

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 034446/19

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED: NO <u>10-10-2025</u> Date	 Signature
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In the matter between:

M. M.(born M)

Plaintiff

And

N. I. M.

Defendant

JUDGMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY/ELECTRONICALLY
AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL/
UPLOADING ON CASELINES AND/OR COURT ONLINE. ITS DATE OF HAND
DOWN SHALL BE DEEMED TO BE OCTOBER 10, 2025

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NTANGA AJ:

Introduction

[1] The plaintiff instituted an action against the defendant for inter alia an order in the following terms:

- a. declaring that she entered into a valid customary law marriage on or about May 14, 2011, with the defendant;
- b. a decree of divorce;
- c. division of the joint estate, alternatively, division of the limited estate;
- d. the Antenuptial Contract concluded between the plaintiff and the defendant on or about December 21, 2016, is invalid and unenforceable, alternatively void, alternatively has been validly cancelled;
- e. an order appointing a Receiver and Liquidator of the joint estate;
- f. parental responsibilities and rights (as envisaged in terms of Section 18(2) and Section 18(3) of the Children's Act 38 of 2005) pertaining to the 2 (two) minor children are awarded to the plaintiff and defendant jointly subject to the terms set out in the particulars of claim;
- g. that the defendant shall pay maintenance to the minor children in the amount of R40 000.00;
- h. that the defendant is to pay to the plaintiff until her death or re-marriage, whichever occurs first the amount of R80 000.00 per month.

[2] The defendant filed a counterclaim and sought an order inter alia in the following terms:

- a. a decree of divorce;

- b. declaring the marriage relationship entered into between the parties as valid and legal;
- c. that the terms of the Antenuptial Contract entered into between the parties are valid and enforceable;
- d. that the plaintiff shall have primary residence and custody in respect of the minor children and the defendant shall have reasonable rights and contact with the minor children which reasonable rights of contact shall not interfere with the minor's social, educational, religious and extra mural activities;
- e. that the plaintiff and the defendant shall have full parental responsibilities and rights in respect of the minor children; and
- f. the defendant to pay maintenance for the minor children in the amount of R20 000.00 per month. The defendant will further be responsible for all necessary school expenses and medical expenses. The defendant will further buy monthly groceries and clothing for the minor children.

Background

[3] Both the plaintiff and defendant effected various amendments to their pleadings before commencement of trial proceedings. In the amended particulars of claim the plaintiff avers that the parties were married to each other in community of property by way of a customary marriage on May 14, 2011, at Johannesburg, Gauteng. The plaintiff avers that customary marriage was concluded as follows:

- a. the defendant paid lobolo to the plaintiff's family;
- b. the marriage was celebrated in two separate ceremonies held at the plaintiff's and the defendant's home. These ceremonies included the exchange of gifts between the two families as well as the welcoming of the bride by the defendant's family;

- c. on or about January 5, 2017, the parties married each other in terms of a registered Antenuptial Contract. In terms of the Antenuptial Contract, community of property and profit and loss were purportedly excluded as well as the accrual system; and
 - d. the plaintiff averred that the Antenuptial Contract amounts to a postnuptial variation of the matrimonial property regime of the parties from a marriage in community of property, to a marriage out of community of property. The plaintiff avers that the parties were obliged to obtain the leave of the Court prior to the conclusion of the Antenuptial Contract in order to validly change their matrimonial property regime from a marriage in community of property, to a marriage out of community of property. The plaintiff avers that this failure to obtain leave of the Court has rendered the Antenuptial Contract invalid and unenforceable. The plaintiff further avers that the Antenuptial Contract is void, alternatively voidable as a result of misrepresentation and/or duress.
- [4] The defendant in his plea avers that the parties, acting in their personal capacity, during or about the period of 2010/2011 entered into an explicit verbal alternatively, tacit further alternatively implied agreement, the terms of which are the following:
- a. that the parties will in due course in the future enter into a civil marriage;
 - b. that, prior to entering into civil marriage, the parties will execute an Antenuptial Contract in terms whereof the parties will agree to be married out of community of property with the exclusion of the accrual system; and
 - c. that, for the sake of the parties' respective families and more specifically their parents, the parties will participate in a traditional ceremony where lobolo is exchanged, and certain traditional rights are followed.

- [5] The defendant further averred that in terms of the foregoing agreement, during or about May 2011 the parties and their respective families participated in the exchange of *lobolo*. Subsequent to the aforesaid, the parties acted as follows:
- a. at all relevant times arranged their respective financial affairs and conducted their affairs as if they were not married;
 - b. the parties did not establish a joint estate; and
 - c. the parties maintained full de facto and de jure control over their respective estates.
- [6] The defendant's case is that he admits that certain customary rites were followed but denies that such rites created or amounted to a customary marriage in terms of customary law and further denies that it was the intention of the parties to be married in terms of customary law.
- [7] The defendant averred that the parties never intended to enter into a customary marriage, and/or to establish a joint estate and further denies that the ceremonies pleaded by the plaintiff established a customary marriage. In keeping with their agreement, the parties entered into an Antenuptial Contract which resulted in a civil marriage on January 5, 2017. The defendant further averred that at the time when the parties concluded the Antenuptial Contract, and on the insistence of the plaintiff, the parties agreed that certain benefits will be bestowed upon the plaintiff in the event of the dissolution of the marriage. On dissolution of the marriage by means of a Court order, the defendant shall pay the plaintiff an agreed amount of R4 000 000.00 in complete discharge of the defendant's patrimonial obligations including spousal maintenance by means of five equal instalments in the sum of R800 000.00.

Issues for determination

- [8] This Court is called upon to determine (i) whether the parties were married in terms of customary marriage and consequences thereof; (ii) whether the

Antenuptial Contract entered into between the parties is valid in law and consequently, whether the parties are married out of community of property in terms of civil union; and (iii) whether the defendant should be ordered to pay maintenance to the plaintiff in the amount of R500 000.00 per month until her death or remarriage, which amount is inclusive of the two minor children's claim for maintenance and support.

Plaintiff's Case

- [9] The plaintiff testified in person as a single witness and no other witnesses were called to support her case. Her testimony was the longest as she took more than a week in the witness stand, whilst the defendant took just over a day to testify. The plaintiff testified that she met the defendant on or about 2011. At the time she was a presenter on a television show, and they were doing a shoot for another television show known as "Soul City", which was broadcast on SABC 1 television channel. She was also on the third season of a show known as "Tshisa", which was also broadcast on SABC 1 television channel. Her status was that of a freelancer, meaning that she was not on a permanent contract.
- [10] She testified that she did not have the skill of signing contracts and described herself as terrible at dealing with contracts. Hence, she had an agent looking at the contracts who would relay the messages and payment terms so that she could understand what she was signing. She would then sign the contract once everything was explained in depth and with the assistance of her agent who was more qualified than she was. At the time, she was 21 years old, and her highest standard of education was matriculation ("National Senior Certificate" or "NSC").
- [11] The plaintiff testified that she first met the defendant on the set of a television show known as Tshisa and the defendant was a guest for the foregoing television show. They met again in a show she was shooting, known as Young, gifted and black television show. That evening the defendant sent her an inbox via Facebook, a social media channel, and asked her out for a coffee. Due to the defendant's persistence over time, she finally gave in and agreed to go out on a date with the defendant for coffee or dinner. The defendant picked her up from

her place and on their way the defendant told her that he wanted to get her on that date so badly and he might have told a little lie. The defendant told her that they were not going directly to a date, but he had two gigs before they could go, and he did not want to miss out on the opportunity to go out with her. She explained a gig as a booking for an artist be it for DJs, acting on television shows and/or being a Master of Ceremonies.

- [12] They went to the first gig in Wattville in the East Rand and later to the second gig in Rosebank. After the second gig they could not go to a restaurant as it was already past the time that restaurants were serving dinner. They decided to get something to eat from a convenient store and went to the defendant's house where they had great conversation; and they might have spoken until the early hours of the morning. She was then convinced that they had something solid and when she wanted to leave that evening and go home, the defendant talked her out of it. They spent the night together and had a conversation until the sun rose, from that day, they became inseparable.
- [13] The plaintiff testified that after she became pregnant, she was scared because she was not ready to have a baby at her age and without being married. They had a conversation with the defendant; she started crying and the defendant comforted and assured her that she had nothing to worry about as there was a plan for their future. At the time she was unsure of what that meant but she trusted the defendant and expected no harm from him.
- [14] They then started talking about a trip to Greece as that was the defendant's next place of performance. The defendant wanted her to experience the beginnings of his beautiful career. They travelled to Greece together in the same flight, this was a beautiful experience for her, and she felt innocent and pure. They travelled economy class, but this is not how they travelled later in their relationship. The trip to Greece was a new experience for her as she had never travelled internationally.
- [15] On arrival in Greece, they met the defendant's friends and went to a hotel. After the defendant's first gig, they took a trip to the island called Santorini which she

described as one of the most beautiful places she has ever seen. As she was pregnant, she had cravings and she wanted a hot dog, the defendant was on edge, and this was unlike him. They finally decided to leave without the hot dog and went to the hotel, they decided to get a burger, and she was happy that she finally was getting something to eat. After an argument with the defendant, she decided to give up on the burger.

[16] The sun was setting in the background, and the defendant led her up to the peak and they watched the sunset in silence for the longest time. The plaintiff testified that at some point she turned towards the defendant, and he was on his knee, he asked for her hand in marriage, and he asked for her to be his wife, she did not expect the proposal. It felt so beautiful to feel the same way someone else does about her. This was a beautiful moment for her, and she accepted the proposal as she also wanted to be the defendant's wife. She was more than excited and took honour with the beautiful ring which was not too big but cute and modest. She testified that when the defendant proposed, he went down on his knees and said 'would you make me the happiest man in the world; you have come into my life and so much has changed, you are truly the love of my life, and I would love for you to be my wife. So, will you marry me and be my wife'. She had never thought that she would be a wife at the age of twenty-one, but she accepted that the man that she was in love with wanted her to be his wife.

[17] The plaintiff testified that her understanding of the proposal was that when they got back home, they were to start planning for the wedding. On the same evening as the proposal, the defendant mentioned that he would like to send a letter to her uncles for negotiations. She sent everyone a message about the engagement, and it was important to her that the defendant put a ring on her finger. She sent a text message to her aunt advising her that her fiancée wanted to send a letter home. The aunt advised her to speak with her mother, who was shocked because she was young. Her mother requested to see both of them, later when they were doing a shoot for a television show known as Zone 14. The plaintiff's mother went to the defendant's vehicle, they spoke for a while and when they went out, they were both crying. They had forged a relationship and walked

closer together; the defendant undertook to take care of her. The plaintiff's mother gave them her blessing for their marriage.

- [18] The plaintiff testified that she spoke to the defendant about the letter that was to be sent to her family to initiate *lobolo* negotiations. The defendant and his family assembled a negotiation team and requested the plaintiff's mother to assemble a team from the plaintiff's family, thereafter the first letter was delivered to the plaintiff's mother who handed it over to the plaintiff's grandfather who was deceased at the time of the proceedings.
- [19] The plaintiff testified that the *lobolo* negotiations commenced and the first date was set. The defendant and her were both nervous. The negotiation team went to the plaintiff's family home in Mofolo, Soweto where her grandmother grew up and her mother was staying at that house at the time. She testified that the tradition was followed, the groom stood outside of the gate and asked for permission to come in. Her uncles were not happy that she was engaged before the defendant had spoken to her family, but she spoke to them and requested leniency as she was in love and that the defendant was a millionaire. She wanted her family to be fair so that things could also be good at home.
- [20] There was a delegation from both sides of the families when the *lobolo* negotiations commenced. From the defendant's side, there was his sister, and two friends whose full names were identified during the proceedings. From the side of the plaintiff the delegation comprised her uncle, an aunt and her husband. She testified that there were more but could not remember everyone at the time of the proceedings.
- [21] On how the tradition was followed she explained the Zulu tradition in relation to the *lobolo* negotiations. She testified that the custom is that the *makoti* (bride) should not be seen when the guests arrive. She was in the property but was not allowed to see the family members of her husband to be. She was in her mother's bedroom within the property but was in communication with the defendant about the negotiations.

