CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 293/22

In the matter between:

D H B Applicant

and

C S B Respondent

Neutral citation: *D H B v C S B* [2024] ZACC 9

Coram: Zondo CJ, Maya DCJ, Kollapen J, Mathopo J, Rogers J, Schippers AJ, Theron J, Tshiqi J and Van Zyl AJ

Judgments: Theron J (majority): [1] to [63]
Schippers AJ (dissent): [64] to [114]

Heard on: 12 September 2023

Decided on: 22 May 2024

Summary: Prenuptial agreement — providing for maintenance — pleaded as unspecified donation — Divorce Act 70 of 1979 — section 7 — not triggered

Prenuptial agreement — providing for maintenance — valid and enforceable vis-à-vis the antenuptial contract — not change anything *stante matrimonio*

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed with costs.

JUDGMENT

THERON J (Kollapen J, Mathopo J, Rogers J, Tshiqi J and Van Zyl AJ concurring):

Introduction

[1] This application for leave to appeal relates to the enforceability of a prenuptial agreement which provides for, amongst other things, maintenance upon the dissolution of marriage.

Background and litigation history

[2] In anticipation of their marriage, the applicant, Mr D H B, and the respondent, Mrs C S B, concluded an antenuptial contract, which declared their marriage to be out of community of property with the exclusion of the accrual system. The antenuptial contract was registered on 22 January 2015.

[3] On 20 February 2015, the parties concluded a further agreement (prenuptial agreement). The prenuptial agreement, which was written in Afrikaans, provided that: the parties' marriage shall be in terms of their antenuptial contract (out of community of property with the exclusion of the accrual system); the

prenuptial agreement is to be read together with the antenuptial contract; and upon the dissolution of their marriage, by either divorce or death, the applicant agreed to donate to the respondent a residential dwelling to the value of R1 500 000, a motor vehicle to the value of R250 000, monthly contributions in respect of the respondent's medical aid membership, the payment of the premiums of a life policy during the respondent's lifetime and R20 000 per month in respect of the respondent's life-long spousal maintenance ("lewenslange onderhoud tussen gades" in the Afrikaans text).

[4] The parties were married on 19 May 2015. On 8 August 2018, the applicant instituted divorce proceedings against the respondent in the Regional Court for the Regional Division of Gauteng held at Springs (Regional Court). These proceedings are pending. In defending the action, the respondent filed a counter-claim in which she sought enforcement of the terms of the prenuptial agreement.

[5] The applicant filed a plea to the counter-claim and admitted having executed the prenuptial agreement, but denied that its terms were enforceable, given the existence of the antenuptial contract. The applicant contended that the parties abandoned the prenuptial agreement when their antenuptial contract was registered (abandonment defence). Alternatively, the applicant contended, in the event that the Regional Court was to find the prenuptial agreement enforceable, that the respondent had made herself guilty of gross ingratitude and he was entitled to revoke the donation (ingratitude defence).

[6] The parties requested that the Regional Court separately adjudicate the issue of whether the prenuptial agreement was enforceable. The enforceability of the prenuptial agreement forms the basis of the proceedings before us.

Litigation history

Regional Court

[7] In the Regional Court, the parties argued the following legal point: whether the prenuptial agreement was valid and enforceable vis-à-vis the antenuptial contract, that is, whether the prenuptial agreement could co-exist with the antenuptial contract (incompatibility issue).

[8] The Regional Court found that the prenuptial agreement was enforceable and held that it should be read together with the antenuptial contract. In reaching this conclusion, the Regional Court relied on the principles of *pacta sunt servanda* (agreements must be kept) and freedom of contract.

High Court

[9] The applicant appealed to the High Court of South Africa, Gauteng Division, Pretoria (High Court). Before the High Court, the applicant advanced two arguments. First, the antenuptial contract and the prenuptial agreement have materially different terms and cannot be read together. To read the agreements together, according to the applicant, is tantamount to introducing an amendment of the antenuptial contract via the back door. Second, the prenuptial agreement was unenforceable because it ousted the divorce court's discretion as provided for in section 7 of the Divorce Act[1] (ousting issue).

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[1] 70 of 1979. Section 7 of the Divorce Act reads in relevant part:

> "(1) A court granting a decree of divorce *may in accordance with a written agreement between the parties* make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.
>
> (2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party 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." (Emphasis added.)

[10] The respondent repeated the submissions she advanced in the Regional Court and argued that she merely sought specific performance of a donation agreement.

[11] The High Court set aside the decision of the Regional Court and held that the prenuptial agreement was unenforceable. Relying on *S T v C T*,[2] the High Court reasoned that to hold that the prenuptial agreement was enforceable meant that the respondent would receive life-long maintenance couched as a donation where no agreement existed in terms of section 7(1) of the Divorce Act. This would preclude a divorce court from exercising its discretion under section 7(2) of the Divorce Act.

[12] Further, in order to have the prenuptial agreement made an order of court, the respondent was required to comply with the *Eke* factors.[3] The High Court noted that a court was required to lend its imprimatur to the agreement in order to make it enforceable. As the prenuptial agreement did not relate to a legal issue at the time of its making, the agreement should not be enforced. It was not concluded at a time when divorce proceedings were pending or contemplated and was thus not in settlement of any dispute.

[13] Lastly, the High Court held that the Regional Court's conclusion that the prenuptial agreement should be enforced, to honour the maxim of *pacta sunt servanda*, was untenable in the face of the requirements of section 21 of the Matrimonial Property Act[4] (MPA), because the agreement introduced terms that were contradictory to the

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[2] *S T v C T* [2018] ZASCA 73; 2018 (5) SA 479 (SCA) (*S T v C T*).

[3] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (*Eke*) at paras 25-6. In *Eke*, the Constitutional Court held that when parties approach a court to make a settlement agreement an order of court, the agreement must be competent and proper in that the agreement must: relate directly or indirectly to the dispute between the parties; not be objectionable in that it must accord with the Constitution and the law and not be offensive to public policy; and it must hold some practical and legitimate advantage. These are referred to as the so-called "*Eke* factors".

