

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

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:24583/2009

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

Date: 22 September 2022 E van der Schyff

In the matter between:

K[...] L[...]

PLAINTIFF / EXCIPIENT/ RESPONDENT

and

A[...] L[...]

DEFENDANT / RESPONDENT/ APPLICANT

FAIRBRIDGE WERTHEIM BECKER

ATTORNEYS INCORPORATED

SECOND RESPONDENT (ANTI-DISSIPATION

APPLICATION)

JUDGMENT

Van der Schyff J

Introduction

- [1] The court is seized with three interlocutory applications between the parties: (i) an application to condone the late filing of an amended plea and the determination of the appropriate costs order relating to the late filing of an amended plea and counterclaim; (ii) an exception raised against the amended counterclaim, and (iii) an anti-dissipation application by the defendant. For clarity, the parties will be referred to as cited in the divorce action.

Background

- [2] The plaintiff and defendant were married out of community of property with the inclusion of the accrual system on 3 April 1992. They were divorced on 14 March 2019. The issues in respect of each party's estate and costs, were separated from the divorce in terms of Uniform Rule 33(4), and the order granted by Fabricius J (the Fabricius-order) specifically provided that –

'[T]he following remaining disputes are postponed *sine die*:

- 5.1 The party whose estate shows the largest accrual on date of divorce and the payment to the party whose estate shows a lesser accrual of an amount equal to half of the difference between the accrual of the respective estates;
- 5.2 Costs.'

The order also provided that in the event that the defendant intended to amend her pleadings, such amendment shall be served on or before Monday, 15 April 2019.

- [3] It is common cause that the defendant did not amend her pleadings by 15 April 2019. The plaintiff's attorney telephonically and by email informed the defendant's attorney on 15 April 2019 that as a consequence of the defendant failing to deliver her amended pages on 15 April 2019, she would need to provide the court with an explanation as to why she was not able to abide by the time periods set out in the Fabricius-order.

- [4] The defendant filed a notice of intention to amend the plea and counterclaim on 14 May 2019. On 24 May 2019, the plaintiff filed a notice of irregular proceedings in terms of Rule 30(1). The plaintiff averred that the defendant's notice of intention to amend her pleadings constituted an irregular step because the defendant failed to comply with the Fabricius-order in that she failed to serve the amendment before 15 April 2019, and because she failed to file a condonation application, wherein she sought condonation for the late service of the notice to amend. The defendant subsequently filed a condonation application on 7 June 2019.
- [5] On 19 June 2019, the defendant served her amended counterclaim. Pursuant to the delivery of the defendant's counterclaim, the plaintiff excepted to it. On 11 July 2019, the plaintiff filed a notice in terms of Rule 23(1), excepting to the defendant's counterclaim.
- [6] After the notice in terms of Rule 23(1) was filed, the defendant's attorney informed the plaintiff's attorney that a further substantive amendment would be filed to address the issues raised in the Rule 23 Notice. On 13 August 2019, the defendant served a notice of intention to amend, but subsequently informed the plaintiff's attorneys that they were abandoning the proposed amendment but would launch a joinder application. Thus, the defendant intended to rely on the 'first amendment'. The plaintiff's attorney sent numerous unanswered letters to the defendant's attorney requesting an indication of when the defendant's joinder application and further amended counterclaim could be expected to be filed. The matter was, in the meanwhile, set down for trial on 11 February 2020. The defendant's attorney of record only responded in a letter dated 31 January 2020, indicating that the defendant is proceeding on the counterclaim as per the amended counterclaim filed in June 2019. The parties then agreed to postpone the trial *sine die*, reserve the costs, and seek the appointment of a case manager to assist with expediting the finalisation of the matter, including any interlocutory applications, trial certification, and the allocation of a preferential trial date. This agreement was captured in an order of court granted on 11 February 2020.

(i) The condonation application

[7] Against the background set out above, regard should be given to the case-management meeting that was conducted before Mngqibisa-Thusi J on 29 March 2021. It is important for the issues to be decided by this court that the Directive issued by Mngqibisa-Thusi J, and signed by the parties' respective counsel, records the following:

'3. In an effort to curtail the disputes, the parties have agreed to the following directive, with particular reference to the timelines of the delivery of court process, which is hereby made an order **by agreement**:

3.1 subject to the discretion of the Court hearing the matter to grant or refuse condonation for the late filing of the Defendant's amendment in terms of the divorce order granted by Fabricius J on 14 March 2019, the Plaintiff withdraws its opposition to the Defendant's condonation application in respect of such late filing of the first notice of amendment (served on 14 May 2019) and the subsequent filing of the amended papers (served on 20 June 2019);

3.2 subject to the discretion of the Court hearing the matter to grant or refuse condonation for late filing of the Plaintiff's exception, having regard to the Plaintiff's Rule 23 Notice served on 11 July 2019, the Defendant condones the late [filing of] the Plaintiff's formal exception to the amended pages. The Plaintiff shall deliver his formal exception to the amended pages within ten (10) Court days of signature of this directive by both parties;

3.3 should the Defendant wish to further amend her papers after the Plaintiff's formal exception has been delivered, the Defendant shall deliver her subsequent notice of intention to amend within 15 (fifteen) court days of the delivery of the Plaintiff's formal exception;

...

