

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2023-114345

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

7 April 2025


Judge Dippenaar

In the matter between:

M N P U M

APPLICANT

and

S V M

FIRST RESPONDENT

REGISTRAR OF THE DEEDS OFFICE

SECOND RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 07th of APRIL 2025.

DIPPENAAR J:

[1] The applicant, Mrs M, launched application proceedings in which she sought declaratory orders declaring: (a) that the ante nuptial contract concluded between her and the first respondent, Mr M, is invalid, null and void; (b) the marriage concluded between her and the first respondent is a marriage in community of property; and an order declaring the second respondent, the Registrar of Deeds, to remove the said ante nuptial-contract from the register.

[2] The application was opposed by the first respondent, Mr M. As the second respondent did not actively participate in the proceedings, Mr M will be referred to as the respondent where convenient.

[3] The relevant background facts are not contentious. The parties met in 2002, whilst the applicant was registered as a student at Tshwane University of Technology and the respondent was employed at Alexander Forbes, having studied actuarial science. The parties moved in together shortly after meeting. Their first child, a daughter, was born on 7 July 2004. The applicant later that year graduated with a diploma in public relations. The parties have four children together.

[4] After various separations and reconciliations, the parties finally separated in May 2017. The parties are presently in the midst of an acrimonious divorce. The respondent instituted divorce proceedings against the applicant during June 2021. A copy of the

parties' ante nuptial contract, reflecting that they are married out of community of property with the exclusion of the accrual system, was attached to the particulars of claim. In her plea, delivered in November 2021, the applicant disputed that the parties were thus married and challenged the validity of the ante nuptial contract on the basis that she had not agreed to its terms and had not signed the ante nuptial contract. The parties have been unable to reach a settlement.

[5] Prior to their marriage the parties purchased some nine properties together to obtain rental income. It was common cause that seven properties were registered jointly in the parties' names. The other two, including the matrimonial home, were registered in the name of the respondent only.

[6] After the birth of their daughter, the respondent decided to find a larger house to raise their daughter. The matrimonial home in Birch Acres was purchased in July 2005. The parties chose the property together. The respondent however signed the mortgage bond documents on his own and had told the applicant that as she was unemployed at the time and did not have any proof of income, he had been advised to sign the documentation alone. The property was registered in the name of the respondent only. The applicant contended that this was done behind her back and without her knowledge. After securing employment some time later, but before their marriage, she requested the respondent to approach the financial institution involved so that she could be added to the property as co-owner. The respondent refused. That was common cause.

[7] It was undisputed that the applicant was initially a dependant on the respondent's medical aid and that for a period, the respondent was on her medical aid. It was further undisputed that the respondent concluded various lease agreements with the tenants of the parties' rental properties in his name and that he collected the rental derived therefrom and deposited them into his bank account. Each of the parties had separate bank accounts and no joint bank account was ever opened.

[8] The respondent paid the mortgage payments and the municipal charges in respect of all the properties. Although the respondent disputed that the parties shared their financial responsibilities, it was undisputed that the applicant paid for groceries, the family's clothing and other expenses. It was also common cause that during the parties' relationship there were certain occasions when the applicant and respondent respectively were unemployed. It was undisputed that the respondent throughout their relationship earned substantially more than the applicant.

[9] It was undisputed that the respondent arranged a meeting with an attorney relating to the ante nuptial contract and that the parties attended his offices on 19 December 2007 at the instance of the respondent. It was further undisputed that the parties signed a special power of attorney in favour of the attorney, Mr Marius Adriaan Fourie, which attached a draft ante nuptial contract, which was initialed by the parties. The draft ante nuptial contract indicated that there would be no community of property between them and that the accrual system as provided for in Chapter 1 of the Matrimonial Property Act 88 of 1984 was excluded as well as all donations, bequests of legacies any of the prospective spouses may receive before or during the subsistence of the marriage.

[10] The special power of attorney, authorising Mr Fourie to sign the ante nuptial contract before a notary on behalf of the parties, is dated 19 December 2007. Mr Fourie appeared before the notary on 3 January 2008, where the ante nuptial contract was executed. It was undisputed that under s 95 of the Deeds Registries Act 47 of 1937, the execution of a power of attorney for legal purposes, including the execution of an ante nuptial contract is expressly authorised. It was further undisputed that the ante nuptial contract was executed in terms of the relevant legal requirements.

