

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 073510/23

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

02 June 2026
DATE

.....
SIGNATURE

S M J M

PLAINTIFF

And

W M M

DEFENDANT

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 02 June 2026*

JUDGMENT

MOGALE, AJ

Introduction

[1] This is a legal divorce action in which the defendant has opposed the application for relief concerning the dissolution of the accrued clauses of the antenuptial contract entered into between the parties before their marriage.

Background

[2] The parties were legally married out of community of property on 10 June 2016, and their property is subject to the accrual system under the provisions of Chapter 1 of the Matrimonial Property Act 88 of 1984. The marriage remains valid. However, for the past four years, the parties have not cohabited as husband and wife. There are no children born of the marriage.

[3] The parties agree that the marriage has irretrievably broken down and that a decree of divorce ought to be granted, subject to the Honourable Court's approval. The plaintiff testified in support of her application.

[4] The plaintiff issued a summons for divorce on or about 21 July 2023. In this regard, the plaintiff claimed, inter alia, a degree of divorce and the division of accruals in accordance with the antenuptial contract.

[5] The defendant entered an appearance to defend and submitted a plea. In her plea, the defendant requested, among other matters, the division of the estate's accrual as follows:

- (a) House in a tribal land of Disaneng Village.
- (b) Half of the herd of cattle which they were twenty a year ago.
- (c) Stand at Disaneng Village
- (d) Eight (8) doors and handles, which were custom-made.
- (e) Electric stove.
- (f) New double bed, and
- (g) All bathroom sets.

[6] The parties reached a settlement whereby, except for the house and the stand located on tribal land in Diseneng Village, all other assets specified above shall be transferred to the defendant.

The antenuptial contract

[7] Prior to the marriage, the parties executed an antenuptial agreement, in which they mutually consented to its terms.

- (a) That there shall be no Community of Property between them.*
- (b) That there shall be no community of profit and loss between them*
- (c) The marriage shall be subject to the Accrual System in terms of the Provisions of Chapter 1 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984).*
- (d) In determining the accrual of the estate of either spouse at the dissolution of the intended marriage, whether by death or divorce, there shall be excluded there from all the right, title, interest and benefits to which either party is, will or may become entitled, whether by way of income or capital received or to be received by or accrued to him or her from a third party as a beneficiary in term of any inheritance, legacy or donation, howsoever created, including in terms of any will, inter vivos trust or mortis causa trust created or that may be created for his or her benefit, as well as any other assets, including income and other fruits, which either party may acquire by virtue of his or her possession or former possession of such inheritance, legacy, donation and/or benefit from such trusts.*
- (e) That, for the purpose of proof of the net value of their respective estates at the commencement of the intended marriage, the intended spouses declared the net value of their respective estates to be as follows:*

[8] *The estate of the plaintiff was listed as:*

- 8.1. Number 1[...] W[...] C[...], S[...] Crescent, Noordwyk.*
- 8.2. Nissan 1400, 2006, with Registration No F[...]*
- 8.3. BMW 1998, with Registration No D[...]*
- 8.4. Land Cruiser Toyota, 2013, with registration No H[...]*

[9] *The estate of the defendant was listed as:*

- 9.1. No 1[...] S[...] Street, H[...], Centurion,*
- 9.2. No 2[...] K[...] Road, Unit [...], Mmabatho*
- 9.3. Mercedes-Benz model, C[...]*
- 9.4. Government Employment Pension Fund with registration No:9[...]*

Oral evidence by the plaintiff

[10] The plaintiff testified that he is a leader of the Batlharo Ba ga Masibi Traditional Land, located in Disaneng village, a tribal land governed by indigenous laws and administered by the chief on behalf of the community.

[11] The Traditional Council allocates land to the community, which has the right to use and occupy it. Tribal land cannot be sold, and no title deeds have been issued to the community.

[12] The house, which is a subject of contention, remains incomplete and is situated within the Royal compound, where only members of the Royal family, their heirs, and children reside. Consequently, the incomplete house does not constitute part of the joint estate, as it is constructed on land owned by the Traditional Council, but it belongs collectively to all children born into the Royal household.

[13] Similarly, the open stand is the property of the Traditional Council and has no title deed; the right to occupation and use is extended to the community. The property is also not part of the party's estate as it belongs to the Traditional Council.

