



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 25394/2010

In the matter between:

W

Plaintiff

And

H

Defendant

JUDGMENT DELIVERED ON FRIDAY 5 AUGUST 2016

Weinkove A.J.

INTRODUCTION:

I have been requested by Defendant not to furnish the names of the parties because he felt that this might have an adverse effect on the children, although they are all adults. I have agreed to refer to Plaintiff as “the wife” and to Defendant as “the husband” because there may be parts of this Judgment which might cause unnecessary distress to the children, which I would like to avoid.

This is a civil case and disputed versions must be determined on a balance of probabilities, not as in a criminal case, “beyond any reasonable doubt”. The test is what is more likely than not or whether an inference can be drawn on the preponderance of probabilities.

1. The parties were married to each other on 17 July 1992 in Hamburg, Germany, which marriage was governed by an Antenuptial Contract (“ANC”) incorporating the accrual system. This was a document which the husband produced and in which he precluded the wife from claiming maintenance in the event of the marriage breaking down for any reason whatsoever.
2. The husband testified that he inherited substantial assets. While in practice he bought a cattle farm in Namibia. This became known as Groot Gamsberg (“Gamsberg”). This was obviously the beginning of the husband’s plan to acquire assets outside South Africa probably because of exchange control problems within South Africa.
3. He also bought an erf in Windhoek upon which he built a house. He sold the house he owned in Namibia. He thereafter bought another plot in Windhoek and built another house. That house was put in a company called Muy Bien (Pty) Ltd (“Muy Bien”). It later became the Spanish Embassy.

4. At the time that the husband was divorced from his first wife, he had four children. He separated from her in 1988 or 1989. After that divorce he bought the house in Twickenham Avenue, Auckland Park ("Twickenham"). This property was bond free. He then acquired another company called Beerzijnbosvch which owned a portion of land of about 240 hectares in the Transvaal. He also acquired other farms adjoining this land which were engaged in cattle and sheep farming. He testified that the farms which I have described in the Eastern Transvaal were acquired before he acquired Gamsberg in Namibia.
5. He stated in his evidence that when he met the wife, **"I was very attracted to her and it was obviously developing"** (Record p.3395(20)). He also owned a property in Brenton-on-Sea in Knysna which was purchased in the name of a company, Emtlist. He told the Court that he took the wife to see all these properties **"every one"** (see Record p.3398(4)).
6. This was the husband's second marriage and both his and her evidence was that he was deeply disturbed and upset by the Divorce Order in respect of his first marriage. On the other hand it seems to me that the husband planned this divorce prior to his marriage to his wife.
7. The ANC, which I will later deal with in detail, contains clauses and provisions which are difficult to imagine any right thinking woman would

have agreed to have incorporated in an ANC. A copy of the ANC is annexed to this Judgment marked A.

8. The husband described his first divorce as “**very, very, very costly**” (**Record p.3406(14)**). It was based on a “clean break” payment. He did not furnish any details of what was involved.
9. The wife was gullible and naive. She had been in a relationship with the husband for some time, during which time he took her on a tour of all the properties and assets that he owned, which impressed her enormously. After he persuaded her to marry him, he made it clear that he would not marry her unless she agreed, *inter alia*, to the clause, which I will later deal with, relating to her agreement that no Court could award her any maintenance for any reason whatsoever.
10. At the time of her marriage the wife was 28 years of age and the husband was 53 years of age. She was already pregnant and the husband was the father. She initially decided that it was a bad arrangement to continue to be involved with the husband and returned to Hamburg, in Germany, intending not to marry him and to have the child on her own.
11. The evidence was that the husband eventually prevailed upon the wife to marry him on the basis that if she did not do so he would be deprived of the privilege of bringing up a child of their relationship.

12. At the time, the husband was a Senior Advocate who practised in South Africa, Namibia, Botswana and Lesotho and he was based in Johannesburg. He owned properties, a cattle farm and later on a wine farm.
13. The large age difference between the parties made the wife an attractive trophy for the husband, but it in no way diverted him from his course of protecting his money from her and in no way prevented him from planning this divorce action from the beginning.
14. The wine farm that the husband acquired was in the Wellington area, in the Cape. I will deal separately with the manner in which ownership of that farm was dressed up to conceal his true identity as its sole owner.
15. There are two children born of the marriage between the parties and a third child who was lost in a miscarriage.
16. From the start, the husband adopted a “scorched earth” policy in regard to this litigation. To do this he unnecessarily drummed up the costs of this divorce so as to put the wife in a position where she could not afford to fund litigation and, as he hoped, would surrender to his counterclaims. He raised spurious defences and demanded interim Orders all designed to increase the costs of this action.

17. There is no way that the husband, as a Senior Silk with a very lucrative practice, did not realise that all the various applications and objections that he was raising were devoid of merit, yet he recklessly pursued his claims.
18. So, for example, the husband filed a Special Plea in which he claimed that the accrual could not be heard in the main divorce action because of the manner in which the accrual is described in the legislation, that relief can only be obtained after a Decree of Divorce is granted. He contended that there had to be two separate actions. One for the divorce and one for a division in terms of the accrual. Not only is this not the practice in this Division (which the husband must have known), but it is also a nonsensical approach and had no benefit other than drumming up extra costs so that the party that could afford those costs achieved an advantage over the other party. He also tried to invoke a questionable arbitration provision in the ANC to oust this Court's jurisdiction to determine the wife's accrual claim.
19. This is a marriage which has lasted since 1992, that is 24 years. The husband opposed the claim for the wife's personal maintenance on the basis of clause 9 of the ANC, which states that the wife accepts the donations set out in clauses 6 and 8 thereof and in consideration therefor waives any present or future right to claim maintenance for herself (but excluding maintenance for any dependent child or children born of the intended marriage) should the intended marriage be dissolved in whatever

manner and for whatever reason and regardless of the conduct of the parties.

20. Section 7 of the Divorce Act provides that a Court granting a Decree of Divorce may in accordance with a written agreement between the parties make an Order with regard to the payment of maintenance by one party to the other. Section 7 (2) provides that in the absence of an Order made in terms of sub-section (1):

“... the Court may, having regard to the existing or prospective means of the parties, their various respective earning capacities, financial needs and obligations, the age or each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct insofar as it may be relevant to the breakdown of the marriage ... and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until death or remarriage....”.

21. I must point out that although the wife accepted the conditions of the donations in clauses 6 and 8, the husband did not in fact give effect to the donation of the immovable property. What he did was to sell that property and thereafter gave her a half share in another property. That is not in compliance with clause 6 of the ANC. I will deal with that more fully later.
22. The wife contended that the waiver of maintenance in the ANC is contrary to public policy and is unenforceable. I am persuaded that that position is correct. That clause offends public interest and if I have regard to the relative situation of the contracting parties at the time the clause was

sought to be enforced, it renders the enforcement of that clause unreasonable and is voidable on the grounds of unfairness. Not only is the clause *per se* contrary to public policy, but having regard to the conditions which prevailed at the time the ANC was concluded and the circumstances which prevail at the moment, to ask this Court to enforce this waiver would be unreasonable and offensive to public policy. It is unfair, particularly because the parties were not negotiating on an equal footing. The wife was pregnant at the time and birth of the child was imminent. She was prevailed upon by the husband to accept this clause and to believe him when he said that he wanted to be a father to their child that was to be born and that her refusal to marry him was unfair to the child.

23. I am persuaded that generally any purported ouster of the jurisdiction of the Court which deprives a party of a legal right or remedy is *per se* against public policy.

24. I am referred to the decision in ***Schierhout v The Minister of Justice*** 1925 AD p.417, where the Court held that if the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be a good ground for holding that such an undertaking is against the public law of the land.

25. If I have regard to the Constitution as it presently stands and look at this case decided in 1925, it seems to me that for a long time the objectionable provision in the ANC is and always was contrary to public policy.
26. I am also referred to **HAHLO, “The South African Law of Husband and Wife”, 5th Ed. 1985 at p.259** where the author points out that clauses depriving the Courts of their statutory power of divorce to award post divorce maintenance to one of the spouses or to order forfeiture of the benefits against one of the spouses, is contrary to the essential nature of the marriage relationship and, as such, is against public policy.
27. Counsel has also referred me to the Constitution which also enshrines the values of human dignity and the achievement of equality, particularly as this provision only applies to the wife and not to the husband. He can claim maintenance from her and in fact did so, which was another obvious attempt at intimidation because it was withdrawn at the beginning of the trial. Nevertheless, the offending clause prevents only the wife from claiming maintenance and not the husband. Generally see ***Barkhuizen v Napier* 2007 (5) SA 323 CC**.
28. The clause which the husband is asking me to enforce is *per se* so manifestly unreasonable that it offends public policy and is voidable on the grounds of unfairness. Public policy is now deeply rooted in our Constitution and the values that underlie it. Our Constitution, among other values, is founded on human dignity, achievement of equality and the

enhancement of human rights and freedoms and the rules of law. The Bill of Rights enshrines the rights of all people in our country and affirms the democratic founding values of human dignity, equality and freedom. Public policy must be determined with reference to the values which underlie our constitutional democracy and is expressed in the Bill of Rights. A term of a contract that is contrary to those values is contrary to public policy and is therefore unenforceable.