3.6 the costs occasioned by the defendant's first notice of intention to amend served on 14 May 2019, the amended pages served on 20 June 2019, the

condonation application and the Defendant's second notice to amend served on 13 August 2019 are reserved **for determination at the main hearing of the matter.**' (My emphasis)

- [8] Rule 27(1) envisages that an application for the removal of a bar is necessary only in the absence of an agreement between the parties. The plaintiff withdrew his opposition to the defendant's amendment of the counterclaim, the defendant agreed that the plaintiff could proceed with the formal exception if he were inclined to do so. There is no reason to dwell further on the condonation applications. The defendant's amendment of her plea and counterclaim, as set out in the amended pages served on 20 June 2019, stands to be condoned.
- [9] The real thorn in the plaintiff's side is the costs occasioned by the defendant's attorney's indication that the defendant is withdrawing the amended counterclaim that was filed to address the concerns raised in the Rule 23 notice and later reneging thereon while the plaintiff in the meanwhile obtained a hearing date, which eventually necessitated the trial to be postponed for the exception to be dealt with.
- [10] In this context, the Directive issued by Mngqibisa-Thusi J pertaining to costs needs to be interpreted. Considering that Mngqibisa-Thusi J, and the parties proposing the draft Directive, were well aware that the parties agreed that the condonation application be finally decided by a court, and the probability that an exception would precede the trial, and understood the difference between interlocutory proceedings and the trial, I am of the view that the term 'main hearing of the matter' refers to the trial and not to the defendant's condonation application. The condonation application and the amendment of the counterclaim are intrinsically interlinked. In addition, the parties agreed that the costs occasioned by the postponement of 11 February 2020 are reserved. As a result, I am not inclined to decide the issue of the costs associated with the amendment of the plea and counterclaim at this stage, it remains to be dealt with at the main hearing.

(ii) The exception

[11] Due to the background facts set out above, the plaintiff's late filing of the exception is condoned.

[12] The defendant issued a counterclaim. No other parties were joined. In the counterclaim, the defendant reiterates that she was married to the plaintiff in terms of an ante-nuptial contract with the inclusion of the accrual system. She *inter alia* avers that the following terms were, amongst others, 'material express, alternatively implied, further alternatively tacit terms' of the ante-nuptial contract:

- i. '[T]he parties individually and respectively, having a peculiar knowledge of their respective assets and liabilities were under an obligation to disclose same to each other at the commencement of the marriage;
- ii. [T]he parties owed each other a duty of *uberrimae fides* at the time of the conclusion of the Ante-Nuptial Contract and throughout the marriage'.

[13] The defendant also claims that:

- i. The benefits the plaintiff received from his erstwhile employer when his employment was terminated constituted assets in the plaintiff's estate,
- ii. The plaintiff unlawfully and intentionally diminished the accrual in the value of his estate 'specifically and with the sole intention of denuding the Defendant's accrual claim as provided for in terms' of the Ante-Nuptial Contract by (a) creating the L[...] Children Education trust and donating an amount of R1 800 000.00 to the said trust, and (b) the plaintiff's investment of an amount of R5 114 740.75 in an Investec Living Annuity Policy.
- iii. As a result of the donation to the Trust, the plaintiff effectively, unlawfully, deliberately and *mala fides* diminished the value of his estate. The creation

of the Trust was unnecessary and illogical for the reasons set out by the defendant;

- iv. The plaintiff was at all times aware of the fact that his estate had shown a greater accrual and that the defendant would have a claim in terms of s 3(1) of the Matrimonial Property Act (MPA). The Policy was created 'at a time that the Plaintiff was aware that the accrual claim of the Defendant would vest on the date of divorce and accordingly manifests an unjust enrichment of the Plaintiff at the expense of the Defendant. The Plaintiff attempted to effectively circumvent his obligations under and in terms of the Ante-Nuptial Contract while retaining the benefit of the asset in another space';
- v. In taking out the Policy the plaintiff acted unlawfully, deliberately and *mala fide* with the intention to diminish the Defendant's accrual claim;
- vi. The plaintiff's conduct constitutes a material breach, alternatively repudiation of the Ante-Nuptial Contract;
- vii. Because the plaintiff deliberately disposed of assets without disclosing his intention to do to the defendant the plaintiff: (a) breached his duty of *uberrimae fides* owed to the defendant, (b) sought to cause maximum prejudice to the defendant, (c) acted in bad faith, (d) offended public policy and the Constitutional values of human dignity, and achievement of equality, (e) actively disposed of his assets only disclosing to the defendant that he had done so some three months in advance of the trial date;
- viii. As a result, the defendant suffered damages 'in an amount commensurate to the difference in the value of her accrual claim as at the date of divorce and the value of her claim prior to the dispositions to the Trust and the policy. The defendant pleads in the alternative that the court determines a just and equitable method of determining the defendant's accrual claim as at the date of the divorce;
- ix. The defendant, in relying on s 8 of the MPA, averred that the court is vested with an inherent discretion to avoid an inequitable result.
- x. The defendant seeks the following relief: (a) a declaratory order to the effect that the accrual of the plaintiff's estate as it stood on 14 March 2019, be

