In the KwaZulu-Natal High Court, Durban

Republic of South Africa REPORTABLE

Case No : 4316/2013

In the matter between :

M G B Plaintiff

and

D E B Defendant

Judgment

Lopes J

[1] The parties in this divorce action were married to each other at Johannesburg on the 13th March 1999. They have three minor children, two sons aged 14 and 13 respectively, and a daughter aged five.

[2] The plaintiff seeks a decree of divorce, the primary care of the parties' minor children, and maintenance for herself and the minor children, together with an order directing the defendant to pay to her an amount equal to one half of the difference between the accrual in their respective estates.

[3] The defendant counterclaims for a similar primary care order, together with an order declaring that the plaintiff has forfeited all the benefits arising from the marriage between the parties, save for those set out in an annexure to the defendant's plea.

[4] The litigation between the parties has a long and acrimonious history. As that history is relevant to some of the findings in this judgment I summarise it as follows :

(a) pursuant to an application instituted by the defendant on the 8th November 2011, an order was granted by consent directing the plaintiff to vacate the matrimonial home. That order also contained provisions that the children remain with the defendant, with the plaintiff to have contact at certain times. No order for costs was made on the 8th November 2011, but the application again came before the court on the 17th August 2012 when the plaintiff sought to vary the terms of the order. The variation application was eventually adjourned *sine die* with the question of costs reserved;

(b) on the 13th January 2012, the plaintiff launched Rule 43 proceedings for a variation in the contact arrangements and for maintenance *pendente lite* for herself and the minor children, as well as a contribution towards her costs.

On the 27th July 2012 an order for maintenance was made together with an order that the defendant pay a contribution to the plaintiff's legal costs in the sum of R20 000;

(c) on the 27th November 2012, the defendant brought an application to vary the contact arrangements with the children. The matter was heard on the 28th November 2012 and an order was granted dealing with the contact arrangements in the interim, and reserving the question of costs for decision by the trial court;

(d) the defendant also brought an application in November of 2012, for an order setting aside a warrant of arrest issued in terms of an interim protection order, which had been granted in favour of the plaintiff. That application was heard on the 30thNovember 2012 and an order reserving the costs of that application was made on the 13th December 2012;

(e) on the 18th April 2013 the plaintiff instituted Rule 43 proceedings for a contribution towards her costs in the sum of R350 000. That application was adjourned to the first day of the trial with the question of costs reserved, and to be decided by the trial court;

(f) on the 23rd April 2013 the defendant brought an application seeking that the plaintiff be compelled to submit herself for interviews and assessments with the defendant's clinical psychologist. An interim order was granted by me on the 24th April 2013, returnable on the 13th May 2013;

(g) on the 25th April 2013 an application for leave to appeal against the order of the 24th April 2013 was refused by me,with the costs of the application for leave to appeal reserved for decision by the trial court;

(h) on the 13th May 2013 an application was brought by the defendant to compel the plaintiff to make herself available for the interviews and assessments with the defendant's psychologist on her own, and without the benefit of any legal representative accompanying her. That application was adjourned to the 16th May 2013 with costs reserved;

(i) on the 16th May 2013 the matter was heard on an opposed basis and on the 17th May 2013 judgment was handed down in favour of the defendant with the costs of the amended notice of motion, supplementary affidavits and the plaintiff's opposition reserved for determination by the trial court;

(j) on the 23rd May 2013 the plaintiff brought an urgent application for an order that it was unnecessary for her to attend on the defendant's psychologist because she had conceded the relief sought by the defendant in his counter-application with regard to the care of the minor children. That application was adjourned to the first day of the trial. The costs of the urgent application were again reserved for decision by the trial court.

[5] At a Rule 37 conference held in my chambers on the 29th May 2013 the parties agreed that there were four issues remaining in the trial :

(a) whether the defendant was entitled to his claim that the plaintiff forfeit the benefits of the accrual regime;

(b) if not, which party bore the onus with regard to the nature and quantum of the assets which are excluded in the antenuptial contract from forming part of the accrual regime;

(c) whether the plaintiff was entitled to maintenance, and the quantum and duration thereof; and

(d) costs.

[6] Although not specifically recorded as such, it was anticipated by all concerned that, in the event that the forfeiture order was not successful, the plaintiff would seek a monetary order in respect of her accrual claim. Indeed, the defendant suggested that the parties' chartered accountants get together to discuss a possible agreement on the accrual calculation, and the ultimate destination of assets excluded from the accrual calculation in the ante-nuptial contract.

[7] The trial came before me on the 3rd June 2013, and the evidence and submissions by counsel were completed on the 7th June 2013. At that stage, by consent, I granted a decree of divorce together with a further order awarding the defendant full parental rights and responsibilities of the minor children with their primary place of residence to be with him. I also made an order that the defendant continue to pay maintenance to the plaintiff pursuant to the agreements reached in the Rule 43 proceedings, pending this judgment, which deals with the remaining issues between the parties.