29. As the wife's Counsel has pointed out in paragraph 29 of their Heads of Argument, there are five cardinal reasons why clause 9 of the ANC deeply offends the core constitutional values of this country:

29.1 it seeks to exclude the statutory power of the Court to award maintenance at a future time when neither of the parties, nor the wife in particular, had any basis for apprehending the existence of her potential entitlement to maintenance upon divorce;

29.2 it even seeks to exclude the statutory power which was awarded to the wife in terms of Section 2 of the Maintenance of Surviving Spouses Act of 1990 to claim maintenance from the husband's estate on the dissolution of the marriage by the husband's death, that is in the absence of any divorce;

- 29.3 it specifically exempts the husband from the consequences of all misconduct on his part, including that misconduct which is cognisable by the Court in terms of Section 7 (2) of the Divorce Act;
- 29.4 it is a unilateral waiver and is not accompanied by a corresponding waiver on the part of the husband. Hence the husband in these proceedings claimed personal maintenance for himself;
- 29.5 the donations in clauses 6 and 8 of the ANC are ostensibly given as a benefit in return for the waiver, but at the same time, contrary to Section 5 (2) of the Matrimonial Property Act of 1984, such donations are not excluded from the donee's estate for accrual purposes. Nevertheless, in terms of clause 3 of the ANC, these donations are expressly to be taken into account as part of the wife's estate.
30. Counsel has also quoted paragraph 116 of **LAWSA, Vol 6 2nd Ed at pp.233-234** which provides that:
- “The general rule relating to legality is that the term must not be contrary to any rule of statutory law nor be contrary to good morals, public policy, or the nature of marriage. The following terms are contrary to the general rule**
- (d) maintenance after divorce is regulated by statute and is subject to alteration by the courts for good reason. Therefore a term which arranges maintenance after divorce is not contrary to the policy of the law, but it cannot exclude the power of the courts to vary the agreement.... “.**

31. The waiver is offensive because it purports immutably to waive the wife's future rights at a time when she could not have known what her position would be on dissolution of the marriage.
32. The legislator, for policy reasons, enacted Section 7 (2) of the Divorce Act and Section 7 (2) of the Maintenance of Surviving Spouses Act to alter the common law position. Section 7 (2) in particular expressly entitles any spouse to claim maintenance at the time of the divorce and vests the discretionary power to award maintenance in the Court. (The only time that a waiver of maintenance can be made enforceable would be when that waiver is made at the time of the divorce and is incorporated in a settlement agreement which may or may not be made an Order of Court.)
33. A further objection to this clause in the ANC is that it is a waiver which was made even before the parties were married. A waiver by one party to any maintenance without a reciprocal waiver by the other party is offensive to public policy because it tends to the achievement of inequality. I am in agreement therefore with Counsel for the wife that clause 9 of the ANC is *per se* contrary to public policy and is unenforceable.
34. Counsel for the wife has also quoted the principle that notions of fairness, justice, equity and reasonableness cannot be separated from public policy. Public policy takes into account the need to do simple justice between individuals. Furthermore, the requirement that there should be an

adequate and fair opportunity to seek judicial redress is consistent with the notions of fairness and justice. There can be no reason in principle why this test should not be applicable in determining whether a clause is contrary to public policy or not.

35. It cannot be argued that the contract was signed by the wife on a free and voluntary basis when the husband threatened that he would not marry her or be a father to their child if she did not agree to this particular clause. It is inconceivable that persons should not have a right to seek judicial redress. Clauses which restrict this right are offensive and contrary to public policy.
36. This Court must also have regard to the relative situation of the contracting parties.
37. The wife was in an unequal bargaining position and this Court will recognise the inequality of bargaining power to prevent the introduction of an injustice which may be caused thereby. The husband exerted unfair pressure on the wife to obtain her assent to that clause. He took advantage of the fact that she was labouring under a pronounced disadvantage in that she had just finished a gruelling exam which included four 5 hour tests, a 6 week thesis and three orals when the husband came to Germany to persuade her to marry him. At that time she was pregnant and the birth was imminent on 27 July. This was a factor which the

husband used to persuade her to marry him saying it would be unfair to deprive the child of a father and that it was “now or never”.

38. The wife’s ability to appreciate the full import of that ANC was limited because:

38.1 of her emotional state;

38.2 of the fact that they were busy arranging the wedding;

38.3 of the need to obtain a Visa and Birth Certificate for the husband;

38.4 she was at the time visiting friends and relatives and consulting her doctor for regular check-ups;

38.5 having had the benefit of advice from an experienced matrimonial attorney beforehand, the husband arrived with a draft ANC prepared by him in conjunction with his South African attorney;

38.6 she was German, had only visited South Africa for a few months, had no real knowledge or understanding of South African law and no access to a South African legal adviser or attorney with knowledge of the South African family and divorce law;

- 38.7 she was pressured into a hasty marriage, as set out below, in circumstances where she had no real opportunity to investigate the legal position;
- 38.8 she knew South African law would apply but believed that the South African and German legal systems of contract law were the same and that South Africa also entailed what she described as “general clauses” which mitigate and override inequitable stipulations. She explained this in evidence in chief and said that “general clauses” are applied in Germany if a party enters into a contract without being faithful and honest or the contract is against good morals or without full disclosure and in most cases a Judge would amend the contract if it was so imbalanced and improper;
- 38.9 she had no knowledge of the law of maintenance in South Africa or of the Maintenance of Surviving Spouses Act and did not appreciate that the waiver was unilateral;
- 38.10 her English was described as dreadful in 1991 when she was working in Cape Town and the husband refused to address her in English. This was her evidence and when she testified she maintained that she had a good command of English but this was not apparent to this Court, even after so many years;

38.11 the husband said he would not marry her without the ANC and made it clear that he was not prepared to pay maintenance on divorce;

38.12 the husband refused her request to postpone the wedding until December, obviously because he realised that the chances of her agreeing to the ANC would be reduced and he insisted that they marry before the child was born. He said it was either that, or not get married at all;

38.13 Exhibit “DB1” at **pp.15 to 27** of the Exhibits Bundle is a letter which the wife wrote to the husband at that time indicating that she wanted time to reflect on the marriage, but his attitude was that it was “now or never”. This letter not only revealed the severe pressure put upon the wife by the husband, but corroborated her evidence that she was more concerned about the children of the marriage, custody disputes and the international nature of the union than the waiver of maintenance. This illustrated the wife’s ignorance of the South African law of divorce because in the letter she asked the husband who would be liable for maintenance of the family and what would happen if one of the parties could no longer work or the husband died. As Counsel for the wife also pointed out, at the time of the marriage the wife could not have known what the facts and circumstances would be at a future uncertain date when the waiver may become effective. She was not aware of her rights

in terms of the Divorce Act or the Maintenance of Surviving Spouses Act.

39. Although I find that the clause is *per se* contrary to public policy and unenforceable, Counsel for the wife has argued in the alternative that even if it were not *per se* contrary to public policy it is unreasonable and should not be enforced because it would be unfair and would offend public policy. It was submitted to me that for the following reasons enforcement of this waiver would be so palpably unfair and unreasonable in the circumstances that it would be offensive to the notions of fairness, equality, justice and reasonableness which inform public policy:

39.1 the circumstances under which the waiver agreement was concluded, as referred to above, render its enforcement unreasonable and unjust;

39.2 the waiver was an integral part of the broader provisions of the ANC which ostensibly conferred upon the wife an entitlement to share in the accrual of the husband's estate. As was shown in the evidence, the husband systematically divested his estate of assets which were supposedly placed in independent entities beyond the wife's reach;

39.3 I will deal in more detail with the manner in which the husband set up offshore trusts, thereby putting assets beyond the wife's reach.

40. The calculated result of this was effectively to subvert any accrual claim by the wife. The husband actively sought to conceal from her even those assets which he has now acknowledged belonged to him. This will be dealt with further in my Judgment.
41. Counsel for the wife pointed out that upon her arrival in South Africa she was forced to be even more dependent on the husband. He started speaking to her only in Afrikaans in a town in which she was a stranger and was having her first baby. She described herself as being scared and lonely. Even now, when it is common cause that this divorce is inevitable, the wife is bereft of any financial recourse against the husband if she does not have an accrual claim against him.
42. To compound the situation the husband has claimed many substantial amounts in his claims in re-convention which I will deal with later.
43. Throughout the marriage the wife's actual earnings and future earning capacity in South Africa was limited. She worked part-time during the marriage but could not earn enough to support her or the children at a standard of living to which they were accustomed. She sacrificed her own career in Germany to marry the husband and move to South Africa to care for the parties' children. Had she remained in Germany, she would have continued working as a lawyer where she could have become a partner in a firm and earned a good salary.

44. If the wife cannot pursue her claim for maintenance, she will suffer prejudice, deprivation and indignity. Her position is aggravated by the fact that clause 3 of the ANC provides that:

“a donation between spouses shall be taken into account and shall not be excluded from the accrual system.”

Such donations, in terms of clauses 6 and 8, were to be the compensation for the wife's waiver of her rights to claim maintenance. These clauses denude that compensation.

45. The wife is further prejudiced by the fact that the husband systematically attempted to hide his assets and denude his estate. He set up a network of companies, trust companies and trust structures ostensibly for “estate planning purposes”. By his own account, he systematically removed the growth assets from his estate and has advanced interest-free loans to those entities to the detriment of his estate. He moved assets offshore with the calculated objective of placing them beyond the wife's reach and, as his own expert stated, by selling his shares in the property owning company of the wine farm to Tartan Investments (“Tartan”) he effectively removed the future growth of assets from his estate.
46. The husband demonstrably concealed assets in his estate and he has refused to make proper disclosure as required by Section 7 of the Matrimonial Property Act, for example:

- 46.1 he failed to disclose the contents of the safety boxes in Hamburg and Paarl;
 - 46.2 he refused to allow furniture and paintings in his Parkview flat to be valued;
 - 46.3 he obstructed the valuation of the Wellington farm and the contents of the building;
 - 46.4 he concealed his holdings in certain entities, such as the farm owning entity Blouville Landgoed (Pty) Ltd ("Blouville") partly held by third parties on his behalf and he withheld discovery of documents which revealed the shareholding;
 - 46.5 he sought to mislead, by stating that there were no material changes in his 2012 Annual Financial Statements;
 - 46.6 he made incremental discovery by only making disclosures piecemeal on receipt of numerous Rule 35(3) and Rule 35(6) Notices.
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47. The circumstances under which the wife signed the ANC raises concerns as to whether she knew, or understood, or had a free choice, in respect of that contract. She was pregnant at the time by the husband and did not at first want to marry him because she was aware of his controlling ways.

She was persuaded to marry him because he insisted that he wanted to be a father to the child that was to be born and claimed that he loved her. This obviously lulled her into a false sense of complacency. He then presented her with the ANC which contained the clauses waiving her rights to claim maintenance if the marriage became dissolved for any reason whatsoever. He also structured the accrual system in such a way that even donations over a certain amount would be deductible from any claim which she would have in terms of the accrual system.