calculated on the basis that amounts equal to the respective dispositions to the Trust and the Living Annuity be deemed as assets' in the plaintiff's estate; (b) that the parties are directed to endeavour to agree on the calculation of the estate within 30 days of the order, failing which a referee shall be appointed to enquire into and report on the valuation of the parties' respective estates and the computation of the accrual claim; (c) in the event that the plaintiff is unable to pay the accrual claim he must be directed to draw the maximum amount annually permissible from the policy and to make over such monies to the defendant until such time as the defendant's accrual claim is liquidated in full; (d) interest from the date of the divorce until the defendant's accrual claim is paid; (e) costs on an attorney and client scale; (f) further and alternative relief.

[14] The plaintiff submits that the defendant's counterclaim is vague and embarrassing alternatively, lacks the averments necessary to sustain a cause of action. The plaintiff raised twelve exceptions:

- i. *First exception:* The Trustees of the Trust have a direct and substantial interest in the outcome of the litigation. The defendant's failure to join the Trustees of the trust renders the defendant's claim excipiable;
- ii. *Second exception:* The Investec investment is not an asset in the plaintiff's estate and the defendant has no claim in law to the asset. Investec has a direct and substantial interest in the outcome of the litigation. The defendant's failure to join Investec renders the counterclaim excipiable;
- iii. *Third exception:* The defendant purports to rely on the unlawful and intentional diminishing of the accrual as a cause of action but do not allege the grounds upon which unlawfulness is based. As a result, the counterclaim is vague and embarrassing, and fails to disclose a cause of action;

- iv. *Fourth exception:* The defendant purports to rely on unjustified enrichment as a cause of action. The counterclaim does not disclose a cause of action in unjustified enrichment and no allegations have been made to satisfy the requirements of any of the *condictiones*;
- v. *Fifth exception:* The defendant alleges that the plaintiff had a peculiar knowledge of his assets and liabilities and was under a duty to disclose same. If breach of a duty is relied upon, the fact from which such duty arises must be stated. The defendant failed to do so. As a result, the counterclaim is vague and embarrassing, and fails to disclose a cause of action;
- vi. *Sixth exception:* The defendant claims that she suffered damages as a result of the alleged breach of duty but does not specify whether the cause of action in respect of damages is statutory, delictual or contractual. In addition, no relief in respect of payment of damages is sought in the prayers to the counterclaim. As a result, the counterclaim is vague and embarrassing, and fails to disclose a cause of action;
- vii. *Seventh exception:* The defendant alleges that the plaintiff (sic) [court] is vested with an inherent discretion to avoid an inequitable result with regard to the provisions of s 8(1) of the MPA. Section 8(1) of the MPA is applicable prior to the dissolution of the marriage. Since a decree of divorce was already granted and the plaintiff does not identify any other statutory provision which would entitle her to the relief, the counterclaim is vague and embarrassing, and fails to disclose a cause of action;
- viii. *Eighth exception:* the defendant seeks a declaratory order that the amounts commensurate with the respective dispositions to the Trust and the Investec policy be deemed as assets in the estate of the plaintiff. In order for a trust asset to be regarded as an asset of the personal estate of a party to a

divorce action, it should have been alleged that the trust was a sham and administered as such. No allegations to this effect were made. In addition, the defendant does not effectively seek an order that the trust assets and the living annuity be regarded as assets of the plaintiff's personal estate, but that the amounts commensurate with the dispositions be deemed assets. No allegations have been made to support the relief that an asset that in fact does not form part of the plaintiff's estate should be deemed an asset in the plaintiff's estate for purposes of determining the accrual of his estate. As a result, the counterclaim fails to disclose a cause of action;

