, then that limitation must be justifiable under section 36 of the Constitution for the law to be constitutional. 7. If the law permits a party to an ante-nuptial contract to unilaterally impose a commencement value that was never agreed upon by the parties on an equal (footnote 1) Barkhuizen v Napier [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57 footing and with informed consent, then the limitation that the law imposes on a contracting party's right to human dignity is unjustifiable. 8. The right to human dignity is a cornerstone of South Africa's constitutional democracy. 9. The purpose of the limitation, enforcing contractual capacity, is illegitimate. The nature and extent of the limitation is severe. 10. The law imposes an amorphous, anachronistic duty of equality and consensus on a contractor. 11. The principle of equal contractual capacity ensures that contractors enjoy equal contractual capacity and cannot be compromised. There is no relation between the limitation and any legitimate purpose. 12. Enforcing equal*

contractual capacity is recognised as a legitimate purpose, enabling a party to an ante-nuptial contract to falsely record a higher commencement value which would be prejudicial to the other contracting party. 13. There are less restrictive means to achieving the purpose of the limitation. 14. Therefore, if the law permits a contractor to unilaterally impose an inflated commencement value in an ante-nuptial contract, then that law is unconstitutional. 15. To the extent that the common law allows the imposition of an inflated commencement value in an ante-nuptial contract, the common law is inconsistent with the Constitution, in particular section 10, and falls to be developed in terms of sections 8(3) and 39(2). 16. In the present matter, on the plaintiff's version, the defendant unilaterally imposed an inflated commencement value of R68 74 000,00 in the ante-nuptial contract. This was done to the prejudice of the plaintiff. The defendant did not testify and thus has not provided a contrary version. 17. Mrs Kokinis could not and did not take the issue any further and certainly was not privy to any discussions between the parties concerning the Defendant's commencement value. In fact, she testified that it was done in extreme haste the evening before the wedding and the value of the defendant's estate had not been discussed in front of her. 18. We reiterate that the context in which the ante-nuptial contract was signed must be taken into account. In this regard, we rely upon the decision of Justice Unterhalter in the Supreme Court of Appeal in Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others 2022(1) SA 100 (SCA). 19. We accordingly submit that in the defendant has unilaterally imposed his inflated commencement value upon the plaintiff without her consent. This is unjustifiable and unconstitutional. 20. The plaintiff should not be forced to accept the veracity of the commencement value if she did not agree on the amount beforehand or if there was no consensus on the amount before she entered into the ante-nuptial contract."

[175] The defendant filed a response to the plaintiff's supplementary heads. In these heads, he objected to the filing of supplementary heads by the plaintiff as plaintiff did not obtained any consent from this Court in this regard. Further, the plaintiff did not ask for an indulgence in the heads of argument for the Court to allow the further heads of argument.

[176] After the defendant closed his case the parties were afforded less than a week to file heads of argument. This came about as a result of the difficulty to find a date that suited the Court and the respective legal representatives. This was a relatively short time considering the extent of evidence lead in this matter. For this reason, the Court allowed the further heads of argument, which in any event, were fully replied to by the defendant.

[177] The defendant submitted that the constitutional point could and should not be considered by this Court for reason that it was never pleaded by the plaintiff and that none of the required procedural requirements have been met for taking such a constitutional point.

[178] The constitutional point was in fact not pleaded. Does this now disqualify the plaintiff from making it part of her case at this late hour, i.e. after judgment was reserved? No specific legal argument was advanced by the plaintiff in this regard, but the defendant did. The defendant submitted that it is trite law that a court should only decide the issues before it, as pleaded by the parties. The Court was referred to a recent judgment decided in the Supreme Court of Appeal in *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd.*[40] In this matter it was held as follows:

> *"[9] Before addressing the correctness of these orders, it must again be emphasised that a court should decide only the issues before it, as pleaded by the parties. In Fischer v Ramahlele, this Court said:*
>
> > *'[I]t it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the*

[40] [2022] 2 All SA 607 (SCA).

> *nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.'"*[41]

[179] As this constitutional point was not raised in the pleadings the Court is not going to consider it on its merits. It was not part of the broader issues which would have flown from the pleaded case. In any event, the constitutional attacked launched by the plaintiff is aimed against the lawfulness of section 6 of the Matrimonial Property Act. This being the case, it was required of the plaintiff to comply with certain jurisdictional facts for this issue to be fully ventilated in this Court. In the defendant's heads it was submitted as follows:

> *"First, the responsible Minister has not been joined as a party to the proceedings. Second, there is no compliance with the peremptory requirements of Rule 16A of the Uniform Rules of Court, i.e. the posting of a notice by the Registrar of the nature of the constitutional point taken, as formulated by the party taking such constitutional point. Third, there is no formulation of the proposed wording of the statutory provisions that would render the provisions compliant with the constitutional imperatives; here, of section 10 of the Constitution, as contemplated for by the Plaintiff. Fourth, no relief has been pleaded or even advanced in Plaintiff's "supplementary submissions" enabling the Court to make an order suspending particular*

[41] See also *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA); affirmed by the Constitutional Court in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) 234.

provisions of the Matrimonial Property Act pending enactment by Parliament, or any order dealing with the interim arrangement until such enactment has occurred."

[180] I am in agreement with the submissions advanced by the plaintiff.[42] The constitutional point was not raised in the pleadings, was not dealt with in evidence and was not introduced in this matter as required. Consequently, the Court will not decide the constitutional argument raised by the plaintiff in her supplementary heads. The Court will note however, without deciding this point, that the declaration of a commencement value in an antenuptial contract may be a unilateral act but such unilateral act becomes consensual when the parties sign such contract. *In casu,* the plaintiff could have refused to sign the contract until she was provided with sufficient information to verify the veracity of the commencement value. The reason why the parties left the signing of their antenuptial contract to the last minute (the day before their wedding) has not been covered through evidence. Moreover, it is not section 6 of the Matrimonial Property Act that determines whether a consensual contract is binding or not it is the common law. All what is envisaged by section 6(3) of the Matrimonial Property Act is to determine when and under which circumstances a declaration of a commencement value would only serve as *prima facie* proof thereof.

[181] No order in relation to the withdrawn counterclaim of the defendant needs to be made.

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[42] See in this regard the recent decision in *Greyling v Minister of Home Affairs* in the Gauteng Division, Case number 40023/21, delivered on 11 May 2022 where a successful constitutional challenge was launched against the limited applicability of section 7(3) of the Divorce Act, 70 of 1979.

[182] Accordingly, the following order is made:

The plaintiff's claim is dismissed with costs, including the cost of two counsel.

_____

R. STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

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Heard on: 1/06/2020; 2/06/2022; 3//06/2022; 9/06/2020;10/06/2020, 11/06/2020; 21/10/2021, 22/10/2022, 2/11/2021, 3/11/2021, 3/11/2021, 4/11/2021, 5/11/2021/5/11/2021, 8/11/2021, 9/11/2021, 10/11/2021, 10/11/2021, 11/11/2021, 12/11/2021, 12/11/2021, 14/03/2022, 15/3/2022, 16/03/2022,17/03/2022, 23/03/2022, 23/03/2022 (Plaintiff's heads of argument), 23 April

2022 (Defendant's heads of argument); 12 April 2022 (Plaintiff's further submissions); 26 April 2022 (Defendant's response to Plaintiff's supplementary submission)

Delivered on: 29 June 2022