[22] She testified that the defendant's family and friends came to the gate and requested to be allowed access inside so that they could start lobolo negotiations. Her family let them inside her home and they were led to the lounge. She was in one of the bedrooms, the defendant's family and her family met in the lounge. The discussions started and the amount required for *lobolo* was discussed, she got impression that the defendant might have been talking to some of his family members as he would call and say 'baby, this is too expensive, can you ask them to bring it down'. She explained that she was referring to the dowry. She would then communicate with her mother through the window and tell her that it is too high and the defendant cannot afford it.

[23] The plaintiff testified that the families settled at R70 000.00, and the defendant's family paid R8 000.00 on the day. The rest was to be paid for on a separate day. That was the *lobolo* amount was agreed between the two families. She was then led out of the bedroom where she was seated, her family had prepared a meal for the defendant's family, and everyone who was present. After eating they all left, the plaintiff and the defendant then discussed the next step since the first *lobolo* negotiations or the first round was done.

[24] The plaintiff referred to a document on 04-10 on Caselines and identified it as a letter of confirmation and testified that it was a day when they had *umembeso* and *lobolo* payment was completed. The letter is signed on behalf of both families. She read the letter for the record, and it reads as follows:

"We the undersigned representing the families of ... and ... met on the 14 May 2011. We confirm in writing that the amount of R8 000.00 (Eight Thousand Rands only) was received on behalf of the ... family as balance payment for the *lobolo* of ... In full and final settlement.

Signed on behalf of ... family

...

Signed on behalf of ... family

..."

[25] The plaintiff testified regarding this document and corrected her earlier version by testifying that in the first meeting the amount of R62 000.00 was paid and the

R8 000.00 was the balance for the agreed *lobolo* amount. The plaintiff explained that after the first *lobolo* negotiations, she together with the defendant went home in Greymont. They discussed the next step and agreed to keep everything tight and compact as possible without overspending as finances were not in abundance at the time. Their suggestion was that they should complete negotiations on the same day as the wedding in Soweto to avoid wasting people's time and because they wanted to leave as a married couple.

[26] They both spoke to their families, and a date was settled for May 14, 2011. They spoke about what should happen and the defendant's sister had explained that there is *umembeso* which means that the groom's family must give gifts to the bride's family. The defendant's sister wrote a list of what they will have to buy for the groom's side of the family, and she explained that the same will happen on the groom's family and that is called *umbondo*. The plaintiff explained that the purpose of *umbondo* is to thank the groom's family for raising him. Regarding *umbondo*, the plaintiff testified that the bride's family gives gifts to the groom's family.

[27] The plaintiff testified that they went to Durban to give gifts to the defendant's family. They discussed that *umembeso* would happen on May 14, 2011, and *umbondo* would happen in Océandale in Durban on June 25, 2011. The plaintiff referred to the document on Caselines at 04-11 and identified it as an invitation card for both traditional weddings. She testified that the first one was to be in Soweto in her mother's primary residence and the second one was to be held in Durban at Treasure Beach, Océandale. The document identified by the plaintiff as an invitation card reads as follows:

"... and ... Invite you to share their joy as they celebrate their traditional wedding.
Umembeso held on ... 14/05/11 ... Mfolo Central. RSVP ... *Umbondo* 'held in
Durban 25-06-11 ... Océandale Treasure Beach Blaff. RSVP ...".

[28] The plaintiff testified that the document is the inside of the invitation card which specifies that the plaintiff and the defendant were inviting everyone to celebrate their traditional weddings. At the end of the invitation, it has a description of

umbondo and *umembeso*. She testified that persons indicated for RSVPs are her aunt and the defendant's sister. She testified that the information in the invitation card was obtained from both families but mostly from the defendant's sister who was taking them through the custom of the Zulu tradition, and she helped them regarding what they were doing and where. She testified that the defendant and the plaintiff chose the dates to ensure that whoever needed to be there was available. She testified that the defendant and the plaintiff both understood very well that these are weddings. They both went to get outfits for their traditional weddings. They went to a fashion designer in Rivonia, and they asked him to make their wedding outfits as their wedding was taking place one in Durban and the second one in Soweto. She testified that the plaintiff and the defendant had conversations on the wedding that was printed on the invitation card.

- [29] Regarding the day of the *umembeso* as she described it, the plaintiff testified that the defendant's family arrived at her home's entrance and after some time they were let in after discussions with the elders of her family, as that is the traditional Zulu custom. The defendant's family was stuck in the gate because they were late, and they were required to pay *imvulamlo* (a fee payable by the groom's family for starting negotiations). However, her family was not strict about it, and they were let in. This was because there was a wedding on the day, and they understood that time was most important. As a bride she was again put in a separate room.
- [30] The negotiations took a while, and she was not aware of what was going on for the longest time, but the people would come to her room to explain what was happening and why it was taking too long. After the negotiations were done, the plaintiff was taken to a room with elderly women from her family who did what was called *ukulaya*. She testified that this is a Zulu custom of giving advice about marriage and the elderly women told her their experience as married women in a marriage and how to handle situations when you are married.
- [31] The plaintiff testified that whilst she was in the room, there was a slaughtering of an animal. She testified that there was a bile, and she was told by the defendant's family that when you are given a bile from the slaughtered animal, it is your

ancestors welcoming you into the new family you are going to, and she specifically referred to the defendant's family. The plaintiff testified that the defendant got a bile from her family, and they were given instructions by the defendant's family on how to do it. After the slaughtering of the animal was complete, she changed into a Zulu regalia, her friends were called *abakhaphi*.

[32] She stood up together with the *abakhaphi* and her family and created a passage for herself and the defendant to walk out because the defendant had come into the room. From the moment she walked out of the bedroom, she stepped into the lounge where there were her aunts, uncles, the defendant's representatives as well as friends and family. She was instructed to seat down on the floor, the groom then walked in with *abakhaphi*. He was asked if she is the wife and the woman he wanted to marry, he responded by saying 'yes this is indeed the woman I wanted to marry'. The defendant left the lounge together with the plaintiff and they walked to the street.

[33] There was euphoria, they all celebrated, walked outside of the door, the two families were standing against each other. As they got closer, the two families merged, became one and sang a song *umakoti ngowethu*, meaning the bride is ours. There were neighbours and people who caught the wind about the wedding. In the street they had set up a seating area for people to eat and to watch them throughout the course of the bringing together of the families, but most importantly, the plaintiff and defendant as husband and wife. They walked out of the street as two groups of people and sang extremely loudly and it was beautiful to listen to. She testified that she held hands with the defendant and walked back to the venue, they sat in a seating area that was made for the bride and the groom.

[34] The plaintiff testified about her attire and identified it as a traditional Zulu outfit. She gave a description and meaning of her attire. She testified that the defendant's family was very strict about the outfit that she had to wear apart from the accessories. The scarf and the beaded belt were what a bride had to wear. The length of the skirt was important because she was married and could not wear anything short. The hat is called *isicholo* and married women wear it to

cover their hair. She testified that the outfit she was wearing on the day is what she was told to wear as a married woman.

[35] The plaintiff testified that after taking their seats, the family elders came up and spoke on what was happening, they told them that it was their traditional wedding and that it was beautiful to have two families merge and become one, the uncles, aunts and grandparents were called up to be given gifts. The gifts comprised of coats, blankets and various gifts were handed over to her side of the family to thank them for raising the plaintiff. The plaintiff went into detail to testify about the festivities for the day, including the request by the elders for her to dance for the defendant as her husband.

[36] The plaintiff referred to a beauty pageant event held at Sun International for a Ms South Africa beauty contest. The plaintiff testified that the defendant was one of the judges but had to withdraw because her sister was one of the contestants. She referred to a media statement issued by Sun International indicating that the defendant withdrew as a judge due to conflict of interest as one of the contestants is a half-sister to the plaintiff. The following paragraph in the media statement is ascribed to the defendant:

"I have recused myself from the judging process for Miss South Africa 2014 because it has emerged, to my surprise, that I am actually related by marriage to Top 33 semifinalist ... Ms ... Miss ... is the half-sister of my wife ... and, although she and her half-sister have only ever met twice in person, I had never met her, and notwithstanding that we have no relations of any kind with her, I do not wish any perception arising to distract from the pageant".

[37] The plaintiff testified about the second event which occurred at the defendant's home in Durban. She testified that next to the defendant was *umkhaphi* who was her cousin and in accordance with the instruction given to them, *umkhaphi* must be a married person. The instruction was given from the defendant's side of the family. This *umkhaphi's* husband was seated on the far left of the picture presented as evidence¹.

¹ Caselines at 04-22.

- [38] The plaintiff testified that she was instructed to sit on the floor with *umkhaphi* and that the order of the day was that she would sit on the chair when her husband had told her to come seat. The defendant asked her to sit next to him as he did not like that she was sitting on the floor, but they had to adhere to the custom. She sat on the floor with *umkhaphi* who is the plaintiff's cousin. The plaintiff testified that they were instructed on the type of gifts to bring to the defendant's family. They walked up the hill with the gifts on their heads, she testified that unfortunately, the defendant took the computer that had all the images, and she could not produce them in Court.
- [39] The plaintiff testified that they carried gifts on their heads as the family sang up the hill. They walked to the defendant's homestead and sang until they were invited inside, and this was an acceptance of her to the new home as a *makoti*. She was given the name of Nombeko as a *makoti* to the defendant's family. She testified that after the weddings she was referred to as *makoti*. Her grandmother constantly called her, prayed and told her how to be in the marital home, she would refer to the bible. She testified that they lived as husband and wife and that the defendant referred to her as his wife. She disputed the defendant's version that the traditional ceremonies were done for the sake of the parents and the families. She testified that in the African culture, the elders are the ones who run the wedding itself and that is exactly what happened, they wanted to be married and that was it.
- [40] The plaintiff argued that if the defendant did not intend for their ceremony to be a traditional wedding, he could have stopped it and mentioned that it was not what he wanted it to be. She testified that the defendant is the one who initiated *lobolo* negotiations which includes sending the letter proposing *lobolo* negotiations. The plaintiff testified that the defendant referred to her as his wife, *icherry yami* or *umfazi wami*. He referred to her and introduced her as his wife. She testified that they called each other Nana or husband and wife.
- [41] The plaintiff testified about their living arrangements with the defendant after the ceremonies and averred that they wanted a home together. They spoke about having a white wedding, but they did not find it important because they were

already married and that the defendant really wanted to create a home for her outside of the property they were staying at. Their plan was to buy a piece of land to start their new life and build a home from scratch.

[42] They went to see various properties whilst staying in Greymont. The plaintiff referred to a property in Northcliff which is in a gated area where the defendant intended to purchase as their home. She testified that the defendant was not happy that the previous girlfriend had been to the house they were staying in, and they moved to a property in Parkmore, opposite where they were staying and rented the property for their residential purposes. This was done whilst they were going to get funds to start building in the Northcliff piece of land and renovate the other property. Unfortunately, the Northcliff property did not materialize as the plaintiff had seen and liked a property in Parkmore, which is now their matrimonial home. According to the plaintiff, this was a humble home, and it was for sale.

[43] The plaintiff adduced evidence in dealing with her claim for maintenance and support of their minor children as well as her spousal support. The plaintiff testified that the defendant was paying for everything, she had a monthly stipend, and the defendant had a bank card for them in which he loaded R1 million every year so that she could spend the money on odd things. She testified that the monthly stipend was for groceries, small things of the house and the rest she could spend on hair, nails, treatments and children. Each time she needed money the defendant would deposit it into the account. She testified that she was well taken care of financially by the defendant. The plaintiff averred that the defendant was brand conscious and would ask her to purchase designer handbags, she then knew the standard that they had to uplift themselves to as a couple.

