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

CASE No: 22524/2019

In the matter between:

W[...] H[...] L[...]

Plaintiff

and

J[...] R[...]

Defendant

Judgment

Andrews AJ,

Preamble

[1] *"I am my daughter's hero...I am her father...I just want to see my daughter. That is the only thing I care about"*, were the closing remarks of the Defendant in this opposed divorce action. These are the words of an impassioned father who

conducted his trial in person on the virtual platform from Italy in this opposed divorce action.

[2] The Defendant's Attorneys withdrew as his attorneys of record on 25 April 2024. A virtual judicial case management meeting was conducted on 13 and 14 May 2024. On 16 May 2024, this Court provided written directions for trial in terms of which the Defendant was directed to attend the hearing in person. It is apposite to mention that the Court cautioned the Defendant at the judicial case management hearing that there would potentially be challenges if he were to participate in these proceedings on the virtual platform. The Court was astute to illuminating the probable risks and prejudices of the Defendant not being physically present at the hearing. The Court was alive to the principle of equality of arms¹ and emphasised that both parties should be treated in a manner which ensures that they are in a procedurally equal position to make their case².

[3] On 21 May 2024, being the first day of trial, it became apparent that the Defendant was not going to attend the trial in person, notwithstanding the Court's directive that the Defendant be present in person for the hearing. It bears mentioning that the Plaintiff had travelled from Hong Kong to attend the proceedings in person. The Defendant proffered reasons why he was unable to travel to South Africa, which was primarily due to financial constraints. The Defendant requested that he be

¹ *The Helen Suzman Foundation v Judicial Service Commission* (145/2015) [2015] ZASCA 161 (2 November 2016).

[6] *The principle of 'equality of arms' is an integral part of the rights to fair trial and access to Court as well as the due process of the law in civil, criminal and administrative proceedings. Strict compliance with the principle is required at all stages of the proceedings in order to afford opposing parties (especially the weaker party) a reasonable opportunity to present their case under conditions of equality. It is a principle that was jurisprudentially developed by the European Court of Human Rights but has since been referred to with approval by the Constitutional Court in, inter alia, Bernstein & others v Bester & others NNO [1996] ZACC 2; 1996 (2) SA 751 (CC) fn 154; Zondi v MEC for Traditional and Local Government Affairs & others [2004] ZACC 19; 2005 (3) SA 589 (CC) para 63; and Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission of Gender Equality as Amici Curiae) [2007] ZACC 14; 2007 (5) SA 650 (CC) para 21. See also Pieter van Dijk & Godefridus J H Hoof Theory and practice of the European Convention on Human Rights 3 ed (1998) 430. Further see Jason Brickhill & Adrian Friedman 'Access to Courts' in Stuart Woolman & Michael Bishop (eds) Constitutional Law of South Africa 2 ed (Revision Service 6, 2014) at OS 11-07, 59-73.'*

² *S v S* [2019] ZACC 22; 2019 (6) SA 1 (CC); 2019 (8) BCLR 989 (CC) at para 40.

'Equality of arms has been explained as an inherent element of the due process of law in both civil and criminal proceedings. At the core of the concept is that both parties in a specific matter should be treated in a manner that ensures they are in a procedurally equal position to make their case. In particular, weaker litigants should have an opportunity to present their case under conditions of equality.'

afforded the opportunity to participate on the virtual platform. After carefully considering the submissions made by the parties, the Directions Order made on 16 May 2024 was reconsidered and set aside. The Defendant was permitted to participate in the trial proceedings on the virtual platform, subject to certain strict conditions.

[4] The Court's approach to writing this judgment is focused on ensuring that the Defendant, given the unique facts and circumstances of this case, is fully apprised of the Court's reasons. For the benefit of the Defendant, the salient aspects of the evidence have been encapsulated in this judgment, in greater detail than would ordinarily be necessary in order to assure the Defendant that this Court, in reaching the ultimate conclusion, considered all the relevant aspects of the evidence. Again, for the benefit of the Defendant, if there are aspects not included in this judgment, it does not mean that it was not considered.

[5] Lastly, as will be dealt with later in this judgment, the Rules of Court apply equally to everyone. Therefore, this Court, inasmuch as the Defendant was granted much latitude as a lay person, is enjoined to adjudicate the matter fairly, impartially and most importantly, in the best interest of the parties' one minor child, S[...] G[...] R[...] , ("S[...] ").

Introduction

[6] The Plaintiff instituted relocation proceedings on 23 August 2019 under case number 14777/2019, as she was desirous to return to Hong Kong and take S[...] with her. A Settlement Agreement regulating the relocation was entered into between the parties. The Plaintiff thereafter instituted the divorce action in December 2019, in terms of which she seeks *inter alia*, forfeiture of the patrimonial benefits of the marriage in community of property, and that paragraph 3.9 of the Settlement Agreement be addressed in the divorce action.³

³ Settlement Agreement, para 3.9, page 69.

'It is recorded that the respondent has indicated that he may be relocating and that the parties have agreed that, should this eventuate (and the respondent shall inform the applicant forthwith if this happens), the parties will address this in the divorce action.'

[7] The Defendant, opposes the relief sought by the Plaintiff and seeks an order for division of the joint estate and that effect be given to the Settlement Agreement entered into between the parties pursuant to the relocation proceedings in his counterclaim. In and during 2021, the Defendant relocated permanently to Italy where he currently resides.

Jurisdiction

[8] It is trite that the Court derives its jurisdiction over persons and causes of action by virtue of Section 21(1) of the Superior Court's Act⁴ which states:

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

[9] In terms of Section 2 of the Divorce Act⁵:

'A court shall have jurisdiction in a divorce action if the parties are or either of the parties is—

- (a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or*
- (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.*
- (2) A court which has jurisdiction in terms of subsection (1) shall also have jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned.*

⁴ Act 10 of 2013.

⁵ Act 70 of 1979

- (3) A court which has jurisdiction in terms of this section in a case where the parties are or either of the parties is not domiciled in the Republic shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted.
- (4) The provisions of this Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law.’ (my emphasis)

[10] Both parties were domiciled within the jurisdiction of the Court when the action was instituted. It is trite that once, jurisdiction has been established, the Court’s jurisdiction continues until the end of the action even though the ground upon which jurisdiction was established ceases to exist.⁶ The matter of **McConnell v McConnell**⁷ citing **Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd** and other South African authorities with approval recognised that:

‘This is so even where it is the plaintiff who is responsible for the removal of the grounds for jurisdiction. See Balfour v Balfour 1922 WLD 133; Strydom v Strydom 1945 (1) PH B32 (W). It was submitted that the nature of the present application does not affect this principle, for it is not uncommon in a matrimonial action for a Court to make an order relating to the custody or guardianship of minors who are physically outside its area of jurisdiction...’

[11] Section 6 of the Divorce Act⁸ enjoins a court to consider whether the welfare of any minor child in the marriage are the best that it can be effected in the circumstance. Therefore, the court having regard to the trite legal principles proceeded with the matter on the basis that:

⁶ *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (AD) at 310D.

⁷ 1981 (4) SA 300 (Z) 302A – C.

⁸ Section 6(1) ‘A decree of divorce shall not be granted until the court –

(a) is satisfied that the provisions made or contemplated with regards to the welfare of any minor or dependent child in the marriage are satisfactory or are the best that can be effected in the circumstances...’

- (a) The proceedings were initiated out of this court;
- (b) The cause of action arose in the jurisdiction of the court;
- (c) The Defendant had no objection to the matter proceeding in this court and
- (d) The welfare and interest of the minor child required determination.

Issues to be determined

[12] The identified issues to be determined included:

- (a) The care and contact provisions that are in the best interest of the parties' minor child;
- (b) The extent to which the parties' Settlement Agreement in respect of the minor child, made an order of Court on 17 September 2020 under case number 14777/2019, is to be varied, if at all;
- (c) The quantum of the Defendant's contribution to the maintenance of the minor child and
- (d) Whether the Defendant is to forfeit his right to the benefits of the marriage in community of property.

Maintenance

[13] At the commencement of the trial, the Plaintiff indicated that she would not be persisting with her claim that the Defendant contribute towards the minor child's maintenance. Plaintiff proposed that the Defendant use the funds to facilitate his contact with the minor child in Hong Kong.

Factual Background

[14] The Plaintiff is 42 years of age. She was born, raised and educated in Hong Kong where she qualified as a nurse. The Defendant is a 39-year-old businessman and South African citizen who relocated permanently to Italy in 2021.

[15] In 2003, the parties briefly met in Italy whilst the Plaintiff was travelling during her summer holidays as she was on a break from her studies and the Defendant was visiting his grandfather. After a brief holiday romance, they exchanged a few emails until 2008 when the Defendant informed the Plaintiff that he was engaged. Early in January 2018, after receiving an email from the Defendant towards the latter part of 2017, the parties' relationship rekindled. The Plaintiff then travelled to Cape Town where the parties spent two weeks together.

[16] Thereafter, the Plaintiff travelled back to Hong Kong in mid-January 2018. The Defendant joined the Plaintiff in Hong Kong on 28 February 2018. Whilst in Hong Kong, the parties got engaged. The Plaintiff resigned from her job as a senior registered nurse and put the immovable property that she owned in Hong Kong, on the market for sale.

[17] On 06 May 2018, at a marriage registry situated in Tsim Sha Tsui, Hong Kong, the parties were married to each other in community of property. The parties then travelled back to Cape Town in June 2018. Initially they resided in accommodation rented by the Defendant's parents but after about 3 months, in September 2018, they moved into the property situated at D[...] Street, Lakeside ("the D[...] Street property"), which had been purchased from the proceeds of the sale of the Plaintiff's Hong Kong property. A second property, situated in D [...] Court, Lakeside ("the D [...] Court property"), was also purchased from the proceeds of the sale of the Plaintiff's Hong Kong property.

[18] On 1 November 2018, the Plaintiff left the Defendant for Hong Kong, after some difficulties in the marriage where she stayed for almost 2 months. The Plaintiff was persuaded to return to Cape Town at the end of 2018. S[...] was born on 20 March 2019. The parties experienced further difficulties in the marriage which caused the Defendant to leave the D [...] Street common home in June 2019. There

was an attempt at reconciliation between the parties, which was unsuccessful. As previously stated, the divorce action was initiated in December 2019.

[19] The Plaintiff expressed her desire to return to Hong Kong with the parties' minor child in August 2019, which led to the launch of the relocation proceedings on 23 August 2019, after the Defendant initially refused to give his consent. The Plaintiff appointed Dr Ilse van Der Merwe, a Counselling Psychologist, who recommended that the Plaintiff be able to relocate to Hong Kong with S[...] .⁹ The Defendant initially appointed Mr Bernard Altman and thereafter appointed Dr Glyde Thompson, who in his report dated 16 September 2020, also recommended that the Plaintiff be able to relocate to Hong Kong with S[...] .¹⁰

[20] The relocation application was not argued as the parties entered into a Settlement Agreement on 17 September 2020, which was made an order of Court. Since the Plaintiff's relocation there has been no physical contact between the Defendant and S[...] . As a result, the Defendant is of the view that the Plaintiff is in contempt of the Settlement Agreement. I will return to this aspect later in this judgment.

The Reasons for the breakdown of the marriage as per the pleadings

[21] It is trite that *'[a] court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.'*¹¹

[22] The reasons for the irretrievable breakdown of the marriage as summarised in the Plaintiff's Particulars of Claim included that¹²:

⁹ Index F, Section 12, Psycho-Legal Contact and Care Report, Dr Ilse Van Der Merwe, pages 484 – 502.

¹⁰ Index E, pages 271 – 303.

¹¹ Section 4(1) of the Divorce Act 70 of 1979.

¹² Index A: Pleadings, para 6, pages 4 - 6.

(a) The Plaintiff lost her trust in the Defendant more particularly that:

- (i) the Defendant failed to disclose the marital regime options available for the parties to regulate their marriage under South African law, advising her that the only marital regime option was that of being married in community of property, which was done with the objective of benefiting himself financially at the expense of the Plaintiff;
- (ii) the Defendant dissuaded Plaintiff from taking independent legal advice when she purchased the two immovable properties in Cape Town, using her own resources which she had accumulated before the conclusion of their marriage, allowing him to financially benefit therefrom.

(b) The Defendant conducted himself in a financially abusive manner towards the Plaintiff in that:

- (i) Defendant failed to make any financial contribution whatsoever towards the acquisition of the immovable properties or towards their maintenance and/or upkeep;
- (ii) Defendant wilfully frustrated the Plaintiff's ability to generate a rental income from one of the immovable properties, thereby depriving her of an income upon which she and the minor child were dependent;
- (iii) Defendant failed to make meaningful financial contributions towards the parties' household and daily living expenses and/or towards the maintenance needs of their child;
- (iv) As a result of the foregoing, Defendant's financial circumstances had substantially deteriorated.