[8] The plaintiff confirmed that she did not oppose the order for care of the minor children of the parties and that their primary place of residence would be with the defendant. She recorded that she was satisfied with the arrangement because she

also retained full rights and responsibilities in respect of the minor children, and the contact arrangements were working satisfactorily

[9] Two witnesses testified for the plaintiff – Mr Peter James Duncan and the plaintiff herself. It is more logical for me to deal firstly with the evidence of the plaintiff.

[10] The plaintiff outlined the history of her married life with the defendant, and her evidence may be summarised as follows :

(a) the parties initially lived in Johannesburg during which time the defendant worked as an agent for Aristocrat Leisure Ltd;
(b) the plaintiff initially worked as a model, and then as a marketing assistant in Care Assist giving telephonic advice on various aspects;
(c) after the birth of their son D in June 2000, the plaintiff stopped working. She stated that this was because the defendant did not want her to work. She also conceded she wanted to be with her son and raise him;
(d) the plaintiff then maintained the matrimonial home and started studying when M was approximately 18 months old. Both her sons had health difficulties which made the first four years of their lives very stressful for the plaintiff and she had to dedicate large amounts of time and effort to ensuring that they obtained the necessary occupational therapy and physiotherapy;

(e) the plaintiff began her studies through the University of South Africa for a degree in psychological counselling. She has completed all but five subjects of that degree which will take approximately three more years to finalise;

(f) during this time the defendant worked full-time and frequently went overseas for work related matters. The plaintiff took care of the home and the children;

(g) in 2001 the parties purchased a townhouse in Johannesburg, referred to in the documents as 'Tonquani'. The property was purchased for approximately R950 000 and required superficial renovations which were carried out by the plaintiff who painted the bedrooms, renovated the bathrooms and attended to all the soft furnishings;

(h) in 2002 and 2003 the defendant was mostly in Australia, and the plaintiff decided to attempt to set up an interior decorating business with her brother's wife;

(i) the defendant was opposed to the business and said that he preferred the plaintiff to concentrate on her studies and the home and the family;

(j) notwithstanding his objections, the interior decorating business started in 2004 and continued sporadically until the defendant decided to move the family to Durban in 2007;

(k) in 2004 the Tonquani home in Johannesburg was sold and a house at Laura Lane was purchased. This was a substantial home, comprising five bedrooms and three bathrooms with a guest toilet, situated on an acre of land in Johannesburg. Once again the plaintiff attended to all aspects of the renovation of the home. It was an extensive project which took time. The plaintiff always sought to curtail expenditure because she was under the impression from the defendant that there was not a great deal of funding

available. This home featured on the cover of 'The Property Magazine' in Gauteng, and it is obvious from that photograph that it is a magnificent residence, demonstrating that, at that stage, the parties lived a life of considerable opulence;

(l) during this period the plaintiff continued to care for the children, albeit with domestic assistance. At some stage the plaintiff was offered the opportunity to feature their home in the Garden and Home magazine which she envisaged would be very good for her interior decorating business, but the defendant would not allow her to do so;

(m) the Laura Lane home had been purchased for approximately R4 000 000 and was eventually sold for R10 000 000. The defendant gave the plaintiff R100 000 to thank her for her efforts. The plaintiff was not expecting to be paid and was surprised and appreciated the gesture;

(n) when the parties moved to Durban they first stayed in a rental apartment in Umhlanga Rocks. They then purchased, and moved into a home at South Ridge Road. Because of the extensive renovations which the plaintiff had to undertake over a period of nine months the parties at one stage had to move out of the house to accommodate the renovations. During this time their minor daughter was born;

(o) when the parties moved to Durban they also purchased the land on which a Mooi River house was built during 2009 and 2010. These projects overlapped and the plaintiff had to divide herself between running the home and dealing with the various properties. In addition, the defendant had become involved in Full House Taverns, a business which purchased and renovated three pubs,

two in Cape Town and one in Durban. The plaintiff was extensively involved in the design and renovation of these pubs in order to assist the defendant;

(p) as a result of the increasing pressure placed upon the plaintiff by trying to juggle all her roles, she became unwell and was eventually admitted to the Riverview Manor Clinic in July of 2011. She was also admitted at some stage to St Augustine's Hospital where she was diagnosed with a serious illness. She then returned to the Riverview Manor Clinic and was eventually discharged on the 30th September 2011;

(q) the plaintiff testified in detail as to how the pressures under which she was placed, and the conduct of the defendant, led to the breakdown of her health and their marriage relationship. I do not believe it necessary or desirable to set out all the circumstances which she related. I deal with the conclusions I arrived at after hearing that evidence in my analysis of the evidence;

(r) the plaintiff also explained how, partly because of the involvement of her brother and partly because she was somewhat overambitious in the redecorating jobs she tackled, the interior decorating business failed. Although she still sporadically does consulting work in interior decorating, she had lost the confidence to continue in that line as a full time business.

[11] The plaintiff expanded on her matrimonial experiences in cross-examination and described the circumstances leading up to the time when the defendant sought an order evicting her from the matrimonial home. She also related in detail the problems which the defendant had with her family and her business dealings.