[44] The plaintiff testified that they lived a luxurious lifestyle, they purchased designer furniture and gave an example of a couch that they purchased at R80 000.00. When they went shopping, they would spend about R400 000.00. Regarding the stipend amount, she testified that it was a small amount which was constantly depleted. The defendant would give her R30 000.00 a month and as soon as the

amount is finished, she would go back to the defendant and make more requests for funds. The plaintiff testified that the defendant was specific on how he wanted the house to look like, he wanted the house to smell good, they purchased aromica perfumes which were quite pricey. The defendant would ask her to write down a budget of what is needed. The defendant was specific on what should be on the menu for the house and some of the items were expensive.

[45] The plaintiff testified that they had many cars which they constantly changed. She mentioned examples of the cars they had and mentioned a Bentley, a Maserati and a Mercedes Benz which she described as having suicide doors and its rims cost R200 000.00. She testified that there was constant circulation of luxury cars, and she drove every single one of them and the defendant considered the vehicles to be hers. There was a point where they had to park some of the cars outside. There would be two vehicles in the garage, three in the parking bay and one would be parked in parallel. The plaintiff estimated the value of their estate to be approximately R100 000 000.00.

[46] The plaintiff testified that after the 2011 ceremonies, the defendant was very uncomfortable with her line of work. Prior to the celebrations he was proud that she was an actress, however, this changed after the ceremonies. The defendant was no longer comfortable with her taking kissing scenes. She testified that her mother advised her to respect her husband. The plaintiff testified that at some point she became rebellious and took a job that had one kissing scene. She testified that for the bulk of the time she did not take any jobs because it made her fight with the defendant, she decided to keep peace and work towards their marriage.

[47] The plaintiff testified that the defendant promised that when his career is up and running, he would help chase her dreams and ambition of being an international performer. He undertook to use his influence to assist her. She would stop working for a while and look after the home.

[48] The plaintiff testified that her career became dormant, she worked now and then to try and save it. She would go behind the defendant's back, sign a contract and

later tell the defendant about it. She testified that majority of the time she was not working. She did not have a stable income apart from what she referred to in the bank statement. The plaintiff testified that the defendant's star would not have risen without her contribution towards household activities which included her taking care of the children and their needs. She testified that she handled the children daily, assured that they had breakfast, meals and lunch. Sometimes she would walk to the nursery school, pick the children up and would do everything that had to do with the household. She ensured that there was food in the house, that everyone that was hired in the house was looked after and that the defendant was picked up from the airport, though the picking up from the airport deteriorated over time.

[49] The plaintiff testified that around 2016 they started talking about the white wedding and they identified December 2017 as a date for the white wedding due to venue change. The defendant had told her that she needed to sign a contract. Upon enquiry, the defendant advised her that it was just a marriage contract, and she had nothing to stress about. The defendant assured her that it was going to be a simple contract, and everything would be discussed with her at the office of the lawyers who prepared the contract. She testified that in hindsight, she should have attended the meeting to sign the contract relating to the wedding with her legal representative. She went ahead with the signing of the contract because of the trust she had in the defendant. She had asked the defendant if she would need a lawyer and the defendant replied in the negative and said he did not have a legal representative as well.

[50] The plaintiff testified that the defendant advised her that they would discuss the contract at the lawyers' offices and there was no need to talk about it beforehand. She had no idea of what was to be talked about. Upon arrival, they were led to a boardroom where both the plaintiff and the defendant met the lawyer who was to assist them with the contract. The lawyer explained the Antenuptial Contract and asked her if they were to separate what she would want from the defendant. The defendant proposed R4 000 000.00, and she requested him to go a bit higher. The defendant replied by saying no and she left it at that.

- [51] She testified that she did not have full understanding of what was being explained but everyone in the room seemed to be moving in the same direction and the defendant looked comfortable. At the time she held a view that if the defendant was comfortable, she should also be comfortable as he had never done anything to her in any way or throw her under the bus. The plaintiff testified that the next discussion was about the vehicle and the defendant mentioned R800 000 for the vehicle, she was a bit taken aback as the vehicles they owned were valued at more than the amount proposed, however, she agreed to it. The plaintiff confirmed that she signed the Antenuptial Contract.
- [52] She testified that she was not aware that the implication of customary union means that they are married in community of property. She only knew about this when consulting with her legal representatives in relation to this matter. The plaintiff testified that no one explained to her in the room where they signed the Antenuptial Contract that she was married in community of property and that by signing that document, she was no longer married in community of property.
- [53] The plaintiff testified that she did not waive her rights in terms of the customary union. She did not know that she had rights to waive. She testified that she requests the Court to consider that the first wedding took place in 2011 and she would like her fifty percent to be taken into consideration from 2011 until the day the Antenuptial Contract was signed, should the Court find that the Antenuptial Contract is valid.
- [54] Regarding monthly expenditures, the plaintiff did an exercise of calculating household monthly expenses and came to a figure of R120 000.00. She could contribute an amount of R40 000.00 but unfortunately, she is not employed on a permanent basis. She testified that during the year of her testimony, she was only employed for three months. She is nowhere close to matching the defendant's income. When she got an au pair, she bought a Reno vehicle for the children to be driven. She considers this to be a significant drop from what the children are used to. Regarding maintenance of the minor children for her to maintain the lifestyle of the minor children, an amount of R50 000.00 per child will suffice.

- [55] Regarding spousal maintenance, the plaintiff testified that she is accustomed to a luxurious lifestyle and the defendant as her husband has made sure that her lifestyle was at a certain level. She testified that the amount of R15 000.00 she currently receives as a result of the Rule 43 Court Order is not sufficient to maintain her lifestyle.
- [56] The plaintiff explained her lifestyle by testifying that she used to get shopping sprees of thousands of rands, Euros and Dollars. She averred that she used to purchase the best of everything, she lived the life of luxury and requested the Court to increase the spousal maintenance and went in detail to explain the nature of the lifestyle she is accustomed to. She testified that she is currently a freelance actress, and this varies from once a year to working five times a year, one short start project, or one six-month project. She is unable to sustain herself the way the defendant would. She is older and the roles are not always available for an older female. In total the plaintiff testified that an amount of R500 000.00 will be sufficient for both minor children and her.
- [57] The plaintiff testified that they started having difficulties in their marriage and averred that the defendant had extra-marital affairs which resulted in the defendant having children outside of their marriage. Both parties confirmed that their marriage relationship has irretrievably broken down and that there are no prospects of restoring it to a normal marriage relationship.

The defendant's case

- [58] The defendant testified in his defense as the only witness. Before commencement of the defendant's evidence in chief, the defendant's Counsel addressed the Court regarding an offer made without prejudice to which he was instructed to make on record. The defendant tendered to allow the plaintiff to reside in the house that she presently resides in. The defendant will continue to pay the bond registered over that property and the property can become the property of the plaintiff in full ownership.

- [59] The defendant further tendered to pay the plaintiff the amount of R4 million set out in the Antenuptial Contract over and above the property and he will continue to pay maintenance for the minor children as ordered in terms of Rule 43 plus the ancillary expenses of the children as ordered. The plaintiff's Counsel confirmed that the foregoing offer was not accepted by the plaintiff.
- [60] The defendant testified that he had love for music as a child and has always been drawn to music and he joined a music class from junior secondary level until Matric. When he was younger there used to be two different guys in his township that had a mobile sound system. He would get hired to play music off a sound system at events like weddings, birthday parties and graduations. He testified that by the time he was in high school, he was an established DJ in his neighbourhood. When he went to study at Natal Technicon, he was a DJ on the side, he played in nightclubs already. He testified that after releasing his second album, he started licensing music internationally with other small record labels. At the time he was already an independent artist and did whatever he wanted to do with his music. When he released his third album in 2008, he was already an established DJ internationally. His music started being released and played by DJs internationally.
- [61] The defendant testified that he met the plaintiff in 2010 at an award ceremony where he was nominated for an award. The plaintiff was working at that award ceremony. He testified that he started travelling internationally for his first gig in 2007, which was in Barcelona and his second gig was in Paris in 2008 where he met an agent who took him as one of his artists under his management. Thereafter his career grew as an international artist.
- [62] Regarding his cultural background, the defendant testified that he was born in Kwazulu-Natal ("KZN") from a big family. He relocated to Eastern Cape to his maternal grandmother's house. There was a partial difference as the then Transkei where his maternal grandmother lived was underdeveloped. He had to learn a new language, when he went to KZN for holidays, he would be referred to as a Xhosana because he spoke Isixhosa. He found himself not belonging

anywhere because when he went back to Eastern Cape he would be identified as Zulu speaking.

- [63] When he turned 18 years old, this was a time to go to an initiation school, things became complicated because he is not Xhosa. Because of peer pressure he ended up going to an initiation school without his grandmother knowing about it. When his father heard about this, he sent his uncles who took him out before the end of the initiation school process. He could not do the full ceremony like everyone else of coming out as a Xhosa boy, more so because it is not his culture.
- [64] The defendant testified that growing up in Eastern Cape he had dreams of living a different life. This is because he grew up in a disadvantaged place which he believes still is. He used to have dreams of living in America, that is what he wanted to do. He wanted to be a big star. He testified that culturally, there was nothing as his grandmother was church going and never performed any cultural rituals. They were raised like that and went to church every Sunday. The defendant testified that he never had a cultural activity in his family.
- [65] The defendant testified that when he met the plaintiff he was staying in Greymont, Johannesburg and he was doing very well for himself, he had a vehicle and furniture. He testified that when he met the plaintiff, she had a car that was a little beat up, it had damages. When the plaintiff got pregnant, she drove this vehicle, and he decided to buy her a new car the same year. He believes that the comments about him being a millionaire originate from this.
- [66] The defendant testified that after the plaintiff fell pregnant, he had a trip to Greece and invited the plaintiff to the trip. He told his friends about his plan and one of his friends had a ring, his plan was that after doing all the shows they would go to the island where he would propose to the plaintiff. His friends helped him to plan the whole trip. They eventually travelled to Santorini where he planned to propose. They had a big fight because he wanted them to get quickly to a very well-known place where people go for sunset. He wanted to arrive before sunset because they were a little bit late. The plaintiff wanted to eat but unfortunately,

time was not on their side, and the plaintiff did not like that. The mood was not exactly what he wanted but he wanted to make a proposal around sunset, and it happened. He went down on his knees and made a proposal, they went to a chapel close by, prayed and went back to the hotel. The plaintiff started to send text messages to her family about the proposal. He testified that the next step was a white wedding, he explained the white wedding to be a civil union.

[67] The defendant testified that the white wedding is something they discussed with the plaintiff. He testified that as an artist, he owns half of the songs written and other people own the other half. If he would not marry right that means he would have involved another person, this he testified was always his clear vision including the love he has for other things. He did not have to always have his partner signing every time he wanted to do a deal. They wanted to sign an Antenuptial Contract before the white wedding as the plaintiff was an entrepreneur as well. Before the proposal he did not involve his family.

[68] The defendant testified that the plaintiff advised her that her family was not happy with the fact that he did this thing the western way without speaking to anyone in the family. He then spoke to his family and asked for advice on how they were going to move forward before they could do what they wanted to do and what was the best way to appease the family. They wanted to make sure that things were done the right way. He spoke to his family, and the suggestion was to do *umembeso* where the families meet. He was advised that the first thing was to send people to recognize the fact that the plaintiff is pregnant and acknowledge the pregnancy at the same time. Thereafter they acknowledge that they needed to have a family meeting before they could do what they intended to do. He testified that he never intended to have a customary marriage.

[69] He testified that he did not know exactly what a customary marriage is. They never discussed customary marriage as what they wanted was a white wedding. He testified that they discussed with the plaintiff that they were going to do a prenup before and that is what they spoke about. He testified that there was never a conversation about a customary marriage, he does not know how it works. The defendant testified that his understanding was that the plaintiff had

the same understanding, they both did not know how customary marriage works, which is why she told him that her family was not happy instead of saying he had to first call her family. They were in the same space that did not understand or know anything about the customs.