[11] The applicant admitted to signing the special power of attorney dated 19 December 2007 and that her initials appeared on the second and third pages thereof, being a draft of the ante nuptial contract. The parties' versions diverge regarding their intention at the

time and whether the different marital regimes and the implications thereof were explained and agreed upon.

[12] The parties were married by civil rights in a church in Dundee on 5 January 2008, in what the parties described as 'a white wedding'. The respondent disputed the applicant's contention that prior to their wedding, lobola negotiations were conducted with her family in Lesotho. However, no reliance was placed on a customary marriage and that aspect is irrelevant to the issues which must be determined.

[13] The nub of the dispute between the parties is the enforceability and validity of the ante nuptial agreement. In sum, the applicant contended that she was deceived into signing the special power of attorney by the respondent or that her signature was obtained by fraud. She contended that there was never a discussion or agreement between her and the respondent to marry out of community of property. According to the applicant, she first found out that they were married out of community of property excluding accrual, when she received the divorce summons during June 2021.

[14] The applicant's central contention was that there was no meeting of the minds when the ante nuptial contract was signed as she never entertained the necessary intention to marry the respondent out of community of property excluding accrual or to sign an ante nuptial contract. Her case is centrally predicated on two pillars. The first, that she never entertained the necessary intention to conclude an ante nuptial contract or to marry the respondent out of community of property. The second, that her signature on the power of attorney authorising the execution and registration of the ante nuptial contract was obtained by deceit, as the respondent advised her that it was necessary to sign the documents as it would place the parties in a lower tax bracket and would ensure funds were not frozen if one of them passed away. She contended that she was not afforded an opportunity to read the documents signed by her, but was urged by the respondent to trust him.

[15] On the applicant's version, the different marital regimes and their consequences were not explained to her. She admitted to accompanying the respondent to a meeting with the attorney, Mr Fourie, on 19 December 2007, which was her birthday. She could not recall whether she signed any documents at the attorney's office but was emphatic that the attorney did not explain the various marital regimes and their implications to her. According to the applicant, the attorney asked her whether she was satisfied, which she confirmed.

[16] Despite not being articulated precisely in the applicant's heads of argument it is clear that she wishes to resile from the ante nuptial contract on the ground of *justus error* or, put differently, reasonable or pardonable error.

[17] The respondent contended the opposite, namely that the parties before their marriage discussed and expressly agreed that their marriage was to be out of community of property with exclusion of the accrual system, so that each of the parties was free to grow their respective estates, which they did during the marriage. He contended that the ante nuptial contract was valid and reflected the agreement between the parties and that the various matrimonial regimes and their consequences were explained at the meeting with Mr Fourie on 19 December 2007.

[18] The following questions must be answered:

(a) As the parties have mutually contradictory versions, which of the versions should be accepted?

(b) Is there an adverse inference to be drawn for the respondent's failure to call the attorney, Mr Fourie, as a witness?

(c) Does the *caveat subscriptor* rule apply and the applicant is thus bound by the contract, given that she conceded that she signed the special power of attorney pursuant to which the ante nuptial contract was executed? Or; has the applicant established *justus error* in signing the said special power of attorney authorising the conclusion of the ante nuptial contract and thus that the contract is invalid and liable to be set aside?

[19] It is convenient to first dispose of the question whether a negative inference can be drawn from the respondent's failure to call the attorney, Mr Fourie, as a witness. Ordinarily, the failure to call an available factual witness will give rise to the inference that the evidence that such a witness could give would be to the detriment of the party's case.¹

[20] A failure to testify by a party who is available and whose actions lie at the core of the dispute is a factor to take into account, but in doing so regard must be had to the strength or otherwise of the case a party has to meet. A failure to call any witness of fact is part of the inferential process which must be viewed in the context of the case as a whole. It is apposite to refer to *Koukoudis*²: wherein the Supreme Court of Appeal held:

"...Failure to testify by a party who is available and whose actions lie at the core of the dispute is, of course, a factor to be taken into account, but in doing so, regard must be had to the strength or otherwise of the case that party has to meet."