(c) The Defendant conducted himself unacceptably towards the Plaintiff during the marriage by:

- (i) Being demeaning and disparaging about the Plaintiff and her culture in private and before third parties;
 - (ii) Being verbally and emotionally abusive towards Plaintiff, which caused her to fear for her own health and safety and
 - (iii) Demeaning the Plaintiff's dignity by demanding sexual favours after the parties separated from one another.
- (d) The Defendant vacated the common home in June 2019 and after a failed attempt at reconciliation, the parties have finally separated since December 2019.
- (e) The Plaintiff no longer feels any love or affection for the Defendant and has no interest in the continuation of the marriage.

[23] The Defendant in his plea, admitted that the marriage between the parties had reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship, but denied the reasons as suggested by the Plaintiff. In this regard, the Defendant averred that the marriage between the parties has broken down for the following reasons:

- (a) That the Plaintiff was emotionally and psychologically abusive throughout the course of the marriage;
- (b) The Plaintiff placed unreasonable pressure and demands on the Defendant to maintain a lifestyle above their means;
- (c) The Plaintiff would consistently request the Defendant to vacate the marital home and frustrate contact between him and S[...] whenever the Defendant did not meet the Plaintiff's unreasonable demands;

- (d) The Plaintiff's constant berating and belittling of the Defendant, coupled with one incident where she physically attacked the Defendant;
- (e) There is no meaningful communication between the parties;
- (f) The Defendant left the marital home at the Plaintiff's behest for the final time on 13 January 2020; and
- (g) The Plaintiff made false and unfounded allegations against the Defendant and applied for an interim protection order against the Defendant, which complaint was subsequently voluntarily withdrawn.

[24] It is uncontroverted that the marriage relationship between the parties has irretrievably broken down, despite the Defendant's concession that he still has residual feelings for Ms L[...].

Forfeiture of the patrimonial benefits of the marriage.

[25] The parties in this matter were married to each other in community of property on 6 May 2018. It is trite that upon dissolution of a marriage in community of property, the default position is that the assets of the joint estate are to be divided equally between the parties. The exception to this rule is provided for in section 9(1) of the Divorce Act which provides as follows:

'(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.'

[26] In **Wijker v Wijker**¹³, the court adopted the following approach in dealing with the issue of forfeiture claim:

*'It is obvious from the wording of the section (section 9) that the first step is to determine whether or not the party against whom the order is sought will in fact be benefited. That will be a purely factual issue. Once that has been established the trial court must determine having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefited if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial court after having considered the facts falling within the compass of the three factors mentioned in the section.'*¹⁴

[27] It is the Plaintiff's contention that it would be just and equitable that the Defendant forfeits any patrimonial benefits in the Plaintiff's favour for the following reasons:

- (a) The Defendant did not make any direct and indirect contributions towards the acquisition of the assets;
- (b) The Defendant did not make any direct and indirect contribution towards the maintenance or upkeep of the assets;
- (c) There has been substantial misconduct on the part of the Defendant towards the Plaintiff.

[28] Although the Defendant pleaded division of the jointed estate, his primary focus throughout the hearing of the matter was to secure his contact with S[...] . On more than one occasion he indicated that he did not really care about the marital assets and pertinently indicated that "the marital assets are a distant second to me in terms of importance...". At some point the Defendant offered the Plaintiff all the

¹³ 1993 (4) SA 720 (A).

¹⁴ at 727.

assets so that he could see S[...] , however; because his proposition was rejected, the Defendant, in his Heads of Argument stated:

'I would request that I do not forfeit the marital assets for the specific reason that I do not believe that this will be the last trial as the plaintiff has never adhered to the settlement agreement in terms of care & contact & I will need to use my share to fund future trials. If she were to win everything, I can guarantee with complete certainty that I will never hear from her & my daughter again, as she is completely protected in Hong Kong with no mirror order...'

Marital Regime

[29] The Plaintiff testified that the parties were married to each other in Hong Kong in 2018 in the Magistrates Court. She orated that she was unaware that she had other options and receive no legal advice in respect of the other matrimonial property regimes. According to the Plaintiff, she went with what the Defendant told her to do as according to him, it was the only way to get married. She stated that if she knew about other options she would have chosen not to get married in community of property.

[30] The Defendant on the other hand testified that he married the Plaintiff under duress as there was a threat to take his passport away. The Plaintiff denied having cancelled air tickets on two occasions and then reinstating them when the Defendant agreed to marry her. The Defendant stated that he was concerned about his well-being and his only recourse was to get married to the Plaintiff.

[31] The Defendant orated that it was the Plaintiff who had arranged for the marriage to be in community of property and that he found it bazaar that she didn't arrange an antenuptial contract and did not protest to the registration of the marriage in South Africa. The Plaintiff stated that although she organised the wedding, she was not familiar with family law.

[32] The Court, has regard to what the Plaintiff testified were the reasons why the parties got married, *vis a vis* the reasons the Defendant says the parties decided to

get married. Inasmuch as the Defendant does not agree with the submissions made by Counsel for the Plaintiff regarding the contradictions highlighted, the evidence in this regard, in the form of what Dr Thompson recorded in his report as well as what the Defendant expressed to Harry Trisos cannot be ignored. The explanations proffered by the Defendant, in my view, appear implausible when considered on the probabilities and in light of the totality of the evidence. I will deal with these aspects more fully later in this judgment.

Undue benefit

[33] In considering the matter of forfeiture as a starting point, it is trite that the party seeking forfeiture is to show that if an order of forfeiture is not granted, the party against whom the order is sought will unduly benefit from the benefits derived from the marriage. The primary consideration is therefore whether any benefit which might accrue to the Defendant, because of the marriage in community of property, would be undue.

[34] The Plaintiff testified that the Defendant promised that he would look after her financially. She then quit her job and she put her house on the market. Documentary evidence was provided in relation to the Agreement for Sale and Purchase of the Plaintiff's property in Hong Kong, which bears the date of 29 March 2018.¹⁵ This property was sold for HK\$ 6 800 800.¹⁶ The proceeds of the sale was sent over to South Africa and paid into the Defendant's bank account. The amount in South African currency amounted to R7 376 497. According to the Defendant, he discouraged the Plaintiff from selling her property in Hong Kong.

[35] The Plaintiff testified that when they were in Hong Kong, he did not pay for anything, but claimed he was a "slave". Traditionally it would have been the Defendant's responsibility to pay a dowry to her father but she had to do so. The Defendant however regarded the Plaintiff's fathers' demands as being interfering and tantamount to human trafficking. The Plaintiff also paid for the associated costs of the wedding which included *inter alia*, the clothes, venue, flowers and the supper.

¹⁵ Trial Bundle F, page 2.

¹⁶ Trial Bundle F, page 27.

[36] According to the Plaintiff, they bought the D[...] Street property for cash. She explained that it was the Defendant who made the deal with the Estate Agent. She expressed that she wasn't happy as the house was too expensive. It was put to the Plaintiff that she was the one who wanted to purchase the D[...] Street property. She responded by saying she did not agree to the price and signed the documents because the Defendant had asked her to sign. The Plaintiff remained steadfast that it was the Defendant who had misled her into buying the house that was ultimately purchased for R2 650 000. The transfer costs amounted to R164 000. The bank records to which she was referred confirmed the deposit amount that was paid. They spent an amount of R200 000 to furnish the D[...] Street property. According to the Defendant, the furniture expense was against his will. Thereafter they bought a second property situated at 5 D[...] Court Lakeside for R1 230 000. This property was also bought from the proceeds of the sale of the Plaintiff's Hong Kong property.

[37] The transfer costs for the D[...] Court property amounted to R103 000. The parties rented out the D [...] Court property. In addition, a motor vehicle was purchased and an amount of R265 000 was paid to the dealership. According to the Plaintiff, the vehicle is gone as the Defendant sold the vehicle without her permission and kept the proceeds. The balance of the money, after purchasing the two properties and the vehicle, went towards paying her mother R850 000 and her father R1 360 000. There was approximately R554 497 left which she used for living expenses for herself and S[...] as well as legal fees. The Plaintiff stated that she has no money left from the proceeds of the sale of her Hong Kong property.

[38] The Plaintiff orated that the Defendant was never employed. She further explained that she received no financial contributions from the Defendant, except for having received a once-off amount of R7 000 for maintenance. The Defendant on the other hand, referred to his balance sheet where it was indicated that he paid for all the D[...] Street rates and tax as well as gifts to the Plaintiff. The Plaintiff regarded these payments as negligible, rates on the properties.

[39] The Plaintiff's assets, as at the time when she testified, comprised of her 50% share in the immovable properties, policies and bank account credit balances

all amounting to R2 241 870.¹⁷ In order to survive she had to take out loans as the balance of the proceeds in the amount of R554 497 was depleted to cover her and S[...] 's living expenses and her legal costs. The Plaintiff's liabilities amounted to R2 195 663. The Plaintiff provided a detailed exposition of her income and monthly financial commitments.¹⁸ She also testified that she receives a 50% of the rental income from the D[...] Court property, which amounted to approximately R6 618.33 per month.

[40] Counsel for the Plaintiff contended that the Defendant was dishonest with his finances and his financial contributions to the marital relationship. The Defendant maintained that he was gainfully employed at all material times and that he earned sufficient income to make significant contributions. In support hereof, the Defendant referred to the tax amount that he paid in 2018 in the amount of R11 000. The Defendant also referred the court to various invoices for which he said he was financially responsible.

[41] The Defendant could however not refute that a total of R4 527 461.23 was paid into his account. After various transactions he was left with an amount of R141 999. During cross-examination, it was established that payments the Defendant claimed he made for example, the rates and taxes for the D[...] Street were evidently made from the surplus in the amount of R141 999 of the proceeds of the sale of the Plaintiff's Hong Kong property. Counsel for the Plaintiff demonstrated this conclusion from information sourced from the Defendant's own trial bundle. In this regard, it was highlighted that for the tax year 2018, the Defendant disclosed to SARS an amount of R22 410 per annum and for 2019 an amount of R38 454 per annum respectively.

[42] Whilst the Defendant in his Heads of Argument contended that Counsel for the Plaintiff only produced calculations from his Capitec Accounts and not his Bidvest Account, it remained the Defendant's duty to place the relevant evidence before court, which he had not done. I pause here to mention that the Defendant's trial bundle comprised of 454 pages, of which the bulk of the documents, possibly

¹⁷ Index F, Assets and Liabilities spreadsheet, page 1

¹⁸ Index F, Monthly maintenance requirements, pages 329 – 331.

337 pages thereof, were account statements and income tax statements. These documents are meaningless if the specific purpose therefore have not been dealt with in evidence.

[43] The Defendant refuted that he “was useless” and suggested that his tax documentation is proof that he had an income.¹⁹ According to the Defendant, the interest which accrued was paid into the Plaintiff’s banking account. Even if the Defendant paid tax in 2018, the issue for determination essentially turns on whether he contributed to the purchase of the major assets in the estate.

[44] The Defendant testified that his father and mother also gave the Plaintiff money and took care of her well-being. He further narrated that he gave the Plaintiff between R100 and R10 000 every 2 to 3 months. He testified that he paid for the plumbing expenses. He explicated that he had a job at UCT where he worked on site for 3 weeks. He stated that he had a long history with the school of business at UCT, spanning back 15 years.

[45] It is also noteworthy that while the Defendant claimed to have paid for the birth of S[...] in an amount of approximately R47 000, it came to light that the birthing expenses were covered by his grandparents and his father’s brother. The Defendant stated that he also made 2 payments from his accounts and questioned whether it mattered who paid for the birthing expenses of S[...] , which ought to be viewed within the context of Italian customs. I understand that the Defendant regarded this contribution as coming from himself, by extension in terms of Italian culture, however, it is unrefuted that it did not come from his bank account or personal resources.

[46] It is evident that there are numerous factual disputes in relation to the version of the Plaintiff and Defendant. The adjudication upon two mutually destructive versions require consideration. The matter of **Stellenbosch Farmer’s Winery**

¹⁹ Defendant’s discovery bundle, pages 374 and 376.

Group LTD and another v Martell et Cie and Others²⁰ is instructive on this point where Nienaber JA stated the following:

‘The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as –

- (i) the witnesses; candour and demeanour in the witness-box,*
- (ii) his bias, latent and blatant,*
- (iii) internal contradictions in his evidence,*
- (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,*
- (v) the probability or improbability of particular aspects of his version,*
- (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.*

As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on

²⁰ 2003 (1) SA 11 (SCA) at para 5.