[70] The defendant testified that the first thing was for them to go to the plaintiff's family to address the pregnancy, which is a common thing and address the fact that they had an intention of marriage together, hence the *lobolo* negotiations. That is the process where his family went to meet the plaintiff's family in Soweto, but he does not know what to call it. The defendant testified that it is *umembeso* where his family went to the plaintiff's home and then plaintiff's family went to his home to bring gifts to introduce each other. He testified that this is how he thinks solved the situation that the uncles were not happy about, from there they continued with their plans, and he was looking for a notary to help them at the time.

[71] The defendant testified that the outfit he was wearing during the ceremony was a designed two-piece suit not a traditional outfit. He disputed the plaintiff's version that bile was put on his clothes and that bile was put on her mouth. He testified that he would not put bile on his clothes or mouth.

[72] In explaining the time it took to do the white wedding, the defendant testified that he was very careful about how they did things. He did not want to splash money on a wedding when they did not have a home. He wanted to first find a place to stay and know that they have a home to come back to after the wedding. They started working on renovating the house, but the plaintiff became pregnant with the second baby, and they decided to have their last born in America.

[73] They moved to America and stayed there for seven months. The plan was to be away while the house was being built, and they came back after the house was finished. They left again because the plaintiff wanted to go to college and find things related to acting. They moved to Los Angeles whilst the house was still being renovated but started schooling in New York and later moved to Los

Angeles. The plaintiff also did some shoots in Los Angeles and came back to South Africa after the house was complete.

[74] The defendant disputed the plaintiff's version that they are married by customary marriage. He testified that the only time that he had ever been married with the plaintiff was a civil marriage. They did everything that they had planned to marry in terms of civil marriage. The defendant testified that they discussed the Antenuptial Contract, and they went to see the notaries together. He testified that he did not have any other representative that was there to assist him when they went to sign the Antenuptial Contract, and they had the same notaries whom he found through his agent.

[75] He testified that after the enquiry by the notary of what they wanted, he then asked the plaintiff if they got to a point where their marriage dissolves, what would she want, and she responded by saying nothing. That is how the issue of the house and the vehicle came about and provided for in the Antenuptial Contract. He disputed the plaintiff's version that she saw the Antenuptial Contract for the first time when they met the notary to sign it. He testified that an email was sent by the notary to both of them before the meeting. He referred to a document discovered and testified that it is an email trail of the email sent to both of them by the notary.

[76] The defendant disputed the plaintiff's version that the white wedding was a party to celebrate the wedding they already had. He testified that this was the wedding he had been wanting and waiting for. The defendant averred that their purpose was either to marry in community or out of community of property.

[77] Regarding his financial affairs, the defendant testified that his financial affairs were the same before they were together and even after they got married. He testified that he never consulted the plaintiff on how to conduct his financial affairs. He averred that he made his own decisions with his earnings, and the plaintiff made her own decisions with her earnings. The plaintiff averred that their financial affairs were conducted separately, each party handled their affairs as their own.

[78] Regarding maintenance of the minor children, the defendant testified that he pays R50 000.00 every month in addition to school fees. He made an example of the amount of R300 000.00 he pays for school fees of one of the children. He testified that one of the children is in the racing academy and the fees for that are R1 million. He testified that he pays R48 000.00 for security in the house where the plaintiff and the children reside. He disputed the plaintiff's version that there was a time when the children had to go hungry because of his failure to maintain them. The defendant testified that the plaintiff does not need maintenance from him as she is employed. He testified that the plaintiff bought herself a Porsche vehicle and that there is a second vehicle that he does not know whether she got it through endorsements. He disputed the plaintiff's claim of R500 000.00 for maintenance.

Legal Framework and Analysis in relation to the customary union

[79] Section 1 of the Recognition of Customary Marriages Act defines customary law and customary marriage as follows:

"Customary law means the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those peoples ...

Customary marriage means a marriage concluded in accordance with customary law".

[80] Section 1 of the Recognition of Customary Marriages Act defines *lobolo* as follows:

"means the property in cash or in kind, whether known as *lobolo*, *bokgadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *Magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage".

[81] The Recognition of Customary Marriages Act sets out the requirements for validity of a customary marriage in Section 3 as follows:

“(1) For a customary marriage entered into after commencement of this Act to be valid-

(a) The prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.”

[82] Section 7(2) of the Recognition of Customary Marriages Act deals with proprietary consequences of customary marriages and provides as follows:

“ ...

(2) A customary marriage in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage”.

[83] Dissolution of customary marriages is dealt with in Section 8 of the Recognition of Customary marriages Act which provides that:

“(1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.

...”

[84] The Constitution entrenches the right of everyone to equality, to participate in the cultural life of their choice and to enjoy their culture. The Recognition of Customary Marriages Act is a leaving example of enabling legislation enacted to ensure realization of these rights. The preamble of this Act sets out its purpose *inter alia* as: (i) to make provision for the recognition of customary marriages; (ii) to specify the requirements for a valid customary marriage; ... (iii) to provide

equal status and capacity of spouses of such marriages; and (iv) to regulate the dissolution of customary marriages.

[85] This in my view is an indication that customary law is not to be treated as secondary or subsidiary to any other law that is applied in our country. This is a development in our legal system which demonstrates a departure from the legal system which did not recognize the African customs and equality of South Africans, particularly the rights of women. As the Supreme Court of Appeal stated, this aspires to rid the customary marriage of the pariah-status and stigma to it by the apartheid regime and accords it dignity and legal validity.² The Court has an important function to give careful consideration on whether customary law is applicable when making a determination of a matter brought before Court.

[86] In *Alexkor Ltd v The Richtersveld Community*³ the Court stated that:

“While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all laws it depends on its ultimate force and validity on the Constitution. The courts are obliged by s 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the court must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution

‘... does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill (of Rights)’.

It is clear, therefore, that the Constitution acknowledges the originality and distinctiveness of the indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that

² See *Moropane v Southon* [2014] ZASCA (29 May 2014) at para 44.

³ 2004 (5) SA 460 (CC) at para 51.

specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law".

[87] Customary law is not static; it changes with time. A check list in the form of a tick box approach is not the best way of determining whether parties before Court are married in terms of customary law. As the Supreme Court of Appeal described it, customary law is a dynamic system of our law.⁴ In the instant case, the dispute lies on whether the parties intended to enter into a customary marriage. The defendant argued that the customary rites were undertaken to appease their families. On the contrary, the plaintiff argued that this constituted a valid customary marriage between them.

[88] The Courts have pointed out that in dealing with issues of this nature, the answer lies in Section 3(1) of the Recognition of Customary Marriages Act.⁵ This section sets out the statutory requirements for the validity of a customary marriage. The diversity and pluralistic nature of the African communities practicing customs, rituals and cultures makes it impossible to develop a step-by-step description of what may constitute complete requirements for a valid customary marriage. In the instant case, the parties acknowledged their limited knowledge on customary practices relating to a Zulu customary marriage.

[89] They both testified that they relied on their family members for advice and guidance on what steps were to be taken. Both parties did not call an expert on Zulu customary marriages. They also did not call any of the parties who were present during their customary ceremony, including the defendant's sister whom they testified was their key advisor on how to conduct the customary ceremony. This Court is limited to what was presented as evidence to determine whether there is a valid customary marriage between the parties.

⁴ See *Moropane v Southon* [2014] ZASCA (29 May 2014).

⁵ *Id* at para 33.

[90] In *MM v MN*⁶ the Court stated that:

“Section 3(1)(a) introduces express substantive validity requirements that were not required under pre-colonial notions of customary law: the majority age and the consent of both parties to the impending marriage. This development is significant since, in pre-colonial times, ‘marriage was always a bond between families and not between individual spouses’ and the bride and groom-to-be were thus not always the most important decision-makers with regard to their pending rituals. Section 3(1) goes on to stipulate that ‘the marriage must be negotiated and entered into or celebrated in accordance with customary law’. Customary law may thus impose validity requirements in addition to those set out in ss (1)(a). In order to determine such requirements a court would have to have regard to the customary practices of the relevant community”.

[91] In *Moropane v Southon*, the Court stated that:

“Furthermore, African law and its customs are not static but dynamic. They develop and change along with the society in which they are practiced. This capacity to change requires the court to investigate the customs, culture, rituals and usages of a particular ethnic group to determine whether their marriage was negotiated and concluded in terms of their customary law at the particular time of their evolution. This is so particularly as the Act defines ‘customary law’ as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those people”.⁷

[92] The Supreme Court of Appeal⁸ formulated the ways in which indigenous law may be established, namely: (i) a Court may take judicial notice of it and this can only happen where it can readily be ascertained with sufficient certainty; (ii) where it cannot be readily ascertained, expert evidence may be adduced to establish it; and (iii) finally, a Court may consult text books and case law. In consideration of these factors, the Court still must judiciously exercise its duties and responsibilities.

⁶ 2013 (4) SA 415 (CC) at para 29.

⁷ See *Moropane v Southon* para 36.

⁸ See *Moropane v Southon* at para 150.

[93] In *MM V MN*⁹ the Court stated that:

“Paradoxically, the strength of customary law – its adaptive inherent flexibility – is also a potential difficulty when it comes to its application and enforcement in a court of law. As stated by Langa DCJ in *Bhe*, ‘(t)he difficulty lies not so much in the acceptance of the notion of “living” customary law ... but in determining its content and testing it, as the court should, against the provisions of the Bill of Rights”.

[94] The defendant referred this Court to the decision of *Shilubana & Others v Nwamitwa*¹⁰ where the Court stated that:

“It follows that the practice of a particular community is relevant when determining the content of a customary-law norm. As this court held in *Richtersveld*, the content of customary law must be determined with reference to both the history and the usage of the community concerned. ‘Living’ customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. Where there is, however, a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred”.

[95] In the instant case, it is not in dispute that the customary rites were practiced. It is the defendant’s case that the customary rites were practiced to appease their families. The document referred to by the plaintiff relating to payment of *lobolo* demonstrates that the families were in full control of the process. This is in keeping with the traditional practice and the authorities referred to herein. The plaintiff referred to the document signed for and on behalf of both families.¹¹ The document reads:

“14 May 2011

⁹ *MM V MN* at para 25.

¹⁰ 2009 (2) SA 66 (CC).

¹¹ Caselines 04-10.

We the undersigned representing the families of ... family and ... family met on the 14 May 2011. We confirm in writing that the amount of (my emphasis) R8000.00 (Eight Thousand Rands only) was received on behalf of the ... family as balance payment for the *lobolo* of ... In full and final settlement.

Signed on behalf of ... family

...

Signed on behalf of ... family

..."

- [96] It is common cause that the *lobolo* was paid on behalf of the defendant by his family to the plaintiff's family. There is no dispute that this was in accordance with customary law and practice. The traditional practice is that whilst the bride and the groom are part of the practice, they take guidance from the families, the evidence in these proceedings indicates that this is exactly what happened.
- [97] The defendant in his evidence cast doubt on the fullness of the customary activity they undertook and denied the plaintiff's version that bile was used on him, he denied that his attire was a traditional outfit, he disputed the plaintiff's version that there was a singing of a wedding song "*umakoti ngowethu*". He disputed the plaintiff's version that the plaintiff was requested to dance (*ukugida*) for him as his wife. This having been said, it was never the defendant's case that there was non-compliance with the prescripts of a customary law for a valid customary marriage to be in existence. The dispute is whether the parties were married in terms of a valid customary marriage or in terms of civil union.
- [98] There are two mutually distractive versions placed before this Court. The plaintiff's version is that she is married to the defendant in terms of customary marriage. The defendant's version is that he is married to the plaintiff in terms of civil union and that an Antenuptial Contract was entered into between the parties prior to the civil union to ensure regulation of the patrimonial regime during their marriage. When faced with two mutually destructive versions, the Court must

evaluate all evidence to determine which of the two versions is more probable and meets the required standard of proof.

[99] This Court is called upon to make an evaluation of evidence adduced before it to determine the marriage and matrimonial regime between the parties. It is common cause that when the parties met, they fell in love. They were so in love that they decided to take their love relationship to the next level. They were both determined to start a family together and spend the rest of their lives as husband and wife. What seems to be the issue is how they are married, as this brings about the patrimonial consequences, depending on the nature of their marriage. Consequently, the plaintiff requests that, the Court should find that she is married to the defendant in terms of a valid customary marriage and that the Antenuptial Contract entered into between the parties is invalid and unenforceable, alternatively void, alternatively voidable, alternatively has been validly cancelled. On the other hand, the defendant requests the Court to find that he is married to the plaintiff in terms of civil marriage and that the Antenuptial Contract entered into before their civil union is valid.