[21] Although this is a referral of the matter to oral evidence and the affidavits must be considered together with the oral evidence, what transpired in the meeting with Mr Fourie forms part of the nub of the dispute. Either the implications of a marriage out of community of property without accrual was explained to the applicant, as the respondent contends, or they were not, as the applicant contends. It would have a simple matter for Mr Fourie

¹ *Galante v Dickson* 1950 (2) SA 460 (SCA) at 465.

² *Koukoudis and Another v Abrina 1772 (Pty) Ltd and Another* 2016 (5) SA 352 (SCA) para 49.

to clarify the position during evidence, where he would have been subject to cross examination. He could also have clarified whether the power of attorney was signed in front of witnesses, which the applicant disputes.

[22] In his affidavit, the respondent did not aver that the special power of attorney was signed in front of witnesses, only that the parties signed it in the attorney's and each other's presence on 19 December 2007. In his oral evidence, the respondent's version was that it was indeed signed in the presence of witnesses. The applicant disputed that any witnesses were present when she signed the special power of attorney.

[23] At the inception of the hearing, the respondent stated that Mr Fourie would be called to testify. That was also stated in the pre-trial conference held between the parties. Unfortunately, he was not. Although the confirmatory affidavit must be considered, that is not sufficient to overcome the respondent's failure to call a witness who could have substantially corroborated his version. Considering all the evidence and the principles involved, I am not persuaded that an adverse inference can be drawn, although his lack of corroboration is taken into account as a factor in determining the probabilities.

[24] What remains, are the versions proffered by the respective parties. Those versions are mutually exclusive on material aspects. The test pertaining to disputed issues is set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others* thus: ³

'To come to a conclusion in the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.'

³ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others* 2003 (1) SA 11 (SCA) para 5.

There are also subsidiary considerations which must be taken into account. Although not all of them are set out in any detail herein, they have been taken into consideration.

[25] It is trite that a court must base its conclusions on a consideration of all the evidence, which must take the totality of the evidence into account.⁴ The drawing of an inference requires properly established objective facts.⁵

[26] Both the applicant and the respondent respectively urged the court to conclude that the evidence of the other party should be rejected and that their respective evidence should be accepted. However, the versions of both the applicant and the respondent contained certain inconsistencies and improbabilities which affected their reliability and tainted their credibility. Ultimately, neither party's evidence can be rejected in its totality. The demeanour of the respective witnesses is not of determinative import. The matter must be decided on the basis of all the relevant factors, including the probabilities, on the evidence considered as a whole.

[27] As held by Meyer J in *Standard Bank of South Africa Ltd v Sibanda*:⁶

'I respectfully agree entirely with the learned author that 'by far the best determinant of the truth of testimony is not a witness's demeanour (visual or auditory behavioural cues) at all, but the actual content of the testimony' and that factors 'such as self-contradiction, inherent plausibility or the lack thereof, omissions and imprecisions, verification of facts testified to by other witnesses and exhibits, bias or motive on the part of the witness, and limitations of recall are among the most important indications of witness credibility', all of which would be readily discernible by a reading of a transcript of the evidence'.

⁴ *S v van der Meyden* 1999 (2) SA 79 (W); *Passenger Rail Agency of South Africa v Seleke* (A5016/2022) [2023] ZAGPJHC 51 (25 January 2023) (*Seleke*) para22.

⁵ *Seleke* paras 24-26 and the authorities cited therein.

⁶ *Standard Bank of South Africa Ltd v Sibanda* 2021 (5) SA 276 (GJ) para 9.

[28] It is uncontentious that the onus to prove the invalidity of the ante nuptial contract rests on the applicant. The principle of *pacta sunt servanda*⁷ is well entrenched in our law. If the applicant freely and voluntarily authorised the conclusion of the ante nuptial contract in its terms, she is bound thereto and her application must fail.

[29] The true issue between the parties is whether the applicant is bound by the *caveat subscriptor* rule, having conceded that she signed the special power of attorney authorising Mr Fourie to conclude the ante nuptial contract on her behalf or whether she made a mistake in doing so due to misrepresentation on the part of the respondent. The respondent's reliance on *CB v DB*⁸ and *GKR v Minister of Home Affairs and Others*⁹ does not avail him and the principles set out therein do not assist him in resolution of the present disputes.