- (i) *the opportunities he had to experience or observe the event in question; and*
- (ii) *the quality, integrity and independence of his recall thereof.*

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail'.

[47] The considerations articulated in this matter have been quoted with approval in plethora of subsequent judicial authorities.²¹ In determining whether the Defendant stands to unduly benefit from the marriage, it is therefore incumbent on this court to evaluate the evidence with due regard to the credibility and reliability of the witnesses as well as the probabilities and improbabilities.

[48] On the Defendant's own version, he had limited resources as he testified that one of the reasons for not visiting Hong Kong in 2023, was because he had a limited budget. It is undisputed that the Plaintiff had, prior to the marriage accumulated her own financial resources independently from the Defendant.

[49] Insofar as the motor vehicle is concerned, the Defendant explained that his erstwhile attorneys advised him to sell the vehicle to fund the relocation matter as he purchased the vehicle in his name. The Defendant's explanation proffered in court as to why the vehicle came to be registered in his name, was that the dealership advised him that the vehicle had to be transferred into the name of someone with a

²¹ *National Employers General Insurance v De Jagers* 1984 (4) SA 437 (E) at 440D-G; *Santam Beperk v Biddulph* 2004 (5) SA 586 (SCA) at para 5 and 20; *De Beer v Road Accident Fund* ZAGPJHC 124 (28 March 2019). *Ntsele v Road Accident Fund* (2017) ZAGPHC (1 March 2017) at paras 13-14.

driver's license. According to the Defendant, it was the Plaintiff who insisted on purchasing the car, as he had a vehicle at the time.

[50] The unrefuted evidence is that the Plaintiff contributed 100% to the acquisition of the patrimonial assets of the joint estate, namely:

- (a) the purchase price and transfer costs of the D[...] Street property in the sum of approximately R2 800 000;
- (b) the purchase price and transfer costs of the D[...] Court property in the sum of approximately R1 330 000;
- (c) the furnishing of the D[...] Street property, in the sum of approximately R200 000 and
- (d) the purchase of a motor vehicle in the sum of approximately R265 000.

[51] The Plaintiff's evidence was supported by objective documentary evidence. The Defendant argued that fairness is not a ground for forfeiture. It is my considered view that the Defendant's contributions were negligible. It is trite that the court has a discretion to make an order of forfeiture of benefits if satisfied that the party against whom the order is sought would be unduly benefited in relation to the other party if the order is not made. I am therefore satisfied, based on the undisputed independent evidence that any benefits that might accrue to the Defendant by virtue of the marriage in community of property, more particularly the immovable property, the furnishings of the property and the motor vehicle are undue.

[52] It follows that once this determination has been made, the court is to consider the factors set out in Section 9(1) of the Divorce Act. In terms of Section 9(1) of the Divorce Act the court is cloaked with a discretion to make an order for forfeiture after having regard to the following factors:

- (a) duration of the marriage;

(b) the circumstances that gave rise to the breakdown of the marriage relationship; and

(c) substantial misconduct on the part of the party against whom the order is sought.

[53] In *Binda v Binda*²², the court held that the legislature in section 9(1) of the Divorce Act required that each of the factors should be given due consideration without requiring the presence of each one of them, including their accumulative effect.

Duration of the marriage

[54] On the Plaintiff's version the parties lived together for approximately 12 – 13 months; bearing in mind that the Plaintiff travelled between South Africa and Hong Kong on a few occasions since the marriage in May 2018. Divorce proceedings were instituted in December 2019. On the Defendant's version, the parties reconciled on 3 occasions. The Defendant wishes the court to consider that the parties story goes back to 2013. The Defendant submitted that he did not regard the marriage as being of a short duration.

[55] The duration of the marriage is effectively calculated from the date of marriage and not when the parties started dating. Therefore, on a generous calculation based on the Defendant's version which will include the attempts at reconciliation, the relationship, will for the purposes of this matter, be deemed to have seized on 13 January 2020, being the date given by the Defendant that their relationship ended. There is no dispute that the parties have lived on separate continents since October 2020.

²² 1993 (2) SA 123 (W) at 124.

[56] The considerations in **KT v MR**,²³ serve as a useful guide as the marriage broke down within 24 months and the issue of misconduct did not arise. The court held that:

*‘... the longer the marriage, the more likely it is that the benefit will be due and proportionate, and conversely, the shorter the marriage, the more likely the benefit will be undue and disproportionate.’*²⁴

[57] I am of the view that the duration of the marriage *in casu* is on the facts presented, relatively short, given that there were a number of breaks during the period 2018 – 2019 as per the evidence. Consequently, on the conspectus of the evidence *in casu*, the court would be justified in granting a forfeiture order based on the duration of the marriage alone. Whilst the duration of the marriage would justify an order for forfeiture, I nevertheless deem it prudent to consider the other remaining factors in order to concretise my findings in this regard.

Circumstances which gave rise to the breakdown of the marriage

[58] It is trite that Section 9 of the Divorce Act envisages substantial misconduct. In **Wijker v Wijker**²⁵ (*supra*), the court held that substantial misconduct is one that is found to be so *‘obvious and gross that it would be repugnant to justice to let the “guilty” spouse get away with the spoils of the marriage.’* The authorities are furthermore clear that the court is to have regard to the factors cumulatively. The matter of **Botha v Botha**²⁶ endorsed the principles emanating from **Wijker v Wijker** (*supra*) and impressed that the application of Section 9 of the Divorce should be within the context of the evidence tendered in court.

[59] The circumstances which gave rise to the breakdown of the marriage is integrally interwoven with the allegations of the Defendant’s misconduct. There are certain factual disputes that emanates from the respective versions of the parties

²³ 2017 (1) SA 97 (GP) at p105.

²⁴ at para 105.

²⁵ At para 28.

²⁶ 2006 (4) SA 144 (SCA).

which will require evaluation by way of application of the trite legal principles as earlier illuminated in ***Stellenbosch Farmer's Winery*** (*supra*).

The evidence

[60] The Plaintiff confirmed the content of Dr Glyde Thompson's report, in support of the relocation application as being an accurate narrative of the timeline of events and her naivety insofar as it related to what she was given to believe by the Defendant.²⁷ The Plaintiff testified that the marriage was not a happy one and provided anecdotes of events to augment the reasons that led to the breakdown of the marriage. The Defendant challenged Dr Thompson's report and stated that he did not only marry for money. According to the Defendant, their relationship started out as an affair. He described that he and the Plaintiff had a love bond. He testified that he believes that if the Plaintiff did not apply for a divorce, they would still be married.

[61] The Plaintiff narrated that on the evening of the marriage they had an argument before the wedding dinner which was attended by her family and a few very close friends. The Defendant did not show up for the supper. She expressed that she felt embarrassed and wanted a divorce at that time already. The Defendant's version under cross-examination was that the Plaintiff had left him on the street. He explained that Ms L[...] got angry because he took off the flower from his lapel and threw it in the bin. The Defendant's explanation was that because he did not speak Cantonese, he was unable to find out where to look for the venue.

[62] The Plaintiff testified that the Defendant had erratic mood swings, had a lack of interest to find suitable employment and a general lack of basic hygiene. The

²⁷ Index E, Dr Glyde Thompson, Psycho-legal Report, page 280 '*...The decisions made by S[...]2 to move to south Africa, sell her only residential property in Hong Kong, pay her father the matrimonial bride price (which is ordinarily paid by the husband to be), buy two properties in South Africa with the proceeds of her property sale, place both these properties in her and J[...]s name, purchase a vehicle and place the vehicle in J[...]s name, all in a space of approx.. 6 months, not only shows S[...]2s naivete but also represents the trust she placed in J[...] and the vision of a life he promised. It is evident from the case history that J[...] oversold himself with regards to this vision and once they started living together and they also started to have interpersonal problems the relationship quickly soured and reached tipping point. Six months into her arriving in Cape Town, S[...]2 moved back to Hong Kong and once there she had doubts about returning. However, after talking to J[...]s father she decided to return...*'

Plaintiff orated that they would have arguments. She described that the Defendant would emotionally abuse her. The Plaintiff was referred to a transcript of a WhatsApp audio recording of a message by the Defendant and a Mr Harry Trisos, the Defendant's erstwhile legal representative. The Plaintiff explained that she listened to this voicemail and was shocked to learn that the Defendant had actually tricked her into marrying her with the objective of getting all her money. The salient portions of the audio recording were read into the record.

[63] The Plaintiff recalled an incident that while she was 4 months pregnant, she was kicked out of the house and the Defendant's mother refused to open the door for her. She described how she had to stand outside in the pouring rain. The Defendant on the other hand denied that the Plaintiff was locked out of the house in the pouring rain when she was 4 months pregnant.

[64] She furthermore recounted an incident where the Defendant had damaged her cellphone. In addition, she related an incident that happened when her family visited them in October 2018. This invite, according to her, was at the behest of the Defendant to celebrate their wedding. They had a dinner at Groot Constantia. The Plaintiff testified that her father ended up paying for the dinner. She explained that the Defendant conducted himself towards her parents in a disgraceful and abusive manner.²⁸ The Defendant on the other hand, denied that it was his idea to host the Plaintiff's family for a wedding dinner in Cape Town.

[65] In another narrative, the Plaintiff orated that her family cooked Hong Kong food and invited the Defendant and his family over. Only the Defendant and his father arrived. The Defendant on the other hand, could not recall eating with Ms L[...]'s family where it was only him and his father in attendance. Initially he could not remember being critical of the food. Later during cross-examination he conceded that he might have said that he did not like the food.

²⁸ Index E, Relocation Application, page 11, para 15 '*Relations between the Respondent and myself deteriorated further when, during October 2018, and after my parents came over from HKSAR to visit us, Respondent conducted himself towards my parents and towards me in such a disgraceful and abusive manner that on 1 November 2018 I left him to return to HKSAR.*'

[66] According to the Plaintiff, the Defendant claimed that he was dizzy and felt sick after complaining about the food. He left the dinner and when she returned home, she found him lying on the bed busy on her phone. Her father got angry when he saw this. She and her father spoke in Cantonese to each other. The Defendant wanted to know what they were saying. He got angry because he thought they were talking about him. The Plaintiff requested the Defendant drive her to where her family was staying in Lakeside. The Defendant did not do so, forcing her to tell him what they were talking about. This led to the incident where he drove around with her until at some stage he asked her to get out of the vehicle at an unknown place in Tokai. She alighted from the vehicle and hid in the bush.

[67] The next morning, she was woken up and informed that her father and the Defendant were in a fight. When she saw her father, his shirt was torn, and his nose was bleeding. Soon thereafter she left to go back to Hong Kong and returned 2 months later as she was pregnant and garnered the hope to save the marriage.

[68] The Defendant's version was that he could not remember that the Plaintiff found him on the bed going through her phone and therefore was unable to deny it. He could not remember doing anything wrong. He only recalled the Plaintiff's father slamming the door and the Plaintiff running down the street. He explained that he found the Plaintiff crying down the street because her father shouted at her. He denied telling the Plaintiff to get out of the car and stated that she had in fact refused to talk to him and at some stage started screaming and hit him with her phone. This is when he drove to the garage and asked her to give him a moment. She then jumped out of the car. When asked why he did not try to get the Plaintiff back into the car, he stated that he went looking for her but she had disappeared. He sought help from his brother and they eventually found the Plaintiff.

[69] The Defendant stated that he did not see the Plaintiff for about a week thereafter. She then returned to Hong Kong because of the fight with her father. According to the Defendant, the Plaintiff's father threatened not to speak to her again if she did not return to Hong Kong.

[70] The Plaintiff stated that the Defendant's father promised to take care of her. The undertaking by the Defendant's father never materialized and the relationship between her and the Defendant did not improve. According to the Defendant, his father concocted the story that he was working for him. The Defendant's version is that his father's business "had gone into oblivion" and that he hadn't worked for his father since he was 30 years old. The Defendant averred that they acted in the interest of S[...] , who was born through what he referred to as "our manipulations to stop her from aborting the child".

[71] In another incident the Defendant accused the Plaintiff of not feeding S[...] and for giving too much attention to her cats. She recalled that on one particular night he took S[...] to his parents' house when she was only a few weeks old at the time. The next morning at around 7 a.m. the Defendant stated that S[...] wasn't looking good, accusing her of not feeding S[...] . When he took the child to the doctor she was absolutely fine. The Defendant also threatened to throw all her cats away if she did not breastfeed S[...] .