[12] The second witness was Peter James Duncan, a chartered accountant. He did not give evidence as an expert, the plaintiff's counsel having placed on record that the expert notice which had been given in respect of his evidence was withdrawn. Mr Duncan's evidence may be summarised as follows :

(a) he was given seven lever arch files by the plaintiff's attorneys containing the defendant's discovered documents. He was also given the original antenuptial contract concluded between the parties which was annexed to the defendant's plea. (In the antenuptial contract the value of each parties' estate is set out, together with certain assets which are to be excluded from any accrual calculation.) Mr Duncan transposed the figures which he obtained from the defendant's tax returns for the years 1999 to 2012 onto a schedule. He obtained the figures from the statements of assets and liabilities which were attached to each of the tax returns, with the exception of the 1999 tax year;

(b) with regard to the 1999 tax year there was no schedule of assets and liabilities attached to the defendant's income tax return. A number of requests were made for that document, but it was never forthcoming from the defendant. In order to establish values for the 1999 tax year Mr Duncan used a personal financial statement compiled by the defendant for submission to the Gambling Board, and which was also contained in the defendant's discovered documents. From the Gambling Board statement, Mr Duncan extracted certain asset values as they were recorded there and included them in his schedule;

(c) some of the values of the assets recorded on the first page of the Gambling Board statement were supported by a schedule attached to the statement

setting out the details of various bank accounts, companies in which shares were held, business investments, real estate and other assets such as household goods, jewellery and various insurance and provident fund investments;

(d) the net worth of the defendant according to the Gambling Board statement was the sum of R1 413 164;

(e) Mr Duncan pointed out that the first seven assets, which were excluded in terms of the antenuptial contract, are to be found in the Gambling Board statement. With regard to the eighth and last asset to be excluded in the antenuptial contract – i.e. the value of the rights arising in respect of an option to purchase sharesin Aristocrat Leisure Limited - there is no reference, nor is mention made of it in the Gambling Board statement;

(f) in his declaration of the value of his assets in the antenuptial contract, the defendant declared one amount of R1 438 000 consisting of his interest in immovable property, cash on hand, claims receivable, shares and interest in companies and corporations, investments and movable assets. A further amount of R1 105 939 is stated as being the value of the option to purchase the shares at an agreed price in Aristocrat Leisure Limited. With the exception of the items listed above, the difference between those amounts andthe net worth reflected in the Gambling Board statement was approximately R24 000;

(g) Mr Duncan was unable to find any other documents contained in the seven lever arch files comprising the defendant’s discovered documents which evidenced any other assets;

(h) also contained in the defendant's discovered documents were letters addressed to the defendant reflecting his right to take up the option to purchase shares in Aristocrat Leisure Limited;

(i) Mr Duncan recorded that a large number of statements and parts of statements referring to bank accounts held by the defendant were omitted from his discovered documents. For example there were no documents relating to the Investec Bank account referred to as one of the excluded items in the antenuptial contract;

(j) on the schedule compiled by Mr Duncan, he recorded the page number which he had assigned to the defendant's tax schedules, which he had extracted, placed in order and numbered.

[13] In cross-examination by Ms *Julyan* SC who appeared for the defendant together with Mr *Humphrey* ,Mr Duncan confirmed that he could not vouch for the accuracy of the figures which he extracted from the various tax returns and the Gambling Board declaration because he had not audited them. He had basically drawn a line at the 2012 tax year, and had compiled the 2013 tax year figures from the assets and liabilities document which he found in the defendant's discovered documents, and carried forward some figures from the 2012 tax year.

[14] Mr Duncan accepted that the value reflected in his schedule for the Mooi River house of approximately R2,5 million was not a true valuation for the purposes of accrual but had been retained in the accounts at cost. Similarly the jump in value of the house at South Ridge Road from R8 000 000 to R12 600 000 between 2009

and 2010 was done on the basis of cost of the alterations. Mr Duncan conceded that if the property had been over-capitalised, the figures would need to be adjusted. He also conceded that he was unable to express a view on the values of the properties and that the net asset value he arrived at for the 2012 tax year of R28 760 038 was an extrapolation from the defendant's documents. The only valuation which he had seen for the fixed properties was the valuation for the Mooi River house, for R1,65 million.

[15] Mr Duncan was also cross-examined on the valuations attributed to the Aristocrat Leisure Ltd share options in the antenuptial contract. It was put to him that that value may have been out of kilter with the true market values. Mr Duncan said that he had tried to reconcile the value in the antenuptial contract with various share prices found in the documents, but was unable to do so to his satisfaction. He was also unable to comment on the proposition that theloan account reflected for Full House Taverns may be irrecoverable, because he had not seen the annual financial statements of that concern. He did say that he had seen a document reflecting the loan account as being in the sum of R11.01m. He also suggested that the taverns had been sold and receipted after the 2013 tax year for R4 million – this was not disputed by Ms *Julyan*.