Single testimony

[100] The plaintiff and defendant's evidence is based on a single witness testimony. Both of them did not call additional witnesses to corroborate their evidence. It is trite that the Court is required to exercise judicial discretion regarding single witness testimony. I have pointed out that neither of the parties called persons who were present during performance of the customary rites, and they did not call any expert witness in relation to the customary rites of Zulu customary marriages.

[101] The evidence adduced by the parties requires the Court to consider legal principles applicable when resolving factual disputes, the Court is required to find where the truth lies between the two mutually destructive versions.¹² The Court

¹² *Mhlanga v Passenger Rail Agency* ZAGPJHC 147 (17 April 2020).

in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA & Others*¹³ set out the following principles:

“ ...

The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized 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 ... the court will then, as a final step, determine whether the party burdened with onus of proof has discharged it”.

[102] The plaintiff's evidence was in my view clear and satisfactory; her evidence was convincing in both evidence in-chief and under cross-examination. I did not find her evasive when answering questions. Her evidence was consistent with the documentary evidence that was referred to during the proceedings. The plaintiff showed confidence and was unshaken during evidence in chief and under cross-examination. She was truthful, answered questions fairly and honestly and she was straightforward. I am satisfied that her evidence may be relied upon.

[103] The defendant was also clear in his evidence, and he was forthright and straightforward in his testimony. He showed confidence and was unshaken during his testimony, both during his evidence in-chief and under cross examination. Under cross-examination he seemed to avoid and deny basic questions in relation to the occurrence of events during the celebrations. It is impossible to believe that the defendant was unaware that the celebrations were that of a customary marriage. It is improbable that the defendant had no knowledge of the invitation that was issued to invite guests to their traditional wedding. The invitation card expressly invited guests to attend a traditional wedding celebration of the plaintiff and the defendant.

¹³ 2003 (1) SA 11 (SCA) at para 5.

[104] In *National Employers' General Insurance Co Ltd v Jagers*¹⁴ the Court stated that:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false".

[105] Having considered the plaintiff's evidence on whether she is married to the defendant in terms of customary marriage, I do not believe that she made up evidence to conceal the truth about their matrimonial regime. She is clear about what happened when the customary rites were practiced. The balance of probabilities favours the plaintiff that she is married to the defendant in terms of customary marriage and I accept her evidence as probable and true.

[106] Whilst I find the defendant's evidence clear and unshaking, the balance of probabilities does not favour the defendant in dispute of the marriage in terms of customary marriage between him and the plaintiff. In my view, the evidence indicates that the statutory requirements; customs and usages traditionally

¹⁴ 1984 (4) 437 (E) at 440D.

observed for a valid customary union in accordance with the Zulu tradition have been followed. I find the defendant's version as improbable, untrue and it falls to be rejected.

Onus

[107] The plaintiff bears the onus to prove existence of a valid customary marriage between her and the defendant. She must prove that the statutory requirements for existence of a valid customary marriage have been complied with and that the required customs for a valid customary marriage were observed. In *M v M and Others*¹⁵ the Court stated that:

“... To prove the existence of the marriage, the respondent had to advance collateral evidence that there was a marriage. The respondent was obliged to show that all legal and customary requirements were adhered to”.

[108] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*¹⁶ the Court stated that:

“As was pointed by Davis, A.J.A. in *Pillay v Krishna and Another*, 1946 at pp. 952-3, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defense, as the case may be, and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense”.

[109] In *Motsoatsoa v Roro and Others*¹⁷ the Court stated that:

“Proving the existence of a customary marriage should not present many problems as the formalities for the coming into existence of marriage have crystallised over the years. The reasons for these are not hard to find. The institution of customary marriage is an old-age and well respected one, deeply embedded in social fabric of Africans. The formalities relating thereto are well known and find application

¹⁵ [2025] ZSCA 10 (10 February 2025).

¹⁶ 1977 (3) SA 534 (A) at 548.

¹⁷ [2011] 2 All SA 324 (GSJ) (1 November 2010) at para 16.

even in the marriages of Africans who marry by civil rites as the two marriages are celebrated side by side. Any distortions and deviations to the formalities can easily be identified, particularly by those who are well-versed with the real and true customary law".

[110] The Court¹⁸ went further to state that:

"As described by the authors Maithufi I.P. and Bekker J.C., Recognition of Customary Marriages Act 1998 and its Impact on Family Law in South Africa CILSA 182 (2002) a customary marriage in true African tradition is not an event but a process that comprises a chain of events. Furthermore, it is not about the bride and the groom. It involves the two families. The basic formalities which lead to a customary marriage are: emissaries are sent by the man's family to the woman's family to indicate interest in the possible marriage, this of course presupposes that the two parties man and woman have agreed to marry each other: a meeting of the parties' relatives will be convened where *lobolo* is negotiated and the negotiated *lobolo* or part thereof is handed over to the woman's family and the two families will then agree on the formalities and date on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration of the wedding".

[111] The defendant argued that case law directs that Courts must distinguish between allegation, fact and suspicion. The plaintiff must satisfy the Court that she has discharged the onus of proving her case. The plaintiff testified as the only witness, and this requires the Court to exercise judicial discretion when evaluating her testimony. It is trite that such testimony should be clear and satisfactory in all material respects.¹⁹

[112] The plaintiff provided full account of what was followed by both families after her family indicated unhappiness about the fact that the defendant had proposed to her without seeking their permission. Thereafter, customary rites were practiced in accordance with the customary rites relating to the Zulu tradition. I am satisfied that the plaintiff has proved on a balance of probabilities that the statutory

¹⁸ *Id* at para 17.

¹⁹ See *S v Artman and Another* 1968 (3) SA 339 (AD) and *R v Mokoena* 1956 (3) SA 81 AD.

requirements, customs and usages traditionally observed for a valid customary union in accordance with the Zulu tradition have been followed.

Intention

[113] The defendant argued that this Court must determine whether it was the real intention of the parties to enter into a customary marriage as required in terms of Section 3(1)(a)(ii) of the Recognition of Customary Marriages Act. The defendant further argued that the Court must determine whether the evidence that the parties concluded the rites as pleaded by the plaintiff and the exchange of *lobolo* constitute and/or lead to the conclusion of a customary marriage. To be able to resolve this issue, the Court must evaluate the facts and the law applicable.

[114] In *MM V MN*²⁰ the Court stated that:

“... First a court is obliged to satisfy itself, as a matter of law, on the content of customary law, and its task in this regard may be more onerous where the customary-law rule at stake is a matter of controversy. With the Constitutional recognition of customary law, this has become a responsibility of the courts. It is incumbent on our courts to take steps to satisfy themselves as to the content of customary law and, where necessary, to evaluate local custom in order to ascertain the content of the relevant legal rule.

Second, the courts must understand concepts such as ‘consent’ to further customary marriages within the framework of customary law and must be careful not to impose common-law or other understandings of that concept. Courts must also not assume that such a notion as ‘consent’ will have a universal meaning across all sources of law”.

[115] Section 3(1) of the Recognition of Customary Marriages Act requires that the parties must both consent to be married to each other under customary law and that the marriage must be negotiated, entered into and celebrated in accordance with customary law. The defendant argued that the plaintiff must prove these

²⁰ *MM V MN* at paras 48-49.

requirements. In essence the defendant argued that the plaintiff must prove the agreement to be married in terms of customary law; celebration of the marriage in terms of the customary law; and applicable customary law. The authorities I referred to herein point to the dynamic nature and flexibility of customary law. Emphasis is placed on communal values and that the families and communal values take the center stage more than the individualistic interests. As it is pointed out, customary marriage is more than the individual bride and the groom. The Court in its evaluation must take this into consideration.

Conclusion on existence of Customary Marriage between the parties

[116]The defendant argued that the parties became engaged and agreed to be married in terms of civil marriage after completion of a residential house for the parties. The customary rites which were followed were due to the insistence of the plaintiff's family who were unhappy about the fact that the defendant proposed without the permission of the family of the plaintiff. The parties became engaged before the traditional rites were followed. The engagement is a western tradition normally pre-empting a civil marriage and is not a customary marriage.

[117]The plaintiff insisted that they are married in terms of customary marriage. Her evidence is that after receiving the engagement ring from the defendant, she started sending messages to her family to relate the good news of being engaged. Things took a turn when her family expressed unhappiness about the fact that the defendant proposed without seeking permission from her family. The defendant thereafter consulted his family on what should be done to keep the family of the woman she wanted to be married to happy. The defendant's sister played a central role in advising them on the steps to be followed in accordance with a Zulu tradition of getting married.

[118]This in my view set in motion what would be a journey to customary marriage between the parties. A letter was sent by the defendant's family to the plaintiff's family to initiate *lobolo* negotiations. The *lobolo* negotiations took place on two occasions. On the first day an amount of R62 000.00 was paid towards the

agreed amount of R70 000.00. The families agreed that the balance of R8000.00 will be paid on the day that *umembeso* would be performed. On the second occasion, the outstanding balance of *lobolo* was paid and it is on the same day that *umembeso* was performed, this being May 14, 2011. Prior to the second occasion, an invitation was issued, and it is specifically mentioned in the invitation card that plaintiff and defendant invited guests 'to share their joy as they celebrate their traditional wedding'. The third occasion was *umbondo* which was undertaken at the defendant's home in Durban. There was a slaughtering of an animal and the dispute between the parties is whether a bile was put on the plaintiff's mouth and defendant's pocket. Defendant specifically testified that he would not have drunk the bile.

[119] The parties stayed together as husband and wife after the traditional rites were performed. The defendant took care of the plaintiff and the minor children born between the two of them. The defendant took full responsibility for their financial and household needs.

[120] The defendant withdrew as a judge from a beauty pageant where the plaintiff's half-sister was a contestant. This was done to avoid conflict of interest. A statement was issued by Sun International regarding the defendant's withdrawal and the statement specifically indicated the reason for his withdrawal being that the defendant recused himself because he is related to one of the contestants who is a half-sister to his wife. There is no evidence that the defendant refuted the statement that was attributed to him in the media statement issued by Sun International. Reference was made during the defendant's cross-examination to an affidavit he deposed to in support of the separation application and Rule 43 affidavit where it is stated in the foregoing affidavits that he is married to the plaintiff in terms of customary union.

[121] During argument, the defendant's Counsel pointed to the contradiction between the preamble and the affidavit as well as the pleadings which dispute the existence of a customary marriage. The legal representatives who assisted the plaintiff in the separation and Rule 43 applications, were not called to explain the

reason for indicating in the affidavits that the plaintiff and the defendant are married to each other in terms of customary union. The affidavit supporting the separation application was deposed to on June 23, 2020, and the affidavit supporting the Rule 43(6) application was deposed to on December 6, 2023. These affidavits are deposed to by the defendant.

[122] The defendant argued that the 'admissions' as relied upon by the plaintiff during the proceedings, goes against the grain of the plaintiff's pleadings since the inception of the matter. In *Unit 15 Rondevoux CC t/a Done Rite Services v Makgabo*²¹ the Court stated that:

"It is trite that a party will be strictly kept to its pleadings "where any departure would cause prejudice or would prevent full enquiry" (Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198). However, where the evidence covers an unpleaded claim fully, "that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the Court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised" (Middelton v Car 1949 (2) SA 374 (A) at 385). The Supreme Court of Appeal has recently re-affirmed this approach to unpleaded issues, albeit while disallowing an unpleaded claim (see MJ K v II K [2022] ZASCA 116 (28 July 2022) at paragraphs 21 to 23)".