[4] 88 of 1984. Section 21(1) of the MPA provides:

> "(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—

antenuptial contract.[5] The High Court held that the parties should have sought an amendment of their antenuptial contract.[6]

Supreme Court of Appeal

[14] The respondent appealed to the Supreme Court of Appeal where she advanced four arguments. First, that there was no conflict between the antenuptial contract and the prenuptial agreement, and that they can co-exist and remain valid and enforceable as two distinct and separate legal agreements. Second, she relied on *pacta sunt servanda* and argued that her claim was of a contractual nature, based on donations in her favour which were made by the applicant with full knowledge of the contents of the antenuptial contract. Third, she contended that sections 7(1) and (2) of the Divorce Act were not applicable. Fourth, relying on *Odgers*,[7] the respondent contended that the donation made by the applicant, in which he undertook to pay lifelong maintenance, was neither unusual nor impermissible.

[15] The Supreme Court of Appeal ruled in favour of the respondent.[8] It held that the two legal instruments could co-exist because the antenuptial contract regulated the matrimonial regime of the parties *stante matrimonio* (while the marriage was in force), whereas the prenuptial agreement had no bearing at all on the nature of the matrimonial regime and the respective estates of the parties.[9]

(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 authorise 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."

[5] *B v B*, unreported judgment of the Gauteng Division of the High Court, Pretoria, Case No A135/2020 (28 April 2021) (*High Court judgment*) at para 14.

[6] Id.

[7] *Odgers v De Gersigny* [2006] ZASCA 125; 2007 (2) SA 305 (SCA).

[8] *C B v D B* [2022] ZASCA 123; 2023 (1) SA 381 (SCA) (*Supreme Court of Appeal judgment*) at para 7.

[9] Id at para 9.

[16] Further, the Supreme Court of Appeal held that the finding of the High Court – that the prenuptial agreement purported to vary the antenuptial contract or the parties' matrimonial regime contrary to section 21 of the MPA – was fundamentally flawed.[10] The Supreme Court of Appeal held that the legal effect of the prenuptial agreement was that a portion of the patrimonial consequences upon divorce or death would flow from the prenuptial agreement and not from the matrimonial regime. Thus neither party would have a claim against the other based on the Divorce Act or the MPA.[11]

[17] The Supreme Court of Appeal found that, as the parties never intended for the prenuptial agreement to rectify or amend the antenuptial contract, section 7(1) of the Divorce Act was not applicable, nor was *A M v H M*.[12] The import of section 7(1) was to confer upon a divorce court the power to make a written settlement agreement, concluded by divorcing parties which relates to the payment of maintenance, an order of court.[13] The respondent did not ask for a settlement agreement to be made an order of court under section 7(1), she merely advanced a contractual claim for specific performance.[14] The fact that the prenuptial agreement referred to a lifelong monthly payment of "maintenance" did not render it an attempt to settle a pending divorce action.[15]

[18] Further, the Supreme Court of Appeal held that the prenuptial agreement did not fall within the ambit of the provisions of section 7(2) of the Divorce Act because that discretion only arises when a claim is made under that section.[16] In this matter, the respondent was not claiming maintenance under section 7(2), but simply requesting the

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[10] Id.

[11] Id.

[12] *A M v H M* [2020] ZACC 9; 2020 JDR 0852 (CC); 2020 (8) BCLR 903 (CC) (*A M v H M*); *Supreme Court of Appeal judgment* above n 8 at para 11.

[13] *Supreme Court of Appeal judgment* above n 8 at para 11.

[14] Id.

[15] Id.

[16] Id at para 15.

divorce court to enforce the terms of the prenuptial agreement.[17] Therefore, in the view of the Supreme Court of Appeal, the agreement did not oust the discretion conferred on the divorce court in terms of section 7(2).[18]

[19] Lastly, the Supreme Court of Appeal found, on the authority of *Odgers*, that the divorce court was not under a duty to ensure that the best interests of the divorcing parties were served during proceedings.[19] Rather, "[e]verybody may bind his estate, by contract no less firmly than by will, to pay maintenance after his death".[20]

[20] The Supreme Court of Appeal replaced the High Court's order with one dismissing the appeal against the Regional Court's judgment. Therefore, the Regional Court's judgment on the incompatibility issue was reinstated.

In this Court

Jurisdiction

[21] This matter engages our constitutional jurisdiction. It potentially raises the question whether a prenuptial agreement purporting to regulate the patrimonial consequences of divorce, including maintenance, is contrary to public policy and unenforceable for the reason that it impermissibly ousts the jurisdiction conferred on the divorce court in terms of section 7(2) of the Divorce Act.[21]

Issues

[22] The following are the main issues that arise for consideration:

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[17] Id.

[18] Id.

[19] Id at para 13.

[20] Id.

[21] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

(a) Was the enforceability of the prenuptial agreement in relation to section 7(1) and (2) of the Divorce Act properly before the High Court and the Supreme Court of Appeal?

(b) If yes, was the conclusion reached by the Supreme Court of Appeal, that the prenuptial agreement was enforceable, correct?

The enforceability of the prenuptial agreement

[23] In the Regional Court, the respondent filed a plea and counter-claim wherein she claimed specific performance by the applicant of his obligations in terms of the prenuptial agreement. The applicant, in his plea to the respondent's counter-claim, admitted the conclusion of the prenuptial agreement but pleaded that it was unenforceable for the following reasons: first, because the parties concluded the agreement under "emotional circumstances and upon the insistence" of the respondent; and secondly, that the parties had abandoned the prenuptial agreement.

[24] The applicant further pleaded in the alternative that, if the agreement was to be enforced, the respondent "made herself guilty of gross ingratitude and in the premise the [applicant] was entitled to revoke the donations". At the hearing of the matter in the Regional Court, the parties agreed to argue the legal point "whether the agreement was valid and enforceable vis-à-vis the [antenuptial contract]".

[25] It is important to note that the point *in limine* (preliminary point) was determined solely on the pleadings. On the pleadings, it was common cause that the prenuptial agreement was a donation. No evidence was led by either party as to the nature of the prenuptial agreement, nor was any evidence led as to the characterisation of the donation itself. All remaining issues in the divorce action were postponed *sine die* (adjourned indefinitely) by the Regional Court.

[26] The applicant contended that the prenuptial agreement was unenforceable for the following reasons: the respondent had not pleaded rectification of the antenuptial contract; the parties had not followed the legally recognised means of amending their

antenuptial contract; and the prenuptial agreement contradicted the terms of the antenuptial contract and therefore had the effect of impermissibly varying the antenuptial contract.