- ix. *Ninth exception:* the defendant seeks interdictory relief against the plaintiff in prayer 3 of the counterclaim. No facts sustaining interdictory relief have been pleaded. As a result, the counterclaim fails to disclose a cause of action;
- x. *Tenth exception:* the defendant seeks interdictory relief against the plaintiff in prayer 3 of the counterclaim. The Divorce Act does not provide the Court with a discretion to distribute assets, but merely awards a party a right to claim an amount equal to one-half of the difference in accrual between the respective estates of the parties. As a result, the counterclaim fails to disclose a cause of action;
- xi. *Eleventh exception:* the defendant relies interchangeably on contract, delict, statute and unjustified enrichment as purported causes of action in her counterclaim. No alternative relief is sought in respect of each of the purported causes of action. It is unclear whether the defendant sues in contract, delict, statute or unjustified enrichment, alternatively, it is not clear which cause of action sustains the relief sought alternatively there is more than one claim evident from the counterclaim and the relief sought in respect of each has not been set out. As a result, the counterclaim is vague and embarrassing and fails to disclose a cause of action;

xii. *Twelfth exception*: the defendant pleads that she was a creditor of the plaintiff. The allegation contradicts the legal position that the defendant's claim for the accrual arises only at the date of divorce. No payment is sought for payment of a debt in terms of a debtor-creditor relationship. As a result, the counterclaim is vague and embarrassing and fails to disclose a cause of action;

xiii. *Thirteenth exception*: The plaintiff did not persist with the thirteenth exception.

Applicable legal principles pertaining to exceptions

[15] It is trite that an exception is a procedure 'designed to dispose of pleadings that are so vague and embarrassing that an intelligible cause of action or defence cannot be ascertained.'¹ The aim of the exception procedure is to avoid the leading of unnecessary evidence.² The Supreme Court of Appeal recently summarised the approach to be adopted in regard to adjudicating exceptions in *Luke M v Tembani and Others v President of the Republic of South Africa and Another*.³ The SCA stated:⁴

'Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on

¹ Cilliers, Herbstein & Van Winsen 630.

² *Dharumpel Transport (Pty) Ltd v Dharumpel* 1956 (1) SA 700 (A) at 706.

³ (Case no 167/2021) [2022] ZASCA 70 (20 May 2022).

⁴ *Luke M, supra*, at para [14].

an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.' (References omitted).

[16] The same court stated that:⁵

'It is thus only if the court can conclude that it is **impossible to recognize the claim**, irrespective of the facts as they might emerge at the trial, that the exception can and should be upheld.' (My emphasis).

[17] A court should also be alive to the reality that the dismissal of an exception does not deprive the plaintiff of the opportunity of raising the same defences as substantive defences in his amended plea and for their merits to be determined after the leading of evidence at the trial, which, as the court explained in *Pretorius and Another v Transport Pension Fund and Another*⁶ is probably, in any event, a better way to determine the potentially complex factual and legal issues involved.

[18] In adjudicating this exception, the court is enjoined to accept the facts pleaded by the defendant in her counterclaim as true.⁷ A plaintiff (whether in convention or reconvention) only needs to plead the primary factual allegations that are necessary for it to prove (*facta probanda*) in order to support its right to judgment. A plaintiff is not required to plead secondary allegations (*facta probantia*) on which it will rely in support of the primary factual allegations.⁸ Vally J elucidated the

⁵ *Luke M, supra*, at para [16].

⁶ 2019 (2) SA 37 (CC) para [22].

⁷ *Pretorius supra* para [15].

⁸ *Trope v South African Reserve Bank and Another and Two Other cases* 1992 (3) SA 208 (T) 210G-H.

question as to what facts are necessary to ensure that a cause of action has been disclosed. He explained in *Drummond Cable Concepts v Advanced (Pty) Ltd*⁹ that the answer depends on the nature of the claim - 'a claim arising from breach of contract requires different facts from a claim based in delict'.

- [19] Van Oosten J explained in *Sivuka & 328 Others*¹⁰ that an exception to a pleading that is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. He referred to *Trope*¹¹ where the particularity required in pleadings was explained as follows:

'It is, of course, a basic of principle that the particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made...'

- [20] In explaining the concept of 'vagueness' Van Oosten J stated:

'Vagueness arises from statements which are meaningless (*Venter and others NNO v Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) para 11), or are capable of more than one meaning, or fail to provide the degree of detail necessary to properly inform the other party of the case being advanced (*Win Twice Properties (Pty) Ltd v Capitulo Entertainment (Pty) Ltd t/a Galaxy World and Others* (33426/2017) [2018] ZAGPJHC 519 (7 September 2018) para 3). The second consideration is whether

⁹ 2020 (1) SA 546 (GJ) at para [7].

¹⁰ (36879/2015) [2022] ZAGPJHC 450 (30 June 2022) at para [7].

¹¹ *Supra*, at 210G-H.

the vagueness causes embarrassment of such a nature that the excipient is prejudiced (*Barloworld Logistics Africa (Pty) Ltd v Ford* 2019 (5) SA 133 (GJ) 141F-H), which is a factual enquiry and a question of degree, influenced by the nature of the allegations, their contents, the nature of the claim and the relationship between the parties (*Win Twice Properties*, para 4).'

The nature of the relief sought

[21] The defendant unequivocally defined the relief sought by her, when she set out in prayer 1 of the amended claim in reconvention that she seeks 'a declaratory order to the effect that as date of divorce (ie 14 March 2019) the accrual of the estate of the Plaintiff be calculated on the basis that amounts commensurate with the respective dispositions to the Trust and the Living Annuity be deemed as assets in the estate of the Plaintiff'.