[72] The Defendant narrated that the Plaintiff was hostile and refused to feed S[...] . The Defendant confirmed that he took S[...] to the emergency room. The Defendant refuted that the doctor indicated that the child was fine the next morning as according to him, the child spent the whole morning at his mother's house.

[73] The Plaintiff further articulated that she had asked the Defendant to leave the house, but he didn't do so immediately. When he ultimately left in June 2018, he retained the keys to the house which allowed him free access to the house whenever he felt like it.

[74] In another instance, she explained, that when she arrived home at around 4:00 p.m. she found that the front door was open, and her belongings were in the front yard. She asked the Defendant and his mother what they were doing, and they did not respond. When she tried to put her belongings back, she was told that she should not bother as they will do the same thing tomorrow again.

[75] In a further occurrence, policemen were sent to her to inquire about childcare that was reported. She was then given advice to obtain a protection order which she did on 5 August 2019. The Plaintiff explained that she did not proceed with this protection order because the Defendant told her that it would destroy him.

[76] During cross examination, the Plaintiff denied that she hit the Defendant with a phone on his head in the car. The Plaintiff denied that she bit the Defendant on his stomach around his liver. The Plaintiff denied that she is pretending to have a limited command of the English language and confirmed that she completed her Master's degree in English.

[77] Many propositions were refuted or denied by the Plaintiff which included the suggestion that it is Chinese tradition for the paternal father to pay and that his parents attempted to pay their portion of the dinner. It also came to light that the Defendant stopped the Mountain Men security when he left D[...] Street and refused to pay, as a consequence, she was obliged to pay for her security. The Plaintiff denied that he attempted to reinstate Mountain Men.

[78] The Defendant, during cross-examination was confronted with the content of his message to Mr Trisos; more particularly that the marriage was a charade; that he took advantage of the Plaintiff's English and ignorance of South African Law and that he tricked her to get the properties onto his name. It was put to the Defendant that he had made no mention of being concussed or lying in a hospital bed at the time when he was messaging Mr Trisos. It was suggested that the Defendant invented a story that he was concussed because he was only in hospital for 4 hours as was confirmed by the Defendant. It is noteworthy that the Defendant provided no proof that he was actually admitted in hospital as elicited during cross-examination. The Defendant confirmed that he had discovered no proof that he was in fact admitted to hospital for 4 hours as he claims.

[79] The veracity of the Defendant's version was further challenged in terms of what Mr Trisos conveyed to the Plaintiff's attorney. The Defendant explained during cross-examination that there were in fact 2 recordings and that the voicemail referred

to was in fact sent a week later, namely 27 October 2018. However, according to Mr Trisos the Plaintiff's father assaulted the Defendant on 20 October 2018.

[80] Counsel for the Plaintiff contended that the message was remarkably coherent for someone who had a concussion. In court, the Defendant explained that the message he left should be considered in the context that he was concussed at the time which was combined with an "adrenalin surge". During cross-examination he also explained that the reason for the message was because he wanted to hurt the Plaintiff and because he was angry.

Submissions regarding substantial misconduct

[81] Counsel for the Plaintiff argued that there were a number of factors that constituted substantial misconduct. Firstly, the message from the Defendant to Mr Trisos where he said:²⁹

- (a) His marriage to the Plaintiff was a "farce" and a "charade";
- (b) He took advantage of the Plaintiff's lack of English and her ignorance of South African law;
- (c) He tricked the Plaintiff into giving him 50% of her property by marrying her in community of property;
- (d) His plan was to get the properties into his name.

[82] The Second aspect that the Plaintiff argued amounted to misconduct on the part of the Defendant pertained to the communications sent by the Defendant to the Plaintiff after the marriage had broken down; the contents whereof were insulting, threatening and harassing.³⁰ Examples thereof included:

²⁹ Index F, Section 36, pages 359 – 360.

³⁰ Index F, Section 6, pages 394, 378, 380 and 384.

(a) He threatened to expose her “psychopathic” behaviour to the world;³¹

(b) That he had installed software which would go digitally live so that the whole world could see “what evil looks like”;³²

(c) He accused the Plaintiff of stealing and kidnapping S[...];³³

[83] In the email dated 20 January 2024 addressed to Ms L[...], by the Defendant he wrote “...By the time you get me in jail, you all will be in jail.”³⁴ He explained that he wrote it in response to not seeing his daughter for years.

[84] The Defendant however indicated that the majority of the communications were not like that. The Defendant during his testimony admitted to saying a lot of inappropriate things but orated that he did not think it to be harassment. He explicated that he was suffering tremendously as the Plaintiff has locked him out of his daughter’s life. The Defendant expressed frustration because the Plaintiff stopped responding to his emails. He also expressed that what the Plaintiff did to him was hurtful.

[85] It is manifest that the Defendant did not desist from sending communications to the Plaintiff, despite being requested to do so by the Plaintiff’s attorneys. The Defendant conceded during cross-examination that the email messages would have been perceived as threatening. He conceded that he had directed many communications with threatening undertones. When confronted with certain of this communicate, he did not agree to it being tantamount to harassment but explained that he was desperate to have contact with his daughter as previously stated.

[86] Thirdly, Counsel for the Plaintiff submitted that the court is to have regard to the nature of the content of communications sent by the Defendant to the Plaintiff’s

³¹ Index F, Section 6, page 394.

³² Index F, Section 6, page 394.

³³ Index F, Section 6, pages 388 and 396 “*You stole my child from me and I am getting her back...I fear nobody! You f...ing kidnapped my daughter!!! And everyone that helped you will be exposed.*”

³⁴ Index F, Email dated 20 January 2024, page 393.

attorneys which were also insulting, threatening and harassing of her.³⁵ Despite the Defendant being asked to refrain from this conduct, the Defendant did not accede to the request. During cross-examination the Defendant acknowledged that many of the email communications were inappropriate.

[87] Fourthly, it was highlighted that the court is to have regard to the Defendant's attitude towards Dr Poon Mak, the Plaintiff's expert which was derogatory and demeaning of her. The attack on Dr Mak, was indeed shockingly inappropriate to the extent that the language used in the onslaught on her such as calling her as *inter alia* being a "financial prostitute", a "hired gun" and a "monster" is deserving of censure.³⁶ To add insult to injury he called her a "c..." and wrote:

'I truly hope that you burn in hell and that your death is one of inexplicable suffering and torment when it happens, hopefully from a terrible disease of cancer...

*The reality is, that while you prostitute yourself for money my daughter is suffering...and while I know that you are incapable of actually feeling remorse because of your lack of humanity, just know that I see straight through you...'*³⁷

[88] When confronted about this during cross-examination, the Defendant also admitted to the contents of the email communications to Dr Mak being inappropriate. I will deal with Dr Mak's report later in this judgment.

[89] Fifthly, Counsel for the Plaintiff submitted that the court is to take cognisance of the Defendant's attitude towards other experts where for example:

(a) The Defendant referred to Dr Ilse Van Der Merwe as "a gun for hire";

³⁵ Index F, Section 7, pages 399 to 432.

³⁶ Index F, Section 8, pages 434 and 440.

³⁷ Index F, Section 8, page 441.

(b) The Defendant referred to Dr Glyde Thompson's report, his own expert, as being "nonsense" because he did not understand Chinese or Italian Culture. He made other spurious accusations and innuendos;³⁸

(c) The Defendant was dismissive of Dr Czech's recommendation that he requires to see a psychiatrist regularly.

[90] It was furthermore highlighted that the Defendant, during cross-examination accused all of the experts of being unethical.³⁹ Sixthly, it was argued that the Defendant's evidence during the trial was a sustained personal and reckless attack on the Plaintiff and her family and Hong Kong with a view to portraying her, her family and Hong Kong in a poor light. In this regard, it was contended that the Defendant made wild, unsubstantiated claims as to the Plaintiff's conduct, certain of the Plaintiff's family members and life in Hong Kong in general.

[91] Counsel for the Plaintiff submitted that the Plaintiff's narration of specific incidents in support of the reason for the irretrievable breakdown of the marriage, were sufficient for the court to find in favour of a forfeiture order. It was furthermore argued that the above factors on its own, are sufficient for this court to grant forfeiture on the basis of the Defendant's substantial misconduct.

[92] The Defendant testified that the Plaintiff was abusive which was corroborated by a copy of an affidavit from Benson Tembo.⁴⁰ The Defendant also stated that the Plaintiff, in a WhatsApp conversation, admitted to having a temper.⁴¹ According to the Defendant, the Plaintiff would assault him when they had arguments. The Defendant also referred to Dr Thompson's report where the Plaintiff admitted to assaulting him. He recounted an incident where there were glass shards in the driveway with the objective, according to the Defendant, of popping his tyres. The Defendant stated that the Plaintiff called him a loser and insisted that he park in the road. He stated that the Plaintiff refused to pick up the glass, that remained there for 3 weeks.

³⁸ Plaintiff's Heads of Argument, para 91.2, pages 38 – 39.

³⁹ Plaintiff's Heads of Argument, para 91.4. page 39.

⁴⁰ Defendant's discovery bundle, page 436.

⁴¹ Defendant's bundle, page 442.

[93] The Defendant suspected that the Plaintiff was romantically involved with his best friend Mr Lottering who had a drug problem. This, because Mr Lottering went to Hong Kong to visit the Plaintiff. He likened the Plaintiff to being like a proverbial Jekyll and Hyde; where she would be warm or cold and angry. She would, according to the Defendant perpetually kick him out of the house.

Evaluation

[94] I deem it prudent to mention that the Defendant was cautioned at the commencement of the hearing to the limitations of conducting his case on a virtual platform. This court is acutely aware that the Defendant is a lay person, the rules of evidence is clear. There are countless examples of factual submissions that were not put to the Plaintiff during cross-examination. The Defendant on numerous occasions made unsubstantiated assertions as to the Plaintiff's conduct, which he claims to have disclosed in a digital report which was not placed before the court.

[95] It is trite that in civil litigation, evidence is the substratum on which cases are built. The primary function of evidence in civil litigation is to establish facts, which are essentially the building blocks of the case. This provides the foundation for all subsequent legal arguments and decisions. This court is beholden to consider the evidence before it. It must be borne in mind that the Defendant has a counterclaim and as such he held a duty to place evidence to satisfy the court that he is entitled to succeed on his claim or defence as the case may be.⁴² The standard of proof in a civil matter is a preponderance (balance) of probabilities.

[96] The Defendant in his Heads of Argument stated the following:

'It must be noted that during the trial, a large digital report with 10 gigs of video & audio evidence, that the judge has not seen was continuously referred to by myself as the advocate referenced an email containing the link to the report.'

⁴² Pillay v Krishna 1946 AD 946 at 952 – 953.

(a) It must be noted, that the plaintiff did not use any evidence from this extensive video & audio report in her discover and the plaintiff's advocate did not bring up the report during cross questioning nor any other time during the trial even though it is the largest repository of digital evidence that exists for this trial.

*(b) The report was created by myself & the advocate sought to steer clear of all questioning or mentioning of this report at all costs even though I brought it up several times...*⁴³

[97] The Defendant cannot rely on the Plaintiff's Counsel to raise the issues in the digital report, when it is not what the Plaintiff's case is based on. The Plaintiff's case has been specifically pleaded and as such, the Plaintiff is confined to the four corners of her case as per the pleadings. Therefore, it was incumbent on the Defendant to present relevant evidence in support of his counterclaim and defence. I also deem it necessary to stress to the Defendant that Heads of Argument does not constitute evidence. Omissions during the trial cannot be cured through amplification in Heads of Argument. It must be emphasised that no party is permitted a second bite of the cherry, proverbially speaking, when making submissions in the Heads of Argument.

[98] By way of another example, the Defendant, in his Heads of Argument, highlighted various other "nonsensical" statements made by himself, and explained that when he is under extreme stress, he produces what he referred to as "word salad sometimes". This was primarily to explain the message to Mr Trisos. In his Heads of Argument, he goes on to explain:

'...This I believe is a residual symptom of my psychosis that I had as a child. While this is a rare occurrence & benin (sic), my father has told me that on occasion but infrequently I do produce word salad. For the record, I have been under psychosis since I was 14 years old but it is normal for those who have history of psychosis to experience minor symptoms even when rare...however

⁴³ Defendant's Heads of Argument, para 4.

*the rare occurrence of this word salad is not enough to indicate psychosis as I am still a fully operational adult that has historically managed a business, paid Tax & never been ill enough to be put into medical institution for my disorder and nor do I have a criminal record...Regardless of what was said to Harry, I remained committed to the marriage for the sake of my daughter...*⁴⁴

[99] I interpose to refer to the evidence of the Defendant when he testified that Dr Czech misunderstood him. During cross-examination, when asked whether he took Dr Czech's advice, he stated that he did not comply with the recommendation and that he hasn't seen a psychiatrist since he was 20 years old.