48. The probabilities are that the husband correctly assessed the wife as being naïve and gullible. He took comfort in the fact that she had nobody to properly advise her because the so-called legal experts she spoke to were not sufficiently informed, nor did they understand the laws of South Africa. After all, her main adviser was a business law expert in Germany. I can hardly imagine a less qualified lawyer than a business law expert in German law to advise a client who was concluding an ANC under the accrual system in South Africa.
49. No self-respecting South African attorney who is familiar with the provisions of the Matrimonial Property Act of South Africa and who practised in that field would have allowed his client to sign a document such as I am asked to accept as a binding agreement between the parties in respect of their marriage to each other.
50. As I previously indicated, the husband did not comply with his obligations in terms of clause 6.1 of the ANC which provided that he transfer to the

wife a half share in the unbonded Twickenham property. He acknowledged in evidence that he did not do so. Therefore he has not discharged his obligation. It was only 18 months after the marriage, at the end of 1993, that the parties “jointly acquired” a new matrimonial home situated in Saxenwold, which was bonded. There was evidence that Twickenham was unbonded and, strictly speaking, the husband defaulted in his obligation to transfer one-half of that property in order to implement his rights relating to the waiver of maintenance.

51. I am further asked to exercise an overriding discretion to award maintenance to the wife in the absence of a written agreement between the parties with regard to the division of their assets or the payment of maintenance by one party to the other. I am asked to hold that because the waiver clause disentitles the wife to any maintenance whatsoever, that agreement constitutes the absence of a written agreement between the parties in regard to the payment of maintenance. Counsel is correct in this respect but I am absolutely satisfied, for the reasons above set out, that the terms of this ANC in regard to the payment of maintenance are contrary to public policy and are not binding upon this Court.
52. *Ex abundante cautela* however, I exercise such discretion in her favour to the extent that it is necessary to do so. I am persuaded that I can and must do so in the circumstances of this case.

53. See Section 173 of the Constitution of the Republic of South Africa 1996 which gives this Court its inherent power herein referred to and reads as follows:

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice”.

54. As far as the quantum of maintenance is concerned, I take into account that:

54.1 this is a marriage of 24 years;

54.2 the wife is now 51 years of age and the husband is 76 years of age;

54.3 for a long time this has been an unhappy marriage with problems;

54.4 the wife left the husband after the marriage in January 1994 but they became reconciled in that year;

54.5 in 1995 the wife had a miscarriage which had a traumatic effect upon her;

54.6 since 2007 the parties and their children have resided in the Rondebosch, Cape Town, property. The husband lived part of the time in his Parkview flat in Johannesburg and she spent all her time

in the Rondebosch property. By 2009 the marriage became very unhappy. The wife was work tired and depressed. She felt low and belittled and even considered suicide. She had obviously compromised her career opportunities in Germany and was not qualified to work in South Africa. The South African equivalent degree would have been a B.luris;

54.7 the wife has worked part-time earning modest earnings. She started selling Herbalife and then stationery. Thereafter she worked for the Goethe Institut and then for the wine farm;

54.8 the wife used her income mainly to fund annual trips to Germany for herself and the children to visit her family. When she started working, the husband was not prepared to pay for these trips;

54.9 the parties enjoyed an above average middle class standard of living in an up-market neighbourhood. They sent their children to private schools, drove expensive motor cars, took annual overseas holidays with their children, entertained friends at their home, often lavishly, and bought good quality clothing overseas;

54.10 from early 2007, the husband maintained three residences simultaneously, that is the Parkview flat, the Rondebosch property and the Wellington farm. He now owns a home in a security estate

in Wellington having sold the Parkview flat. He maintains the residence at Rondebosch and the Wellington farm;

54.11 the wife's existing and prospective means and income earning capacity are such that she will never be able to support herself from her own resources, certainly nowhere near the standard of living the parties enjoyed during their marriage. She needs to live in an acceptable home and I consider the Rondebosch property to be such;

54.12 the wife has claimed maintenance in the sum of R30 000.00 per month, which amount is arrived at by deducting her current earnings from Amazon.com where she deals with German speaking clients. She is basically a telephone operator. At the moment, the husband pays the sum of R16 231.20 per month towards her living costs. He pays some of her vehicle expenses and short-term insurance, R2 800.00 towards her medical aid and R5 000.00 towards groceries. This is approximately R25 522.00 per month;

54.13 the husband suggested that the wife's reasonable maintenance needs should not be more than R19 737.00 per month, which was contrary to the statement by his then Counsel, Hodes SC, that he accept that her expenses are approximately R25 000.00 per month. He claimed he needed R25 000.00 per month for himself (see

Record p.3972(24)). See also **pp.4045 and 4047** where he concedes a similar amount for the wife;

54.14 By contrast, the husband's earning capacity runs into a nett taxable income of over R3 million to R5 million per annum. In the 2014 and 2015 years, his returns were between R3 million and R3.8 million. He set-off "farming losses" against his practice income, which I find suspect. The evidence is that based on the incomplete Financial Statements for the period 1997 to 2012, that is a 5 year period, the husband funded so-called "farming losses" in respect of the Wellington wine farm in an amount totalling R12 million. It is inconceivable that the husband, an astute Senior Counsel, with commercial experience would have carried on pumping an amount of approximately R60 000.00 per month into a wine farm running at a loss. The probabilities are that the wine farm was not making any loss but that the husband claimed losses for the reasons of tax avoidance. There is no logical explanation why an educated person would have persisted in pumping millions of Rands into an enterprise making a loss. At the same time, while making all these losses, he was able to set up trust entities in offshore investments. It is common cause that the husband borrowed €23 000.00 from the wife to fund the Mas D'Andrum Farm ("the French farm") and that must also be an asset in his estate.

- 54.15 the husband is spending R11 258.00 per month on financing his motor vehicle. He lives in Johannesburg and spends weekends in Wellington on his wine farm and in his newly purchased home on a secure estate in Wellington. He initially acknowledged that his current expenses were calculated by him to be R114 352.70 per month, including a contribution of roughly R50 000.00 per month towards his farming activities. He later calculated his personal expenses, which comprised 18 items only and did not include many categories of expenses, to be R18 467.00 per month.
55. There is a vast disparity between the wife's and the husband's income earning capacity and their means. The husband has an estate which exceeds R22 million, which excludes the value of many of the offshore assets and properties and which should be included.
56. As far as the payment of the sum of R300 000.00 is concerned, I do not agree with the wife's Counsel that the husband has not, on a balance of probabilities, proved that he did make payment of that amount. The evidence is that he wrote a letter to the wife confirming that he had made that payment. If in fact he had not paid the money, one would have expected her to have recorded that fact. She did not do so. See the trial **Record at p.3488** and my ruling at **p.3496(6)**.
57. As far as the wife's claim for an Order in terms of Section 6 (2) of the Divorce Act is concerned (which would oblige him to prove that he had

made satisfactory provision for the maintenance of his dependent major children), the husband alleged that he had made adequate provision for the children, but he has not made financial disclosure to this Court to prove that this is so. The probabilities are that he made provision for his children in the offshore Trusts but that he also made provision for himself in those same Trusts. His failure and refusal to identify the Trustees and furnish their names is sinister to say the least.

58. In the **Record** at **pp.3930-3948** evidence is clearly set out that the husband wrongly refused to make discovery of relevant documents and obstructed the wife in the preparation of her case. These related to discovery of the Share Register of the companies in which the husband had an interest, the Minutes of the Directors' and Shareholders' Meetings and the fact that a company controlled by him owned shares in the wine farm company on his behalf. That is, Gamsberg held 15.1% of the shares in the property holding company of the wine farm on behalf of the husband.
59. At **p.3993** the husband is again discredited in a Reply to a Request for Trial Particulars where he said there was no lease between him and the land owning company of the Wellington farm. However, there is an entry that he was paying R25 000.00 per annum as lease costs for that property. His answer was "**that's a book entry**". See **p.3994** as the husband tried to talk himself out of that reply. At **p.3996** the husband could not explain how, if the property was the property of the wine farm

and owned by Tartan by almost 25%, it can be leased for a nominal rental of R25 000.00 per annum, which the husband described as merely “**a book entry**”. The interesting thing is that Tartan is a company which is registered in the British Virgin Isles. See **Record p.3996(24)**.

60. It is common cause that the husband farms on both his Wellington and French farms. He has most recently declared an annual income of R3.2 million per annum from his practice against which he set off his farming losses before paying tax.

61. There are no tax returns or assessments for the following years but according to the husband's Financial Statements for the period from 2005 to 2012:

61.1 in the 2005 financial year the husband's practice grossed R3 473 025.00;

61.2 in 2006 it was R4 326 520.00;

61.3 in 2007 it was R5 680 060.00;

61.4 in 2008 it was R3 225 439.00;

61.5 in 2009 it was R3 376 245.00;

61.6 in 2010 it was R4 246 464.00;

61.7 in 2011 it was R3 439 293.00; and

61.8 in 2012 it was R3 430 243.00.

62. No Financial Statements have been produced by the husband in respect of the period 2012 to date, a period of 4 years. However, his nett taxable

income in 2014, according to his provisional tax return, was R3.29 million and R4.89 million. His 2015 nett taxable income was R3 million. I see no reason why his real income will not be as much, if not more than this in the future.

63. Counsel has addressed me in respect of the expert evidence of Ms Hofmeyr in regard to the wife's earning capacity. The problem I have with Ms Hofmeyr's evidence is that it is based on the wife's unduly optimistic assessment of what she can earn in the future. I am satisfied on the evidence before me, and having regard to the evidence of Dr Czech, that the wife does not enjoy any reasonable prospect of earning much more than she is currently earning working for Amazon.com as a German speaking telephonist, if at all.
64. The wife's self-confidence has been shattered by this long drawn-out trial and she is on the verge of a mental breakdown. I am particularly impressed with the evidence of Dr Czech and it seems to me that the likelihood that the wife will continue to earn the modest income that she currently does is uncertain to say the least. It must be demeaning for her, having regard to the position that she occupied as a marketer of wines produced by the Wellington wine farm, to now become a telephonist for Amazon.com.