[16] Mr Duncan agreed that it was necessary to trace the assets recorded in the antenuptial contract to see what was done with the proceeds of those assets including the share options, and conceded that he had not been able successfully to trace all the proceeds. This was because of the incomplete documents with which

he had been furnished. He did concede that on the court day but one before the trial commenced the plaintiff had been furnished with further documents, but that he had not had time to investigate them.

[17] Mr *Stokes* SC, who appeared for the plaintiff, recorded that not all the banking documents had been received by the plaintiff notwithstanding what was alleged by the defendant's attorneys. Mr Duncan was further cross-examined by Ms *Julyan* regarding various figures on his schedule. A document was handed to Mr Duncan during cross-examination ('the defendant's asset list') being a calculation compiled by the defendant's chartered accountant, a person who had formerly assisted Mr Duncan in his office, and who had been present in court throughout the proceedings.

[18] At the end of the plaintiff's evidence, Mr *Stokes* indicated that the defendant accepted the values set out in the defendant's asset list regarding the values ofthe South Ridge Road property and the Mooi River property. The plaintiff's case was then closed.

[19] At that stage Ms*Julyan* placed on record that the defendant was not pursuing his claim for forfeiture of the benefits of the accrual system applicable to the marriage and she then made a tender on the defendant's behalf. That tender was :

(a) on the basis that no accrual existed in defendant's estate, accordingly no capital payment was due to the plaintiff;

(b) an amount of maintenance of R30 000 per month together with medical aid contributions for two years, such maintenance to terminate thereafter; and

(c) no tender was made as to costs.

[20] It was recorded that the parties had reached an agreement on the 26th January 2012 in terms of which the defendant had paid to the plaintiff a sum of R700 000 and donated two motor vehicles to the plaintiff. It was agreed that if a divorce ensued, the amounts reflected in the agreement could be deducted from any amount agreed upon or found to be payable by the defendant. The tender included the fact that the plaintiff could retain the R700 000 and that the motor vehicles would be transferred into her name and into that of her mother. The case for the defendant then closed without leading any evidence.

[21] With regard to the issues which I have to consider, the first issue – i.e. whether the defendant was entitled to his claim that the plaintiff forfeit the benefits of the accrual regime – falls away with the defendant's concession that he would no longer seek that relief. Given the fact that he had not testified, this was hardly surprising. At no stage in the cross-examination of the plaintiff was anything put to her which in my view would have constituted the necessary 'substantial misconduct' which may have entitled the defendant to that order. Had the concession not been made I would undoubtedly have found against the defendant on that issue. Both the plaintiff and Mr Duncan gave their evidence in a satisfactory manner, and I have no reason to doubt that what they said was the truth.

[22] With regard to the onus of establishing the nature and quantum of the assets which were to be excluded from the accrual calculation, I refer to the statement by Cloete AJ in *AM v JM* 2011 JDR 0091 (WCC), where at paragraph 43 the learned Acting Judge stated :

'Although defendants counsel argued that plaintiff bears the onus to establish that defendant's alleged excluded assets should form part of the accrual in his estate, it is clear that the defendant bears the onus to persuade this court that such assets should indeed be excluded from the accrual.'

It seems to me that in circumstances where the defendant is in possession of all the facts relating to the assets reflected as being excluded in the antenuptial contract, he should bear the onus of demonstrating what has happened to those assets, how they have become converted from time to time, and what their present values are which fall to be excluded from the calculation of his net worth as at the date of the divorce. Although the plaintiff bears the onus of establishing the monetary value of the share of the accrual in the defendant's estate to which she is entitled, the defendant is required to show which assets are to be excluded from that calculation, and why.

[23] The defendant has led no evidence to demonstrate how the excluded assets were dealt with by him from time to time. In the absence of deductions which can reasonably be made from the extracts from the defendant's tax returns and the Gambling Board statement, I am unable to determine what happened to those excluded assets, and whether or not they formed any part of the defendant's present day assets.

[24] In argument Mr *Stokes* handed up a document setting out a computation of the amount of the defendant's estate and the claim made by the plaintiff as her share of the accrual.

[25] Ms *Julyan* submitted that there was no acceptable evidence before me as to the value of the defendant's estate. In this regard she referred to s 3 of the Matrimonial Property Act, 1984 which provides :

'(1) At the dissolution of a marriage subject to the accrual system, by divorce … the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, … acquires a claim against the other spouse … for an amount equal to half of the difference between the accrual of the respective estates of the spouses.'

[26] Ms *Julyan* submitted that there had been no agreement reached between the parties as to the admissibility of the documents referred to in the evidence for the plaintiff, save for the antenuptial contract and the plaintiff's list of current assets and liabilities. It was common cause that there was no accrual in the estate of the plaintiff.