[22] Section 21(1)(c) of the Superior Courts Act 10 of 2013 constitutes the basis for declaratory relief. This section provides as follows:

'Persons over whom and matters in relation to which Divisions have jurisdiction

21. (1) A Division has jurisdiction over all persons residing in or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power –

(c) in its discretion, and at the instances of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[23] A Full Court of this Division dealt comprehensively with the basis and requirements of declaratory relief in *Minister of Finance v Oakbay Investments (Pty) Ltd; Oakbay*

Investments (Pty) Ltd v Director of the Financial Intelligence Centre.¹² The court explained:¹³

'The exercise of the Court's jurisdiction in terms of section 21(1) (c) follows a two-legged enquiry. [T]he Court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so, the Court must decide whether the case is a proper one for the exercise of its discretion.' (References and footnotes omitted).

[24] The first leg of this enquiry involves establishing the existence of the necessary condition precedent for the exercise of the Court's discretion. An applicant for declaratory relief satisfies this requirement if he succeeds in establishing that he has an interest in an existing, future or contingent right or obligation. Only if the Court is satisfied accordingly, does it proceed to the second leg of the enquiry.¹⁴

[25] The accrual claim is a monetary claim that the spouse who has lesser of the accrual during the marriage has against the spouse who has the greater accrual during the marriage, upon dissolution of a marriage subject to the accrual system. The accrual claim is not a claim to a share in the other spouse's assets themselves.¹⁵ Gilbert AJ explained in *ND v MD* that an accrual claim is a 'deferred equalisation' claim.¹⁶ He explained that the accrual claim is contingent in nature until it vests upon dissolution of the marriage or earlier in the event that an immediate division of the accrual is granted in terms of section 8(1).¹⁷ *In casu*, the parties are already divorced with the legal issue pertaining to the accrual claim

¹² 2018 (3) SA 515 at paras [51] – [

¹³ *Oakbay, supra*, at para [52].

¹⁴ *Oakbay, supra*, at para [53].

¹⁵ *Reeder v Softline Limited and Another* 2001 (2) SA 844 (W) at 848J- 849A; *RS v MS and Another* 2014 (2) SA 511 (GJ) at para [11].

¹⁶ (24953/2019) [2020] ZAGPJHC 228; [2021] 1 All SA 909 (GJ) (16 September 2020) at para [13].

¹⁷ *JA v DA* 2014 (6) SA 233 (GJ) at para [9.1].

being separated from the divorce and postponed *sine die*. In these circumstances, an accrual claim is not contingent but vested. The necessary condition precedent for the exercise of the court's discretion thus exists.

[26] The factors that courts have taken into account in deciding whether judicial discretion should be exercised positively or negatively have been extrapolated by Herbstein and van Winsen.¹⁸ These include:

- i. the existence or absence of a dispute;
- ii. the utility of the declaratory relief and whether if granted, it will settle the question in issue between the parties;
- iii. whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought;
- iv. considerations of public policy, justice and convenience;
- v. the practical significance of the order; and
- vi. the availability of other remedies.

[27] In this matter a dispute exists that turns on the question as to whether the value of the money the plaintiff donated to the Trust and the money invested in the Investec living annuity should be considered when the parties' accrual claim is calculated. This issue needs to be determined in order to bring the divorce litigation to a close and as such will be practically significant. The defendant is entitled to seek a determination on the question at hand.

[28] The plaintiff's contention that the defendant failed to make out a case based in delict, or unjustified enrichment is misplaced, since the defendant's cause of action is not founded in delict, or unjustified enrichment. The references to her suffering damages and the plaintiff being unjustly enriched if the amounts he diverted from

¹⁸ See Cilliers, Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa Volumes 1, 5th ed, 2009 Ch43-p1438-1440.

his personal estate are not taken into account when the accrual is determined, do not purport to define the nature of the relief she seeks, but the consequences she will suffer if it is not granted. For this reason, and having regard to the nature of an accrual claim as a 'deferred equalisation claim' founded in the Matrimonial Property Act, the counterclaim does disclose a cause of action. The allegations made in the paragraphs referred to in the fourth, sixth, and eleventh exceptions are also not so vague and lacking in clarity that the plaintiff will be substantially embarrassed if required to plead thereto.

- [29] The nature of the relief sought likewise impacts on the consideration of the first, second, and eighth grounds of exception. The defendant does not seek an order that the trust assets or the amount invested in the living annuity with Investec be regarded as assets of the defendant's personal estate. She seeks an order that the amounts donated to the trust and invested with Investec be taken into account when the accrual claim is determined. She claims, and intends to make out a case that the amounts were diverted with the intention to diminish the value of the plaintiff's personal estate. In this context, neither the trust nor Investec has a direct interest in the relief sought and the fact that they are not parties to these proceedings does not render the defendant's claim excipiable.¹⁹ The facts as stated in the counterclaim differ from the facts underpinning the SCA's recent judgment in *MJ K v II K*,²⁰ where the trustees were joined to the proceedings. In *MJ K* it is stated in paragraph 8 of the judgment that 'the respondent testified that she joined the trusts and the CC to the divorce proceedings because she felt that she had contributed more than her share during the marriage to the appellant and was entitled to a share in these entities.' In addition, the trusts in question were formed in 1999, shortly after the parties' marriage in 1993. The shares in the CC were also bought in 1999. *MJ K* is not authority substantiating an argument that the defendant, in the particular facts of this case, ought to have pleaded that the trust was a sham to seek the relief that is sought, or that the trustees had to be joined to the proceedings.