[123] The pleadings assist a counterparty to the proceedings to know well in advance of the case that he or she is expected to answer. This affords equal opportunity for the parties to prepare their case and evidence necessary to counter the case of their opponents in the proceedings. The Court must make an evaluation of the nature of the evidence complained about and weigh prejudice that will follow, considering the interests of both parties in the proceedings. In the instant case, it is clear from the pleadings that the dispute lies on whether the parties were married in customary union or civil union. In my view, the affidavits relied on by the plaintiff did not introduce evidence outside of her pleaded case. This was an expansion of the pleaded case of the plaintiff. I therefore see no prejudice against

²¹ [2022] ZAGPJHC 627 (1 September 2022) at para 18.

the defendant. The affidavits referred to were deposed to by the defendant, it is nothing new to the defendant.

[124] The defendant instructed his family to send a letter to the plaintiff's family to commence *lobolo* negotiations. The emissaries were sent to the plaintiff's family to commence *lobolo* negotiations on his behalf. The defendant was in full attendance and participated in the *umembeso* and *umbondo* celebrations. The decorations during the ceremonies were in accordance with the Zulu tradition. The plaintiff's attire was that of a *makoti*, which she testified that she was advised that it must be worn by a bride in terms of a Zulu tradition. The defendant gave consent to the customary rites that were practiced which gave effect to a valid customary marriage between himself and the plaintiff. I find the defendant's version that the customary rites that were followed to appease their families unsustainable for this Court to make an invalidity finding on the customary marriage between the plaintiff and the defendant. The defendant's evidence seems to downplay the customary rites followed as merely practices to appease their families. This flies in the face of the Constitution which guarantees human dignity, equality and right to cultural and religious practices. This is unfortunate as this may be a regression from the achievements of the Constitution.

[125] The parties may have discussed to be married in terms of civil union and enter into an Antenuptial Contract to regulate their patrimonial regime. This was however overtaken by events; the moment they decided to practice and observe customary rites relating to entering and celebration of a customary marriage in terms of a Zulu tradition, a customary marriage regime was set in motion.

[126] In my view, both parties have consented to be married to each other under customary union. They negotiated, entered into and celebrated their marriage in accordance with customary law. The Recognition of Customary Marriages Act clearly sets out the proprietary consequences and in the case of a spouse who is not a partner in any other existing marriage, the marriage is a marriage in community of property, unless this is specifically excluded by the spouses in an Antenuptial Contract, which will regulate the matrimonial property system of their

marriage. The plaintiff and defendant elected not to enter into an Antenuptial Contract prior to the conclusion of their customary marriage. This unfortunately cannot be done post their customary marriage without following the prescribed procedure.

[127] Having considered the conspectus of evidence, the statutory requirements for a valid customary marriage, the customary rites performed by the plaintiff and defendant, the customs observed in relation to the Zulu tradition for a valid customary marriage, the case law which gave guidance on the dynamic nature of customary law and its flexibility, the weight accorded to the community rather than placing a limit to individualistic bride and the groom. I am satisfied that the plaintiff has proven on a balance of probabilities that she is married to the defendant in terms of a valid customary marriage. On the evaluation of evidence adduced by the plaintiff, I find that the plaintiff has discharged the onus of proving that she is married to the defendant in terms of a valid customary marriage. I find that the customs necessary for a valid customary marriage, particularly the Zulu customs, were performed. The parties stayed together before and after the customary rites were performed.

[128] Notwithstanding the defendant's denial of the customary marriage between himself and the plaintiff, I find his denial to be unsustainable, untenable and that it must be rejected. The defendant's conduct clearly demonstrates that he has consented and concluded a valid customary marriage as envisaged in terms of Section 3(1) of the Recognition of Customary Marriages Act.

The Antenuptial Contract

[129] In the pleadings and during the proceedings, the parties extensively referred to the Antenuptial Contract entered into between the parties. Both the plaintiff and the defendant led evidence in relation to the Antenuptial Contract. It is common cause that the parties signed an Antenuptial Contract on December 21, 2016.²²

²² Caselines 01-76 to 01-79.

The Antenuptial Contract indicates that the parties have declared that a marriage has been agreed upon and is intended to be solemnized between the plaintiff and the defendant. The terms of the Antenuptial Contract are as follows:

"1. There shall be no community of property between them. 2. There shall be no community of profit or loss between them. 3. The marriage shall not be subject to accrual system in terms of the provisions of Chapter 1 of the Matrimonial Property Act, 1984 (NO. 88 of 1984) and the accrual system is hereby expressly excluded. 4. Upon dissolution of the marriage by means of a Court Order ... shall pay ... the agreed total sum of R4 000 000.00 (Four Million Rand) in complete discharge of all his patrimonial obligations to ... including spousal maintenance, which ... hereby accepts, by means of 5 (five) equal annual instalments in the sum of R800 000.00 (Eight Hundred Thousand Rand), the first instalment becoming payable on the date of dissolution of the marriage by means of a Court Order to such effect, and subsequent annual instalments being payable on the succeeding anniversary dates of such date of dissolution, until the agreed amount has been liquidated in full. 5. Any monetary values in this contract shall be calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of this marriage and for that purpose the weighted average of the consumer price index as published from time to time in the Government Gazette shall be the agreed method of determination thereof".

[130] The reference to the Antenuptial Contract by the parties during the proceedings requires this Court make a determination on its legal status. In the pleadings, the parties prayed for the Court to determine validity and/or invalidity of their Antenuptial Contract. The purpose of Antenuptial Contract is to regulate the matrimonial property regime of the parties intending to get married, and this cannot be done postnuptially without complying with the proper procedure for changing a matrimonial property regime.²³ In *Mathabathe v Mathabathe*²⁴ the Court stated that:

"Every seriously intended promise of marriage, or contract of betrothal, or engagement to be married, has potential legal consequences and is literally an

²³ J Heaton et al, South African Family Law 4 ed at 83.

²⁴ 1987 (3) SA 45 (WLD).

'antenuptial contract' when that expression is used, as it properly may be, to refer to every kind of pre-marital agreement".

[131] Section 7(2) of the Recognition of Customary Marriages Act provides that:

"A customary marriage in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the in an Antenuptial Contract which regulates the matrimonial property system of their marriage".

[132] Section 21(1) of the Matrimonial Property Act 88 of 1988 deals with change of matrimonial system and provides that:

"(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a Court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the Court may, if satisfied that –

- (a) there are sound reasons for the proposed change;
- (b) sufficient notice of the proposed change has been given to all the creditors of the spouses: and
- (c) no other person will be prejudiced by the proposed change,

order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit".

[133] When dealing with the issue of whether the spouses can postnuptially alter their marriage from one in community of property to one out of community of property, the Court in *Honey v Honey*²⁵ followed the decision of *Ex parte Marx et Uxor*²⁶ where it was held that '...parties who are married in community of property cannot by postnuptial agreement change to a marriage out of community of

²⁵1992 (3) SA 609 (WLD).

²⁶*Id* at page 614 E-G. See also *Ex Parte Marx et Uxor* 1936 (2) CPD 499.

property 'for the very simple reason that according to our law a change from a communal marriage to a marriage out of community amounts to a donation between the spouses'.

[134] In *Honey v Honey*²⁷ the Court stated that:

"It is therefore concluded that the mere repeal of the prohibition against donations between the spouses did not automatically abrogate the rule that parties may not postnuptially amend an antenuptial contract whether such amendment is intended to have effect *inter partes* only or not".

[135] The Court in *Honey v Honey* held that the contract between the parties purporting to vary their Antenuptial Contract is void and unenforceable as between the parties *inter se*.

[136] The Court in *Mathabathe v Mathabathe*²⁸ considered the method for changing the existing matrimonial property and stated that:

"The procedure for introducing the accrual system to an existing marriage that is provided by s 21(2) will only be available for the two-year period ending on 31 October 1986. Thereafter the only method of changing an existing matrimonial property system will involve the procedure provided for by s 21(1). That procedure requires an application to Court".

[137] The plaintiff argued that Section 21(1) of the Matrimonial Property Act presupposes that there must be judicial instruction and if that did not happen, the Antenuptial Contract is invalid. It was argued further that the power dynamics in the marriage between the plaintiff and the defendant are in a skewed manner. She was bamboozled into signing the Antenuptial Contract. The plaintiff argued that she was preoccupied with preparation for a civil marriage, which she described as a celebration of her wedding.

²⁷ *Honey v Honey* at page 614G-H.

²⁸ *Mathabathe v Mathabathe* at page 57F-G.

[138] The plaintiff described their white wedding as a fairy tale. She testified that to her mind the white wedding was for her to wear a wedding dress and walk down the aisle. The plaintiff argued for the Court to find the Antenuptial Contract as oppressive to women and that she never acquiesced or waived her claim to the joint estate. The plaintiff argued that she played no part in the agreement that was supposedly going to deprive her of 50% of the joint estate. She averred that she signed the agreement to maintain peace, she was young, gullible and did not know the consequences of the agreement. All her life people had to simplify the contracts for her to sign.

[139] The defendant argued against the plaintiff's averment regarding defendant's conduct of being fraudulent, unbecoming of an intended husband to his wife to be and having ulterior motive in entering into an Antenuptial Contract, based on immoral grounds. The defendant argued that the plaintiff failed to disclose factual basis upon which these averments were made. The Court was indeed not provided with evidence supporting these averments and no finding can be made against the defendant regarding the allegations made by the plaintiff against the defendant. The Antenuptial Contract was drafted by a notary who is a legal practitioner. There was a discussion of the contract on the first day and it was not signed on the same day; it was signed on the day of the second meeting with the notary. The averments made in the particulars of claim against the defendant are not sustained by any evidence.

[140] The defendant argued that when plaintiff signed the Antenuptial Contract she did not raise an issue that she is married to the defendant in terms of customary union. It is common cause that both parties did not know that they were married in community of property at the time they signed the Antenuptial Contract. The defendant argued that the plaintiff is trying to evade the consequences of an Antenuptial Contract, and the Court cannot apply equity, instead, the Court must apply the law. It was further argued by the defendant that there was a discussion of the Antenuptial Contract before the date that it was signed. The defendant argued that they were not married at the time that the Antenuptial Contract was signed.

[141] The defendant argued that the provisions of Section 10(2) of the Recognition of Customary Marriages Act provide for the parties to an existing customary marriage the legal right to enter into an Antenuptial Contract prior to entering into a civil marriage, and that such Antenuptial Contract will then regulate the matrimonial property system of their marriage. The defendant argued that Section 10 of the Recognition of Customary Marriages Act disposes of the plaintiff's claim as formulated in paragraph 4 of the plaintiff's amended particulars of claim. In dealing with the provisions of Section 10(2) of the Recognition of Customary Marriages Act, the Court in *J.R.M v V.V.C and Others*²⁹ held that:

"Section 10(2) of the Recognition of Customary Marriages Act is declared to be inconsistent with section 9(1) of the Constitution and invalid to the extent that it permits the conclusion of contracts that seek to change the parties' matrimonial property regimes and thereby regulate their proprietary consequences after such parties' have concluded customary marriages without judicial oversight.

Section 10(2) of the Recognition of Customary Marriages Act is declared to be inconsistent with section 25(1) of the Constitution and invalid to the extent that it permits arbitrary deprivation of financially weaker spouses' ownership rights over assets that form part of their joint estates established by their customary marriages, when post their marriages they are led to sign contracts that change their matrimonial regimes from community of property to out of community of property without judicial oversight.

...

Should the Legislature fail to correct the defect within this period, the words 'existing' and 'customary' will be read in to section 10(2) of The Recognition of Customary Marriages Act as follows:

'When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an existing antenuptial contract which regulates the matrimonial property system of their customary marriage'".

²⁹ [2024] 3 All SA 853 (GP) (10 June 2024).

[142] The default position is that the change of matrimonial property regime requires judicial oversight. Regarding the interpretation of the provisions of Section 10(2) of the Recognition of Customary Marriages Act, I align with the decision of *J.R.M v V.V.C and Others*³⁰ whose order was referred to the Constitutional Court in terms of Section 172(2)(a) of the Constitution for confirmation. The discussion on alteration of matrimonial property regime also appears in LAWSA³¹ where it is stated that:

“However, the courts have held that the immutability principle with regard to choice of matrimony property regime is separate from the relaxation of the prohibition on the donations between spouses. The immutability system means that all postnuptial variations by spouses of the matrimonial property regime are invalid, and contracts concluded between the parties on that basis cannot be enforced, even as between the parties themselves”.