65. As far as Mr Le Roux is concerned, he clearly aligned himself with the husband and I do not consider his evidence particularly helpful or objective.
66. Counsel for the wife attacked the credibility of Mr Le Roux and it is correct that he was neither independent nor objective. He contradicted himself, avoided answering questions and was argumentative. His suggestion that the wife has an earning capacity of between R35 000 and R40 000.00 per month is far-fetched and absurd. She worked for her husband and was assisted by two experts whom the husband had employed, one Philipe, who was described by him as a genius and an expert wine blender, and one Mr Bruer, who he described as a “world class marketer”. Mr Bruer died in 2005 (**Record p.3513 ff**). The wife was married to the owner of the wine farm, was useful to him in selling the wine in the sense that she was fluent in German and has an aristocratic surname which was impressive to persons from Germany. As Counsel properly pointed out, Mr Le Roux did not investigate whether the wife found new markets, or whether she did any particular research on modern trends in regard to wine drinking, or what sort of wines the people in Asia drink.
67. Counsel for the wife criticised Mr Le Roux who did not produce his notes until pressed to do so. When he did produce his notes, it was clear that he had done an evaluation of the wife’s personality based on her say-so and not an evaluation of the post that she had filled at the Wellington wine farm.

68. As far as Ms Hofmeyr is concerned, she was clearly objective and unbiased, but she did rely to a great extent on the say-so of the wife who had an over-optimistic assessment of her own abilities.
69. Finally, as far as Dr Czech is concerned, he is a psychiatrist and it was his opinion that the wife suffered from depression. He said that, having regard to her experiences in the marriage and in this trial, it was no wonder that she was depressed.
70. As far as the wife's earning capacity is concerned, Ms Hofmeyr correctly assessed that the wife had symptoms of anxiety and depression and was emotionally vulnerable, facts which adversely affected her income earning capacity. This corresponded with Dr Czech's diagnosis of ongoing major depression. This is a chronic and progressive illness and can result in cognitive impairment where on-going small traumas cascade into major episodes.
71. As far as I am concerned, both Dr Czech and Ms Hofmeyr are unduly optimistic about the wife making a recovery and earning as much as R10 000 or R15 000.00 per month. In any event, if she were to do so, the husband would be in a position to apply for a variation of the amount of maintenance which I intend to award the wife, which will be based on her present income earning capacity.

72. Dr Czech talks about a 2 year period to recuperate. Ms Hofmeyr's opinion is based on the wife selling herself into the hospitality industry or to an up-market boutique guest house for a wine farm. Having listened to the wife and her cross-examination, I consider that both Dr Czech and Ms Hofmeyr are unduly optimistic about her potential to make a proper recovery to compete effectively in the labour market.
73. The wife, when she worked for her husband at the Wellington wine farm, was working under conditions of sheltered employment (**Record p.3523**). In the background were Mr Bruer and Philipe (who I have already referred to). All decisions were ultimately made by the husband and she was not placed in a position to make independent decisions. I consider that the husband's suggestion that the wife has the capacity to earn R35 000 to R40 000.00 per month as a marketer in the wine industry is absurd.
74. The wife's present emotional well-being has been seriously compromised in that she suffers from depression. The manner in which the husband has conducted this litigation is sufficient to break the spirit of the strongest litigant because he has embarked on nothing less than a "scorched earth" policy. One of his more remarkable claims is for repayment, after all these years of marriage, of the rates and municipal charges that he paid in respect of the common home because that home and its successors in title were registered in the names of the parties equally. He kept meticulous records of all the monies he paid for the rates and, for the first time in these proceedings, now claims repayment of these sums on the

basis that she, as half owner of the property, is liable for half the rates. I find this claim incredible to say the least. He never told her that she was liable to pay this money and he never asked her for it at any stage until this litigation. Had he done so in the first place she would have then had the choice of electing to sell her share or to rent out the property so that she could derive an income therefrom and at the same time oblige the husband to provide a home for her and her family according to his maintenance obligations.

75. This claim is typical of his mind set and is remarkable in every respect. He decided to improve the former common home for their comfort and enjoyment during their marriage but kept records of all the costs of the improvements to the property. He has now sprung a claim against the wife for her half share of the costs of these improvements, many of which were for his exclusive benefit. The house was used as a show piece to impress his instructing attorneys and promote his practice as a successful Senior Counsel. These costs are his costs of maintaining the wife.
76. It is inconceivable that the husband does not have offshore income and resources. The probabilities are overwhelming that he does have such resources. I will deal more fully with the husband's credibility later, but I have no doubt that he has good reason not to furnish details about his offshore investments, the offshore Trusts and the identity of the Trustees of these Trusts. I do not believe that he does not know who the Trustees are. I also do not believe him when he said that these Trusts are only for

the children's benefit and not for his benefit. He was caught out in cross-examination when it was shown to this Court that he lied when he said he was not a beneficiary in the Family Trust. The Deed of Trust was produced by the wife, which showed that that statement was false.

77. These Trusts are situated in Guernsey and one of the Trusts was in Monaco but is now being moved to the British Virgin Islands. There can be no doubt that there are enormous costs involved in setting up Trusts in offshore countries which co-operate in the hiding of assets.
78. To the extent that I am asked to make an Order in terms of Section 6 (2) of the Divorce Act, I decline to do so. All his children are of an age where our law recognises them as majors and they must take such steps as they may be advised if the husband has not made satisfactory provisions for their due maintenance and support. If necessary, that may become another action but I am not prepared to tag this claim onto the wife's claim as her Counsel has urged me to do.
79. It seems sinister to me that the husband formed offshore Trusts in countries outside South Africa which maintain levels of secrecy, are known to run banking facilities for people who want to keep their financial affairs secret and whose wishes are accommodated by the laws of those lands.

80. These countries will not give information about their clients' financial affairs and are structured in such a manner that they are beyond the reach of our Courts.
81. The husband claimed that the Trust he established offshore is controlled by Trustees who are not subject to a Letter of Wishes which he directed to them. I do not believe this to be true.
82. As far as I am concerned, the probabilities are that the husband would not have parted with his money and established or invested in Trusts in any country without maintaining control over the funds that he placed there. I do not believe him when he said there was no Letter of Wishes and that he has no control over the money placed in these Trusts.
83. At **p.3885** he was again questioned about his interest in the Family Trust. As it was put to him, it was alleged in the pleadings that he did have an interest in that Trust and the question was why did he not make discovery of the Trust Deed? His answer was that if he did not have an interest in the Trust, why should he discover it? (**Record p.3885(18)**). He was then asked whether he accepted that if someone was a beneficiary in a Trust he had an interest in that Trust. His answer was he did not accept that the beneficiary had any interest in a discretionary Trust. Again, he stated that he was not a beneficiary in any Trust. He persisted in this answer (**p.3886**). He stated in terms "**I am not a beneficiary in the Trust and the discretionary nature of any Trust such as the Family Trust, let's**

talk specifically” excluded any beneficial interest. At **p.3887** he admitted that having looked at the beneficiary Trust, the Family Trust, he was a beneficiary. He said it was never his intention to be a beneficiary. It was pointed out that he created the Trust himself. He was the author of the Trust and he caused the Trust to be formed. This exchange of answers demonstrated the reckless attitude of the husband. He was an untruthful witness.

84. The husband’s excuse was that he withheld discovery of relevant documentation because, notwithstanding the pleadings in the matter and the allegations by the wife, his personal view of the law excused him from making discovery of documents relating to her claim.

The Trust set up in Guernsey was set up by the husband in the 1980’s (**Record p.3902**). He said he was not a Trustee and he said on oath “**I don’t know who the Trustees are**” (**p.3902**). Counsel for the Defendant, deliberately interrupted cross-examination time and again to alert the husband into giving particular answers. At **p.3903 (5 ff)** she demonstrates this attitude. It is improper for Counsel to do this and Counsel must know that. It colours the answer which the witness ultimately gives and it is improper interference with the process of this Court.

85. According to the husband, the Schoonwater Trust is now located in Monaco. This was the Trust which was set up for the children born of the

husband's marriage to the wife and in which he was described as being one of the beneficiaries. Again, he pleaded that he did not recall being made a beneficiary and again said it was never his intention that he should be. See **Record p.3924(18 ff)**. This was the only Trust for which the wife was able to obtain a copy of the Trust Deed and she knew that there were at least two other Trusts.

86. The husband claimed that the wine farm does not belong to him and that he set up an intricate arrangement of dividing up all the components of ownership of the farm into separate parts. So, the land is owned by one entity, the wine cellar and the processing of the wine is owned by another entity and the grapes that are produced on the farm are owned by another entity and all these entities are separate components which make up the whole of the farm. The husband owns part of each of these entities in his own name but is employed and engaged to control the whole farm.
87. The probabilities are that this is a deliberate subterfuge and that in fact the husband owns the whole farm, but his ownership is masked by the entities which he created. The probabilities are that there are tax advantages in this scheme and that he likes to operate behind a veil. To get to the truth of this matter one must lift that veil.
88. Another difficulty I have with the husband's evidence is his explanation concerning the employment contract which he designed for the Wellington wine farm and wine cellar for himself and Mr Tolme. He explained to this

Court how he inserted clauses in that contract defining duties for Mr Tolme, who was engaged as a marketer and sales person for the wine farm's wines. He said that the problem with employing people is that the labour laws of this country are so weighted in favour of the employee that it is necessary to build in clauses that can be used to get rid of an employee when necessary. He said he deliberately put in clauses defining duties which he knew were beyond the capacity of Mr Tolme so that if and when necessary he could get rid of him on the grounds of breach of contract. What is remarkable is that when he gave this explanation he spoke in a boastful manner because in his mind he was clever. This contract was not concluded in good faith and further questioned the husband's integrity. I annex, marked "B", a copy of the transcript of this evidence.

89. As far as the husband's financial affairs are concerned, the evidence that was introduced in his evidence in chief was never put to the wife. See **Record p.3637(13 ff)**. He was argumentative and evasive throughout cross-examination. He persistently used the phrase "**I have no recollection**". His evidence contradicted the evidence of Mr Le Roux, who was his witness, and he even claimed privilege in respect of those contradictions.
90. Time and again the husband's Counsel, interrupted cross-examination and tried to introduce evidence herself. Efforts on my part to silence her were fruitless. Warning her to stop had no effect. See

Record p.3840(17 ff). Effectively Counsel overruled me and introduced evidence to assist the witness. Her conduct was deplorable.