¹⁹ *ABSA Bank Ltd v Naude N.O.* (20264/2014) [2015] ZASCA 97 (1 June 2015), *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para [12].

²⁰ (360/2021) [2022] ZASCA 116 (28 July 2022).

- [30] It is trite that pleadings must be read as a whole, and that no paragraph can be read in isolation. The third, fifth, and twelfth exceptions were raised because the plaintiff focused on individual paragraphs of the defendant's amended counterclaim instead of considering the counterclaim as a whole. The defendant states in paragraph 11 of the counterclaim: 'The Plaintiff, as more specifically addressed in paragraphs 12 through 28 infra, in and during 2018 unlawfully and intentionally diminished the value of his estate.' (My emphasis). The content of these paragraphs needs to be considered in the context explained in the paragraphs preceding paragraph 12. The defendant pleaded the material facts which she believes support the legal conclusion that the plaintiff's actions were unlawful. The trial court will be seized with having to make a finding in this regard. If the plaintiff is of the view that more information is required in this regard, he is entitled to seek further particulars.
- [31] The plaintiff's contention that the defendant relies on a 'duty to disclose' but failed to disclose the fact from which such duty arises, is without merit if regard is had to the content of paragraphs 4.9, 4.10 and 28 of the defendant's amended counterclaim.
- [32] The plaintiff submits that the amended counterclaim is vague and embarrassing or fails to disclose a cause of action because the defendant pleads that she was a creditor of the plaintiff. The defendant actually pleaded that 'as at date of the divorce (14 March 2019) the Defendant was and remains a creditor to the Plaintiff.'. This paragraph, if read in the context of the counterclaim as a whole, is not vague or embarrassing to the extent that the plaintiff cannot be expected to plead to it. The defendant's accrual claim vested as at the date of the divorce, it is not a contingent claim, and the defendant seeks to enforce her accrual claim. The third, fifth and twelfth exceptions have no merit.

[33] The plaintiff excepts to the defendant's reliance on s 8(1) of the MPA.²¹ The defendant avers that the court is vested with an inherent discretion to avoid an inequitable result with regard to the provisions of s 8(1) of the MPA. Although I am of the view that reference to s 8(1) is misplaced in light of the fact that the parties are already divorced, the defendant's reference to the section does not render her claim for declaratory relief vague and embarrassing. She does not seek the relief provided for in s 8(1).

[34] The remaining two exceptions, the ninth and tenth exceptions, relate to prayer 3 of the defendant's counterclaim. With this prayer, the defendant seeks an order regarding the enforcement of her accrual claim, if she is successful with the claim and the plaintiff is unable to pay. This matter is ancillary to the main relief sought. The relief sought is interdictory in nature and premised on the assumption that the plaintiff's estate will be found to be the estate with the bigger accrual. In the event that the defendant succeeds in her accrual claim, she will be in the position to prove that she has a vested right in the accrual. Whether she will be able to prove the remaining requirements to succeed with the interdict will depend on the evidence placed before the court, and the plaintiff's plea. I am of the view, however, that the necessary averments to sustain the granting of an interdict, if it is borne out by the evidence lead during the trial, are set out in the counterclaim, and the plaintiff is able to plead thereto.

The defendant's anti-dissipation application

[35] Gilbert AJ explained in *ND v MD*²² in the context of a contingent accrual claim, that:

²¹ Section 8(1) of the MPA provides as follows: '—(1) A court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Chapter or on such other basis as the court may deem just.'

²² (24953/2019) [2020] ZAGPJHC 228; [2021] 1 All SA 909 (GJ) (16 September 2020) at para [44].

'When considering interdictory relief aimed at protecting the contingent right to share in the accrual, a distinction should be drawn between ordinary interim relief and what can be described as anti-dissipatory or Knox d'Arcy-type relief. The requirements for each are not the same and it assists to keep in mind that the two forms of relief are distinct although both can be used to protect the contingent accrual claim.'

[36] He continued to explain when each of the two remedies will apply by stating:

'As stated above, the alienator spouse in alienating his or her assets before the accrual claim vests prejudices the claim in two respects. The first respect is to deplete the assets before the determinative date of the accrual claim, thereby reducing, if not extinguishing the difference in accrual between the two estates. In such instance, interdictory relief aimed at preventing a dissipation of assets to preserve the extent of the difference in the accrual claim is appropriate – it is aimed at preserving the contingent right to share in the accrual, so that when the accrual claim is awarded, there is an accrual left in the marriage. Anti-dissipatory relief features where the alienator spouse alienates his or her assets so that once the accrual claim is granted and quantified there may be no assets left to satisfy that monetary judgment.'