[143] The existing legal system recognizes the African customs and traditions based on the values of the Constitution. In the instant case I have made a finding that the parties are married to each other in terms of a valid customary marriage. Their matrimonial property system is regulated in terms of the provisions of the Recognition of Customary Marriages Act. I am unable to accept the defendant's submission that Section 10(2) of the Recognition of Customary Marriages Act disposes of the defendant's claim for declaration of the Antenuptial Contract entered into between the parties as invalid and unenforceable. Accepting the defendant's submission will create legal uncertainty on the matrimonial property system of parties married in terms of a valid customary marriage.

[144] There is a dispute of facts in the instant case on whether there was an agreement prior to the marriage that the parties will enter into an Antenuptial Contract. The defendant testified that they spoke about the Antenuptial Contract at the beginning of their relationship. The plaintiff's version is that there was never a discussion about the Antenuptial Contract and that the only discussion they had was that in future there would be a white wedding celebration. The plaintiff's

³⁰ *Id.*

³¹ LAWSA Vol 28(2) 3 ed at para 124.

evidence is that after the proposal, she sent a message to her family advising them that she is engaged. In return, the plaintiff's family indicated unhappiness about the fact that the defendant proposed the plaintiff without seeking their permission. The defendant sought advice from his family, and they were advised on how to go about performing the customary rites which they followed with the guidance of the families. It is not clear to me at what stage did the parties discuss and agree that they will sign an Antenuptial Contract. I have already referred to the evidence on how the Antenuptial Contract was signed, considering the dispute of facts. I am not persuaded that there was an agreement between the parties before performance of the customary rites leading to the conclusion of the valid customary marriage between the parties.

[145] In addition to the provisions of Section 21 of the Matrimonial Property Act, Section 88 of the Deeds Registries Act 47 of 1937 deals with postnuptial execution of Antenuptial Contracts. It is specifically provided for the Court to authorize the postnuptial execution of the Antenuptial Contract, including registration of such a postnuptial contract within the time limits that may be determined by the Court. It was never the defendant's case that the Antenuptial Contract between the parties is postnuptial, I am mentioning the provisions of the Deeds Registries Act to demonstrate the default position that once parties are validly married, they cannot change their matrimonial property system without judicial oversight.

[146] In the instant case, there is neither compliance with Section 21 of the Matrimonial Property Act nor Section 88 of the Deeds Registries Act. Having considered the legislative requirements applicable to change of matrimonial property system, case law and facts of this case, I find that the Antenuptial Contract entered into between the plaintiff and the defendant on December 21, 2021, is invalid and *void ab initio*. The plaintiff and defendant are married to each other in terms of a valid customary marriage effective on May 14, 2011, and the matrimonial property system applicable to their customary marriage is one in community of property and profit and loss.

Maintenance Claim

[147] In the amended particulars of claim, the plaintiff claims for maintenance of the minor children in the sum of R40 000.00 per month, per child as well as R80 000.00 per month in respect of spousal maintenance. There is no dispute regarding the claim for maintenance of the minor children. The defendant accepted responsibility for paying maintenance for the minor children. He testified that maintenance of the minor children is his priority and that is what he is working for. The defendant tendered to continue paying maintenance for the minor children as ordered in terms of Rule 43 plus the ancillary expenses of the children as ordered. In her argument the plaintiff submitted that in her particulars of claim an amount of R50 000.00 per month per child is sought and that this has never been disputed by the defendant.

[148] The reference to the amount of R50 000.00 in her heads of argument may be an error as the amount in the amended particulars of claim is indicated as R40 000.00.³² The defendant in his argument persisted with a prayer for an order directing him to pay maintenance towards the minor children as was ordered in terms of the Rule 43 order. In the Rule 43 application, the Court ordered the defendant to pay R25 000.00 per month, per child and R15 000.00 per month to the plaintiff.

[149] When dealing with maintenance claim, the Court first has to determine the claimant's income for past and future earnings. That will assist in determining how the parties will sustain their lifestyle post dissolution of their marriage. The Court must determine whether the party against whom maintenance is claimed has sufficient earning capacity to pay the amount claimed, taking into account the needs of the defendant. The difficulty is that monthly expenses vary from month to month, but the basic needs and reasonable demand is taken into account. The Court must be presented with sufficient evidence to enable it to arrive at a just determination. The golden rule is that the claimant bears the onus

³² Caselines 01-73.

to prove that she is in need of support and must provide evidence to support her claim.

[150] The plaintiff testified that she is in need of spousal maintenance to maintain the lifestyle she was accustomed to. She testified that the amount of R15 000.00 ordered by the Court in terms of the Rule 43 application for her spousal maintenance is not enough to defray her expenses. She testified that she is accustomed to luxurious lifestyle which includes purchasing designer clothes, driving luxurious vehicles, taking international trips and purchasing hair from international sites to get the best quality. She is used to shopping sprees of thousands of rands, Euros and Dollars. She is used to purchasing the best of everything. She wants to maintain her status as a public persona. She made examples of instances where she bought two handbags for the sum of R100 000.00 and a dress for the sum of R400 000.00. The defendant habitually paid her a monthly stipend of R30 000.00 which she used on household needs. The defendant used to top up her Standard Bank card with R1 Million per year, for bigger things in the house and to spend on herself.

[151] The plaintiff testified that she is currently studying for a degree, but she can only afford to register for small modules as she is financially struggling. Regarding her capacity to earn income, she testified that she is a freelance actress, and this varies from working once a year, to working five times a year, to having one short stat project, or one 6-month project. She is unable to sustain herself the way the defendant would. I have earlier referred to the plaintiff's evidence regarding the defendant's discomfort in the plaintiff taking acting roles that have kissing scenes; and she testified that this affected her capacity to earn income. The plaintiff took the Court through her bank statements to demonstrate her earning capacity. She testified that she does not have another bank account where she receives funds.

[152] According to her evidence, the total household expenses are R68 000.00, with electricity expenses fluctuating depending on seasons. She calculated her monthly personal expenses to an amount of R49 167.00. She testified that in

addition, she would need funds for holiday travels with the minor children and international trips that they were accustomed to during the marriage with the defendant. She testified that their children attend school in private schools, and it breaks her heart to hear them saying 'oh I was born in New York, and I used to travel there'. She cannot ask the defendant to assist with as he would decline. The plaintiff testified that sometimes she would borrow money from friends to keep up with her expenses.

[153] The plaintiff testified that she contributed to the estate, this was however disputed by the defendant. However, the evidence indicates that the defendant was always away from home and had numerous international trips. This left the plaintiff to be at home to monitor how things were in the household. The defendant argued that he employed domestic staff to take care of the household. This in my view does not take away the fact that as a mother in the household, the plaintiff had a significant role to play. There was a dispute of facts between the plaintiff and the defendant on whether she cooked and drove the children to school.

[154] The plaintiff argued that her prolonged and unstable employment was exacerbated by the defendant's demand for her to cut off certain gigs she used to do; the instability of her industry; the fact that she could no longer take gigs at all to keep peace in the household; her looking after the house; packing defendant's clothes; feeding him; and massaging the defendant's injured hand. The plaintiff argued that this directly increased the matrimonial estate of the parties as this allowed the defendant to continue working and generating wealth, undisturbed.

[155] The defendant testified that he pays for the house where the plaintiff and the minor children reside. He pays for security in the house and the maintenance of the garden. The only thing he does not pay for is electricity charges. He testified that the impression he has is that the plaintiff is not financially destitute. He averred that it is public knowledge that the plaintiff is a well celebrated actress. Regarding the plaintiff's maintenance claim in the sum of R500 000.00, the

defendant testified that he does not know what the amount claimed is for. The defendant is opposing the plaintiff's claim for spousal maintenance on the basis that she can afford the lifestyle she lives.

[156] The spousal maintenance is regulated by section 7(2) of the Divorce Act 70 of 1979 which provides that:

"In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by one spouse to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur".

[157] The defendant referred to the decision of *Botha v Botha*³³ where the Court stated that:

"It is an accepted principle of South African law that neither spouse has a right to maintenance upon divorce.

The payment of maintenance to a spouse upon divorce is the creation of statute. The matrimonial Affairs Act 37 of 1953 permitted a court to make an award against the guilty spouse for the maintenance of an innocent spouse. The current Divorce Act 70 of 1979 permits a court to make an award which it finds 'just' for maintenance by one party of the other".

³³ 2009 (3) SA 89 (WLD) at paras 29-30. See also *Strauss v Strauss* 1974 (3) SA 79 (A).

[158] In *V v V*³⁴ the Court stated that:

“It is trite principle of our law that neither spouse has a right to spousal maintenance upon divorce. The court does, however, have discretionary power to make an award for spousal maintenance if necessary. In deciding whether a party is entitled to spousal maintenance the court considers the need for maintenance by the one party on the one hand and the ability to pay maintenance by the other party on the other hand”.

[159] The Court in *V v V* followed the decision of *EH v SH*³⁵ where it was stated that:

“It is trite principle that the person claiming maintenance must establish a need to be supported. If no such need is established, it would not be ‘just’ as required by this section for a maintenance order to be issued”.

[160] In *Rousalis v Rousalis*³⁶ the Court stated that:

“A wife of long standing who has assisted her husband materially in building up his separate estate would in my view in justice be entitled to far more by way of maintenance, in terms of this section, than one who did not more for a few years than share his bed and keep his house”.

[161] The legislative framework sets out factors to be taken into consideration by the Court when determining the dispute on spousal maintenance. These factors must be considered in totality in order to make a just determination, having regard to particular circumstances of the case. The Court must make a fair and just decision to balance the interests of both parties, taking into account the need for maintenance from the claimant and the ability to pay by the party against whom the maintenance claim is made.³⁷

³⁴ [2017] ZAGPPHC 545 (30 August 201117) at para 11.

³⁵ 2012 (4) SA 164 (SCA) at para 11.

³⁶ 1980 (3) SA 447 (C) at page 450 G-H.

³⁷ *Botha v Botha* at para 49. See also *Grasso v Grasso* 1987 (1) SA 48 C

[162] The defendant argued that the plaintiff did not introduce a list of expenses or lead credible evidence supported by documents or lay a basis that any funds which she presently receive were insufficient to meet her reasonable needs based on the factors enumerated in Section 7(2) of the Divorce Act, rather, her claim is based on general propositions that she enjoyed an extremely luxurious style of living. The defendant argued that, on this basis, the Court cannot exercise discretion in favour of the plaintiff. The defendant referred to the decisions of *D, A.E. v D, A.*³⁸ where the Court stated that:

“In an application for spousal maintenance the applicant must demonstrate that the respondent owes her a duty of support, the applicant must establish the need to be maintained and that the respondent has adequate resources to discharge this duty. In my view, the applicant has not established the need to be maintained. Apart from the applicant’s material non-disclosure of her income and earnings, the applicant has also throughout failed to state what her live-in partner’s contributions are, if any”.

[163] The defendant further referred to the decision of *T.S. v M.L.S.*³⁹ where the Court stated that:

“Except that it is common cause that the Plaintiff earns more money than the Defendant, of paramount importance is that there is no evidence on record indicating how much the Plaintiff earns on a monthly basis, and whether she will afford to pay the sought amount of R15 000. The Defendant seeks to maintain the lifestyle enjoyed by both parties during the marriage, yet he proffered no evidence to prove the type of lifestyle they enjoyed during their marriage. Nor did the Defendant tender evidence to prove his financial needs and obligations on a monthly basis in order to justify his claim for R15 000.00 per month”.

[164] The married couple traditionally enjoy maintenance and support during the subsistence of their marriage. The historical background in our society has over the years created a situation where the male spouses are placed in a stronger

³⁸ [2023] ZAGPJHC 528 (19 May 2023) at para 75.