[27] Ms *Julyan* submitted that the evidence of Mr Duncan was irrelevant because :

(a) no election had been made by the plaintiff as to which of Clauses 7 or 8 of the antenuptial contract should be held to be *pro non scripto* (Clause 7 dealing with the parties' assets and Clause 8 dealing with the excluded assets of the

defendant – and as the assets of the defendant appear to be the same as the excluded assets);

(b) the fact that the figures adduced by Mr Duncan only go up to the end of February 2012 and it is now June of 2013;

(c) Mr Duncan did not have all the documents available to him, and his evidence in regard to the matters about which he testified were hearsay and accordingly inadmissible;

(d) no-one was called to say that the documents referred to by Mr Duncan were in fact the defendant's discovered documents. The suggestion here was that the plaintiff's attorney should have testified that the discovered documents were given by them to Mr Duncan. This is what happened in the matter of *Maize Board v Hart* 2005 (5) SA 480 (OPD) where the plaintiff's attorney testified that certain documents of third parties were obtained by the plaintiff's legal representatives at inspections at the relevant premises;

(e) as there was no proof of the current assets of the parties , there was no need to do any accrual calculation.

[28] The election by the plaintiff not to declare either paragraphs 7 or 8 of the ante-nuptial contract *pro non scripto* because of the contradiction in including and excluding the same assets in those two paragraphs is not, in my view, determinative of the calculation. The plaintiff relies on figures put up by the defendant, and the defendant bears the onus to show which figures should be excluded.

[29] Ms *Julyan* submitted that it is clear that the assets and liabilities of the defendant have to be determined as at the date of divorce, although there is authority for the proposition that the appropriate date is when *litis contestatio* occurs.

This emerges from a judgment of Brassey AJ in the matter of *MB v NB* 2010 (3) SA 220 (GSJ). I was referred to a criticism of this judgment by Van Niekerk in his work *A Practical Guide to Patrimonial Litigation in Divorce Acts* page 3 – 14.

[30] Van Niekerk refers to the matter of *Le Roux v Le Roux* [2010] JOL 26003 (NCK) a judgment of Olivier J, who held that upon a proper interpretation of s 3 of the Matrimonial Property Act, the plaintiff is not entitled to proceed with a claim for an accounting of the value of a defendant's estate and an abatement thereof together with an order that the defendant pay to the plaintiff half of the amount to her in terms of an accrual calculation, prior to the dissolution of the marriage. His view is that a plaintiff does not have an acquired and complete cause of action to claim payment in terms of s 3, until a divorce order is granted.

[31] I have read and given careful consideration to the views of Olivier J. I am in respectful disagreement with the conclusion at which he arrives with regard to the time when a court may hear evidence regarding the actual accrual in the estates of the respective parties. In my view it is wholly impractical that parties to a divorce should go to the lengths of establishing a right to accrual in the divorce action and then have to embark upon a further litigious exercise in order to decide the extent of such accrual. I have grave reservations whether it could have been the intention of the legislature to devise a procedure which seems only calculated to prolong the settlement of disputes between parties to a marriage, and to greatly increase the legal costs of being able to resolve their differences.

[32] I prefer the approach of Brassey AJ in *MB.* Having referred to *Reeder v Softline Ltd and another* 2001 (2) SA 844 (W), Brassey AJ stated at page 233 C :

'The decision establishes the moment at which a contingent right becomes perfected and, in consequence, the spouses become invested with legally enforceable entitlements. This is, as the learned judge makes clear, at the moment when the divorce court makes the applicable order. What the decision does not do is establish the moment by reference to which the respective estates of the parties must be assessed. This problem is one of procedure, nor substance, and owes its origin to the fact that litigation takes time to complete. On this matter the established principle is that the operative moment is *litis contestatio,* for that is the moment when the dispute crystallises and can be presented to the court for decision.'

In that case Brassey AJ granted a decree of divorce together with other relief, including the payment of a specific amount in terms of the accrual system.

[33] With regard to the various values to be attributed to the assets of the defendant with regard to the accrual claim, I have used the figures presented by both parties, many of which are not disputed. That those figures were presented to me with no real distinction between what they may have been at the point of *litis contestatio* and what they were at the time of hearing is in my view of little moment, no such distinction having been drawn, or sought, by either of the parties.

[34] I now deal with the suggestion that the plaintiff has not established the values upon which an accrual calculation can reasonable be made.In this regard Ms *Julyan* relied upon *Zungu NO v Minister of Safety and Security* 2003 (4) 87 (D) at 90 D where McCall J stated :

'It is clear that the mere handing in of the document in terms of Rule 35(10) does not make its contents admissible in evidence against the defendant. The contents are hearsay and would be

admissible as evidence against the defendant only if they could be brought under one of the exceptions to the hearsay rule.'

[35] Ms *Julyan* also stated that the annexure to the defendant's plea, being the defendant's balance sheet as at the 27th June 2012, and which is referred to in the defendant's claim in reconvention, had been denied by the plaintiff and accordingly could not be relied upon by the plaintiff.

[36] This matter is distinguishable from *Zungu*, because in *Zungu* the statement handed in was a statement of an employee of the minister sought to be held liable. The court held the statement to be admissible in any event. Here the statements alleged were made by the defendant himself.