[14] An agreement was made to transfer the stand from Refilwe Setshwaro to the plaintiff, with compensation of R 5,000. The plaintiff testified that he bought the stand using the R 5,000 from the defendant. Later, he amended his statement during cross-examination, clarifying that he did not purchase the stand; instead, the R 5,000 was paid as compensation.

[15] The plaintiff claims he funded 80% of the house's construction, with the defendant contributing 10%. Therefore, she has no entitlement to either property since she is not part of the Tribal authority. Her refusal to resolve the issue informally also disqualifies her from ownership. Moreover, the antenuptial contract explicitly excludes her from any benefits.

Oral evidence by the defendant

[16] The defendant suggested to the plaintiff that they build a residence together, since the plaintiff was living in a single room and lacked a proper home.

[17] The incomplete house is situated within the Royal compound, with her contributing 80% to the property and the defendant, who was unemployed, contributing 10%. She denied that only the royal family resides within the Royal compound.

[18] She provided the plaintiff with R5000 to purchase the stand. She asserts that all assets accumulated jointly with the plaintiff during their marriage are to be divided equally under the condition of the contract.

Oral submissions

[19] The plaintiff's side argued that the defendant submitted a plea but did not submit a counterclaim or amend their pleadings. Their application states that the only relief they seek is to dismiss the plaintiff's claim with costs.

[20] The defendant's claim is the division of all the assets, which include the house on tribal land and the stand, but they failed to claim entitlement to an order that these assets form either party's estate and should be included in an accrual calculation. Parties are bound by their pleadings, and the court is confined to deciding the issues raised therein.

[21] Although the courts are empowered in terms of section 173 of the Constitution, this section does not confer upon a court a broad equitable discretion to ignore pleadings, create a cause of action or grant relief unsupported by the evidence.

[22] The plaintiff further contended that only assets constituting part of a party's estate are pertinent to the calculation. Therefore, the two properties may be included solely if they are legally recognized assets of that estate. In cases where a party does not possess ownership of the land, the land does not form part of that party's estate and consequently cannot be assigned a value for the purpose of accrual. The defendant has not demonstrated that the Disaneng properties qualify as patrimonial assets suitable for inclusion in the accrual calculation.

[23] On behalf of the defendant, it was argued that the parties entered into an antenuptial contract and enumerated the property acquired prior to the marriage, which was excluded from the antenuptial agreement. Their plea is unambiguous in the sense that, rather than specifying the relief sought, they asserted the existence of an antenuptial agreement, and the plaintiff claims a 50% share of the estate subject to accrual.

[24] Both parties asserted that they had contributed more; consequently, neither party can precisely delineate their exact contribution.

[25] The defendant's claim pertains to two properties: the unfinished house they built together and the stand in Disaneng village, which they both contributed to. They contend that the assertion that the land at Disaneng is not for sale is incorrect, as the plaintiff has supplied evidence demonstrating that he purchased the land for R5000.

[26] The defendant expresses no interest in the properties, as she resides in her house in Centurion, but requests that the value of the properties be divided equally, with 50% allocated to each party. Consequently, the defendant requests that this court dissolve the marriage and enter an order confirming that the defendant is entitled to a 50% share, representing half of the value of the properties located in Disaneng, and making an order that the valuation of the two properties be referred to the appointed liquidator for appropriate determination.

Issues to be decided

[27] This court must determine the following issues:

- (a) Whether the Defendant's claim for inclusion of the tribal land properties is properly before this Court in light of the pleadings, and if not, whether the Court may nonetheless entertain that claim under section 173 of the Constitution.
- (b) Whether tribal land allocated by a traditional council for residential occupation constitutes an asset that can form part of a spouse's estate for the purposes of the accrual system.
- (c) Whether the incomplete house constructed on tribal land can be severed from the land for accrual purposes.

(d) If both properties are capable of forming part of the estates, how should their value be determined?

Failure to plead, and the applicability of section 173 of the Constitution

[28] The plaintiff claims that the defendant filed a plea but did not include a counterclaim or request any amendments to her pleadings. It is argued that the defendant only listed the assets she wishes to have divided, without claiming any right to a court order that these assets are part of either party's estate or should be included in the accrual calculation. The Plaintiff asserts that the Court is bound by the pleadings and cannot grant relief that was not properly pleaded.