[27] The respondent's case in the Regional Court was that the agreements should and could be read together. The respondent did not seek rectification, variation or amendment of the antenuptial contract, merely specific performance of the prenuptial agreement.

[28] It is clear from the judgment of the Regional Court that the only question that was argued before that Court was the enforceability of the prenuptial agreement on the narrow basis set out. It is recorded in the judgment that "[a]fter extensive submissions [made by the legal representatives acting on behalf of the parties] it was agreed that the issue of whether the agreement was valid and enforceable vis-à-vis the [antenuptial contract] is what was to be argued".[22] In the Regional Court, the enforceability of the prenuptial agreement was "attacked simply because of the existence of a registered [antenuptial contract] concluded prior to [the prenuptial agreement] being signed by the parties".[23] On this question the Regional Court reasoned as follows:

> "It is a valid agreement that regulates what would happen in the future event taking place and seeks to govern the patrimonial consequences of the respective parties' debt on divorce or death of the plaintiff. There is no legislative prerequisite prescribing that the [prenuptial] agreement in its form concluded prior to the marriage [must] be registered. The end result is that a portion of the patrimonial consequences of this divorce flow from the [prenuptial] agreement and not from the marital regime and arguably in existence *stante matrimonio*."[24]

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[22] *B v B*, unreported judgment of the Springs Regional Court, Case No GP/SPR/RC352/2018 (21 November 2019) (*Regional Court judgment*) at 3.

[23] Id at 16.

[24] Id.

[29] In adjudicating the dispute, the Regional Court noted that the applicant had not sought to attack the prenuptial agreement on the basis that it was "illegal, contrary to the *boni mores* [legal convictions of the community], incoherent or that it is uncertain or vague and embarrassing".

[30] The judgment goes on to deal with the impact of the prenuptial agreement on the estates of the parties. It reasons that their estates remain separate. The judgment continues:

> "Mention is made of specific items that the [applicant] will . . . donate to her as her exclusive property, a house . . . , a car . . . , medical aid . . . , spousal maintenance and the [applicant] will pay the premiums on a life insurance policy as long as the [respondent] lives. This does not suggest infringements or violations of the antenuptial contract. Indeed, the agreement itself intends that it be read with the antenuptial contract and [had] the parties intended otherwise, they would . . . no doubt have made that patently clear."[25]

[31] The Regional Court held that the prenuptial agreement was enforceable and could be read with the antenuptial contract. In concluding that the prenuptial agreement was enforceable, it did not decide anything more than that the subsequent registration of the antenuptial contract did not render the prenuptial agreement unenforceable. This is because the Regional Court was not asked to decide anything else. Despite the Regional Court not making a formal order, its judgment should be understood as rejecting the contention that when the parties' antenuptial contract was registered, they abandoned their prenuptial agreement. Any other issue, including the issue of gross ingratitude, was to stand over for later determination.

[32] The applicant thereafter appealed to the High Court against the decision of the Regional Court. The applicant, in his amended notice of appeal, alleged that the prenuptial agreement impermissibly amounted to a settlement agreement entered into

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[25] Id at 17.

prior to their marriage in settlement of their divorce (that is, at a time when a divorce was not contemplated) and, for the first time, he invoked the provisions of section 7 of the Divorce Act. In particular, the applicant further relied on section 7(2) of the Divorce Act for the contention that the prenuptial agreement purported to impermissibly divest the divorce court of its discretion in regard to the determination of spousal maintenance.

[33] The applicant raised the public policy argument for the first time in the amended notice of appeal. He alleged that it would be *contra bonos mores* (against public policy) to hold that an agreement entered into by parties, prior to their marriage, including provision for the division of assets and for maintenance of one of the parties in the event of divorce, was enforceable in that it ousted a divorce court's discretion in terms of the provisions of sections 7(1), (2) and (9) of the Divorce Act.

[34] The argument of the parties in the High Court has not been placed before this Court. It would appear that the applicability of section 7 of the Divorce Act, as foreshadowed in the amended notice of appeal, was considered on appeal. It is not clear from the record on what basis this was considered and determined by the High Court. This is not dealt with in that judgment. It was correctly recorded in the first paragraph of that judgment that the appeal concerned an appeal in which the applicant contended that the Regional Court had erred in holding that the prenuptial agreement was enforceable and could be read together with the antenuptial contract. That this was the sole issue before the Regional Court, and the issue before it on appeal, seems to have subsequently escaped the High Court.

[35] The judgment of the High Court, under the heading "Discussion", dealt at length with the provisions of section 7 of the Divorce Act and referred to *S T v C T*. It then, somewhat surprisingly, concluded that "we are not dealing with a waiver of maintenance [as in *S T v C T*], but an executory donation with terms that are

contradictory to those of the parties' antenuptial contract".[26] The judgment then went on to find that the Regional Court had erred, in that the effect of its finding that the prenuptial agreement was enforceable ousted the discretion of a divorce court called upon to determine the question of maintenance in terms of section 7(2) of the Divorce Act. The High Court reasoned thus:

> "[T]he respondent will end up with an order of life long maintenance, couched as a donation, where no agreement existed in terms of section 7(1) and in circumstances where the court would effectively have been ousted from exercising its discretion in terms of section 7(2) of the Divorce Act. Such a result cannot be countenanced. On this score, the court [of first instance] erred. The ineluctable conclusion we reach is that the [prenuptial] agreement cannot be enforced."[27]

[36] The High Court held that the prenuptial agreement was not enforceable. The reasoning of the High Court was that, if one were to uphold the agreement as enforceable, the applicant would end up paying lifelong maintenance where no agreement existed in terms of section 7(1) of the Divorce Act and this would oust the discretion of the court under section 7(2). It reasoned that the court retains the statutory power to enquire into the reasonable needs of the spouse who requires maintenance, the existing and prospective means of the spouses, their ages, to mention but a few, and make an order for the payment of maintenance. The Court held that "in terms of section 7(1) and (2) [of the Divorce Act] the authority to make orders in respect of matters such as maintenance, even where the parties have agreed, vests with the court."[28] Reliance for this finding was placed on the decision of the Supreme Court of Appeal in *S T v C T.*

[37] In addition, the High Court held that, in order for a court to lend its imprimatur to an agreement and make it enforceable, it must, in the first place, relate to litigation or a legal issue between the parties at the time of its making. This was not the case with

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[26] *High Court judgment* above n 5 at para 11.