[30] The legal principles applicable to the *caveat subscriptor* rule were summarised thus by Plasket J in *Absa Bank Ltd v Mc Creath*:¹⁰

'[7] ABSA relies on the *caveat subscriptor* rule which is to the effect that a party who signs a document containing contractual terms is bound by his or her signature whether he or she read the document or not.¹¹ This rule is not absolute. As appears from Fagan CJ's judgment in *George v Fairmead (Pty) Ltd*,¹² it all comes down to whether the party who signed the document created the impression for the other party that he or she had agreed to the terms contained in the document:

'When can an *error* be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the

⁷ *Baedica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) at paras 81-89.

⁸ *CB v DB* 2023 1 SA 382 SCA, which confirms that the primary purpose of an ante nuptial contract is to establish a marital property regime.

⁹ *GKR v Minister of Home Affairs and Others* 2022 (5) SA 478 (GP), dealing with claims under s 7(3) of the Divorce Act.

¹⁰ *Absa Bank Ltd v Mc Creath* 26/14 [2014] ZAECGHC 51 (13 June 2014)

¹¹ See *Burger v Central South African Railways* 1903 TS 571 at 578; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 34.

¹² *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471B-D.

test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? . . . If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound.'

[8] In other words, the 'true basis of the principle is the doctrine of quasi-mutual assent, the question being simply whether the other party is reasonably entitled to assume that the signatory, by signing the document, was signifying his intention to be bound by it'.¹³

[9] In *Brink v Humphries & Jewell (Pty) Ltd*¹⁴ Cloete JA, with reference to the passage cited above from *George v Fairmead (Pty) Ltd*, stated that an innocent misrepresentation by the other party suffices to enable a signatory to escape the usual consequences of his or her signature, before proceeding to say:

'The law recognises that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory, whether intentionally or not. Where such a misrepresentation is material, the signatory can rescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if he had known the truth. Where the misrepresentation results in a fundamental mistake, the "contract" is void *ab initio*. In this way, the law gives effect to the sound principle that a person, in signing a document, is taken to be bound by the ordinary meaning and effect of the words which appear over his/her signature, while, at the same time, protecting such a person if he/she is under a justifiable misapprehension, caused by the other party who requires such signature, as to the effect of the document.'

[31] In *Prins v Absa Bank Ltd*,¹⁵ cited with approval in *G v G*,¹⁶ Davis AJ proposed the following questions that can be used to determine whether reliance in terms of the conduct of the party allegedly creating the impression of consensus and the conduct of the other party in believing the impression:

- '(a) *Is there consensus?*
- (b) *If not, is there dissensus caused by a mistake?*
- (c) *Is the other party aware of the resiler's mistake?*

¹³ RH Christie and GB Bradfield *Christie's The Law of Contract in South Africa* (6 ed) at 182.

¹⁴ *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 2.

¹⁵ *Prins v Absa Bank Ltd* 1998 (3) SA 904 (C)

¹⁶ *G v G* [2018] ZAGPJHC 499 (21 September 2018) confirmed on appeal in *G v G* (A 5045/2017) [2018] ZAGPJHC 626 (13 November 2018).

(d) Who induced the mistake and was done by commission or omission, which was either fraudulent or even innocent?’

[32] The parties testified about their conduct, both before and after the marriage in support of their respective versions on the probabilities. The applicant contended that such conduct indicated that they shared the family’s financial responsibilities and were building up a joint estate and sharing expenses. Although disputed by the respondent, the evidence established as a probability that the parties did share their financial responsibilities.

[33] There was a period where the applicant was on the respondent’s medical aid and another where the converse occurred. The evidence further established that the respective parties took responsibility for different expenses to sustain their family and its responsibilities. The fact that the respondent persisted with his denial that the parties shared the family’s responsibilities in cross examination, despite being confronted with corroborating evidence, detracts from his credibility. The sharing of financial responsibilities is however not determinative of whether they agreed to be married in community of property or in accordance with the terms of the ante nuptial contract.

[34] The respondent further made various claims regarding property in Lesotho and other assets owned by the applicant independently, which she disputed and for which he could provide no corroborating evidence. That was disputed by the applicant. No weight can be attached to the respondent’s bald and unsubstantiated averments. The respondent’s version regarding the circumstances under which certain of his assets were attached, and the documentation he relied on is improbable.