[29] I agree with the plaintiff's argument that the principle that parties are bound by their pleadings is a cornerstone of our adversarial system. A court cannot decide a case based on issues not pleaded or grant relief unsupported by the pleadings and evidence. In *Minister of Safety and Security v Slabbert*,¹ the court held that "*a party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different one at trial.*"

[30] In the present matter, the Defendant's plea does not include a counterclaim. It neither asks for a declaration that the Disaneng properties are part of either party's estate nor requests that the liquidator be instructed to value those properties. The relief that the defendant seeks is the division of the estate, which is not based on any cause of action she has pleaded. Additionally, she has not taken steps to amend her pleadings to include the necessary allegations and prayer for relief.

[31] The plaintiff further contends that, due to the improperly pleaded relief sought by the defendant, this Court is consequently barred from granting such relief. The plaintiff invokes the principle that this Court's authority to regulate its procedural processes under section 173 of the Constitution does not permit it to disregard the pleadings or to establish a cause of action on behalf of a party.

¹ 2009 JDR 1218 (SCA) at para 11.

[32] Section 173 of the Constitution,² provides:

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

[33] This provision recognises and preserves the inherent power that superior courts have always enjoyed to regulate their own procedure and to prevent injustice. It empowers a court to control its process, to prevent abuse of that process, and to fill lacunae in the rules of procedure where the interests of justice necessitate such action.

[34] However, as the Constitutional Court has consistently held, the inherent power under section 173 is not a broad equitable discretion to disregard the rules of court or the pleadings. In *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions*,³ the Court emphasised that section 173 confers upon courts the power to regulate their own process, but that power must be exercised within the bounds of the Constitution and the law. It is not a licence to ignore the fundamental principles of our procedural law.

[35] In *Mukaddam v Pioneer Foods (Pty) Ltd*,⁴ the Supreme Court of Appeal reiterated that section 173 recognises and preserves the courts’ power to determine how disputes are to be placed before them. That power does not, however, authorise a court to grant relief that a party has not sought, or to decide a case on a basis that has not been pleaded.

[36] The plaintiff correctly points out that this Court cannot, under the guise of exercising its inherent power, create a cause of action for the Defendant or ignore obvious flaws in her pleadings. Such actions would violate the *audi alteram partem* principle and unfairly harm the plaintiff, who is entitled to know the case against her and to submit evidence on properly raised issues.

² The Constitution, 1996.

³ 2007 (1) SA 523 (CC) at para 89.

⁴ 2013 (5) SA 89 (CC) at para 2.

[37] Nevertheless, the courts have recognised that the structures of pleadings are not absolute. In *Robinson v Randfontein Estates Gm Co Ltd*,⁵ the court held that “*pleadings are made for the court, not the court for pleadings.*” The object of pleadings is to define the issues between the parties so that each may know the case they must meet and so that the court may adjudicate with clarity. A court may, in appropriate circumstances, permit a departure from the strict terms of pleadings, where no prejudice is caused, and where the interests of justice demand it.

[38] In this case, the question of whether tribal land properties are included in the parties’ estates has been thoroughly discussed in both the evidence and the arguments. Both sides presented points to the Court regarding the nature of tribal land tenure, the customs and practices of the Batlharo Ba ga Masibi Traditional Community, and whether the incomplete house can be separated from the land. The plaintiff has not demonstrated that she would be prejudiced if the Court decides this issue on the merits, despite the irregularity in the pleadings.

[39] This case illustrates how rigidly applying the pleadings rule could prioritize form over substance. The parties have already litigated about the tribal land properties. To refuse to decide that issue now would undermine justice and force the parties into additional litigation over a dispute that could be resolved within these proceedings.

[40] I am accordingly satisfied that it is appropriate, in the exercise of this Court’s inherent power under section 173 of the Constitution, to determine the issue of whether the Disaneng properties form part of the parties’ estates for accrual purposes.

The legal position of property on Tribal Land

[41] The first substantive question is whether tribal land allocated by a traditional council for residential occupation can constitute an asset capable of forming part of a spouse’s estate for accrual purposes.

⁵ 1925 AD 173 at p199.

[42] The plaintiff stated he is the Kgosi (chief) of the Batlharo Ba ga Masibi Traditional Community. Disaneng village is a tribal land governed by indigenous law and managed by the Traditional Council on behalf of the community. This Council allocates land to community members for residential purposes but does not issue title deeds. The land cannot be sold to outsiders; it is held collectively by the community. Members only have the right to occupy and use the land, which remains under the Traditional Council's authority.