[27] Id.

[28] Id at para 10.

the prenuptial agreement and on this basis alone, the agreement could not be enforced. Reliance for this finding was placed on the decision of the Supreme Court of Appeal in *H M v A M.*

[38] A further reason why the High Court found that the prenuptial agreement could not be enforced, with reliance on the legal principle of *pacta sunt servanda*, is that it would be legally untenable in the face of the requirements of section 21 of the MPA. This was so, in the High Court's view, because the agreement introduced terms that were contradictory to the antenuptial contract. Before marrying each other, and by following the relevant provisions of the Deeds Registries Act,[29] the parties could have effected changes to the antenuptial contract via registration with the Registrar. The only option for the parties to achieve what they now sought was to apply to court for an amendment of the terms of their antenuptial contract in terms of section 21 of the MPA.

[39] The High Court judgment specifically made a finding that the Regional Court erred in regard to the impact of section 7 of the Divorce Act. It is not clear on what basis it reached that finding when this was not an issue raised before the Regional Court or determined by it. The High Court judgment is also silent on how this issue came to be raised on appeal for the first time. Further, it also fails to deal with any prejudice to the parties.

[40] It is important to revisit the pleadings in this matter. In her counter-claim, the respondent specifically pleaded that the prenuptial agreement was a donation agreement and that one of its material terms was that the applicant would, on the dissolution of the marriage, whether by death or divorce, *donate* certain property to her. In his plea to the counter-claim, the applicant admitted "the terms of the agreement as pleaded" by the respondent.

[29] 47 of 1937.

[41] On the pleadings, the applicant thus clearly admitted that the agreement was a donation. In his plea he went on to plead the abandonment and ingratitude defences previously mentioned.

[42] I stress, that on the pleadings, it was common cause that the prenuptial agreement was a donation agreement. Furthermore, on the pleadings, there remains a live issue between the parties whether the applicant is entitled to revoke the donation agreement on the basis that the respondent was guilty of gross ingratitude. On appeal, the High Court was not entitled to decide a dispute that was raised for the first time on appeal. Once it is accepted that, on the pleadings as they stood, the prenuptial agreement is a donation agreement, and as the pleadings do not tell us whether the agreement is a pure or a remuneratory donation, neither was any evidence led on this aspect, it cannot be said with any degree of certainty that the donation fell within the ambit of section 7 of the Divorce Act.

[43] The general rule is that a court should only decide issues before it, as pleaded by the parties. In *Fischer*,[30] the Supreme Court of Appeal said:

> "[I]t it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of the dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* [of its own accord] raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone."[31]

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[30] *Fischer v Ramahlele* [2014] ZASCA 88; 2014 (4) SA 614 (SCA).

[31] Id at para 13, affirmed by this Court in *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 234.

[44] The purpose of pleadings is to define the issues for the other party and for the court. The court is called upon to adjudicate the disputes that arise from the pleadings and those disputes alone.[32] There are instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and which is necessary for the determination of the matter, provided its consideration on appeal involves no unfairness to the other party against whom it is directed.[33] It is however impermissible for a court to decide issues falling outside the pleadings, without determining issues of fairness and prejudice.[34] It is impermissible for a party to plead a particular case and seek to establish a different case at the trial.[35]

[45] This principle is equally applicable, and perhaps more so, to appeals. A party should generally not be allowed to argue new issues on appeal that were not raised or considered by the lower court. There are exceptions and circumstances when a party may be allowed to rely on an issue which was not covered in the pleadings. In *Slabbert*, the Supreme Court of Appeal articulated these circumstances:

> "This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*, this court said: 'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the court was expected to pronounce upon it as an issue.'"[36]

[46] This Court, in *Notyawa*,[37] expressed its disapproval of a litigant changing its case as the matter proceeded through the various courts. It said:

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[32] *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at paras 27-8.

[33] Id.

[34] *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) at paras 11-2.

[35] Id.

[36] Id.

[37] *Notyawa v Makana Municipality* [2019] ZACC 43; 2020 (2) BCLR 136 (CC); (2020) 41 ILJ 1069 (CC).

> "Before us this finding was not challenged, but the applicant changed tack. The consequential relief was no longer sought, but he submitted that a live controversy between the parties remained. This related to what further consequential remedy, in the form of a claim for damages, might be available to the applicant. This would be pursued in different proceedings.
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> This change in strategy cannot avail the applicant, not least because the point is being raised for the first time in this Court. *There was nothing to prevent the applicant from seeking an amendment to the relief he sought in the High Court.* Yet there is no explanation why he did not do so, nor why this Court should do so as a court of first instance. That this should not readily be countenanced was recently re-affirmed by this Court in *Tiekiedraai*. There is no reason to do so here."[38] (Emphasis added.)

[47] The question of unfairness and prejudice must be considered where a party raises an issue for the first time on appeal. What might be "unfair" was considered by this Court in *Barkhuizen*, albeit in a slightly different context, where the Court noted that:

> "Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial."[39]

[48] It also noted that:

> "The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point."[40]

[49] An appeal court can deal with an issue that was not raised in the lower courts and not considered by the lower courts. However, this can only be done in exceptional

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[38] Id at paras 59-60

[39] *Barkhuizen* above n 21 at para 39.

[40] Id.

circumstances.[41] A court will not entertain a new issue on appeal where it causes prejudice or unfairness to the other party.

[50] In the matter before this Court, the issues expanded from what was originally before the Regional Court. The issue before the Regional Court was whether the prenuptial agreement was enforceable vis-à-vis the antenuptial contract. This then morphed into questions about section 7 of the Divorce Act and public policy before the High Court, the Supreme Court of Appeal and in oral argument before this Court.

[51] The Supreme Court of Appeal in *Fischer* noted that although parties are generally bound by their pleadings, there are cases where parties may expand those issues by the way they conduct proceedings. This provides an exception to the rule that parties are generally bound by their pleadings. However, in my view, the applicant did not conduct himself in such a way to suggest that he wanted to challenge the nature of the prenuptial agreement. As mentioned, before the Regional Court he argued two points, namely that the agreement was concluded under emotional circumstances and further that the parties, by their conduct, had abandoned the prenuptial agreement.