91. The evidence that the husband gave in connection with the Wellington wine farm was unsatisfactory. He refused to authorise the wife's representative to obtain information about Tartan, which apparently owns part of the property owning company in relation to the Wellington wine farm. His answers in cross-examination were evasive. (**Record p.3852 ff**). At the end of the day, the Wellington wine farm, according to the documents, is partly owned by an entity in Guernsey and partly owned by the husband.
92. The husband was thoroughly discredited in cross-examination, particularly concerning the assets and offshore Trusts which were connected to him. He stated on oath that he was not a beneficiary of the Family Trust in favour of his children. When presented by the Wife's Counsel with a copy of his Trust Deed defining him as a beneficiary, he would have the Trust Deed amended. It is common cause that he did not make discovery of any documents relating to this Trust. It was specifically put to him in cross-examination that there was an allegation in the Particulars of Claim that he did have an interest in this Trust and his answer was "**well that was denied**". See **Record p.3879 ff**.
93. It is common cause that he made no discovery of his shares or shareholdings. His answer was that he regarded the issue as irrelevant

because there was no valid maintenance claim. I regard that as a dishonest reply because, as an advocate and a lawyer, he knew, or must have known, or at least had regard to the fact that there is strong legal authority which provides that the clauses that he put in the ANC are void, unenforceable and contrary to public policy. His answer in any event disregarded the fact that it is the wife's case that those clauses in relation to maintenance are not enforceable. Nevertheless, he refused to make discovery of documentation relating to her claim for maintenance. He knew that on the pleadings this was one of the issues and the extent of his assets, means and resources were relevant to the wife's claim.

94. What is evident is that the husband, although an officer of the Court, made discovery of documentation which withheld discovery of relevant documents which he knew, or must have known, the wife was entitled to see. See also his answers at **p.3934** to this issue.
95. The answers which the husband gave at **p.3936** as to why he refused to give information relating to his own expenses and living costs were because he was still of the view that the waiver for maintenance was effective and that on the pleadings and in terms of the ANC there was an effective waiver. I regard this as a disingenuous and obstructive attitude on his part.
96. The husband said that on his retirement he would need a bond free house and about R25 000.00 per month (**Record p.3972(24)**).

97. At **p.3976** the husband was unable to explain why in the list of shareholdings which he held in private companies he did not list his shareholding in the land owning property of Wellington farm. This is another example of the husband's reckless disregard for the legal process in which he is well versed.
98. The husband's attitude in respect of this trial was to refuse and/or delay furnishing replies to legitimate requests for further particulars and generally obstructing the wife in the preparation of her case. See **p.3981 ff.**
99. The answers the husband gave at **p.4001(9 ff)** do not make sense. He conceded that he had set up Trusts for his children, but he had no idea who the Trustees were and he had not seen documentation in relation to that.
100. A reading of the **Record** at **pp.4006-4009** demonstrated that the husband was an evasive witness. He contended that he did not know who the Trustees of any of the Trusts were, answering that he relied on Mr Len Durham to nominate these people.
101. The husband stated that the farming operation in Wellington had consistently been conducted at a loss. See **Record p.4072(14)**. The cost to the husband to run the wine farm amounted to R50 000.00 per month

based on the last 16 to 17 years that he has given us records. See **p.4075(15)**. The wine farm had never been profitable and no improvements had been made to the property. At **p.4076(5 ff)** the husband maintained that he would continue farming at a cost of R600 000.00 per annum. He would retire and live off an income stream sufficient to cover his losses. The only source of income he would have is a living annuity, but that could never be sufficient to cover even half of the monthly losses accruing in respect of the farming venture. This evidence could not possibly be true. This farm was not running at a loss. The losses were artificial and purely generated to set off tax on the husband's income as an Advocate.

102. If one has regard to the questions put at **p.4101**, the wife should be awarded R30 000.00 per month plus free accommodation, were she to continue earning R7 000.00 per month working for Amazon.com.
103. The husband is even seeking to implement the clause that gifts exceeding a certain value must be taken into account in the calculation of the accrual claim. The concept of chivalry is beyond his comprehension and lies dead and buried in his mind, if it ever existed.
104. More importantly, providing that gifts over a certain value be taken into account in the calculation of the accrual claim means that the half share in Twickenham and the R300 000.00 which were to be given to the wife in return for the waiver of a maintenance undertaking have little if any value

to her because they are part of her estate in terms of the accrual system. This fact should have been explained to the wife before she could be expected to sign this agreement.

105. Adverting now to the wife's accrual claim, the husband raised a number of defenses. He said that his estate had not shown any accrual. That statement was self-evidently false because the ANC provided for a nil commencement value for each of the parties' estates. The wife is insolvent and all the assets which the husband now possesses represent his accrual.
106. The husband's contention that a claim under Section 8 of the Matrimonial Property Act can only be brought by "application" and not by way of an action because that is the word that is used in the Act, is spurious. Clearly that claim could be brought by way of an action or an application.
107. The husband took a special defense that the claim under the Matrimonial Property Act could not be brought until after the dissolution of the marriage. That contention was equally illogical and bad in law. The claim under Section 8 was being brought in the divorce action, as is the practice in this division and all other divisions that I am aware of. Various authorities in support of these rulings have been furnished by Counsel for the wife and I do not propose to repeat them.

108. He also took a special plea to the fact that clause 11 of the ANC provides that a resolution of disputes concerning the value of assets and liabilities had to be done by arbitration. This is all very interesting, but we do not have a dispute concerning the value of assets and liabilities. We have a dispute as to whether there is an accrual or not.
109. The wife's Counsel pointed out that the husband's expert, Mr Greenbaum, acknowledged that he has assets of at least R12 million and proclaimed that these represent the fruits of the so-called excluded assets. The problem is that Mr Greenbaum's opinion in this respect is based on information furnished by the husband. In truth and in fact, the husband had not furnished any proof that any of his assets were the fruits of the so-called "excluded assets". Any attempt to gain that information by way of Requests for Further Particulars and a request that the husband furnish information regarding his assets and liabilities were refused by him. He adopted an obstructive approach to disclosing his assets and liabilities and it is clear that he did not and will not provide that information.
110. Counsel for the wife pointed out that our Courts, both in this division and elsewhere, routinely entertained accrual claims as part of divorce proceedings. A long list of cases is cited and form part of the List of Authorities provided by Counsel for the wife. It would be wholly impractical for parties in a divorce action to have to run two actions, one to obtain a divorce and another to obtain payment of the accrual. The practice in all our divisions allows that these proceedings be done in a

single action. Again a great number of cases have been cited by the wife's Counsel and these form part of the Heads of Argument which have been furnished to me and the parties.

111. It is useful to quote Section 8 (1) of the Matrimonial Property Act relating to the accrual claim which provides as follows:

“8(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.”

112. The husband is under a duty to disclose the nature and extent of his assets and liabilities. Despite repeated demands, he has refused to make such disclosure. Section 7 of the Matrimonial Property Act provides as follows:

“When it is necessary to determine the accrual of the estate of a spouse or a deceased spouse, that spouse or the executor of the estate of the deceased spouse, as the case may be, shall within a reasonable time at the request of the other spouse or the executor of the estate of the other spouse, as the case may be, furnish full particulars of the value of that estate.”

113. Such a request was addressed to the husband and was incorporated in various Requests for Particulars and demands for discovery, all of which were ignored. I have been referred to the unreported decision of **B v B** included in Counsel for the wife's List of Authorities, where the Court held as follows:

"Since community of property is excluded, each spouse maintains a separate estate. If a spouse so desires, the assets which make up the separate estate are under his or her sole control. In an accrual claim, therefore, the spouse making the claim often has little or no knowledge of the assets which make up the estate of the other party. It is presumably for this reason that the legislature enacted s7... It is therefore clear that the legislature requires full particulars if requested."

114. I agree with the wife's Counsel that because of the statutory obligation there is an onus and an evidential burden which rests upon the husband because he has peculiar knowledge of his assets and liabilities and he is under a statutory obligation to disclose it. If he does not do so, then he offends the Court's statement in the matter of **MB v DB** which points out that litigation is not a game where parties can play their cards close to their chest in order to obtain technical advantages or to prejudice the other party.

115. I am referred to the decision of **Mostyn J** in **NG v SG**, the English case referred to by Counsel for the wife in his List of Authorities where the Court held that non-disclosure is a bane which strikes at the very integrity of the adjudicative process. Without full disclosure the Court cannot render a

true, certain and just verdict. It cannot lawfully exercise its power. It is thrown back on inferences and guesswork which may result in an unjust result to one or other party. This judgment accords with the process which was adopted in this division where Cloete AJ, as she then was, in the matter of **AM v JM** held that:

“Although the defendant’s 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.”

116. Simply put, there was an onus on the husband to show that certain assets were excluded, to identify those assets and to trace those assets to show that they were still there and should remain excluded. He was in possession of all the facts relating to these assets and he should bear the onus of demonstrating what had happened to them. He should bear the onus of showing the present values. That decision, which was reflected in the matter of **MB v DB** quoted in Counsel for the wife’s Heads of Argument, was not overturned on appeal. The Supreme Court of Appeal found it unnecessary to decide the issue of onus and refrained from doing so. There were no excluded assets that could be traced from the discovered documents. On the evidence therefore the husband did not prove that any particular asset should be excluded by the ANC.
117. Section 8 of the Matrimonial Property Act where it refers to applications must not carry the narrow meaning of an application as opposed to an

action. Disputes concerning an accrual claim cannot usually be addressed by affidavit, unless all the facts concerning the dispute are common cause. There are various cases where a comparable Statute has referred to an application which has been held to include action proceedings. These cases were quoted by Counsel for the wife in paragraph 122 of his Heads.