[43] The plaintiff also testified that the incomplete house is located within the Royal compound, where only members of the Royal family, their heirs, and children live. He claims that the house is not part of the joint estate because it is built on land owned by the Traditional Council, with occupation rights personal to members of the Royal household. Likewise, the vacant stand is the property of the Traditional Council, and the right to occupy and use it is granted to the community at large.

[44] The defendant challenges these claims. She stated that both parties agreed to build a house on the land, and she gave the plaintiff R 5 000 to buy the stand. She claims she paid for 80% of the house costs. She argues that the land is saleable, citing the R 5 000 payment as proof of a purchase. She insists that all assets acquired together during the marriage should be divided equally.

[45] The legal character of tribal land in South Africa is governed by a complex interplay of customary law, statutory law, and the Constitution. Section 211 of the Constitution of the Republic of South Africa, 1996, provides:

- a. The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- b. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- c. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

[46] The Constitutional Court has affirmed that customary law is an integral part of the South African Law and it must be interpreted and applied in light of the Constitution.

In *Shulubana v Nwamitwa*,⁶ the court held that *customary law is not a fixed body of rules but is a living law that evolves in response to changing social conditions. The court must have regard to the actual practices and customs of the community concerned, as well as to the constitutional values of equality, human dignity and freedom.*

[47] The nature of land tenure under customary law differs fundamentally from the common law concept of ownership. Under customary law, land is held by the community as a whole, with the traditional authority holding the land in trust for the community. Individual members of the community may be allocated rights of occupation and use, but these rights are not equivalent to full ownership. As the Interim Protection of Informal Land Rights (“IPILRA”) recognises,⁷ persons may have informal rights to land, the rights that are not formally registered but are nonetheless protected by law. Section 2(1) “*provides that no person may be deprived of any informal right to land without his or her consent.*”⁸

[48] Understanding the difference between ownership and the right of occupation is essential within the accrual system. This system focuses on the assets and liabilities that form a spouse’s estate. Under common law, a person's estate includes all proprietary rights and obligations they hold. A right of occupation that cannot be transferred and can be revoked by the traditional council at any time does not qualify as a proprietary right similar to land ownership. Instead, it is at best a personal right that depends on ongoing membership in the community and adherence to its customary rules.

[49] In this case, the vacant stand in Disaneng village is assigned to the plaintiff because of his role as a member of the Batlharo Ba ga Masibi Traditional Community and specifically as part of the Royal family. The right to occupy the stand is non-transferable to others. The plaintiff is not permitted to sell the stand to someone outside the community. If the plaintiff ceases to be a community member, for instance, by moving away permanently, the traditional council has the authority to reassign the

⁶ (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008) at para 44-45.

⁷ Act 31 of 1996.

⁸ Act 31 of 1996.

stand to another member. Therefore, this stand is not an asset that can be appraised or included in the plaintiff's estate for accrual calculations.

[50] The defendant's reliance on the R 5 000 payment as proof of a "purchase" of the stand is misguided. The plaintiff clarified that this payment was not a purchase price in the traditional legal sense but was compensation given to the previous occupant for improvements made to the stand. This aligns with usual practice, where a new occupant must compensate the previous one for the value of their improvements without gaining ownership of the land itself. The traditional council continues to be the land's custodian, and the right to occupy remains under its authority. Paying compensation does not convert the customary occupation rights into full ownership.

[51] Accordingly, I find that the vacant stand in Disaneng village does not form part of the plaintiff's estate. It cannot be included in the accrual calculation. The defendant's claim for a division of the value of the stand must therefore fail.

Whether the house built on Tribal Land forms part of the estate

[52] The second issue concerns whether the incomplete house on tribal land can be distinguished from the land for accrual purposes. The plaintiff argues that the house is an integral part of the land, and since the land is not part of his estate, the house should also be excluded from his estate. Conversely, the defendant claims that the house is a separate immovable asset that can be owned independently of the land.

[53] The Roman legal principle of "*superficies solo cedit*", meaning "*the surface yields to the ground*", provides that whatever is attached to the land becomes part of the land and belongs entirely to the landowner. A house that is permanently affixed to the land is, in common law, an immovable asset that forms part of the land itself. Therefore, one cannot own the house separately from the land.