[37] Even if the statements used by Mr Duncan constitute hearsay evidence, I have also given consideration to s3(1) of the Law of Evidence Amendment Act, 1988. That section provides that a court may admit hearsay evidence where it is of the opinion that such evidence should be admitted in the interests of justice and having regard to the following factors :

(a) the nature of the proceedings;

(b) the nature of the evidence;

(c) the purpose for which the evidence is intended;

(d) the probative value of the evidence;

(e) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(f) any prejudice to a party to which the admission of such evidence might entail; and

(g) any other factor which should in the opinion of the court be taken into account.

[38] With regard to those factors;

(a) the nature of the proceedings. In this matter I am not dealing with a contractual issue between parties at arm's length where technical defences may easily be raised, and sometimes relied on. This is a matter between two people who have been married for approximately 14 years. They have three children and have built a life pooling their resources, abilities and efforts;

(b) the nature of the evidence sought to be adduced by the plaintiff. This refers to the accumulated wealth of the parties in general, and the defendant, in particular. This was not information easily available to the plaintiff and was contained in tax returns compiled on the defendant's behalf, and presumably, authorised and signed by him for submission to the Receiver of Revenue. One must, in those circumstances, assume that the documents were as accurate a reflection of the defendant's assets and liabilities as he could in the circumstances have given;

(c) the purpose for which the evidence is tendered. This was to substantiate the plaintiff's claim to her share in the accrual of the defendant's estate. That the parties would share their assets in this matter was something which was agreed to between the parties when they set out on their life together;

(d) the probative value of the evidence. In my view it is of such a nature that it should not easily be dismissed unless contradicted by the defendant. That has not happened;

(e) the evidence which was led via Mr Duncan could otherwise only have been given by the defendant. It is unrealistic to have expected the plaintiff to call him on her behalf;

(f) there can be no prejudice to the defendant if the information contained in his income tax returns are used in order to calculate the accrual in his estate. I say this because it was open to him at all stages to contradict, or lead evidence to contradict the accuracy of the figures transposed from his discovered tax returns to Mr Duncan's calculations;

(g) a further factor which in my view should be taken into account is that no indication was given by the defendant's legal representatives that the defendant would adopt the view that the tax returns could not be relied upon because they constituted inadmissible hearsay evidence. That was never put to either the plaintiff or Mr Duncan.

[39] In my view litigation is not a game where parties are able to play their cards close to their chest in order to obtain a technical advantage to the prejudice of the other party. This is even more so in matrimonial matters where the lives of the parties have been inextricably bound together and, as in this case, the efforts of both parties made a significant contribution to the defendant's estate. Indeed Ms *Julyan* put it to the plaintiff during cross-examination that she was a talented, energetic decorator and designer, and that there was no doubt about her work ethic.

[40] The disclosure of financial information in divorce cases has also, on occasion, been the focus of English Courts .In *J v J* [1955] P 215 at 227 Sachs J said:

'In cases of this kind; where the duty of disclosure comes to lie on a husband; where a husband has – and his wife has not – detailed knowledge of his complex affairs; where a husband is fully capable of explaining and has had the opportunity to explain, those affairs, and where he seeks to minimise the wife's claim, that the husband can hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. On the contrary, when he leaves a gap in such a state that two alternative inferences may be drawn, the court will normally draw the less favourable inference – especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative.

…

the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings – in so far as such inferences can properly be drawn.'

In *NG v SG* (Appeal : Non-Disclosure)[2011] EWHC 3270 (Fam)Mostyn J began his judgment with these words:

'The law of financial remedies following divorce has many commandments but the greatest of these is the absolute bounden duty imposed on the parties to give, not merely to each other, but, first and foremost to the court, full frank and clear disclosure of their present and likely future financial resources. Non-disclosure is a bane which strikes at the very integrity of the adjudicative process. Without full disclosure the court cannot render a true and certain and just verdict. Indeed, Lord Brandon has stated that, without it the court cannot lawfully exercise its powers (see *Jenkins v Livesey (Formerly Jenkins)* [1985] FLR 813 HL. It is thrown back on

inference and guess-work within an exercise which inevitably costs a fortune and which may well result in an unjust result to one or other party.'

Mostyn J continued :

'Pulling the threads together it seems to me that where the court is satisfied that the disclosure given by one party has been materially deficient then :

(i) The court is duty bound to consider together by the process of drawing adverse inferences whether funds have been hidden;

(ii) But such inferences must be properly drawn and reasonable. It would be wrong to draw inferences that a party has assets which, on an assessment of the evidence, the court is satisfied he has not got;

(iii) If the court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds, even in the broadest terms;

(iv) In making its judgment as to quantification the court will first look to direct evidence such as documentation and observations made by the other party;

(v) The court will then look to the scale of business activities and at lifestyle;

(vi) Vague evidence of reputation or the opinions or beliefs of third parties is inadmissible in the exercise;

…

(viii) The Court must be astute to ensure that a non-discloser should not be able to procure a result from his non-disclosure better than that which would be ordered if the truth were told. If the result is an order that in unfair to the non-discloser it is better that the court should be drawn into making an order that is unfair to the claimant.