118. I have already ruled that clause 11 of the ANC relates to disputes concerning the value of any asset or liability as at the date of marriage and certainly does not relate to the existence of assets and liabilities at the time of the termination of the marriage. Furthermore, the dispute relating to value does not appear from the pleadings and was raised long after the commencement of these proceedings. In any event, because of the husband's refusal to provide a statement of his assets and liabilities, a dispute of this nature could never have arisen. The only asset of value related to the Wellington wine farm and that evidence was entered and disposed of without objection. It must not be forgotten that for a long time the husband's interest in Blouville was concealed. Certain shares in that company were held on his behalf by Gamsberg and that only emerged during the trial. Any possible dispute in the value of the wine farm only crystallised when the husband filed an expert report on 17 October 2014, some 4 years after the institution of the action, and 4 months after the trial had commenced. Prior to this he claimed he had no knowledge of the value of the farm. These same considerations apply to the value of the Cellar on the farm.

119. In computing the value of the husband's estate, it seems to me that inasmuch as he has failed to furnish a list of his assets and liabilities, I must in the circumstances value those assets which he admitted he owned and/or which I believe have been proven to be owned by him and to then treat them as accrued assets and therefore direct that the wife's accrual claim must apply to the value of those assets so that each party should have half.
120. In applying the provisions of the accrual claim, I have to treat the donations of R300 000.00 and half share in Twickenham as part of the assets which the wife should have received. The R300 000.00 is gone and lost and she never received her half share in Twickenham. She did, however, receive a half share in the former common home and I must take that value into account.
121. The wife's schedule of assets and liabilities is recorded in Schedule B at p.99 of her Counsel's Heads of Argument. It shows that taking into account all her assets, which total just over R4 million, and deducting all her liabilities, which exceed R5 million, she is effectively insolvent. It must be remembered that from the outset the husband refused to identify which assets and their values were owned by him directly or indirectly at the date of the parties' marriage. He stated that **"the information required does not arise out of the pleadings alternatively constitutes an interrogatory, alternatively does not relate to any issue justiciable in**

this action". See paragraph 140 at p.58 of the wife's Counsel's Heads of Argument.

122. The evidence has shown that the husband failed to disclose his assets and actively concealed assets. He persisted in making incomplete and incremental discoveries of documents. He claimed that his No 2 account would record the realisation on the sale of his excluded assets existing at the time of the marriage as well as the purchase of new assets from such proceeds. These accounts were only the subject of discovery by the husband in the eleventh Supplementary Discovery on 20 October 2015 and were hopelessly incomplete. He refused to furnish any statement of his current assets and liabilities and their value as required by Section 7 of the Matrimonial Property Act. His expert, Mr Greenbaum, made no effort to independently establish and verify the extent of the husband's current assets or to establish a documentary trail to show that these assets were acquired from the proceeds of the so-called excluded assets.
123. It is important to note that in the crucial period 1992 to 1998, in which period Mr Greenbaum's report stated that excluded assets were realised to generate funds, the bulk of the statements in respect of the No 2 account are missing. Furthermore, the husband's income in Namibia was ignored. He also practiced as a Silk at the Johannesburg Bar, in Botswana and Lesotho. Mr Greenbaum took no account of these other sources of income between 1992 and 2001. He made no effort to determine the order or magnitude. Even today, the only evidence of the

husband's South African income in this critical period is informal income statements for the years February 1997 and February 1998. There was no disclosure of his income over the relevant period in Botswana and Lesotho. Mr Greenbaum, in his thesis, pre-supposed that the fruits of the excluded assets realised in the period 1996 to 1998 were not moved offshore or used for purposes other than the acquisition of loan accounts. There was no such evidence before this Court.

124. Counsel for the wife annexed a Schedule "C" to his Heads of Argument which details the sequence of events regarding pleadings and the husband's discoveries. This highlights the husband's repeated refusals to make disclosure, his concealment of assets, the falsity of certain statements made in relation to assets and interests and the incremental revelation of information as documents were obtained from other sources. It cannot be said by any stretch of the imagination that he made a full disclosure of his assets and liabilities. So, for example, his 2012 Financial Statements omitted reference to his 25.1% shareholding in Blouvlei, his 26% of the shares in the company owning the trademarks and his 25.1% shares in the Cellar. These shareholdings were not held in his name but were held on his behalf by Gamsberg in terms of various Deeds of Trust, none of which were discovered. On this basis the wife contends that the husband was concealing them.
125. Only much later, when the husband acquired knowledge that his shareholdings had been uncovered by subpoenaed documents, did he

make selective disclosure of further interests in loan accounts which he held in corporate entities. So, for example, he initially claimed that he had no interest in the Family Trust and in reply to a Rule 35 (3) Notice he stated on oath in his Affidavit that he had no such interest. This was false because the terms of the Family Trust Deed which he had signed stated that he was both a Trustee and a beneficiary. Significantly, he never discovered the Trust Deed which was also only produced under subpoena. After it had been dealt with in evidence, the Trust Deed was hastily amended to remove the husband as a beneficiary.

126. In other Replies, the husband repeatedly stated that he had no lease with Blouvillei in respect of its farm. It later emerged that he did lease the farm property, albeit at a nominal rental which in recent years has not even been paid.
127. The husband refused, in the face of the wife's Rule 35 (3) Request, to produce the Liquidation and Distribution Account in his late father's estate. However, he himself produced it after he had testified for his own purposes during the presentation of his case, plainly because he thought it was to his advantage.
128. It was the husband's case that the No 2 account recorded all the realisations and sales of assets existing at the time of the marriage as well as the purchase of new assets. The statements and records relating to this account, which would have included cheques and cheque stubs, were

material to this investigation. Nevertheless, save for the exception of two monthly statements for this number 2 account which he discovered, evidently because he wished to rely on entries showing payments he made to the wife, the bulk of the No 2 account statements which he eventually produced were withheld until 20 February 2015. Even then, the statements relating to the period between 1996 and 1998, which were relevant to tracing the proceeds of excluded assets, were missing.

129. If I have regard to the meticulous manner in which the husband kept records of the rates and electricity accounts that he paid in respect of the common home so he could claim half of these expenses from the wife, I find it incredible that these trivial statements were so carefully collected but not the documentary proof where he had invested his excluded and other assets.
130. I am satisfied that the Discovery Affidavits which the husband made were not *bona fide*. It should be noted that every one of the Discovery Affidavits contained the disclaimer notice that the Deponent had no other documents in his possession or under his control relating to these issues, yet he did not discover the documents showing that the shares held by Gamsberg were held by it as his nominee. The husband cannot avoid responsibility for withholding this information because according to him he believed that the wife was not entitled to pursue her claims.

131. The issues are defined by the pleadings and it is not open to a party, however important a Senior Counsel he may be, to pre-judge and make discovery of documents as and when he wishes. The wife's complaint that the husband attempted to mislead her and this Court indeed has considerable merit.
132. As a witness, the husband was argumentative and often refused to answer questions. I do not for example believe him when he said that he had no knowledge of the Trustees or the Directors of the various Trusts and corporate entities which he was instrumental in setting up offshore and in particular those structures which hold the French farm.
133. As a starting point I must look at the value which Mr Greenbaum gave to the husband's estate of R12 016 000.00. The problem is that that valuation excluded certain assets and under-valued others. It must accordingly be adjusted. It is clear that these assets are not traceable as the fruits of the so-called excluded assets. I must therefore regard them as accrued assets. Mr Van der Spuy valued the Wellington farm at R15.7 million. Mr Marais, a so-called expert valuer on behalf of the husband, valued the farm at R12.5 million.
134. The problem with Mr Marais' valuation was that he could not explain why he previously valued that farm for municipal purposes at a much higher value. So, he valued the one plot at R4.3 million in July 2012 while he currently valued it at R1.7 million. The wine farm is made up of two plots.

The smaller one was valued at less than half of the municipal value that he previously gave for that part of the land. He clearly aligned himself with the husband and I cannot accept his evidence in regard to value.

135. I agree with Counsel for the wife that the full value of the Wellington farm should be included because the husband is in *de facto* control of that property. The offshore company which he claimed owns part of the land and part of the farm constituted a book entry and a sham.
136. The Glacier Living Annuity of the husband's estate has a value of R3 270 638.00. I agree with Counsel for the wife's contentions set out in paragraph 185 of his Heads of Argument that for the purposes of this matter I must regard the value of the husband's estate as R22 259 702.00. This allows R2 million for legal costs.
137. I also believe that the husband effectively owns the French farm and I do not believe him when he said he does not know who the Trustees or the Directors are, but he exercises full control over that property. I do not know the value of that property. I cannot include it, but if there has been any use of excluded assets in terms of the ANC, they must reside in the offshore company which owns the French farm. The fact that I cannot establish the value of that property reinforces the conservatism of my finding that the Wellington farm must be treated as wholly owned by the husband and not financed by excluded assets. When he sold the Namibian property, which was held in the name of Muy Bien (see

paragraph 194 of Counsel for the wife's Heads of Argument), he was paid offshore.

138. Counsel for the wife was correct in saying that Mr Greenbaum was not in a position to demonstrate that any of the excluded assets financed any current assets. He completely relied on what he was told by the husband and he did not make an independent enquiry or investigation. Mr Greenbaum has not investigated the current structuring of the husband's estate, including the French farm structure.
139. Counsel for the wife set out in Schedule D to his Heads of Argument how he calculated the claim in respect of the accrual. In the circumstances I consider that to be a fair and reasonable approach which I will incorporate in my Judgment.
140. As far as the counterclaim is concerned, the husband had no explanation as to why he waited 24 years before he decided he should put in a claim for rates and electricity charges and alterations in respect of the jointly owned common homes. The evidence from the wife was that he always acknowledged that he would pay for the alterations and the rates and electricity charges, which he did for 24 years. The probabilities are that her explanation makes more sense than his does. It is difficult to imagine how he could possibly have shared bed and board with the wife. He fathered children with her and behaved as a husband to her, while all the time secretly accumulating evidential proof of the extent of the rates,

electricity, water and other household charges that he was paying for, including the cost of alterations and repairs which he did to the various homes. I do not believe him when he said that he did not acknowledge that he would pay these expenses.

141. I am satisfied that the payments referred to in the counterclaims relate to costs and charges for household necessities. If I have regard to the Matrimonial Property Act No 88 of 1984, Section 23 (1) of the Act stipulates:

“that any right of recourse which a spouse may have against the other spouse in terms of the common law or any law which is in force at the beginning of 1984, or which was enforced before that date, in respect of contributions made for household necessities, lapses on that date.”