³⁹ [2024] ZAGPPHC 289 (19 March 2024).

financial position than their female spousal counterparts. This is a reality of our society that cannot be ignored. Female spouses are mostly the ones who depend on their male counterparts for financial support during the subsistence of the marriage. Our law has developed over the years to recognize that maintenance should not cease with the dissolution of marriage.

[165] The legislative framework is an intervention that provides safeguards for spousal maintenance post-dissolution of marriage. In addition to the factors set out in the Divorce Act, the Court has a discretion to exercise when making a determination on whether to make an order for spousal maintenance in favour of the claimant. In addition to the factors set out in the legislative framework, the Court considers contribution of each spouse to the matrimonial estate. Other than financial contribution, the Court considers domestic contributions made by the other spouse who had no financial means to contribute, these may include but not limited, domestic care and maintenance of the household, cleaning, cooking, doing laundry, taking care of the children of the spouses and managing the domestic home in general.

[166] It is trite that spousal maintenance is not an automatic right, the person claiming maintenance must establish the need to be supported. The plaintiff adduced evidence to demonstrate that her earning capacity is less than the defendant's earning capacity. The difficulty is that this Court does not have the benefit of the defendant's financial position as no evidence was adduced other than estimated earning capacity. The plaintiff expressed difficulty in obtaining the defendant's financial status, it was submitted that the defendant refused to cooperate with the request for his financial information.

[167] During the proceedings, the defendant was not forthright about his financial information. The Court gained impression that he was concealing his financial information. This is unfortunate as this was not assisting the Court in getting a clear picture of the defendant's financial status. Section 7 of the Matrimonial Property Act provides that:

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

[168] The Court in *ST v CT*⁴⁰ followed the decision of *MB v DB*⁴¹ where it was stated that:

“In my view litigation is not a game where the parties are able to play their cards close to their chest in order to obtain a technical advantage to the prejudice of the other party. This is even more so in matrimonial matters where the lives of the parties have been inextricably bound together...”.

[169] In *MB v DB*⁴² the Court followed the English decision of *Prest v Petrodel Resources and Others*⁴³ where it was stated that:

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

⁴⁰ 2018 (5) SA 479 (SCA) at para 34.

⁴¹ 2013 (6) SA 86 (KZD) at para 39.

⁴² *Id* at page 101 C-F.

⁴³ [2013] UKSC 34 at para 45.

[170] It is unclear as to how the amount of R500 000.00 claimed by the plaintiff was arrived at. The plaintiff has failed to give evidence substantiating that the amount of R500 000.00 constitutes reasonable and necessary monthly expenses for herself. The monthly expenses provided by the plaintiff do not come anywhere close to the amount of R500 000.00. There is no evidence indicating whether the defendant has financial means to afford paying a monthly spousal maintenance in the sum of R500 000.00. The Court does not make a finding against the plaintiff's inability to provide evidence of the defendant's ability to pay the amount claimed, due to the defendant's uncommunicative conduct. What was proffered by the plaintiff is that they lived a luxurious and opulent lifestyle.

[171] The generally acceptable principle is that neither spouse is entitled to maintain the same standard they enjoyed during the subsistence of the marriage, unless money is no object. The plaintiff has a duty to provide evidence to persuade the Court to exercise its discretion and make a finding in her favour. She bears the onus to prove entitlement to the maintenance she is claiming. There must be sufficient evidence depicting the lifestyle they enjoyed whilst together. The plaintiff's evidence that they enjoyed a luxurious and opulent lifestyle has not been proven. The defendant testified that he could not describe their marriage lifestyle as luxurious as he believed that he lived the lifestyle he deserved due to his hard work.

[172] There is no evidence to prove that the plaintiff's income requires adjustment to the sum of R500 000.00 per month. Regarding the holidays and international trips, the Court has a difficulty in finding that these are the expenses that meet the requirements of need for support, the evidence is unclear on how often did the plaintiff and defendant travel for holidays and internationally. There is no clear evidence indicating that they regularly traveled during school holidays with the children. There is also no evidence of how much it would cost for such holiday travels, the Court has difficulty in quantifying this claim without evidence from the plaintiff. The claim seems to be generalized and lacks sufficient particularity.

[173] Having considered the plaintiff's claim for spousal maintenance, I am unable to find that there is reasonable and just duty on the part of the defendant in respect of the spousal maintenance in the sum of R500 000.00. However, the plaintiff is entitled to a lesser amount for spousal maintenance to rebuild and sustain her life. Like majority of women in South Africa, she is in a financially weak position, and the Court has a duty to take this into consideration. The plaintiff has established the need for support by the defendant, for an amount less than R500 000.00.

[174] The plaintiff's evidence regarding her monthly personal expenses totals to the sum of R49 167.00 and R68 000.00 for household expenses. I have considered the expenses provided by the plaintiff, albeit not substantiated. The plaintiff is therefore entitled to spousal maintenance in the sum of R67 167.00 which is calculated by considering the total amount she was able to prove for personal expenses plus the difference between the amount she proved as household expenses minus the child maintenance amount as ordered in terms of Rule 43.

[175] The expenses accounted for by the plaintiff appear to be reasonable and necessary. I have taken into account that the plaintiff's contribution to the estate was more than warming the bed, she invested a great amount of time in supporting the defendant and their children. Her earning capacity was restricted by the defendant's prohibition of her taking certain acting roles, particularly the kissing scenes. She has lost prime time in her acting career. She took care of the children, including assisting them with schooling activities; and managed the household whilst the defendant was increasing his net worth. This is disputed by the defendant, however, it is common cause that the defendant spent most of the time travelling in the country and internationally to advance his career, whilst the plaintiff remained at home, save for few instances that they travelled together.

[176] The plaintiff's bank statements demonstrate that she does not have stable monthly income save for instances where she is engaged in short-term-contract projects. Whilst there was no evidence regarding the defendant's earning capacity, it is common cause that money is no object. The defendant's current

and expected earning capacity is substantially better than the plaintiff. The defendant has the ability to make financial contribution towards the plaintiff's living expenses. The defendant has spent the better part of his life advancing his career whilst the plaintiff was hindered by the circumstances mentioned herein.

Costs

[177] The general rule is that the award for costs is at the discretion of the judicial officer, and the second principle is that the successful party should, as a general rule, have his or her costs.⁴⁴ However, Section 10 of the Divorce Act provides that:

“In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order the costs of the proceedings be apportioned between the parties”.

[178] The defendant complained about the length of the plaintiff's heads amounting to 159 pages and requested the Court to make a costs order of an attorney-and-client scale against the plaintiff in respect of defendant's perusal costs of the heads. The Court agrees that the plaintiff's heads are longer than what is expected, considering that the parties had opportunity to submit oral argument. The defendant also complained about the tone and seemingly strong language used in the plaintiff's heads against the defendant. Parties are reminded that the purpose of Court proceedings is to assist parties to resolve their disputes and are cautioned to be courteous and show respect to each other, taking into consideration the Court's decorum.

[179] I have taken into consideration the personal circumstances of the parties including their comparative financial abilities. The plaintiff is in a weaker financial position compared to the defendant. As a successful party, I am of the view that the costs should follow the results. The defendant should therefore pay the

⁴⁴ *Ferreira v Levin NO and Others* 1996 (2) SA 621 (CC).

plaintiff's costs; however, the defendant should only pay half the costs in relation to the plaintiff's heads.

Order

[180] I therefore make the following order:

1. It is declared that:
 - 1.1 the plaintiff and the defendant entered into a valid customary law marriage on or about May 14, 2011;
 - 1.2 the customary law marriage between the plaintiff and the defendant is in community of property and of profit and loss; and
 - 1.3 the Antenuptial Contract concluded between the plaintiff and the defendant on or about December 21, 2016, attached to the plaintiff's particulars of claim as Annexure "A", is invalid and unenforceable, alternatively void, alternatively voidable and has been validly cancelled.
 - 1.4 The civil marriage entered into between plaintiff and defendant on January 5, 2017 is declared invalid.
2. A decree of divorce is accordingly granted.
3. Division of the joint estate.
4. A Receiver and Liquidator to be nominated by the parties is hereby appointed.
5. Parental responsibilities and rights (as envisaged in terms of Section 18(2) and Section 18(3) of the Children's Act 38 of 2005) pertaining to the 2 (two) minor children are awarded to plaintiff and defendant jointly subject to the following:

5.1 the plaintiff shall have primary residence and custody in respect of the minor children;

5.2 the defendant shall be entitled to reasonable contact with the minor children, including (but not limited to) the following:

5.2.1 the right to remove the minor children each weekend when he is in Johannesburg, on a weekday from 14h30 until 18h30 and from Friday 16h00 until Sunday at 17h30 or on 48 hours' notice by text message or WhatsApp with the notice to set out for what period the Respondent expects the minor children to be with him;

5.2.2 that during the children's school term the defendant is to ensure that the minor children attend school and that they are returned home by 20h30 on a school night;

5.2.3 the defendant is to notify the plaintiff as to who is caring for the minor child A...e until he turns 7 years of age and it must be a caregiver agreed to between the parties and known to the children;

5.2.4 the right to have the children with the defendant for one half of each school holiday, with the provision that the December holidays shall be shared on such a basis between the parties and that the minor children shall spend an alternative Christmas with each parent;

5.2.5 the right to remove the minor children on Father's Day and on the defendant's birthday;

5.2.6 should the birthday of any of the children not fall over a weekend and/or school holiday which the children spend with the defendant, the defendant shall be entitled to contact each child on his birthday at least 2 hours;

- 5.2.7 both parties shall consent in writing to any major decision involving each of the children as stipulated in terms of the provisions of Section 31(1)(b) of the Children's Act No. 38 of 2005, and in the event that the parties cannot agree on any such major decision involving any of the children, such issues shall immediately be referred to mediation;
- 5.2.8 In the event that the defendant intends to make arrangements to have the minor children join the defendant whilst the defendant is overseas during any such period when the defendant is entitled to exercise his right of contact to the minor children and/or when the defendant intends to proceed overseas on holiday with the two minor children whilst exercising his right of contact to the minor children, the plaintiff shall provide her written consent as required in terms of any law to enable the minor children to accompany the defendant overseas for holiday purposes;
- 5.2.9 The plaintiff shall at all reasonable times provide her full corporation to enable the minor children to be placed in possession of a valid passport for travel purposes, and shall sign any and all necessary documentation on demand to enable the issue of a passport for travel purposes to any of the two minor children;
- 5.2.10 The defendant shall pay maintenance for the minor children in the sum of R25 000.00 per month per child, escalating annually by an amount equal to CPI (Consumer Price Index) on the anniversary date of this Order, until the minor children are self-supporting;
- 5.2.11 The amounts aforesaid will be payable on or before the first day of each and every month directly into a bank account the particulars of which the plaintiff will advise the defendant in writing;

5.2.12 The defendant shall pay any and all reasonable medical expenses incurred for and on behalf of the minor children and for which purposes the defendant will retain the minor children on a medical aid fund and pay all premiums and shortfalls in respect of such medical aid fund on demand;

5.2.13 The defendant shall pay for any and all reasonable scholastic and extra-mural activities in respect of the minor children;

6. The defendant shall pay spousal maintenance to the plaintiff until her death or re-marriage, whichever occurs first in the sum of R67 167.00 per month, payable on or before the first day of every month into a bank account to be nominated by the plaintiff, and which amount will escalate yearly on the anniversary date of this Order at a rate equal to the average rate of the Consumer Price Index for the preceding twelve months.
7. The defendant is ordered to pay plaintiff's costs including the costs of Rule 43 application as well as the costs of two Counsels on a party and party Scale C. The defendant is to pay half of the plaintiff's costs of preparation of the Heads of argument.



M NTANGA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 11 July, 2025
Date of Judgment: 10 October 2025

Appearances

Plaintiff's Counsel: Adv TJ Machaba SC
Adv SG Maritz SC
Instructed by: Jerry Nkeli & Associates Inc.

Defendant's Counsel: Adv Van Niekerk SC
Adv Ledwaba
Instructed by: KS Dinaka Attorneys