[100] Yet, the Defendant's Heads of Argument suggested that he experienced "a residual symptom" of his psychosis. This was not the Defendant's evidence during the trial. The Defendant cannot amplify his case by way of Heads of Argument; especially as it was the Defendant's testimony that he hasn't had any symptoms since he was 14 years old. It is furthermore noteworthy that the Defendant wishes the court to take into account that he was compromised because of the concussion and went on to suggest that the message "made little sense" as he referred to the marriage "being registered in South Africa, when it was only registered after (S[...]) was born almost a year later". He then goes on to say, ***"HOWEVER, THE REST OF THE HARRY TRISOS RECORDING COULD NOT HAVE BEEN MORE ACCURATE. EVEN IF THE RECORDING WAS TAKEN A WEEK LATER AS THE ADVOCATE SUGGESTED"***⁴⁵(my emphasis)

[101] In addition to this admission, the Defendant goes on to state in his Heads of Argument, that regardless of what he said to Harry, he remained committed to the marriage. Consequently, by the Defendant's own admission, I am satisfied that the Defendant acknowledged that his marriage was a "farce" and a "charade", but that that he remained committed to the marriage. It therefore follows, that all the other aspects, whether it was word salad or not, ought to be accepted which includes that he took advantage of the Plaintiff and tricked her into giving him 50% of her property

⁴⁴ Defendant's Heads of Argument, para 34 (d).

⁴⁵ Defendant's Heads of Argument, para 34 (c).

by marrying her in community of property and that his plan was to get the properties into his name.

[102] The registration of the assets of the joint estate serves as the objective evidence to confirm, on a balance of probabilities, that his plan was effectively actioned. This not only concretises my earlier finding that the Defendant would not only unduly benefit, but that his conduct amounts to substantial misconduct to warrant an order for forfeiture. In order to reinforce this conclusion, there are other considerations which for the sake of completeness and for the benefit of the Defendant, I will deal with in this judgment.

[103] The Plaintiff made a good impression on the Court. The Court was able to observe the demeanour of the Plaintiff. I find her to be a credible witness as much of her testimony was supported by way of objective documentary evidence. She endeavoured to provide a narrative of events in a manner that did not impugn the character of the Defendant. Her recollection of events was clear, logical and chronological. She remained steadfast during cross-examination.

[104] The same can unfortunately not be said of the Defendant. In considering the conflicting versions, on a balance of probabilities, there were countless examples as highlighted earlier in this judgment which brings into question the plausibility of the Defendant's evidence. To further demonstrate this conclusion, the Defendant conceded that there was a false averment made regarding Ms L[...] applying for a passport as an "unmarried" status.

[105] As earlier pointed out, the augmentation of the Defendant in his Heads of Argument of aspects not canvassed during the trial, cannot be accepted as evidence tendered in court and therefore cannot be considered for the purposes of this judgment. The Defendant is furthermore reminded that the Plaintiff pleaded an order for forfeiture and has endeavoured through the leading of evidence that she has successfully discharged the onus required to succeed with the relief so claimed.

[106] The Defendant has attempted to impugn the Plaintiff's credibility by highlighting aspects such as averments that she had kicked him out of the house at

least 13 times. The Defendant does not bear an onus to show substantial misconduct on the part of the Plaintiff to support his claim for division of the joint estate. It is sufficient to show that the marriage relationship between the parties have irretrievably broken down. It is not in dispute that the parties went through a series of break-ups during the brief subsistence of their marriage. Inasmuch as the Defendant left the common home, so too did the Plaintiff when she returned to China. On a balance of probabilities, the Plaintiff's contention that the Defendant never left in reality because he always had keys and returned is therefore plausible. The test for forfeiture, again for the benefit of the Defendant is whether he would stand to unduly benefit.

[107] The Defendant when challenged about the interim domestic violence protection order obtained, denied verbally abusing the Plaintiff and was adamant that she was the one who abused him, yet there was a plethora of correspondence produced during the course of the trial wherein the language used by the Defendant is deserving of censure. The allegations that the Plaintiff was abusive towards him and had a temper, again, in my view, supports the contention that the marriage relationship has irretrievably broken down, and on the facts before me, cannot tip the scales for the court not to grant an order of forfeiture if regard is had to the considerations and relevant legal principles found in Section 9 of the Divorce Act.

[108] It is uncontroverted that there was acrimony between the parties throughout the marriage. This court in maintaining a balanced approach will accept that there may have been times when the Plaintiff displayed anger or temper; however, it is apparent on the Defendant's own version that she had house rules which she was strict about. He perceived the Plaintiff to have overreacted.

[109] It is evident that the Defendant was focused on preserving his dignity and accused Counsel for the Plaintiff of making slanderous accusations about him. He attempted to demonstrate his financial contributions in the marriage and emphatically denied being a gold-digger. The Defendant was critical of all the experts including his own expert, suggesting that they were "guns for hire". The Defendant emphatically stated that he does not identify with the South African value system.

[110] It is the duty of the court to carefully scrutinize the undue benefit in relation to the three factors expounded on earlier in this judgment. A party that claims forfeiture need not prove all three factors. It is enough if he or she proves any one of the three factors.⁴⁶ For the purposes of this judgment, I have given due consideration to the cumulative effect of the said jurisdictional factors and not the factors individually. This court considered that the duration of the marriage being of relatively short duration, the circumstances that gave rise to the breakdown of the marriage relationship which was extensively dealt with earlier in this judgment; and the substantial misconduct on the part of Defendant. The death knell for the Defendant being the message to Mr Trisos where he stated:

" ...and so, I married her for the simple reason that... I knew that if I went along with her madness then I was probably going to be able to get back to South Africa... That's why the actual marriage itself is a farce because I never wanted to marry her because she was absolutely crazy...I realized, ... if I carry on this charade, I can actually get property out of her... I actually tricked her into signing the houses onto my name well 50% her 50% me because I spun a whole bunch of stories to actually get that property. And my plan was to actually get the property in my name and then divorce her..." (my emphasis)

[111] It is trite that the party claiming forfeiture of the patrimonial benefit is required to prove the nature and extent of the benefits sought to be forfeited.⁴⁷ On the Defendant's own version, I am satisfied that the Defendant would stand to unduly benefit from the proceeds of the sale of the immovable properties, known as 2[...] D[...] Street, Lakeside, Wester Cape and [...] D [...] Court, 1 [...] M [...] Road, Western Cape as the properties were acquired from funds derived from the proceeds of the sale of the Plaintiff's property in Hong Kong. Any contribution that the Defendant may have made, is in my view negligible.

[112] Consequently, I am satisfied that the Plaintiff has successfully established all three jurisdictional factors upon which this Court may grant her application for

⁴⁶ *Klerck v Klerck* 1991 (1) SA 265 (W) at 266 A-B.

⁴⁷ *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C).

forfeiture of the benefits arising from marriage in community of property against the Defendant.

Care and contact pursuant to the relocation application

[113] The Plaintiff testified that on 1 August 2018 she requested her attorney to consult with her at home as she did not have a vehicle. The consultation related to her returning to Hong Kong and taking her daughter with her. A letter was written Defendant requesting his permission, but he did not agree to it which led to the relocation application.

[114] The Plaintiff orated that she made enquiries with immigration regarding the documentation she needed in order for her to take S[...] with her to Hong Kong. She was advised that there was no requirement that both parents had to sign the application form.⁴⁸ The Plaintiff confirmed that the Defendant's attorney challenged the advice given by the relevant Embassy and disputed that Ms L[...] could apply for a passport without the Defendant's consent.⁴⁹ The Plaintiff confirmed that she appointed an expert, namely Dr Ilse van der Merwe, who compiled a Psycho-Legal Care and Contact Report. Dr Van der Merwe recommended that Ms L[...] relocates to Hong Kong with S[...].⁵⁰ The Defendant also appointed his own expert, namely Dr Glyde Thompson who did not have concerns regarding Ms L[...]’s global functioning or parenting.⁵¹ Dr Thompson recommended that the Plaintiff relocates to Hong Kong with S[...]:

‘9.4

- a) *This would allow for the continuation of maternal attachment and cause a break in the paternal attachment...*
- b) *I would recommend that S[...]2 occupy the primary residence position and that J[...] exercise contact as frequently as possible both in South Africa and in Hong Kong. J[...] does not have restrictions in terms of employee*

⁴⁸ Index F, pages 368 – 369.

⁴⁹ Index F, page 374.

⁵⁰ Index F, Dr Ilse van der Merwe, Psycho-Legal Care and Contact Report, page 501.

⁵¹ Index E, Dr Glyde Thompson, Psycholegal Report, page 290.

leave and appears to be more flexible in terms of his availability for contact. S[...]2 indicated that she would consent to allow for S[...] to have contact in South Africa and would welcome J[...] visiting S[...] in Hong Kong. A major obstacle would be cost and distance. It is unlikely that J[...] will be able to afford this independently. S[...]2 indicated that she is willing to contribute to the costs of the travel.

- c) *J[...] indicated that S[...]2 will abduct S[...] and prohibit future contact if residing in Hong Kong. While this cannot entirely be ruled out as there is no legal recourse for J[...] through the Hague convention this does remain a risk factor. Based on S[...]2's psychological presentation and her past history the writer is of the view that S[...]2 poses a low risk in this regard.*

...

10.

10.1 When considering all the relevant factors it is recommended that consent be given for S[...]2 to relocate with the minor child to Hong Kong; and that a feasible contact schedule (both physical and electronic/video contact) is mediated between the parents. This should include working out their financial contributions towards travel costs.⁵²

[115] The parties entered into a Settlement Agreement, which was made an order of Court on 17 September 2020.⁵³ In terms of the Agreement, the Defendant consented that S[...] depart with the Plaintiff from South Africa to Hong Kong.⁵⁴

[116] A further term of the Agreement included the Plaintiff's undertaking to have the Settlement Agreement incorporated in and registered as a mirror order in a competent Court in the relevant jurisdiction of Hong Kong. The Plaintiff was required to instruct her legal advisors in Hong Kong to institute any and all relevant processes and to do so within 60 days of her arrival in Hong Kong.⁵⁵ The Plaintiff further explicated that soon after she arrived in Hong Kong, she sought advice on the registration of the Settlement Agreement as a mirror order in Hong Kong. She

⁵² Index E, Dr Glyde Thompson, Psycho-legal Report, page 294 – 295.

⁵³ Index E, Settlement Agreement, pages 304 – 321.

⁵⁴ At para 2.1.

⁵⁵ At para 2.2.

established that in order for a mirror order to be registered, it would require a re-hearing of the matter for the Hong Kong Court to determine what is in S[...]’s best interests.⁵⁶ Her enquiries revealed that because the Settlement Agreement primarily concerned the care and contact of the child, it cannot simply be mirrored in Hong Kong by way of registration.⁵⁷

[117] The Plaintiff orated that she tried her best to comply with the contact arrangements as per the Settlement Agreement. The contact arrangements envisaged the situation where the Defendant would be resident in South Africa, however, he relocated permanently to Italy. The Agreement made provision for the Defendant to have contact with S[...] in Hong Kong. In this regard, the Plaintiff would cover the costs of 2 airfares per annum for the Defendant to travel between South Africa and Hong Kong. This would however have been subject to whether the Plaintiff was financially able to do so.⁵⁸ Ms L[...] expressed unhappiness with the terms of the Settlement Agreement as she indicated that the contact agreed to was too much as she wouldn’t be able to take time off from work to go to South Africa. She indicated a desire to substitute the terms of the Settlement Agreement. The Plaintiff also confirmed that the Defendant has not had any physical contact with S[...] since she relocated to Hong Kong.

[118] The Plaintiff illuminated that the first time the Defendant indicated that he wanted physical contact was in 2021 and then the next request followed in 2023.⁵⁹ The Plaintiff orated why she was fearful that the Defendant would kidnap S[...].⁶⁰ This is the reason why she has not disclosed her residential address to the Defendant. The Plaintiff’s attorneys were obliged to send a letter to the Defendant’s erstwhile legal representatives to address the harassment of and threats against the Plaintiff and her legal representative demanding that the Defendant desist from this conduct, more particularly:

⁵⁶ Index A, pages 95, 112 – 113 ‘As there is no mechanism to register a mirror order of South Africa in Hong Kong Court, would the commencement of a civil legal proceedings in Hong Kong urging the Hong Kong Court to make an Order in respect of the question of custody, care and control and financial provisions of S[...] be sufficient for the purpose of compliance with the South Africa Order by lay client.’

⁵⁷ Index A, page 117.