The only method under which a claim for household necessities can be brought would be in terms of Section 23 (4) which requires that there be an agreement between the parties that the spouse concerned would have a right of recourse in respect of household necessities, which agreement the husband failed to plead or prove. As far as I am concerned, charges for rates and electricity are household necessities. The husband is liable to pay these charges in accordance with his duty of support. The income which the wife earns and has earned during the marriage was and still is trivial. There is no way that she could pay for these expenses. The husband has no claim in respect of these costs.

142. As far as the costs of alterations and redecorations to the homes are concerned, no evidence has been placed before me that these alterations, or extensions, or so-called improvements enhanced the market value of the property. In some instances they may have done, but to prove that they had, the husband would have had to lead expert evidence to indicate the market value of the property prior to these alterations and the market value of the property after these alterations allowing for inflation and resultant changes in the value of property. That increase in value would have to be attributable to the nature of the alterations or so-called improvements that had been done.
143. Inevitably, when a person buys a new house, even one that has been recently altered or so-called improved, the new owner will probably want something different or want to introduce changes. I do not accept for one moment that the costs of alterations or improvements automatically pro rata increase the value of a property, because it may simply amount to restoring a particular room, for example back to what it previously was. I would need expert evidence to be proved and tested before me before I made that quantum leap which contradicts all my years of experience as a purchaser and owner of property.
144. It has also not escaped my notice that the alleged statements, which he attributed to his wife in his evidence in chief and her so called undertakings were not all put to the wife during her cross-examination.

145. From the beginning of cross-examination, the husband was argumentative and evasive. He latched onto an answer of “**I have no recollection**” and used it consistently. His evidence was in contradiction to Mr Le Roux’s evidence who was his so-called expert. At one stage he even claimed privilege in respect of contradictions in the evidence that he and Mr Le Roux gave. See **Record p.3813**.

The husband’s contentions:

146. In my view, it is the fault of the husband that the divorce trial has taken 50 days of Court time, which I have set out in the first part of this Judgment. He adopted a “scorched earth” policy with a total disregard for the costs involved.
147. I do not intend to deal with each of the submissions made by the husband’s Counsel save to point out that the contract which the husband has been seeking to enforce is illegal, unenforceable and contrary to public policy. Furthermore, there has been no character assassination of the husband. He has achieved that on his own.
148. As far as time and money that has been wasted is concerned, the blame for this lies at the feet of the husband, who refused to make proper discovery and adopted an obstructive attitude throughout this litigation.

149. I will now deal with the question of separation of trials and the separation of legal issues. I am satisfied that those attempts on the part of the husband were nothing less than his attempts to adopt a “scorched earth” policy and to prevent the wife from being able to afford representation. The allegation by the husband’s Counsel that this Court adopted a legally faulty approach in insisting that the question of accrual be dealt with in the same hearing as the divorce, underlines the obstructive policy adopted by the husband and carried out by his Counsel. It was the husband’s Counsel’s attitude that she could dictate to this Court how to handle its proceedings. This is reflected in the first paragraph of her Heads of Argument. I do not intend to deal with all the other provocative statements contained in this paragraph, but record my rejection of the accusations and complaints levelled at the conduct of these proceedings.
150. The waiver in the ANC was not a contract that was “freely entered into”. I have detailed the circumstances under which that contract was concluded and hopefully, when the husband and his Counsel have read this Judgment, they will appreciate that the responsibility lies with them for the drumming up of costs in this matter.
151. The so-called donations which the husband refers to are emasculated by the provision of the ANC which maintains that donations must be treated as part of the wife’s accrual and the value thereof deducted as having been paid to her. Again, paragraph 15 of the husband’s Heads is misguided because the so-called donations are not in fact donations at all.

152. I do not intend to deal with all the sub-paragraphs in paragraph 15 of the husband's Heads, save to point out that the words "unjust enrichment" have no application in this matter because there has been no enrichment of the wife as contended by the husband. Furthermore, the husband ignores *in toto* the question of his duty of support.
153. The so-called common cause facts set out in paragraph 16 ff are not common cause, save as set out in my Judgment above. I do not accept that the husband has an indirect minority interest in the Wellington wine farm. The probabilities are that he owns that farm. Furthermore, as I have indicated, the parties did not jointly own equal shares in the Twickenham Avenue property. That property was never owned by the wife at any stage. In the result, clause 9 was never implemented.
154. As far as my inherent powers to do justice between the parties are concerned, I have referred to the Constitution. In any event, I hold that the offending clauses are contrary to public policy and only implement my inherent powers *ex abundante cautela*.
155. As far as *pacta sunt servanda* is concerned, I am fully aware of this principle and I accept that it is one which is frequently applied in commercial contracts and contracts of service etc. However, as I have indicated, an ANC is a contract which is *sui generis*. Any *pacta* that finds its way into an ANC will always be subject to the test of public policy

because ANC's are unique in the sense that they can only be executed in a prescribed manner and in a prescribed form because this is the very foundation of a contract of marriage. The legislator and our Courts have consistently monitored contracts of this nature. It is not helpful to refer to commercial contracts or to import the findings of the Courts in those cases into ANC's as if ANC's stand on the same footing.

156. An ANC stands in a special position because it regulates the terms of a marriage which is usually the foundation of a family entity and creates and controls the circumstances of the birth of children and the very existence of the family unit. I accordingly find little help in the cases quoted by the husband's Counsel in relation to commercial matters. I know of no case where our Courts have ever enforced a provision in an ANC which incorporated a waiver by the wife of any right to claim maintenance in the future should the marriage break down for any reason whatsoever and irrespective of the fault of the husband, at the same time precluding her from any access to the Court's power in terms of Section 7 (2) of the Divorce Act to award maintenance to her. Particularly where it is a unilateral waiver only applicable to the wife and not applicable to the husband and which even precludes her rights to claim maintenance from his deceased estate in terms of the Surviving Spouses Act. Effectively, I am asked to enforce a provision of this nature. I consider that the terms of this waiver are contrary to public policy and in the circumstances of this case unfair and abhorrent.

157. I take no comfort in the fact that our Courts have from time to time enforced contracts which are controversial under the principle of *pacta sunt servanda*. I do not believe that this doctrine applies to this matter.
158. The husband's Counsel consistently referred to the waiver given in consideration of proprietary and financial benefits. I have set out in my Judgment that strictly speaking Twickenham was never partly transferred into the wife's name. Further, the so-called "financial benefits" were no bargain to her whatsoever because those donations were to be taken out in determining her accrual. In terms of the Matrimonial Property Act donations would be exempt from consideration in determining accrual. As I have indicated, this aspect of the matter could never have been explained to the wife because it does not even seem to have been understood by the husband.
159. Furthermore, I find little value in quoting passages out of cases which long pre-date our Constitution. It is of little help to me to quote cases from 1902, 1938 and 1960. No case, even that far back, has ever been quoted to me where there was a waiver of a future right to claim maintenance in an ANC concluded before the marriage.
160. What the husband's Counsel seems adamant in doing is mixing up a waiver of maintenance in a settlement agreement concluded after the marriage with the facts of this case. I have no problem with including a waiver of maintenance in a settlement agreement and even made an

Order of Court because I am conscious of the fact that divorces are often settled on the basis that the wife waives any claim to personal maintenance. But then she would be represented by a South African attorney and both parties would agree that a waiver of this nature be incorporated in the settlement agreement which would then be made an Order of Court. This present matter involved a waiver before the marriage even took place. It was put into the ANC under the circumstances which I have outlined in detail in this Judgment. As I have indicated, it is not helpful to quote cases which are so far removed from this matter as to become irrelevant, albeit that they were decided by prominent Judges. None of these cases relate to a waiver of a right to ever claim maintenance which is incorporated in an ANC and even including a waiver to exercise rights in terms of Section 7 (2) of the Divorce Act.

161. The power of the Court to grant maintenance in terms of Section 7 (2) has an even greater significance today than before the Divorce Act. Previously a divorce required proof of fault. The present situation is that a divorce can be obtained on a no fault system, so the Court's power in Section 7 (2) under proper circumstances to order one spouse to pay maintenance to the other spouse obtains an even greater significance.

162. The husband's Counsel has managed to generate over 200 pages of arguments and documents in support of the husband's argument. This excludes the enormous bundles of copies of cases which are being cited. Nowhere have I been referred to any case in this country which has

implemented a waiver of maintenance provisions by a wife in an ANC and has gone so far as to waive her rights to even claim maintenance in terms of Section 2 of the Divorce Act.

163. I have dealt with the level of advice which the wife received from her mentors and family in Germany. I have dealt with the so-called benefits which she received from the so-called donations and I have indicated that she presents today as a person who is completely insolvent, even if the benefit of a half-share in a common home is valued. I am unpersuaded that there has been any unjust enrichment of the wife's position arising out of this marriage and this ANC. I have dealt with the payment of R300 000.00 and I have already indicated why I am treating that payment as having been made. I therefore do not need to analyse the husband's arguments in regard to this payment. He succeeds on this issue.

164. In summary I would record the following.

165. The contract of marriage is *sui generis*. It is unlike any other contract, e.g. of sale, or *locatio conductio* etc.

166. The institution of marriage is regulated by the law. A marriage can only be performed by a duly appointed marriage officer and a divorce only by a Court of law.

167. The marriage itself is proclaimed to bind the parties to each other “until death” do them part”.
168. The law of divorce strictly controls how and with what consequences a marriage contract can be terminated.
169. Parties to a marriage owe each other a duty of *uberrimae fides* at the time of the conclusion of an ANC and throughout the marriage.
170. It is not helpful to refer to the rules of interpretation of commercial contracts and to seek to import them into an ANC contract. It is also not helpful to seek guidance from judgments by our Courts in respect of different contracts with different rules and methods of termination.
171. In this case, the wife was at a severe disadvantage and I have described those disadvantages in this Judgment. She did not and could not have known and understood the import of this contract in the context of South African law.
172. Her advisers were not able or trained to appreciate the terms of this ANC or its meaning in the South African context.
173. The husband planned this divorce even before he concluded this marriage. The parties were nowhere near an equal bargaining position and the wife was rushed into this contact and marriage by the husband.