(In the light of the citation of *J v J* [1955] P 215 it would seem that a “than” is missing prior to “that” in the second last line of this citation).’

In *R v Inland Revenue Commissioner and Another, Ex parte TC Coombs & Co* [1991] 2 AC 283, 300, Lord Lowry stated :

‘In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified.’

In *Prestv Petrodel Resources and Others* [2013] UKSC, 34 Lord Sumption stated at paragraph 45 :

‘There is a public interest in the proper maintenance of the wife by her former husband, especially (but not only) where the interests of children are engaged. Partly for that reason, the proceedings although in form adversarial have a substantial inquisitorial element. The family finances will commonly have been the responsibility of the husband, so that although technically a claimant, the wife is in reality dependent on the disclosure and the evidence of the husband to ascertain the extent of her proper claim. The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure cannot be applied in the same way to proceedings of this kind as it is in ordinary civil litigation. These considerations are not a licence to engage in pure speculation. But judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing. I refer to the husband because the husband is usually the economically dominant party, but of course the same applies to the economically dominant spouse whoever it is.’

That case concerned the powers of a court to order ancillary relief in matrimonial proceedings.The approach adopted in these cases accords with my understanding of how a court, in South Africa, should approach the evidence in divorce proceedings.

[41] I was assured by Mr *Stokes* that the defendant's discovered documents were not only incomplete, but also presented in a confusing manner which required time and effort to collate the documents in a proper way.

[42] In the circumstances I have no hesitation whatsoever in accepting that the defendant's discovered documents, from which Mr Duncan extracted the figures from the defendant's tax returns and correctly transposed those figures onto the schedules which he produced, can be used to demonstrate his worth.

[43] It then falls upon me to place a value upon the accrual in the defendant's estate. In this regard I am mindful of the fact that where the evidence is imperfect, it is incumbent on me to do the best I can in the circumstances.

[44] With regard to the antenuptial contract, at Clause 7 it sets out the values of the defendant's estate. The first item which is in the sum of R1 438 000, appears to comprise the first seven items which are then excluded in Clause 8. The second item is in the sum of R1 105 939 being the value of the option to purchase the

shares at agreed prices in Aristocrat Leisure Ltd. The last excluded item, however, is the value of the rights which arise in respect of the exercise of the option to purchase shares. The preamble to Clause 8 which sets out the excluded assets reads as follows :

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

The obvious contradiction then is that the R1 438 000 consisting of interest in immovable property, cash on hand, claims receivable, shares and interest in companies and corporations, investments and movable assets are effectively excluded in Clause 8. Whilst Clause 7 refers to the value of the option to purchase the shares in Aristocrat Leisure Ltd as an asset of the defendant's, the value of all rights arising from the option to purchase are excluded in Clause 8.

[45] The parties were agreed upon the current value of two assets, being the house atSouth Ridge Road in a net asset value amount of R36 433.23, and the Mooi River house in the sum of R1 650 000. Neither property was in existence at the outset of the marriage and it does not appear that those assets were acquired using the proceeds of any excluded asset. The third item claimed by the plaintiff is the valuation of the Full House Taverns (Pty) Ltd loan account in the sum of R11 001 528,00. This loan account is reflected by Mr Duncan in the 2012 tax year as being R7 502 636. In cross-examination by Ms *Julyan*, Mr Duncan disclosed that he had seen a document amongst the defendants' discovered documents showing

that the 2013 loan account in Full House Taverns was R11 001 528,00. It was put to him by Ms *Julyan* that Full House Taverns had incurred a loss of R10 900 000, and in fact the loan account was irrecoverable. Mr Duncan's comment was that one would have to look at the annual financial statements of the company to see if that is accurate. Mr *Stokes* submitted that it was accepted in cross-examination that the amount of the Full House Taverns loan account was in fact as stated by Mr Duncan. He submitted that the effect of putting something to a witness in cross-examination means that it becomes proof of what was put, and the other party need no longer prove it. In this regard he relied upon the dicta of McCall J in *Zungu* (see page 92 B – I of the judgment).

[46] Mr *Stokes* also submitted that the fact that Ms *Julyan* had put to Mr Duncan that that loan account was irrecoverable because of losses incurred by Full House Taverns was neither here nor there. This was because no effort had been made on behalf of the defendant to put up any documentation or adduce any evidence with regard to that loss. A mere suggestion in cross-examination of a fact in favour of the party on whose behalf the cross-examination is being conducted, does not necessarily constitute proof of that fact. It is quite unlike a statement which is against the interests of the party on whose behalf the cross-examination is being conducted. On that basis Mr *Stokes* submitted that I was entitled to accept the Full House Taverns loan account figure as testified to by Mr Duncan and ignore the suggestion that it was irrecoverable. There was no suggestion in argument or in the documents that the origin of the monies advanced and which constituted the Full House Taverns loan account came from any of the assets excluded in the antenuptial contract.