[52] If the applicant had intended to raise the issue of the *nature* of the prenuptial agreement, he would have led evidence in regard thereto or amended his pleadings. Furthermore, the lower courts would have dealt with this issue sufficiently and allowed for its proper ventilation. A failure to do so by both the parties and the lower courts has meant that it would be prejudicial and improper for this Court to determine a factual issue, without evidence, for the first time on appeal. In *Naude*, the Supreme Court of Appeal said "[i]t has often been held that it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness to the other party and raises no new factual issues".[42]

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[41] *A M v H M* above n 12 at para 38.

[42] *Naude v Fraser* [1998] ZASCA 56; 1998 (4) SA 539 (SCA) at 558; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 24BG (*Paddock Motors*); and *Bank of Lisbon and South Africa Ltd v The Master* 1987 (1) SA 276 (A) at 290EI.

[53] In any event, and if it can be said that the ousting issue arose on the pleadings, the expansion of the issues was impermissible for a number of reasons. First, the issues had not been properly covered by the pleadings. Secondly, and crucially, the question of unfairness or prejudice was not considered by the High Court or the Supreme Court of Appeal. Thirdly, as mentioned, the matter was presented as a stated case in the Regional Court. The respondent did not have an opportunity to present evidence as to the facts and circumstances surrounding the conclusion of the prenuptial agreement. Such evidence may have been relevant to the question whether the agreement was a donation that fell outside the ambit of section 7 of the Divorce Act. Although neither party raised the question of prejudice, a court is enjoined to consider this question in determining whether an issue can be raised for the first time on appeal.[43] Fourthly, no reason has been advanced by the applicant as to why he could not amend his pleadings. Fifthly, both the High Court and the Supreme Court of Appeal failed to exercise their discretion as to whether they should consider the new issue on appeal. It would thus not be in the interests of justice to grant leave to appeal on the ousting issue.

[54] It is striking that neither the High Court nor the Supreme Court of Appeal seemed to be aware of the fact that they had widened the pleadings. In the circumstances, both courts failed to exercise their discretion in order to determine whether, despite the issue being raised for the first time on appeal, it was appropriate to consider the point. This failure is fatal.

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[43] In *Quartermark Investments (Pty) Ltd v Mkhwanazi* [2013] ZASCA 150; 2014 (3) SA 96 (SCA), the Court said the following at para 20:

> "In considering the role of the court, it is appropriate to have regard to the well-known dictum of Curlewis JA in *R v Hepworth* to the effect that a criminal trial is not a game and a judge's position is not merely that of an umpire to ensure that the rules of the game are observed by both sides. The learned judge added that a 'judge is an administrator of justice' who has to see that justice is done. While these remarks were made in the context of a criminal trial they are equally applicable in civil proceedings and in my view, accord with the principle of legality. The essential function of an appeal court is to determine whether the court below came to a correct conclusion. For this reason the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed. In fact, in such a situation the appeal court is bound to deal with it as to ignore it may 'amount to the confirmation by it of a decision clearly wrong', and not performing its essential function."

[55] In *Solidarity obo Barnard*,[44] the respondent sought to raise a different and new cause of action before this Court. Jafta J wrote a separate concurring judgment where he set out additional reasons for not deciding the cause of action. He noted that allowing a party to raise a new issue on appeal is a matter of discretion and should only be allowed where the new "cause of action was foreshadowed by the pleadings and established by facts on record".[45] Had the High Court and the Supreme Court of Appeal exercised their discretion they may well have refused to consider it, having regard to the circumstances of the matter, namely: that the issue was not covered by the pleadings; that the matter had been argued as a stated case; that the applicant had advanced no reason why he had not amended his pleadings; and the potential unfairness to the respondent.

[56] The matter under consideration is, on the pleadings, an unspecified donation agreement and thus does not trigger section 7 of the Divorce Act. I therefore conclude that the ousting issue is not properly before this Court. If evidence had been led as to the nature of the donation, the ousting issue could possibly have been considered.

Can the prenuptial agreement and the antenuptial contract be read together?

[57] On the question that *was* before the Regional Court, the Supreme Court of Appeal held that, having had regard to the definition and purpose, including the primary objective of the two legal instruments, these instruments could co-exist. This is because the antenuptial contract regulated the matrimonial regime of the parties *stante matrimonio*, whereas the prenuptial agreement had no bearing at all on the nature of the matrimonial regime and the respective estates of the parties. Their estates remain separate. Thus, the provisions of the antenuptial contract would remain intact and would be applicable upon the divorce despite the respondent's entitlement to enforce the terms of the prenuptial agreement.

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[44] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BCLR 1025 (CC).

[45] Id at para 212.

[58] The Supreme Court of Appeal further held that the finding by the High Court—

> "ignores the clear intention of the parties as espoused in the agreement. The preamble of the agreement is clear and unambiguous. It was carefully crafted and indicated that 'it is agreed that the parties will be married out of community of property' and that 'the [antenuptial contract] will be registered'. An analysis of the text and the factual context in which the agreement was concluded including the clear purport of the agreement reveals that the parties never intended that the agreement should rectify or amend the [antenuptial contract]. The agreement records no reference to the changing of the matrimonial regime. It is important to note that the agreement in this matter was made by the parties fully alive to their matrimonial regime. Had there been any intention on the parties to alter, vary or amend the terms of the [antenuptial contract] by the conclusion of this agreement, the parties would have expressed themselves in clear terms in this regard."[46]

[59] The Supreme Court of Appeal was correct in finding that the two agreements can co-exist, as the donation does not change anything *stante matrimonio* and does not change the matrimonial regime. It merely changes the value of the estates after divorce or death. They can therefore be read together.

[60] The Supreme Court of Appeal also correctly found that the parties did not intend to rectify or amend the antenuptial contract with the prenuptial agreement. This is because the prenuptial agreement states that it must be read together with the antenuptial contract and it does not reference the changing of the matrimonial regime. With the greatest respect to the Supreme Court of Appeal, that should have been the end of the matter. As stated, the applicability of section 7(1) of the Divorce Act was not a matter that arises on the pleadings.