174. During the marriage parties owe each other a mutual duty of support in law (maintenance). That duty can only be terminated upon divorce. Only a Court can terminate that marriage and thereby that duty of support.
175. Divorce is now in terms of the no fault system, a right which either party can claim. But, in deserving cases the Court will only do so after considering and ruling upon a maintenance claim.
176. Hence Section 7 (2) of the Divorce Act. At that time, the Court can, if satisfied, refuse to grant a party a maintenance order or even confirm a settlement which waives a maintenance claim forever.
177. Our Courts respect the sanctity of marriage and will not lightly deprive a spouse of his or her rights in terms of Section 7 (2), even if that waiver is part of the ANC and relates to a future unknown state of events.
178. There is a world of difference between sanctioning an agreement which both parties ask to be sanctioned at the time of a divorce action and an agreement made long before the divorce and even more so before they even marry each other.
179. The Heads of Argument of the husbands Counsel reveal faulty reasoning and distorted statements of the history of this marriage, the conduct of the husband, and the evidence before this Court.

180. On the facts of this case, the husband could not escape a defence of “duty of support” in relation to claims for half payments of the rates *stante matrimonio* and even more so now, more than 20 years after he paid them.
181. I do not agree that the ANC was an agreement which was “freely and voluntarily made”. It was imposed upon the wife.
182. The wife was not given a choice or even reasonable opportunity to take proper advice.
183. I know of no case in South Africa where our Courts have held that a waiver of maintenance in an ANC has ever been held by a Court to be binding on a wife. I have not been quoted such authority.
184. I undertook to give reasons for my Judgments in the husband’s application to re-open his case, lead further evidence and introduce certain documents which he had not previously discovered amounting to over 600 pages. He also applied for another separation under Rule 33 (4) so that the Court could immediately deal with his claim for the former common home to be immediately sold or taken over by either party against payment of an amount, as agreed or as determined by the Court. I undertook at the time that I gave Judgment in these two applications to

furnish my reasons for Judgment in both those matters when I give Judgment in the main action. Therefore I would record the following.

185. After the husband had been cross-examined, after he had been re-examined, after he had closed his case and had completed his evidence, the matter was postponed for a further date to enable this Court to hear one further witness, Mr Hilton Greenbaum. Mr Greenbaum was only available on a much later date. While waiting for that date the husband's Counsel launched an application to file a Further Discovery Affidavit containing over 600 pages and for the husband to be recalled to deal with these documents.
186. This application was opposed by the wife and I heard full argument, which was recorded in **Volumes 46 to 48, pp.4759 to 5134**. This covered the period from 16 September until 21 September 2015, during which time I heard argument by Counsel for the wife, lengthy argument by Counsel for the husband, a reply by Counsel for the wife and even further argument by Counsel for the husband.
187. I gave an order in that application, together with my order in relation to another application brought by the husband to be permitted to compel the wife to sell the former common home either to him, or to buy it from him, or to have it sold by public auction or otherwise so that that asset which was in their joint names could be divided.

188. I refused both these interlocutory applications and ordered the husband to pay the costs thereof. At that stage, the trial was virtually completed and the evidence, bar the evidence of Mr Greenbaum, had been heard.
189. As indicated in my judgment, I am quite satisfied that the husband was adopting a “scorched earth” policy to this litigation. He was deliberately seeking to delay the proceedings and from the very beginning was engaging in dilatory tactics to drum up the costs of the action so as to put the wife into a position where she could not afford to defend herself.
190. I indicated at the time of giving those orders that I would be giving my reasons when I finally gave judgment in this matter. Notwithstanding the foregoing, I received various demands from the husband’s attorney requiring me to furnish reasons for judgment as if I had not already indicated that those reasons would be forthcoming when I gave a final judgment in this matter.
191. As Counsel for the wife pointed out in his argument, this was not simply a matter of producing one or two documents which had been overlooked and which were relevant to the matter, but was a re-opening of the husband’s case by introducing over 600 pages of documentation, coupled with the need to recall the wife as a witness to testify in connection with these documents and, as Counsel for the wife pointed out, this Court could hardly not permit the wife to be recalled and, depending on the nature of the documentation, call such other witnesses as may be necessary. It

should be noted that he only introduced these documents now and there are actually 642 pages. It would require a considerable period of time for the wife's Counsel to consult with her in respect of each of these documents. The probabilities are that she would have to be recalled to deal with those documents and, in addition, the husband's accounting expert, Ms Ladopolis, would have to consider these documents and would have to advise the wife and probably be also recalled.

192. This was a crude attempt by the husband to re-open and delay these proceedings for an ulterior purpose. I did not examine these documents and was advised that they were so prolix that even the wife's Counsel and her attorneys were unable in the short time available to look at all these documents and take instructions from their client.

193. The husband, in his Affidavit, said that these documents were not discovered in the first place because they were not relevant, but that they were now relevant in connection with his credibility because of certain answers he gave in cross-examination. The husband has busied himself at all times seeking postponements of this matter to delay these proceedings. I was not prepared to allow him to continue to do so. As Counsel for the wife pointed out, if the husband said that the documents are irrelevant to the issue then they are inadmissible. The husband had good reason to be concerned about his credibility. He damaged that credibility in his own testimony and by his own conduct as set out in my

Judgment. I am not relying to any extent on the unsatisfactory evidence that he has given in connection with cross-examination in relation to particular documents.

194. The husband also indicated that he wanted to amend his Counterclaim and introduce documents which he wanted to rely on in support of the Counterclaim.
195. Counsel for the wife has furnished me with a Chronology and full written argument. He pointed out that cross-examination of the husband had been completed and that while under cross-examination, he claimed to have found these documents and referred them to his legal team for advice. For the husband, a Senior Counsel to conduct himself in this manner is nothing short of scandalous. I am advised that the Supplementary Discovery Affidavit has more than 160 items. These are not pages, but separate items. The only explanation given by the husband as to why he did not discover these documents in the first place is because they were not relevant.
196. As Counsel for the wife pointed out, over the 4 years that this matter has been before the Court, the husband made sixteen Discovery Affidavits. Strangely enough, the first fourteen of them all contain the statement that he had no other documents relating to these issues other than the documents referred to in the Affidavits. Significantly, Counsel for the wife pointed out that the new Discovery Affidavits did not contain this

statement. He also pointed out that there was an inordinate delay between the discovery of these documents and the furnishing of them to the wife's attorney. The husband not only produced these documents but set out over three pages a series of serious and comprehensive admissions which he sought from the wife. Furthermore, he indicated that his Counterclaim would be amended. After the fourteenth Discovery Affidavit, he claimed to have found a second batch of documents where yet another series of admissions were sought. This time he gave notice that he intended to increase his Counterclaim to an amount of R98 000.00. The fifteenth Supplementary Affidavit was also attested and this included 178 different items. Again significantly, there was no disavowal by the husband that he had no other documents in his possession or under his control relating to this matter. This application was coupled with the application I mentioned for a separation of trials in terms of Rule 33 (4) for an Order that the husband's claim that the former common home be divided or sold.

197. I do not intend to deal with all the separate complaints raised by the wife's Counsel as these are set out in **Volumes 46, 47 and 48 of the Record**. In those Volumes Counsel for both parties were given a free opportunity to present their arguments. Nothing said by the husband's Counsel persuaded me to allow this trial to be further postponed and for these documents to be introduced by way of discovery.

198. I deliberately delayed the furnishing of these reasons because I had no doubt that, notwithstanding the fact that these were interlocutory Orders, this would not have dissuaded the husband from trying to appeal these decisions so as to achieve his purpose of delaying these proceedings to attain a tactical advantage over the wife, given her financial and emotional circumstances .
199. My refusal to allow a separation of issues in terms of Rule 33 (4) was motivated by the same consideration. I will not permit the husband to carry out his “scorched earth” policy and drum up the costs of this trial by these inordinate delays. As was disclosed to me in the application, the husband separately sought an Order before a different judge reducing the contribution towards costs which I had previously ordered him to pay and even managed to persuade that other Court to limit the daily period over which that contribution was to be made. I have not had sight of his Affidavit, but I understand that he seems to have persuaded that Court that the wife was delaying these proceedings and that she was being obstructive. If that allegation was made by the husband, it was knowingly false. Be that as it may, I was not prepared to have a piecemeal determination of the issues in this matter because that would open the door to the husband to further delay these proceedings by appealing against an unfavourable award which he would inevitably have received in regard to the separation of issues in relation to the former common home.

200. His Lordship Mr Justice Dolamo had already dismissed an application by the husband for an Order under Rule 33 (4) for a separation of the trial in regard to the validity of the clause in the ANC which deprived this Court of its jurisdiction to grant the wife maintenance.
201. There is no question that the husband made discovery on an incremental basis throughout this matter. He was deliberately obstructive in giving discovery and a great number of Discovery Affidavits were filed.
202. I was also satisfied that the wife would suffer irredeemable prejudice if either of these applications were allowed.
203. Throughout this matter the husband engaged in selective and piecemeal discovery. He deliberately delayed in bringing that application so as to cause the maximum prejudice to the wife.
204. I have refrained from making specific findings in relation to the answers which the husband gave in relation to the documents described in his Affidavit. I must also take into account that he seemed to want to bring a new Counterclaim but that all concerned the same issue as to why he claimed to be entitled to be compensated for expending money on the common homes and in order to maintain and support himself and his wife. As the wife said, he always acknowledged that he would bear those expenses himself and his conduct in all the many years of their living

together was consistent with that statement. I would not permit him to drag these proceedings out any longer.

205. If the husband had made proper discovery in the first place, an application of that nature could never have been even contemplated.

206. In conclusion, therefore, these two applications were brought in bad faith. They were unreasonable and were designed to drag out these proceedings so as to make it impossible for the wife to continue to afford legal representation.

207. Counsel for the husband belatedly filed a further section of her Heads making up 102 pages together with about another 100 pages of copies of documents. They pertain in the main to submissions in regard to the question of costs to which I have given consideration. I am not persuaded that there should be any Order as to costs in the husband's favour. On the contrary the Order for costs which I intend to make is appropriate and well justified by the husband's conduct.

208. I accordingly make the Order as set out in the Order of Court which is annexed hereto and marked X.

Weinkove, A.J.