⁵⁸ Index E, Settlement Agreement, para 3.4, 3.5 and 4.

⁵⁹ Index F, email from Defendant to the Plaintiff dated 10 March 2023.

⁶⁰ Index F, email dated 23 April 2023, pages 408 – 409.

- (a) Harassing and threatening the Plaintiff;
- (b) Refrain from publishing any information relating to the Plaintiff, S[...] or her attorney on social media or any other internet platform and/or website or make any publication of whatsoever nature and
- (c) To immediately remove all and any publications of any nature whatsoever and on whatsoever platform made by him.⁶¹

[119] During cross-examination the Plaintiff was challenged that she did not consult with South African authority when she applied for S[...]’s passport. The Plaintiff explained that she did not need to consult with South African authorities to apply for a Hong Kong passport.

[120] The Plaintiff denied cancelling air tickets on two occasions and then reinstating them when the Defendant agreed to marry her. The Plaintiff conceded that she had given S[...] instructions on what she was allowed to talk to the Defendant. The Defendant took issue with the fact that Mr Lottering had more time with S[...] than he did, having accused Mr Lottering of using drugs. The Defendant explained that his current girlfriend is a child psychologist who specialises in occupational therapy. He enquired whether it would provide the Plaintiff with some ease, to which she responded that she did not know her and that she wouldn’t be around 24 hours a day.

[121] The Plaintiff was also challenged about compliance with the Settlement Agreement, more specifically for not advising the Defendant about school holidays and her leave times, to which she responded that she had sent him the school plan. The Plaintiff was furthermore challenged about an air ticket that was purchased from Rome as opposed to Venus as per his proposal. The Plaintiff was also challenged about compliance with the Settlement Agreement insofar as co-guardianship and joint decision making was concerned. In addition, there were challenges around

⁶¹ Index F, pages 429 – 430.

whether she informed the Defendant about the cough that S[...] had and photos that she allegedly did not send. In this regard, it came to light that the Plaintiff had set up a google drive link and uploaded photos of S[...]. In relation to not being notified about S[...]’s dance school, the Plaintiff indicated that the Defendant was at liberty to refer to the school link himself. The Plaintiff stated that it is not her responsibility to send documents to him relating to the school and that the Defendant could make an effort himself to contact the school.

[122] The Plaintiff indicated that she blocked the Defendant from various social media access as his messages were tantamount to harassment and scared her. When confronted about her not disclosing a medical condition, the Plaintiff refuted same stating that when S[...] was admitted to hospital, she set up a zoom meeting. The Plaintiff denied that 50% of the video calls were disrupted.

[123] The Defendant expressed that he wants to see his child in his country of domicile. He testified that he is fond of the Plaintiff’s mother. He referred to her as an excellent grandmother. He also testified that he never smoked in the physical presence of S[...]. The Defendant expressed concerns about S[...]’s safety as Ms L[...] administers corporal punishment. He recalled his daughter having bruises and torn clothes on one occasion. The Defendant furthermore testified that he received online threats after the relocation application. He questioned how it would be possible for Ms L[...] to get a passport for S[...] as it is a requirement to obtain both parents’ consent. Whilst she may not have broken Chinese law, she in fact broke South African law according to the Defendant.

[124] The Defendant indicated that he entered into the Settlement Agreement for the relocation application on the advice of his attorney. He explained that he did not take it well and had an anxiety attack.

[125] The Defendant was also confronted about his rejection of the Plaintiff’s offer to purchase and pay for a return ticket to and from Rome so that he could visit S[...].⁶² To which the Defendant indicated that there were 24-hour COVID tests to be

⁶² Index F, Letter dated 4 April 2023, page 441.6 – 441.7.

done. When probed a bit more, he indicated that the Plaintiff had changed the times and that she did it against the terms of the Settlement Agreement. The Defendant expressed the view that Ms L[...] purposely made it impossible for him. He also added that he did not trust her brother.

Contempt of Court

[126] The Defendant has expressed frustration about not being able to enjoy physical contact with S[...]. The Defendant's allegations of the Plaintiff's breach of the court order included *inter alia*:

- (a) That despite the parties sharing full parental responsibilities and rights, the Plaintiff has locked him out of S[...]’s life other than for partial compliance of the video conferring;
- (b) That the Plaintiff has denied him the role of co-guardian as:
 - 1. He does not know where S[...] resides;
 - 2. He does not know where she attends school;
 - 3. The does not know who her doctors are;
 - 4. He does not know who looks after S[...] when she is at work;
 - 5. He does not know many things that he is entitled to as a co-guardian;
- (c) He has no reasonable contact with S[...];
- (d) There is no joint decision-making regarding S[...];
- (e) He is not informed about schooling and/or sporting and/or extramural activities;

- (f) He is not informed about major medical treatment;
- (g) He is not informed about religious, cultural or traditional beliefs;
- (h) S[...] is being denied exposure to her Italian heritage;
- (i) Denying him participation in any decision which may adversely affect S[...];
- (j) He cannot attend school-related events, such as meetings and extramural activities, by blocking his right to access information at the level of school management and
- (k) He has not received progress reports save for once in 2021 etc.

[127] In order for the court to consider contempt proceedings, a substantive application ought to be placed before the court for consideration. It is trite that the test for when disobedience of a civil order constitutes contempt includes considerations as to whether the breach was committed deliberately and *mala fide*. In this matter, the Defendant relocated to Italy permanently. On 17 September 2020, the Settlement Agreement was made an order of court, regulating the Defendant's contact with S[...]. The circumstances *in casu* has evidently changed since the Settlement Agreement was entered into between the parties; however, this court, must be astute to ensuring that S[...]’s best interest has been considered. The Plaintiff deemed it prudent to appoint an expert psychologist to investigate the current care and contact arrangements between the Defendant and S[...]. Dr Poon Mak was appointed. She conducted an investigation and provided a report without the Defendant’s direct participation. Dr Poon Mak, testified on the virtual platform at the hearing.

[128] It is also evident that the terms of the Settlement Agreement envisaged an arrangement in terms of which the Defendant would be in South Africa and not Italy. The Defendant’s election to relocate to Italy has triggered the provision of Clause 3.9 of the Settlement Agreement as earlier mentioned which stipulated:

'It is recorded that the respondent has indicated that he may be relocating and that the parties have agreed that, should this eventuate (and the respondent shall inform the applicant forthwith if this happens), the parties will address this in the divorce action.'

[129] Insofar as the registration of the mirror order is concerned, the Plaintiff has testified about the efforts she has made and challenges she experienced in this regard. The Plaintiff made enquiries about registering the mirror order and sought legal advice in this regard, which constraints were communicated to the Defendant through the attorneys of the Plaintiff. To this end, a comprehensive report entitled "Advice on Registration of South African Order in Hong Kong" was attached. It was highlighted that the Settlement Agreement was not final in effect as clause 3.9 of the agreement was triggered by the Defendant relocating to Italy. In addition, the Settlement Agreement did not contain a judgment sum or maintenance order and therefore was incapable of being mirrored in Hong Kong by way of registration.

[130] Many clauses refer to "South Africa" and has a bearing on enforceability. Therefore, even if there is no substantive application, the Defendant would still have had to show that the Plaintiff committed the breach deliberately and *mala fide*. Consequently, in the absence of a substantive application for contempt of court and in view of some of the highlighted challenges outlined, I am not persuaded that the Defendant has made out a proper case for contempt of court.

Summary of the evidence of Dr Poon Mak

[131] Dr Poon Mak was essentially requested to address the duration of the video chats insofar as it related to S[...]’s concentration span, the need for a familiar figure to accompany S[...] when she meets the Defendant in person, the duration of each visit and the introduction of overnight visits.

[132] Dr Mak, reviewed the following documents, namely, the Court order dated 17 September 2020; Dr Glyde Thompson’s psycho-legal care and contact report requested by the Defendant. The Defendant chose not to be interviewed by Dr Mak,

despite her attempts to engage with him.⁶³ It was placed on record that the Defendant's rejection was insulting and demeaning.⁶⁴ There were a number of other email exchanges between the Defendant and Dr Mak wherein the Defendant expressed himself very strongly in terms that were very insulting towards Dr Poon Mak.⁶⁵ Dr Poon Mak expressed that the content of the correspondence induced a sense of shock.

[133] To my mind, despite the onslaught, Dr Mak maintained her objectivity in the best interest of S[...]. She provided the Court with the background. She stated that the manner in which the Defendant has been communicating with S[...] has established a bond. She envisages that there would be a gradual development of a relationship. Dr Mak expressed that it can be appreciated that the Defendant is a persistent father. Her general view of Ms L[...] is that she is a "down to earth, straight forward lady who is honest and open".⁶⁶ She also had an opportunity to do a home visit. She described the home as being tidy and big enough for the Plaintiff, S[...] and the Domestic Helper.

[134] She explained that there is a bond between S[...] and the Helper. Dr Mak described S[...] to be an engaging child, although torn between her parents. She also had occasion to speak with S[...]’s teacher who described her as helpful, sociable and well-loved by her teacher and fellow students. S[...] is fluent in Cantonese and English. It is also evident that Ms L[...] has a good support system. Dr Mak described S[...] as a happy girl who related to her well. She was full of sunshine and very affectionate with her mom.

[135] Dr Mak recorded that the Plaintiff has a fear that the Defendant will abduct S[...]. Dr Mak opined that Ms L[...]’s negative view of the Defendant is borne from *‘the very dreadful memories about her life in South Africa and believed that Mr R[...] wronged her. It was not unexpected that she would be found troubled by such painful past and unresolved problems over the marriage and S[...] would have sensed it. Ms L[...] emphatically explained that she told S[...] that indeed she disliked her father but*

⁶³ Index F, Letter from Dr Poon Mak to the Defendant dated 13 March 2024, page 433.

⁶⁴ Index F, Letter from Defendant to Dr Poon Mak, dated 13 March 2024, page 434

⁶⁵ Index F, pages 435 – 441.

⁶⁶ Report, para 8.

*she truly supported her in building a relationship with her father...*⁶⁷ Dr Mak does not believe that Ms L[...] had actively done anything to alienate S[...] from the Defendant. She holds the view that it was inevitable for S[...] to pick up the anxiety and fear of her mother.

[136] Despite the Defendant's election, Dr Mak was able to conclude her assessment from observations she made from random video interactions between the Defendant and S[...]. She recorded the details of her observations in her report.⁶⁸ Dr Mak also testified about some of her observations and placed on record that S[...] enjoys playing with her father. She observed that there is affection and a bond between the Defendant and S[...]. She also stated that it is evident that the Defendant does make an effort. They have good laughs together as father and daughter.

[137] She expressed concern about the Defendant telling S[...] that her mother kept her away from him. S[...] also expressed that she wished her father wouldn't smoke and lie on his bed and talk. Her observations between S[...] and the Defendant's mother were that these interactions appeared more natural and she observed that S[...] enjoys talking to her grandmother.

[138] According to Dr Mak, S[...] is perceptive to her mother's feelings. Dr Mak explained why it would not be in S[...]’s best interest for her to exercise contact with the Defendant outside of Hong Kong at this stage, and that for that to occur there had to be a gradual process of trust building, given that there had been no physical contact between them for over 3 and a half years. Dr Mak stood by the recommendations made by her in her report.

[139] During cross-examination Dr Mak explained that Ms L[...] probably told S[...] that her father took money from her, hence the reason why *'she also gave father a tongue out smiley face but also a devilish look and one with money coming out of his mouth.'*⁶⁹ Dr Mak stated that she did not see in the Defendant's report that

⁶⁷ Index D, para 43, pages 22 -23.

⁶⁸ Dr Rachel Poon Mak, Clinical Psychological Report, para's 27 – 37.

⁶⁹ Index D, para 19, page 16.

Ms L[...] punched him in the face and kicked him in his genitals. She confirmed that the Defendant was a desperate father. The Defendant explained the reason for his hostility to not having seen S[...] for 3 and a half years. It was put to Dr Mak that the Defendant refused to be interviewed by “guns for hire”. The Defendant indicated that Dr Mak does not have all the evidence and therefore cannot evaluate or provide an opinion to which Dr Mak responded that she was only able to do what she could with the information given to her. It was put to Dr Mak that she did not have any criticism of Ms [...], to which Dr L[...] responded that she observed her fear. Dr Mak refuted the suggestion that she said that he was an abusive parent. It was put to Dr Mak that the Defendant proposes that S[...] visits him in his country of domicile. Dr Mak remained steadfast with her recommendations.

Submissions by Plaintiff

[140] Counsel for the Plaintiff requested that the court follows the recommendations of Dr Mak as she is a highly experienced practitioner. Furthermore, it was contended that her assessment and report are both thorough and well-reasoned.