[61] I stress that the High Court and the Supreme Court of Appeal failed to recognise that, on the pleadings, they were called upon to consider an unspecified donation. This

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[46] *Supreme Court of Appeal judgment* above n 8 at para 10.

does not fall within the ambit of section 7 of the Divorce Act. It follows that whatever was said by the Supreme Court of Appeal in respect of the characterisation of the prenuptial agreement, as well as on the settlement and ousting issues, are *pro non scripto* (as not written). I should emphasise that these are important issues. However, I do not believe that based on the pleadings, this Court is in a position to answer these issues.

[62] If the pleadings are amended to raise the above issues and if the respondent pleads an alternative claim for maintenance in terms of section 7(2) of the Divorce Act, the Regional Court may decide them unencumbered by the judgments of the High Court and the Supreme Court of Appeal. All this Court should decide and does decide, is that the incompatibility issue was correctly decided by the Regional Court. I stress that the other issues remain open, subject to proper pleading.

Order

[63] For these reasons, the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs.

SCHIPPERS AJ (Zondo CJ and Maya DCJ concurring):

[64] I have had the benefit of reading the judgment of my Colleague, Theron J (first judgment). I agree that this matter engages this Court's constitutional jurisdiction for the reasons given in the first judgment.

[65] With respect, I do not agree with the first judgment in the result or in principle. The first judgment states that "the High Court and the Supreme Court of Appeal failed to recognise that on the pleadings, they were called upon to consider an unspecified donation", which does not fall within the ambit of section 7 of the Divorce Act. It

follows that, according to the first judgment, the prenuptial agreement concluded between the parties constitutes an enforceable donation. It is however not a donation.

[66] My difficulty with the first judgment is this. The prenuptial agreement purportedly determines the entirety of the respondent's spousal maintenance upon dissolution of the marriage by divorce, contrary to section 7 of the Divorce Act. The parties cannot, by private agreement, subvert a court's power under section 7(1) of the Divorce Act, to vet a settlement agreement providing for spousal maintenance. Neither can they subvert its power to make an order for spousal maintenance in terms of section 7(2), in the absence of a settlement agreement.

[67] It goes without saying that courts must abide by the terms of any statute. No court of law can lend its authority to a party seeking to enforce an agreement which the law prohibits, and which violates public policy (illegality principle),[47] *a fortiori* (for the stronger reason) when the illegality is apparent from the contract itself.[48] As Nugent JA observed in *Mabena*:[49]

> "The Constitution proclaims the existence of a State that is founded on the rule of law. Under such a regime legitimate State authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with law is a nullity. That is a cardinal tenet of the rule of law. It admits of no exception in relation to the judicial authority of the State. Far from conferring authority to disregard the law the Constitution is the imperative for justice to be done in accordance with law. As in the case of other State authority, the exercise of judicial authority otherwise than according to law is simply invalid."[50]

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[47] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 103, affirming *Metro Western Cape (Pty) Ltd v Ross* [1986] ZASCA 36; 1986 (3) SA 181 (A) (*Metro Western Cape*).

[48] *Yannakou v Apollo Club* 1974 2 All SA 129 (AD); 1974 (1) SA 614 (A) at 623H (*Yannakou*).

[49] *S v Mabena* [2006] ZASCA 178; 2007 (1) SACR 482 (SCA).

[50] Id at para 2.

[68] This Court cannot shut its eyes to an agreement that violates the law, even less on the ground that it was not pleaded. Thus, it matters not that the point of law – the unenforceability of the agreement because it ousts a court's power under section 7 of the Divorce Act – was not squarely raised in the applicant's plea to the counterclaim. The illegality principle cannot depend on a procedural matter, such as the rules of pleading. This principle is designed to vindicate the public interest as against the interests and legal rights of the parties. That is why a court is required to raise a violation of the illegality principle of its *own* motion, even if the parties have not raised it.[51]

[69] Innes CJ made this clear a century ago:

> "When a Court is asked to enforce or uphold a contract which the law expressly forbids, it is not only justified but bound to take cognisance of the prohibition and the consequent illegality."[52]

[70] Later, in *Yannakou* Trollip JA said:

> "It is true that it is the duty of the court to take the point of illegality *mero motu*, even if the defendant does not plead or raise it; but it can and will do so if the illegality appears *ex facie* the transaction or from the evidence before it, and, in the latter event, if it is also satisfied that all the necessary and relevant facts are before it."[53]

[71] This is a case where the illegality appears *ex facie* the prenuptial agreement. Further, the illegality of the agreement was fully argued in, and decided by, both the High Court and the Supreme Court of Appeal. It raises no factual issue – no amount of evidence can change the meaning and effect of the prenuptial agreement. No evidence is necessary to prove its illegality.[54] What is more, a decision as to whether the

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[51] *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167 (*Cape Dairy*) at 170; *Yannakou* above n 48 at 617H and 623H.

[52] *Cape Dairy* above n 51 at 170.

[53] *Yannakou* above n 48 at 623H.

[54] Id at 617H.

prenuptial agreement is consistent with section 7 of the Divorce Act cannot result in any unfairness to the respondent – it is a point of law.[55] The resolution of this appeal rests primarily on an exercise in statutory interpretation. It is thus not surprising that the respondent does not complain of any prejudice. Her case throughout has been that the prenuptial agreement constitutes an enforceable donation.

The prenuptial agreement is not a donation

[72] The importance of determining the true nature of an agreement – which is a question of fact – was stated by Innes J in *Zandberg v Van Zyl* as follows:

> "Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be. The maxim then applies *plus valet quod agitur quam quod simulate concipitur* [what is actually done is more important than that which seems to have been done]. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down."[56]

[73] With that caution, I turn to consider the terms of the prenuptial agreement. It was concluded on 20 February 2015 and records that the parties intended to get married on 14 March 2015. They were married on 19 May 2015. The marriage lasted some three years; the respondent sued for divorce on 8 August 2018. The prenuptial

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[55] *Paddock Motors* above n 42 at 23D-24G affirmed in *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2003 (12) BCLR 1301 (CC); 2004 (5) SA 460 (CC) at para 43.