[37] Where a party seeks anti-dissipatory relief in the sense that he or she seeks to prevent the other spouse from dissipating his or her assets, so that such other spouse has assets remaining against which the beneficiary spouse can execute once a judgment is granted in his or her favour consequent upon the court's determination of the extent of an accrual claim, such relief is not directed at safeguarding the contingent accrual claim before it vests. Such anti-dissipatory

relief is sought to ensure that there are sufficient assets to satisfy the accrual claim once determined by judgment.²³

[38] In *JLT v CHT and Another*²⁴ the court had to deal with a matter that is quite similar to the matter before this court. The factual context in *JLT* was as follows:

'The applicant, who is married to the first respondent by antenuptial contract with the application of the accrual system, seeks an anti-dissipation interdict against him pending the finalization of their divorce action (issued out of this court under case number 1269/19), in effect freezing the net proceeds from the sale of their matrimonial home which the applicant, at the time of the launch of this application, was expecting to be paid by the second respondent.'

[39] Hartle J explained that an anti-dissipation interdict may be granted where:²⁵

'a party is believed to be deliberately arranging his affairs in such a way so as to ensure that by the time the applicant is in a position to execute judgment he will be without assets or sufficient assets on which the applicant expects to execute. It is not a claim to substitute the applicants claim for the loss suffered, but to enforce it in the event of success in the pending action so that he will not be left with a hollow judgment. It is an interdict of an unusual nature. It is not the usual case where its purpose is to preserve an asset which is in issue between the parties. In fact, the applicant, as is the case in this instance, lays no claim to the property in question merely alleging a general right to damages or, as is the case here, to a matrimonial property accrual. Moreover, the conduct sought to be interdicted is usually *prima facie* lawful, yet its effect is that it prevents the

²³ *DN, supra*, at para [53].

²⁴ (EL 819/2020) [2021] ZAECELLC 4 (22 January 2021).

²⁵ *JLT, supra*, at para [5].

respondent from dealing freely with his assets. The applicant further obtains no preferential rights over the asset forming the subject matter of the interdict.'

[40] Hartle J aptly explained that since the purpose of the interdict sought is to prevent a person who can be shown to have assets and who is about to defeat the other's claim, or to render it hollow by secreting or dissipating assets before judgment can be obtained or executed, and thereby successfully defeating the ends of justice by doing so, the applicant bears the onus to establish the necessary requirements for the grant of the interdict.²⁶ The applicant needs to show a particular state of mind on the part of the respondent, i.e. that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Of importance is Hartle J's view that:

'it is not essential to establish an intention on the part of the respondent to frustrate an anticipated judgment *if the conduct of the respondent is likely to have that effect.*²⁷

[41] Hartle J held, and I agree, that the requirements that must be satisfied to obtain an anti-dissipation interdict, which is interim in both form and substance, are the same for any other interim interdict, provided that it has been held that the interdict is *sui generis*.²⁸

[42] A request for an interim interdict is a court order preserving or restoring the *status quo* pending the determination of the rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these

²⁶ *JLT, supra*, at para [7].

²⁷ *Ibid.*

²⁸ *JLT, supra*, at para [8].

rights and does not affect their final determination. In this regard, the Constitutional Court said the following:²⁹

'An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.' The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo.'

[43] Plasket J, as he then was, highlighted in *Mthizane-Base and Others v Maxhwele and Others*:³⁰

'The approach to disputes of fact when interim relief is sought differs from that when final relief is sought: in effect, the former situation is the obverse of the latter situation.'

[44] It is a trite principle that in an application for a temporary interdict, an applicant's right need not be shown on a balance of probabilities. It is sufficient if such right is *prima facie* established, though open for some doubt. In *Webster v Mitchell*³¹ the court explained that:

'The proper manner of approach I consider is to take the facts set out by the applicant, together with the facts set out by the respondent, which the applicant cannot dispute, and to consider whether having

²⁹ *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002(2) SA 715 (CC) at para [49].

³⁰ (3351/18) [2019] ZAECMHC 11 (28 February 2019) at para [6].

³¹ 1948 (1) SA 1186 (W) 1189-

regard to the inherent probabilities, the applicant could on those facts obtain final relief.'