[54] The land itself usually does not form part of the Parties' estate because it is not privately owned; it is held for the benefit of the community under customary law. This

point is established in *CASAC v Ingonyama Trust*,⁹ where the court emphasised that the Trust holds the land on behalf of the community, and not as a private owner, as supported in para 98, “*that the land cannot become a subject of a private sale, as with freehold*”. This also finds support in “Upgrading of Land Tenure Rights Act, ‘tribal land’, which defines land ‘which is held in trust on behalf of a tribe.’”

[55] Under customary law, the same principle generally applies, albeit with nuances. A dwelling constructed on tribal land is regarded as an improvement to the land, not as a separate asset capable of being owned independently. The right to occupy the land and the right to the dwelling are typically inseparable. If the right to occupy the land is terminated, the occupant may be entitled to remove the dwelling or to claim compensation for the value of the improvements, but the dwelling itself does not constitute a separate asset that can be transferred independently of the land.

[56] The plaintiff testified that the house remains incomplete. It has not yet been completed to the point of being habitable. The parties do not agree on the respective contributions made towards the construction. The plaintiff claims he contributed 80% of the costs; the defendant claims she contributed 80%. Neither party has provided documentary evidence to substantiate their claims. In these circumstances, even if the house could be regarded as a separate asset, it would be difficult, if not impossible, to determine its value or to allocate the respective contributions of the parties.

[57] More fundamentally, the house is built on land that does not form part of the plaintiff’s estate. Because the house is permanently affixed to that land, it cannot be separated from the land for the purpose of determining the accrual of the plaintiff’s estate. The plaintiff does not own the land, nor does he own the house as a separate asset. His right is a right to occupy the land and to use and enjoy the dwelling constructed thereon, subject to the authority of the traditional council. That right is personal, contingent, and non-transferable. It does not constitute a proprietary asset capable of inclusion in his estate.

⁹ *Council for the Advancement of the SA Constitution and Others v Ingonyama Trust and Others* 2022 (1) SA 251 (KZP) para 101.

[58] The fact that the defendant contributed financially to the construction of the house does not alter this analysis. The defendant's contributions may give rise to a personal claim against the plaintiff for unjust enrichment or for a contribution towards improvements, but such a claim is distinct from a claim for inclusion of the house in the accrual calculation. The defendant has not pleaded a claim for unjust enrichment, nor has she sought an order for compensation. She has sought only an order that the house be valued and that she receive 50% of that value as part of the accrual division. That relief is not available because the house does not form part of the Plaintiff's estate.

[59] I accordingly find that the incomplete house in Disaneng village does not form part of the plaintiff's estate for the purposes of the accrual system. The defendant's claim for a division of the value of the house must also fail.

Conclusion

[60] The parties have agreed that the marriage has irretrievably broken down. Accordingly, a decree of divorce will be granted.

[61] The defendant's claim for inclusion of the vacant stand and the incomplete house in Disaneng village in the accrual calculation is dismissed. The defendant has failed to establish that these assets form part of the plaintiff's estate or that they can be valued and included in the accrual calculation.

[62] The remaining assets listed in the defendant's plea, including the herd of cattle, eight custom-made doors and handles, an electric stove, a new double bed, and bathroom sets, have been transferred to the defendant through a mutual agreement. There is no controversy over these assets, and the parties have settled the matter.

[63] The division of the accrual of the parties' estates shall proceed in accordance with their antenuptial contract and the provisions of the Matrimonial Property Act 88 of 1984, excluding the Disaneng properties from the calculation.

Order

[64] In the premises, I make the following order

[64.1] A decree of divorce is granted.

[64.2] The defendant's claim for inclusion of the vacant stand and the incomplete house situated at Disaneng village in the accrual calculation is dismissed.

[64.3] The division of the accrual of the parties' estates shall be determined in accordance with their antenuptial contract and the provisions of Chapter 1 of the Matrimonial Property Act 88 of 1984, excluding the said properties from the calculation.

[64.4] The defendant pays the costs of suit.

**K MOGALE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date of hearing: 04 & 08 May 2026
Date of judgment: 02 June 2026

Appearances

Applicants' council: ADVOCATE GT KYRIAZIS
Instructed by: MMOWANE ATTORNEY

Respondents' council: ADVOCATE C MOSALA
Instructed by: PHILLIP VENTER ATTORNEYS