[56] *Zandberg v Van Zyl* 1910 AD 302 (*Zandberg*) at 309.

agreement is simply headed "agreement" ("ooreenkoms") and is repeatedly referred to as a "donation" in the papers. It provides that upon the dissolution of the intended marriage by divorce or the death of the applicant, the latter "donates" the following property to the respondent, as her exclusive property:

(a) A house to the value of R1 500 000, to be pointed out by the respondent. The applicant or his deceased estate is responsible for payment of the transfer costs.

(b) A vehicle valued at R250 000, as identified by the respondent.

(c) The applicant or his deceased estate shall pay the respondent's medical aid premiums for as long as she lives.

(d) The applicant or his estate shall pay an amount of R20 000 monthly to the respondent "as lifelong maintenance between spouses" ("lewenslange onderhoud tussen gades").

(e) The applicant or his estate shall pay the respondent's Momentum Life Policy for as long as she lives.

[74] These terms constitute the obligations and responsibilities of married persons. They include providing a house for accommodation and a vehicle for transport. All the terms of the prenuptial agreement comprise financial support to the respondent post-divorce. The prenuptial agreement, therefore, is nothing more than an undertaking to provide spousal maintenance. Lesbury van Zyl describes "maintenance" as follows:

> "In South African law the terms "support", "maintenance" and "alimony" are used interchangeably, although "alimony" is used less frequently. The duty of support extends to accommodation, food, clothes, medical and dental attention and other necessaries of life on a scale in line with the social position, lifestyle and financial resources of the parties. While food, clothing and shelter are always mentioned in any discussion of maintenance, the concept embraces much more than these necessities. The maintenance of children includes education. Today the scope of maintenance is always determined according to the standard of living of the parties concerned."[57]

[57] Van Zyl *Handbook of the South African Law of Maintenance* 3 ed (LexisNexis, South Africa 2010) at 3.

[75] In the Supreme Court of Appeal, the respondent contended that the prenuptial agreement was enforceable as a distinct legal instrument; that it was a contractual claim based on donations in her favour; that sections 7(1) and (2) of the Divorce Act had no application; that the applicant's "donation" in terms of which he undertook to pay the respondent lifelong maintenance was permissible; and that the *pacta sunt servanda* principle applied. The Supreme Court of Appeal stated that the High Court should have upheld these contentions.[58]

[76] Consequently, the Supreme Court of Appeal held that the prenuptial agreement was a donation within the meaning of that term in LAWSA,[59] namely—

> "an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality whereby a person under no legal obligation undertakes to give something (this includes the gratuitous release or waiver of the right) to another person, called 'the donee', with the intention of enriching the donee, in return for which the donor receives no consideration nor expects any future advantage."

[77] However, on first principles, the prenuptial agreement is not a donation. Rather, it is a contract, concluded by the parties prior to marriage, that determines spousal maintenance when the marriage comes to an end by divorce or death; nothing more nothing less. In my view, no evidence of the circumstances leading up to its conclusion can change the meaning and effect of the agreement: its terms are clear and unambiguous. It is trite that the nature of a contract is not defined according to the parties' description of it, but what, according to its terms, the contract in substance is.[60] So, the fact that the agreement was styled a "donation" and that the respondent admitted this in the pleadings, does not render it enforceable, as a matter of law.

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[58] *Supreme Court of Appeal judgment* above n 8 at para 7.

[59] Harms "Donations" in *LAWSA* 3 ed (2017) vol 16 at para 19 (cited as 8 *LAWSA* (3ed) para [268] in *Supreme Court of Appeal judgment* above n 8 at fn 4).

[60] *Auditor-General v MEC for Economic Opportunities, Western Cape* [2021] ZASCA 133; 2022 (5) SA 44 (SCA) at para 22; *Zandberg* above n 56 at 309.

[78] It follows that the prenuptial agreement was not borne out of pure benevolence or sheer liberality. None of these virtues are present when the so-called donations are made, or enforced – at divorce when the parties are alienated from each other, generally at a time of intense personal and emotional turmoil. In this case, the parties entered into the prenuptial agreement solely because of the intended marriage, recognising that spousal maintenance is an obligation imposed by marriage. That is the foundation of the prenuptial agreement. Consequently, there can be no suggestion of enrichment as contemplated in a donation.

[79] To show that the applicant had no intention of making any gift to or enriching the respondent, one need merely ask whether, absent the marriage and its consequences, the parties would have concluded an agreement which provides for payment by one party to the other of the purchase price of a house and vehicle, medical aid and insurance premiums, and lifelong maintenance – obligations and responsibilities of the married state. The answer to this question must be "no". None of these payments are gifts: maintenance, medical aid and insurance premiums are not monthly "gifts". Neither is accommodation nor transport. That these are not gifts is underscored by the reason for the prenuptial agreement, recorded in the agreement itself – both parties are unmarried and intend to marry. And, if the prenuptial agreement is not a deed of donation, then it cannot be enforced as such.

[80] The *pacta sunt servanda* principle is accordingly inapposite: the agreement the respondent seeks to enforce is not a binding donation, subject merely to remedies in contract law. In any event, the principle cannot be applied to settlement agreements on the dissolution of marriage without more: marriage is not a commercial contract. In *Radmacher*,[61] Lady Hale explained why marriage differs from a commercial contract:

> "Marriage is not only different from a commercial relationship in law, it is also different in fact. It is capable of influencing and changing every aspect of a couple's lives: where they live, how they live, who goes to work outside the home and what work they do,

[61] *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42.

> who works inside the home and how, their social lives and leisure pursuits, and how they manage their property and finances. A couple may think that their futures are all mapped out ahead of them when they get married but many things may happen to push them off course – misfortune such as redundancy, bankruptcy, illness, disability, obligations to other family members and especially to children, but also unexpected opportunities and unexplored avenues. The couple are bound together in more than a business relationship, so of course they modify their plans and often compromise their individual best interests to accommodate these new events. They may have no choice if their marriage is to survive. And these are events which take place while it is still hoped that the marriage will survive.
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> . . .
>
> All of this means that it is difficult, if not impossible, to predict at the outset what the circumstances will be when the marriage ends. It is even more difficult to predict what the fair outcome of the couple's financial relationship will be."[62]

[81] The fact that marriage and relationship breakdown has an adverse effect on society as a whole and that it is in the public interest that parties should care for the welfare of their families has been recognised by this Court. It noted in *Dawood*[63] that marriage and the family are social institutions of vital importance, which provide for the security, support and companionship of members of society. Entering into marriage, this Court said, is to enter a relationship of public significance as well, since marriage gives rise to moral and legal obligations, particularly the parties' reciprocal duty to support one another, that serve an important social function.[64]

[82] The Supreme Court of Appeal, however, saw it differently. It held that the prenuptial agreement – which in effect provides for spousal maintenance – is "a contractual claim based on donations" in favour of the respondent, to which sections 7(1) and (2) of the Divorce Act do not apply. This finding is erroneous.