- [45] This standard was echoed as far as anti-dissipation applications are concerned in *Knox D'Arcy Limited v Jamieson*:³²

'The basis of the petitioners' claim as set out in the petition for leave to appeal and their heads of argument is that they have proved *prima facie* that the respondents had an intention to defeat the petitioners' claims, or to render them hollow, by secreting their assets. It was common cause that if these facts could be proved, together with the other requirements for an interim interdict, the petitioners would have a good case, and for the reasons given above, I agree with this approach. There was some argument on whether the fact that assets were secreted with the intent to thwart the petitioners' claim had to be proved on a balance of probabilities or merely *prima facie*. However, it seems to me that here also the relative strength or weakness of the petitioners' proof would be a factor to be taken into account and weighed against other features in deciding whether an interim interdict should be granted.'

- [46] The defendant filed the anti-dissipation application after she became aware of the fact that the plaintiff was in the process of attempting to alienate his immovable property located at [...] Close, N[...] G[...], N[...], Johannesburg, as described in the notice of motion dated 1 July 2021 (the immovable property). She avers that the value of the said property is between R 1 595 000.00 and R 1 680 000. She attempted to obtain an undertaking from the plaintiff and his attorneys of record that the net proceeds of the sale of the immovable property would be retained in a trust account pending the determination of the accrual trial. The defendant states that she has an accrual claim against the plaintiff because her estate has shown no accrual and the plaintiff's estate has shown an accrual. She does not

³² 1996 (4) SA 348 (SCA) at 373F-G.

substantiate this submission with any primary facts, e.g. referring to the assumed values of the two estates. This blank statement needs, however, to be considered against the context created in the Rule 34 'with-prejudice' offer made by the plaintiff, where the following is recorded:

'In full and final settlement of the accrual claim of the defendant against the plaintiff, the plaintiff tenders to the defendant a sum of R550 000 (Five hundred and fifty thousand rands) ('the accrual tender')

and

'if the Defendant believes that the accrual tender is lower than what the Defendant is entitled to in terms of her accrual claim against the Plaintiff, the defendant may refer the matter to referee for the referee to establish the quantum of the Defendant's accrual claim against the Plaintiff ...'

[47] The plaintiff's with-prejudice tender is substantiating a view that the defendant has succeeded in proving, albeit *prima facie*, that the accrual of the plaintiff's estate exceeds the accrual of her estate.

[48] The next question to consider is whether there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted. In the context of this case, the question translates to whether the defendant has established a well-grounded apprehension of irreparable harm if the interim relief is not granted. The question of a well-grounded apprehension of irreparable harm needs to be considered in the context of the *sui generis* nature of the relief sought. If the defendant succeeds in her counterclaim, and the plaintiff is allowed to sell the house without the proceeds being kept in trust, it will significantly frustrate the enforcement of her claim. The plaintiff, who had several assets at his disposal just before the divorce order was granted, managed his

estate in such a way that although he still benefits, directly or indirectly, from the value of the assets, the assets are removed from his direct control. The prejudice that will be suffered by the defendant if she is successful in her counterclaim and the order is not granted, meets the requirement of a well-grounded apprehension of irreparable harm.

[49] Since the effect of the interim order will only be to preserve the value of the immovable property until a court of law finally adjudicates the accrual claim and determines the extent of the claim, the balance of convenience favours the defendant. In the circumstances, the defendant has no other satisfactory remedy.

[50] In the result the anti-dissipation order stands to be granted. The nature of the relief granted justifies an order to the effect that the costs of the dissipation application are costs in the cause.

ORDER

In the result, the following order is granted:

1. The defendant's late amendment of her counterclaim is condoned;
2. The issue of the costs associated with the amendment of the plea and counterclaim remains to be dealt with at the main hearing;
3. The late filing of the plaintiff's answering affidavit to the condonation application and the exception is condoned;
4. The exception is dismissed with costs;
5. The anti-dissipation application is granted, and the second respondent (Fairbridge Wertheim Becker Attorneys Incorporated) is directed to retain the total of the net proceeds of the sale of the Immovable Property ([...] Close, N[...] G[...], [...], Johannesburg) in an interest-bearing trust account as envisaged by section 86(3) of the Legal Practice Act 28 of 2014, pending the determination of the accrual claim in the divorce. In the event that the net proceeds of the sale of the immovable property have been paid to the plaintiff (Mr. L[...]), or his nominee,

- 5.1. The second respondent is directed to furnish the defendant's attorney of record with a statement of account reflecting the purchase consideration and detailing the disbursement of expenses within 5 (five) days of the date of this order;
- 5.2. The plaintiff (Mr. L[...]) is directed to pay an amount equivalent to the net proceeds of the sale of the immovable property to the second respondent (Fairbridge Wertheim Becker Attorneys Incorporated) to be retained in an interest-bearing trust account as envisaged by section 86(3) of the Legal Practice Act 28 of 2014, pending the determination of the accrual claim in the divorce.
6. The costs of the anti-dissipation application are costs in the cause.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the plaintiff:	Adv. L C Haupt SC
Instructed by:	Fairbridges Wertheim Becker Attorneys
For the defendant:	Adv. G Kyriazis
Instructed by:	Shaban Clark Coetzee Attorneys
Date of the hearing:	23 August 2022
Date of judgment:	22 September 2022