[47] It is true that neither the books of account nor the annual financial statements of Full House Taverns were proved in evidence before me. It may be that the company is in financial difficulty, and the loan which forms an asset of the defendant is irrecoverable. But, at the end of the plaintiff's case, the defendant must have realised that he was at risk in not electing to lead evidence regarding the financial position of the company. No documents regarding the companies' financial position were put to either Mr Duncan or the plaintiff in cross-examination.

[48] The defendant's failure to back-up what was put in cross-examination by Ms *Julyan* (i.e. that the loan was irrecoverable) must strengthen the prima facie case established by the plaintiff to enable me to answer the question – 'is it more probable than not that the loan is an asset in defendant's estate?' – the answer, in my view, is 'Yes'!

[49] The most equitable manner in dealing with this asset is, in my view, to exclude it from the accrual calculation of the defendant's estate and to declare the right of the plaintiff to recover half of that loan account. If the loan account is indeed recoverable, justice will be served.

[50] The remaining assets listed by Mr Duncan consist of :

(a) various investments in Lentus Asset Management International Equity Holding in a total sum of R13 707 539,13;

(b) a Landrover Discovery motor vehicle in the sum of R224 000;

(c) cash in three cheque accounts totalling R115 676,67;

(d) an Investec Money Market Fund in the sum of R126,58.

[51] The net asset value of the aforegoing, excluding the loan account, is R14 047 342,38. There is no indication in any evidence led before me that the amounts in the Lentus Asset Management Equity Holdings and the cash in the bank accounts represent the increased value of any of the assets excluded in the antenuptial contract. To that amount, falls to be added the values of the immovable properties.

[52] Against the total of those amounts, there falls to be offset amounts totalling R23 806,35 being debts owed to Standard Bank on overdraft and a credit card, together with the R700 000,00 advance payment, and the two cars, valued at R260 000,00 and R100 000,00 respectively. The accrual in the defendant's estate (excluding the loan account) is thus R14 649 969,26.

[53] In those circumstances, and in view of the fact that there was no accrual in the estate of the plaintiff, she is entitled to be paid half of the accrual in the value of the defendant's estate in the sum of R7 324 984,63.

[54] Given the extent of the asset value to which the plaintiff is entitled to be paid by virtue of her right to share in the accrual of the defendant's estate, I do not believe it would be reasonable for the defendant to continue to pay maintenance to the plaintiff. I am mindful of the fact that the defendant will have to gather together funds in order to pay the plaintiff her share of the accrual in his estate. This will no doubt take some time, and, in the order which I make below I have made provision for the defendant to continue to pay maintenance to the plaintiff, pending the payment to her of the amount due, within a specified period.

[55] With regard to costs, the plaintiff has been substantially successful, because right up until the end of the trial, the defendant refused to tender to pay her anything as her share of the accrual in his estate. Although the defendant was successful with regard to the primary residence of the minor children, in the exercise of my discretion, I would regard it as fair that he pay the costs. This accords with what I consider to have been the reasons for the breakdown of the marriage as testified to by the plaintiff. In the absence of any contrary evidence from the defendant, her assertions in that regard remain uncontested. In arriving at the order below I have deducted the sum of R700 000 referred to and paid pursuant to the agreement of the 26th January 2012 together with the value of the two motor vehicles from the amount to be paid to the plaintiff. The plaintiff, however, was unreasonable in her conduct in refusing to consult with the defendant's psychologist and in attempting to evade the initial order I made. She must pay the costs of those hearings.

[56] In the premises I make the following order :

(a) the defendant is to pay to the plaintiff the sum of R7 324 984,63 by no later than the 31st August 2013;

(b) the plaintiff is declared to be the owner of one half of the defendant's loan account in Full House Taverns (Pty) Ltd ;

(c) in the interim, and pending the payment of the amount in (a) above by the defendant to the plaintiff, the defendant is to continue paying maintenance to the plaintiff pursuant to the agreement reached between the parties in the Rule 43 proceedings;

(d) the defendant is to pay the plaintiff's costs of the action, including all reserved orders for costs, save those with regard to the applications to compel her to attend on the defendant's psychologist and the plaintiff is to pay the defendant's costs of those applications;

(e) all costs are to include the costs of senior counsel, and two counsel, where applicable;

(f) in any report of this judgment, no person other than the advocates, the attorneys instructing them, or persons (other than the parties, members of their extended families and their children) identified by name in the judgment itself, may be identified by name or location. In particular the anonymity of the children and the adult members of their family must be strictly preserved. If reported, it shall be the duty of the Law Reporters to carry out this part of the order.

Date of hearing : 3rd to 7th June 2013

Date of judgment : 21st June 2013

Counsel for the Plaintiff : A Stokes SC (instructed by Shepstone & Wylie)

Counsel for the Defendant : J A Julyan SC with S I Humphrey (instructed by Benita Ardenbaum)