[141] It was argued that the court is to have regard to the fact that the Defendant chose to not co-operate with the assessment. He refused to be interviewed despite the repeated attempts by Dr Mak to persuade him to participate. The Defendant was cautioned about the consequences of his decision in this regard. From the testimony of Dr Mak, she was able to assess the relationship between the Defendant and S[...] from the 17 video calls that she chose randomly between 2021 and 2024. It was furthermore submitted that Dr Mak provided a well-reasoned explanation why it would not be in S[...]’s best interest for her to exercise contact with the Defendant out of Hong Kong and as stated earlier, she opined that there had to be a gradual process of building of trust.

[142] Counsel for the Plaintiff submitted that no credence should be attached to any of the Defendant’s unsubstantiated attacks on Dr Mak’s qualification, character and so-called inadequacies of her assessment and report. It was contended that the Defendant did not seriously put S[...]’s primary care in issue although he did say on

occasion that it would be better for S[...] if she lived with him in Italy. It was highlighted that the Defendant produced no evidence to gainsay the evidence of Dr Mak or to support his contentions.

[143] Counsel for the Plaintiff submitted that the Defendant provided unsubstantiated reasons and excuses for why he was unable to travel to Hong Kong to see S[...]. It was argued that the Defendant's claim that as a Westerner, he would be under threat in Hong Kong is insulting and without merit.⁷⁰

Defendant's principal submissions

[144] The Defendant acknowledged that he purposely did not want to be interviewed by Dr Mak. The Defendant questioned the credentials of Dr Mak. The Defendant stated that he sent "evidence" to Dr Mak via email which Dr Mak did not review. The Defendant argued that Dr Mak essentially cherry-picked video clips thus questioning the credibility of the assessment. The Defendant furthermore contended that Dr Mak took the Plaintiff at face value without viewing the evidence that he had sent her. The Defendant raised concerns about matters that would be discussed with S[...]. The Defendant indicated that S[...]’s schooling arrangements were not discussed with him. The Defendant was emphatic about not going to Hong Kong and described that he would be a "sitting duck" if he travelled to a communist country. The Defendant makes additional assertions in this regard in his Heads of Argument with no reference to the authorities.

[145] The Defendant submitted that all references to "South Africa" in the Settlement Agreement could simply be replaced by the word "Italy". The Defendant further holds the view that Dr Mak is not qualified to make an assessment on an "Italian that she has never met".

Discussion

⁷⁰ Plaintiff's Heads of Argument, para 47, page 21.

[146] It is uncontroverted that the Defendant has not had physical contact with S[...] since the time when the Plaintiff relocated with her to Hong Kong in 2020. However, video contact was maintained which was confirmed by the evidence of Dr Mak and the Plaintiff.

[147] It is clear that the Settlement Agreement in its current format is not capable of implementation in light of the Defendant's decision to relocate permanently to Italy. The Settlement Agreement, was not couched as an agreement *pendente lite*. Regard is therefore to be had to the provisions of Section 6(1)(a) of the Divorce Act which makes it peremptory for the divorce court to decide if the care and contact arrangements of a minor child are satisfactory. Counsel for the Plaintiff contended that the court cannot be bound by an agreement between the parties which was made an order of court 4 years ago.

[148] The court is called upon to decide the extent to which the parties' Settlement Agreement in respect of the minor child is to be varied, if at all. It is evident that the Defendant has deliberately chosen not to participate, and neither is he amenable to exercise contact with S[...] in Hong Kong. This court is duty bound to consider that the welfare of the child is satisfactory or are the best that can be affected in the circumstances. This court is to consider whether the report and recommendations of Dr Mak would be sufficient to satisfy this imperative.

[149] The Defendant has indicated that he wants S[...] to be able to visit him in his country of domicile, namely Italy. Dr Mak's recommendation proposes contact to be in China. She proffers her reasons why she is of the view that this would be in S[...]s best interest. The Defendant wishes to invoke the protection of the Hague Convention.

The Central Authority

[150] In light of the concerns raised by the Defendant, the Court deemed it prudent to engage the Central Authority and issued the following directive:

1. The Family Advocate in their capacity as The Central Authority as defined in The Hague Convention (Convention of 25 October 1980 on the Civil Aspects of International Child Abduction), more particularly Article 21, which obliges the Central Authorities to promote the peaceful enjoyment of rights of access and to take steps to remove, as far as possible, obstacles to the exercise of such rights, was ordered to provide a report to this court on:

(a) whether the South African Central Authority would be able to liaise with the Central Authorities of China and/or Italy, respectively to provide support to the Plaintiff and Defendant in respect of arrangements for organising or securing the effective exercise of rights of access to the minor child who is habitually resident in China;

(b) whether the Central Authorities of China and/or Italy have a designated intermediary who will be able to assist with organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject, and if so, the procedures to be followed by the parties;

(c) whether the South African Central Authority would be able to assist with administrative arrangements regarding any orders this court may make in respect of care and contact for the minor child;

(d) the enforceability of orders made by this court in circumstances where the child is no longer habitually resident in South Africa, having specific regard to the fact that 3 distinct geographical jurisdictions are implicated:

(i) minor child and mother reside in China;

(ii) Defendant is domiciled in Italy and

(iii) Divorce proceedings are being concluded in South Africa.

The Family Advocate's Report

[151] In the interim report, dated 12 September 2024, the Family Advocate highlighted that it had made certain inputs for the purposes of the relocation application, which were ultimately not considered. It was confirmed that the Chief Family Advocate's capacity as Central Authority RSA is by virtue of the incorporation of Hague provisions and principles within our legislation, more specifically Chapter 17. In this regard, the Central authority for RSA is legislatively empowered to delegate and/or assign the duties and powers conferred upon her under such capacity, at her discretion on an *ad hoc* basis.

[152] It was furthermore explained that the Family Advocate does not gain capacity to act as Hoc Central Authority by virtue of it being the Family Advocate, such capacity is to be delegated upon the Family Advocate at the discretion of the Central Authority herself and instances where the Hague Convention is found to be applicable. There is no legislative provision for the roles to be interchangeable.

[153] According to the Family Advocate, the Hague Convention cannot be applicable, in light of the fact that S[...] has been resident in Hong Kong since 2020, if regard is had to the provisions of Article 4 of the Hague Convention which stipulates that '*...shall apply to any child who was habitually resident in a contracting state immediately before any beach of custody or access rights.*'

[154] In terms of Article 21 of the Hague Convention '*[a]n application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of the child*'. The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyments of access rights and the fulfilments of any conditions to which the exercise of such rights may be subject. It is accepted that the Central Authority is obligated to take steps to remove, as far as possible, all obstacles to exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or

protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

[155] In light of the fact that the Hague Convention is not applicable it follows that the Central Authority RSA will not have a mandate to present such an application *in casu*. The Family Advocate opined that care and contact be dealt with in terms of the divorce proceedings.

[156] Pursuant to the interim report filed, the Family Advocate conducted an enquiry with the parties with a view to mediating care and contact in respect of S[...]. The Family Advocate considered the pleadings as well as the report and recommendations of Dr Poon Mak. The Family Advocate illuminated the fact that they had recommended that S[...] should not relocate, which recommendation was not noted on the Settlement Agreement. It was further highlighted that the Settlement Agreement was not endorsed by the Family Advocate and as such, it is noteworthy that there was no Family Advocate oversight into the finalisation of those proceedings.

[157] The Family Advocate reported that the issue of the Defendant's contact was not capable of being mediated as the Plaintiff and the Defendant both indicated intractable differences with each other on the issue of Defendant's contact with S[...]. It is apparent that the parties' concerns as highlighted during the trial were repeated to the Family Advocate and does not require restating. The Family Advocate stated that it is clear from the enquiry that the co-parenting relationship between the parties is riddled with conflict and that the parties are acrimonious with each other. Furthermore, that there is a total lack of communication and a tremendous amount of hostility.

[158] The Family Advocate accepted the report submitted by Dr Poon Mak as being the most recent investigation regarding care and contact. The Family Advocate considered that the report by Dr Mak, addresses both parties adequately in terms of their relationship and/or bond with S[...]. The Family Advocate opined that whilst the recommendation of Dr Mak is sensitive to S[...]’s perceived needs, no reasonable

risks are identified for the recommendation of supervised contact and the challenge with S[...] travelling to Italy.

[159] The Family Advocate submitted that the Defendant's concerns encompass potential unnecessary gatekeeping by the Plaintiff. The Family Advocate holds the view that the Plaintiff's concerns are not amplified nor supported by evidence about S[...] travelling to Italy. The Family Advocate furthermore stated that Dr Mak's recommendation of supervised contact for 2 years and not 1 year or a shorter time is without substantiation. In amplification the Family Advocate opined that it is presumptuous to speculate that S[...] will or will not have the necessary maturity to advise on contact within 2 years.

[160] The Family Advocate affirmed that the Defendant and S[...] have developed a bond with each other and that despite the contact being limited to virtual contact same has been meaningful. The Family Advocate has also established that the Defendant and S[...] have a comfortable rapport with each other and that S[...] is at ease in the Defendant's and paternal grandmother's virtual presence.

[161] Counsel for the Plaintiff argued that the recommendation of the Family Advocate ought not to be considered as it was not requested in terms of any directive issued by the court. In this regard, it was argued that the Family Advocate did not have the benefit of the evidence that came to light during the course of the trial and has essentially made recommendations after having consulted with the parties for an hour. It was contended that the duration of the consultation with the parties is inadequate for the Family Advocate to come to its sweeping recommendations and findings.

[162] Counsel for the Plaintiff further submitted that the recommendations of the Family Advocate cannot be preferred above that of Dr Mak and painstakingly identified submissions that were made by the Family Advocate which are at odds with that of Dr Mak. In this regard, Dr Mak carefully set out why S[...] should feel secure and why supervision would be necessary. This based on the Plaintiff's perception that the Defendant would attempt to keep S[...] with him. The Plaintiff has

a legitimate concern that the Defendant would make good on his threats that he would kidnap S[...].

[163] The Defendant on the other hand, submitted that regard is to be had to the fact that he has no criminal record. He regarded the Family Advocate's Report to have gone in his favour. The Defendant contended that the Family Advocate was the only impartial and rational party as he was not consulted by Dr Mak and neither was he part of the process. The Defendant however remained steadfast that he will not go to Hong Kong as he would be compromised. In this regard, he recounted that the Plaintiff's father had on a previous occasion assaulted him. The Defendant placed on record that he would be pursuing his contact rights through the Italian authorities

Discussion

[164] It is evident that the Settlement Agreement which was made an order of Court on 17 September 2020 under case number 14777/2019 cannot be given effect to. The Defendant has emphatically stated that he would not be travelling to Hong Kong because he believes he is compromised. It bears mentioning that the Defendant in an email to the Plaintiff dated 10 March 2023, was willing to travel to Hong Kong. In this regard he stated:

*'Please can you buy me a ticket from Ronchi Airport...I need your address, so that I can find a hotel near your house. As you know, I cannot navigate the transport system in Hong Kong at all...I will need you to bring S[...] to me, or to a sport (sic) that is within walking distance from my Hotel on a daily basis...please can you recommend some affordable accommodation...'*⁷¹

[165] The Defendant at the time of writing this email, did not express any concern about his safety. He has made an about turn in this regard. In the same email, the Defendant stated that:

⁷¹ Index A, Pleadings, page 127.

‘...Italy does not have any laws that stop a child from leaving the country with another parent without permission. Italy does also in fact accept & honour South African settlement agreements. There is no way that I can possibly keep S[...] in Italy. As an alternative to me visiting Hong Kong, I would like to pay for your return ticket & that of S[...] to Italy & put you up in the Casa Bianca Hotel near my house at my expense. It is far more affordable for me and you to go to the tourist thing while I am spending time with S[...]...’

[166] This has not allayed the fears of the Plaintiff if regard is had to threats made by the Defendant wherein the Defendant accused the Plaintiff of kidnapping S[...] notwithstanding the fact that there is a mutually agreed to Settlement Agreement that regulated the relocation of S[...]. In an email, dated 20 January 2024, the Defendant stated that “[a] man that has nothing to lose is the most dangerous type of man that there is”. He also stated that he deems it best for S[...] to live with him in Italy. The Plaintiff believes that the Defendant will make good on his threats to kidnap S[...].

[167] Dr Mak is alive to the fears of the Plaintiff which could easily be felt by S[...]. Dr Mak stated that one of the greatest fears that the Plaintiff had was that the Defendant would abduct S[...]. Dr Mak stated that even if such fears were ungrounded, it was inevitable that S[...] would pick up the anxiety and fear of the Plaintiff. Therefore, it is imperative for S[...] to experience the Defendant in a safe environment so that the relationship of trust can be built. Dr Mak proposed that once trust is built and S[...] is more mature, meeting out of Hong Kong and visiting the Defendant in Italy can gradually be introduced.