[35] As stated, it was undisputed that prior to their marriage the parties purchased various properties for rental income. The applicant contended there were nine properties. On a conspectus of the evidence, that number included the matrimonial home. Although

admitting that averment under oath in his answering affidavit, in evidence, the respondent contended that only seven properties were jointly purchased. He contended that 'joint purchase' meant that the parties had looked at and decided on the properties together. That contention does not bear scrutiny. The reasons provided by the respondent to the applicant as to why she was not registered as a co-owner of the matrimonial home, which the parties jointly purchased before the marriage, are unconvincing. His refusal to take steps to have the applicant registered as co-owner of that property is significant. The applicant was thus fully aware prior to the conclusion of the marriage that the respondent did not agree to a pooling of all their assets in a joint estate.

[36] It is also probable that the respondent had scant regard for the concept of joint ownership as illustrated by him concluding lease agreements in respect of the jointly owned properties in his own name and appropriating the rental income to his own bank account. He did not dispute those facts. The applicant's version that the respondent never accounted to her in relation to the said properties and that she never protested to him administering those assets, is probable. It is not however probable that the applicant accepted that the respondent was administering their joint estate for purposes of a marriage in community of property, as the applicant contended. Even before the marriage the applicant was well aware that the respondent refused to agree to the matrimonial "home being owned by them jointly. There are various issues surrounding their joint ownership of the various properties which will have to be resolved in due course.

[37] It was undisputed that after the parties' marriage and during about 2016, the applicant branched out into two business ventures, which ultimately failed. The respondent was not involved in these business ventures and his consent was not sought to sign any documents in relation thereto. Irrespective of the applicant's reasons as to how this came about, that militates against the notion that the applicant was under the impression that the parties were married in community of property.

[38] The applicant's conduct in relation to the completion of the application for vehicle finance of a Renault Clio with MFC during 2014, supports the probability that she was not in possession of a copy of the ante nuptial contract at the time as it was not provided to the financial institution involved. Although on her version she did not personally complete the application form, it reflects the marriage as being "accrual system". When confronted with this in cross examination, she contended that she had stated she was married in community of property as she was not at the time familiar with the concept of accrual. However, she signed the agreement, effectively representing that she was married out of community of property. In argument, the applicant sought to overcome this difficulty by submitting that the applicant understood accrual to mean 'they accrue assets together'. Considering the facts, the applicant's version on the issue is improbable. It is improbable that the salesperson of his or her own volition would have mentioned the word accrual, unless it emanated from the applicant. No evidence was presented that the applicant was requested for the respondent's consent to the transaction.

[39] The applicant's conduct when she received her pension fund payout from an erstwhile employer, militates against her being under the impression that the parties were married in community of property. It was undisputed that the applicant did not share the said payout equally. Although there is a dispute between them as to the amount the applicant shared with the respondent, on the applicant's own version, that amount did not equate to half the payment received by her. She further did not testify that there was in her view any obligation to share the said payment.

[40] The parties' respective versions on how the special power of attorney was signed, are divergent. On the applicant's version, she signed the documents at home the evening before the parties attended the offices of Mr Fourie. Her version was that she signed them without reading the contents thereof, pursuant to the respondent explaining the need and reasons for signature of the documents. She testified that Mr Fourie at the meeting on 19 December 2007, had not explained anything to her, but asked her whether she was happy

with the arrangement and whether the respondent had explained the documents to her. She confirmed in the affirmative. The respondent on the other hand testified that the parties had discussed the matter and agreed that their marriage should be out of community of property, excluding the accrual system.

[41] It was undisputed that the respondent made the arrangements for the meeting with the attorney in relation to the ante nuptial contract. What exactly transpired before Mr Fourie remains unclear. Ultimately it is not relevant where the applicant signed the documents, given the concession that she did so. She further conceded in evidence that she could not remember whether she had signed any documents at the offices of Mr Fourie. It is improbable that the attorney, as a professional, would have completely disregarded his duties by not insisting that the documents were signed in his presence. On this issue, the version of the respondent is more probable than that of the applicant.

[42] On a conspectus of the facts, the applicant's version that she trusted the respondent and was guided by him in relation to financial matters is probable. It is also probable that the respondent advised her that the reason she had to sign the special power of attorney pertained to tax reasons and to avoid their funds to be frozen in the event of death as testified by the applicant. On the respondent's own version, he was acutely aware that there were different tax brackets for parties married in and out of community of property. He is trained in actuarial science and spent time working for banking and other financial institutions and for SARS. The applicant on the other hand, has no such experience. Although she is educated and holds tertiary qualifications, those are not in the fields of finance. The respondent's evidence lends credence to the applicant's evidence that the respondent told her the documents must be signed for tax reasons. It is unlikely that the applicant would have known such information if it was not imparted to her by the respondent.

[43] Considering all the evidence, it is probable that the respondent persuaded the applicant that it was better for them to be married out of community of property and to conclude an ante nuptial contract. He may well have deceived her on that issue and not fully explained all the implications of doing so. However, that does not equate to a lack of consensus that the marriage would be out of community of property the time the documents were signed. It was open to the applicant to properly read the documents and seek clarification from Mr Fourie regarding any aspect she did not understand. She did not avail herself of that opportunity. Instead, she signed the special power of attorney and appended her initials to the draft ante nuptial contract, thus signifying her voluntary agreement thereto. The applicant is an intelligent and qualified woman, who reasonably must have understood that by signing the documents, she was assenting to a marriage out of community of property, excluding the accrual system.

[44] It can be accepted as probable that the respondent was the forceful and dominant party in their relationship and that the applicant adopted a subservient role. Although the applicant may have been “tricked” by the respondent as to why a marriage out of community of property was a better option, it cannot be concluded that she was misled as to how the parties would be married.

[45] On a conspectus of the evidence, the applicant’s evidence that she was under the impression that the parties were to be married in community of property and would build their estate jointly, is improbable. It is also improbable that they never discussed this issue, given the applicant’s own evidence regarding what transpired the evening before they attended at Mr Fourie’s offices. By this time the applicant had already experienced the respondent’s unwillingness to her acquiring joint ownership of the matrimonial home. It is improbable that the applicant could reasonably have been under the impression that the respondent consented to a marriage in community of property, where all their assets would be owned jointly, including the matrimonial home, given his prior conduct.

[46] The applicant's evidence that she would not have financially burdened herself knowing that the respondent earned far more than her and would have focused on investing money for her own financial security, speaks to hindsight and regret rather than to a lack of consensus at the time the special power of attorney was signed. Whilst she may not have fully appreciated all the future consequences of a marriage out of community of property, excluding accrual, that does not detract from the fact that she was reasonably aware that the marriage would not be one in community of property.

[47] Considering all the evidence and the probabilities, it must be concluded that the applicant did not establish that there was no consensus between the parties as to how they were to be married. The applicant further did not on the probabilities establish *justus error* or grounds which would entitle her to resile from the contract and vitiate the special power of attorney and thus, the ante nuptial contract. The drawing of an adverse inference against the respondent for the failure to call Mr Fourie, would not tip the scales in her favour. It follows that the application must fail.

[48] Considering all the facts and the respondent's conduct, it would not in my view be just to mulct the applicant with the costs of the application. Given the nature of the dispute which is matrimonial in nature, there is scope to depart from the normal principle that costs follow the result.¹⁷ I am not unsympathetic to the applicant's plight. However, the facts, probabilities and ultimately the law were against her. She may have other remedies at her disposal which can be pursued. In all the circumstances, it would be just to direct each party to be liable for her or his own costs.

[49] In the result, the following order is granted:

¹⁷ G v G [2018] ZAGPJHC 499 (21 September 2018) confirmed on appeal in G v G (A 5045/2017) [2018] ZAGPJHC 626 (13 November 2018) para 18.'

[1] The application is dismissed;

[2] The applicant and first respondent are directed to bear their own costs.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

HEARING

DATE OF HEARING : 17 - 18 MARCH 2025

DATE OF JUDGMENT : 07 APRIL 2025

APPEARANCES

APPLICANT'S COUNSEL : Adv L Leeuw

APPLICANT'S ATTORNEYS : E. Talane Inc.

RESPONDENT'S COUNSEL : Adv D Steenekamp

RESPONDENT'S ATTORNEYS : Schumann van den Heever & Slabbert Inc.