[168] Inasmuch as Counsel argued that the court is not to have regard to the recommendations of the Family Advocate, it is my view that it was important for the Defendant to have had an opportunity to be interviewed. It is therefore imperative for this court to have regard to the Defendant’s views and apprehensions; which factors are to be considered together with the evidence, when making a decision concerning the best interest and welfare of S[...].

Conclusion

[169] I echo the sentiment expressed by the Family Advocate that it is imperative that the parties endeavour to set aside their conflict as is aptly stated in *T v T*⁷² where the court held:

‘Parties must put aside their differences and that if the adults do not manage to resolve things by communicating with each other, the children inevitably suffer and the adults may also pay the price when the children are old enough to be aware of what is going on. It is a great shame that sound advice does not appear to have been heeded. It is a tremendous privilege to be involved in bringing up a child. Childhood is over all too quickly, and whilst I appreciate that both sides think that they are motivated only by concern for the children, it is still very sad to see it being allowed to slip away whilst energy is devoted to adult wrangles and to litigation. What is particularly unfair is that the legacy of a childhood tainted in that way is likely to remain with the children into their own adult lives.’

[170] This court accepts without any hesitation that the Plaintiff and Defendant love S[...] and ultimately want what will serve her best interest. However, the zealous pursuit of the Defendant to have physical contact with S[...], has met with a walled response from the Plaintiff and to a measure, justifiably so if regard is had to the tone of various correspondences, wherein demeaning expletives were used and threats were made. The Defendant must be mindful of what he says as once those words are released, it cannot be retracted. The trial bundle is replete with numerous examples of threats and derogatory remarks not only directed to the Plaintiff, but her attorney and various other professionals.

[171] In my view, the threats have legitimately triggered concern which has ultimately informed the cautious approach proposed by both Dr Mak and the Family Advocate. The recommendations of Dr Mak included:

⁷² (2010) EWCA Civ 1366 AT 49.

- (a) That the video contact be continued in terms of the current arrangement namely 20 minutes during mid-week and 45 minutes during weekends. She also suggested that flexibility be introduced with both parents having the right to change the set times, with prior notice in view S[...]’s increasing school work and activities. Dr Mak strongly recommended that this arrangement be reviewed in 2 years’ time to assess its relevance and significance to S[...];
- (b) Physical contact in terms of visits should be conducted in Hong Kong where S[...] feels safe and secure. It is further recommended that a person familiar to S[...] should accompany her during the contact until both S[...] and Ms L[...] feel assured that they would not be separated by any means. Dr Mak also recommended that this arrangement is also to be reviewed in two years.
- (c) Initial physical contact may begin with half days and extend to whole day gradually within a year. Overnight stay is subject to how independent the child could be in terms of self-care routines. She opined that the unfamiliarity of sleep-over arrangements and environment may affect some children more than others. In her view, the feeling of security is even more salient in this regard; hence it should not begin until a trusting relationship between S[...] and her father is firmly established and that S[...] herself is willing to try to sleep in a place outside her home. In her opinion, the duration of contact and overnight stay should therefore be reviewed together with the other conditions.
- (d) Dr Mak furthermore suggested that in the process of reviewing the arrangements, in two years’ time, it would be paramount that S[...]’s wish and ideas is to be heard and respected. In this regard, although S[...]’s wish may have been considered in the context of other factors, she should be informed of the final decisions and given explanations palatable to her mind.
- (e) Dr Mak proposed that a parenting coordinator or a family mediator be considered to facilitate collaboration and in order to overcome the difficulty of communication between the parents and to minimize further animosity.

[172] The recommendations of the Family Advocate included that S[...] remains in the primary care and residence of the Plaintiff subject to the Defendant exercising reasonable contact as follows:

- (a) Virtual contact daily for one hour, accommodating flexibility of schedules;
- (b) Unsupervised physical contact in Hong Kong at a time to be arranged between the parties for the first year of the exercise of physical contact and with the assistance of Dr Mak or any other expert if necessary;
- (c) After the expiry of the above, school holidays are to be exercised physically and divided equally in China and Italy with both parties, S[...] shall travel to Italy accompanied by a companion designated by both parties;
- (d) The parties shall not move S[...] beyond the borders of their respective jurisdictions of Hong Kong and Italy when relevant without the written consent of the other.

[173] To my mind, the recommendation of the Family Advocate provides credence to the recommendations of Dr Mak as the Plaintiff's draft order is by and large on par with the recommendations of the Family Advocate. After considering the aforesaid recommendations, it is my view that the review as proposed by Dr Mak ought to take place within 18 months of the grant of this order with a view to assessing whether contact could be exercised in Italy.

[174] I also deem it in the best interest of S[...] to extend the current virtual contact of twice a week to daily contact which is to accommodate flexibility of schedules; having regard to S[...]’s increasing school work and activities. Furthermore, the parties are encouraged to agree to be flexible should either parent request a change of the time and date upon which the envisaged virtual contact is to occur.

[175] Moreover, it is my considered view that a mirror order must be incorporated into the final order, with due regard to the previous challenges

experienced by the Plaintiff to register the mirror order. To overcome the difficulty in this regard, an order incorporating a nominal maintenance amount is deemed to be appropriate in these circumstances, which will allow the Plaintiff to approach the appropriate Maintenance Court having jurisdiction.

Costs

[176] It was argued that the court is to have regard to the Defendant's evidence which were based on false or unsubstantiated allegations; which together with the substantial misconduct warrants that a cost order be granted against the Defendant. In addition, it was contended that much of the Defendant's conduct was *mala fide* and obstructive, causing the Plaintiff to incur large and unnecessary legal expenses. Furthermore, it was submitted that the Defendant caused the Plaintiff to incur substantial costs in launching a relocation application and for experts to be employed, before agreeing to the relocation. It was argued that that the Defendant provided no cogent reason for his refusal to co-operate in the assessment by Dr Poon Mak.

[177] Counsel for the Plaintiff requested that the court should be mindful that although the Plaintiff has decided not to proceed at this stage against the Defendant for a contribution towards S[...]’s maintenance needs, so that the Defendant can utilise these funds to facilitate his contact to S[...] in Hong Kong, a cost order is on a different footing. The judgment will be valid for 30 years and as such, it was contended, this ought to be no reason why the Defendant should not be able to make suitable financial arrangements in the future to discharge this debt. More especially as the Defendant is not impecunious as he enjoys a lifelong usufruct over the property that he currently occupies.

[178] The Defendant on the other stated that he has no money and cannot pay the court fees or contribute to S[...]’s financial well-being at this stage. The Defendant indicated that Hong Kong is “an extremely expensive City” and submitted that it would be unlikely that he would ever be able to provide S[...] with financial

support in that City, currently or ever.⁷³ He indicated that Italy assists parents that are struggling financially with monthly subsidies in the amount of R22 000, together with medical and schooling. In this regard, it would be easy for him to take care of S[...] in Italy even if he was never to work again and given that he resides in a house that is fully paid for.

[179] The general rule is that costs follow the result. In other words, the successful party should be awarded his or her costs.⁷⁴ It is also trite that the award for cost is in the discretion of the court.⁷⁵ This court is mindful that this matter concerned many issues for determination which included a consideration regarding care and contact.

[180] There is also no general rule that no order as to costs should be made.⁷⁶ The matter of **Bethell v Bland and Others**⁷⁷ provides useful guidance to the approach on costs in matters concerning children where Wunsh J stated as follows: -

"There is no such 'rule' according to the enquiries I have made from many of my colleagues. The position is rather that in custody and access disputes it is frequently, by reason of the circumstances of the case, appropriate not to make an order for costs..."

One should not elevate where Courts have not made orders as to costs to 'rule'. At most, they can be guidelines to the exercise of judicial discretion. In each case, the facts are crucial..."

[181] Opperman J, in **JGJ and RV**⁷⁸ referring to **Bethell v Bland and Others** aptly enunciated the approach with regards to cases involving the rights and

⁷³ Defendant's Heads of Argument, para "J".

⁷⁴ Cilliers AC 'Law of Costs' Butterworths page 1-4; *Agriculture Research Council v SA Stud Book and Animal Improvement Association and Others*; *Thusi v Minister of Home Affairs and 71 Other Cases* (2011) (2) SA 561 (KZP) 605-611.

⁷⁵ *Ibid* page 2-16(1).

⁷⁶ *Kirsch v Kirsch* [1991] 2 All SA 193 (C) at 215.

⁷⁷ 1996 (4) SA 472 (WLD) at 474A – I.

⁷⁸ (5832/2019) [2020] ZAFSHC 226 (19 October 2020) at para 4 – 5.

protection of minors emphasising that our courts do not wish to discourage parents from acting in what they believe to be in the best interest of their children.

‘Cases that involve the rights and protection of minors when parents do not have the ability to establish and manage it, are sue generis as to costs. The doors of Court must remain open to protect children; even against their own parents and the parents against themselves. If costs become an obstacle to access Courts it will be to the detriment of children.

There is never a “winner” or “loser” in parental rights and responsibility cases and the general rule that costs follow the event cannot be the general principle in these cases. The only outcome must be the successful protection of the best interest of the child. In addition; section 14 of the Children’s Act 34 of 2005 states that every child must have access to Court and has the right to bring, and to be assisted in bringing a matter to a Court, provided that matter falls within the jurisdiction of that Court...’

[182] It is however settled law that if one of the parties to custody and parenting proceedings adopts a deliberately difficult and obstructive approach throughout the litigation, the Court, in appropriate circumstances, should impose a punitive costs order.⁷⁹

[183] Whilst the conduct of the Defendant could be perceived as being deliberately difficult and obstructive, I am not persuaded that his behaviour was *mala fide* insofar as it relates to his plight for contact with S[...]. In my view, it is clear that he is simply an impassioned father pleading to have a relationship with his daughter; wanting to be ‘his daughter’s hero’. Therefore, in the exercise of my discretion I deem it appropriate that each party pay their own costs.

Order:

[184] In the result, the following order is made:

⁷⁹ See *KLVC v SDI & Another* [2015] 1 All SA 532 (SCA).

1. A decree of divorce is granted;
2. The Plaintiff and the Defendant shall exercise their co-guardianship and joint parental responsibilities and rights to their minor child, S[...], in accordance with the provisions of the parenting plan, annexed hereto marked "B";
3. That Defendant will pay maintenance to the Plaintiff in respect of the minor child in the amount of R1.00 per month. The first payment is to be made on or before the 7th of December 2024 and thereafter, on or before the 7th day of every succeeding month, until the minor child reaches the age of 18 years, marries or becomes self-supporting, whichever event shall first occur. All further matters of maintenance for the minor child is to be dealt with in the appropriate Maintenance Court having jurisdiction;
4. The Defendant shall forfeit all of the patrimonial benefits arising from the parties' marriage in community of property, including but not limited to:
 - 4.1 the proceeds realized from the sale of the immovable properties, known as 2[...] D[...] Street, Lakeside, Western Cape and 5 D[...] Court, 104 Main Road, Western Cape ("the properties");
 - 4.2 In this regard, the Registrar of this Court is authorized to sign any necessary documentation in respect of the transfer of the Defendant's undivided half share in and to the properties into the name of the Plaintiff, alternatively, at the election of the Plaintiff, in respect of the sale and transfer of the properties to third parties, on behalf of the Defendant.
 - 4.3 Pending the transfer of the properties, and with effect from the date of this order, the Plaintiff shall be entitled to receive the full rental income in respect of the properties and all benefits and liabilities in respect of the properties shall accrue to the Plaintiff;
 - 4.4 the proceeds realized from the sale of the parties' motor vehicle.

- 4 The terms of this order, including the Parenting Plan annexed hereto marked “B”, substitute the terms of the Settlement Agreement entered into between the parties and made an order of Court on 17 September 2020, under case number: 14777/2019;
- 5 The Defendant’s counterclaim is dismissed.
- 6 The Plaintiff is directed to take the necessary steps to apply for a mirror order of this order within one (1) month from the date of this order.
- 7 Each party shall pay their own costs.

P ANDREWS

Acting Judge of the High Court of South Africa
Western Cape Division, Cape Town

APPEARANCES:

Counsel for the Plaintiff: Advocate SB Van Emden
Instructed by: Bernardt Vukic Potash & Getz

For the Defendant: In person

Delivered: 7 November 2024 – This judgment was handed down electronically by circulation to the parties’ representatives by email.