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[62] Id at paras 175-6.

[63] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (*Dawood*).

[64] Id at paras 30-1.

The prenuptial agreement is contrary to public policy

Section 7 of the Divorce Act

[83] Section 7 of the Divorce Act is headed "Division of assets and maintenance of parties" and provides:

> "(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.
>
> (2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party 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."

[84] The correct approach to statutory interpretation is settled. What must be considered is the language of the provision, the context in which it appears, the apparent purpose to which it is directed, and the material known to those responsible for its production. The inevitable point of departure is the language of the provision, read in context and having regard to its purpose.[65]

[85] On its plain language, section 7(1) makes it clear, firstly, that the power to make a spousal maintenance order, or an order regarding the division of assets, is ancillary to

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[65] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18, affirmed in *Airports Company South Africa v Big Five Duty Free (Pty) Limited* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) at para 29; and *National Credit Regulator v Opperman* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) at paras 93-4.

the court's power to grant a decree of divorce. The "written agreement" envisaged in section 7(1) of the Divorce Act is therefore confined to a settlement agreement when divorce is actually pending or contemplated.

[86] Secondly, it is also clear from the wording of sections 7(1) and (2) that the court retains a discretion to make an order for spousal maintenance, whether or not the parties have concluded a written agreement to that effect. The agreement is but one factor, albeit an important one, together with the factors which guide the exercise of the court's discretion set out in section 7(2), that a divorce court takes into account in determining a fair amount of spousal maintenance. These factors, on the plain wording of section 7(2), do not constitute an exhaustive list.

[87] Thirdly, the purposes of section 7 are evident from the provision itself. It is aimed at the fair and equitable distribution of the economic consequences of the marriage and its breakdown and to ensure that a party in need of spousal maintenance post-divorce, is not left destitute. These economic consequences and the means and needs of the parties, are difficult, if not impossible, to predict in advance. Instead, the full impact of the marriage and its breakdown and the parties' means and needs are things that only become apparent over time, and are manifest at the point of divorce.

[88] Parliament has vested in the courts, under section 7(1) of the Divorce Act, a discretion to review and reject written agreements between parties engaged in or contemplating divorce proceedings, concerning the division of assets and payment of spousal maintenance. It has empowered the courts to make an order for spousal maintenance and to fix the amount and the duration of it – until death or remarriage. Such an order is made either in support or variation of a written agreement concluded by the parties, under section 7(1), or in the absence of such an agreement, in terms of section 7(2).

[89] A settlement agreement made an order of court under section 7(1) derives its authority from the court and not from the parties' agreement. The court has an

independent duty to consider the settlement agreement and to decide whether or not to approve it. The court is not a rubber stamp. Parliament has entrusted to the courts the task of deciding appropriate and just orders for spousal maintenance, taking into account the factors listed in section 7(2), against the backdrop of the parties' particular circumstances.

The prenuptial agreement violates section 7 of the Divorce Act

[90] The prenuptial agreement is not a "written agreement" as envisaged in section 7(1): it was not concluded while a divorce was actually pending or contemplated. Rather, it was concluded in circumstances of an intended marriage – it says so in terms. That being so, the prenuptial agreement is contrary to public policy, because it purportedly ousts the court's power to make a just order of maintenance in terms of section 7(2). A just maintenance order in this case might exclude the provision of accommodation, transport and insurance premiums, or the determination of maintenance in a lesser amount than that specified in the prenuptial agreement, or no support at all. This cannot be determined in the present case, because the court's power has been ousted entirely.

[91] The agreement is unenforceable whether one applies the majority judgment in *S T v C T*, namely that the "written agreement" in section 7(1) means a settlement agreement when divorce is actually pending or contemplated; or the minority view that the written agreement does not have to be concluded when divorce is actually pending. On either approach the judgment of the Supreme Court of Appeal is unsustainable, because it holds that the prenuptial agreement is enforceable as an ordinary contract and that section 7 has no application.

[92] Parties cannot waive their right to a spousal maintenance order in a prenuptial agreement – concluded at a time when they have no knowledge of their financial means

and needs. That is against public policy, and void.[66] In *S T v C T*[67] the majority of the Supreme Court of Appeal said:

> "[T]here is a stark difference between waiver upon divorce of the right of a spouse to seek variation of a maintenance order, as envisaged in section 8(1), and a prenuptial waiver of maintenance. The main, compelling, difference is that at the time of divorce both spouses have full knowledge of their respective financial means and needs. That is not the case before the parties have married. It was pointed out in *Schutte* that, unlike in England, here a divorced spouse has no statutory remedy if no order for maintenance is granted upon divorce. Section 7(2) was enacted (and before it, section 10 of the Matrimonial Affairs Act) to provide a statutory right to a spouse to obtain a maintenance order upon divorce. Public (legal) policy therefore establishes a statutory right to maintenance upon divorce. Such a right cannot be waived prenuptially – it would offend legal policy and hence public policy."[68]

[93] Although the applicant has not expressly waived his right to maintenance in the prenuptial agreement, his position is no different in principle: a prospective spouse cannot before marriage exclude the statutory right to maintenance in section 7 of the Divorce Act. The applicant is ostensibly bound by the terms of the prenuptial agreement despite the fact that, when it was concluded, the parties could not forecast: how the economic consequences of the marriage or its breakdown would play out over time; their means; earning capacities; financial needs and obligations; and their conduct in relation to the breakdown of the marriage. These are factors that the divorce court is required to take into account when determining a just order for spousal maintenance under section 7(2) of the Divorce Act. The prenuptial agreement is a purported ouster by the intending spouses of this power of the court.

[94] The Supreme Court of Appeal held that section 7(1) is inapplicable because the respondent did not ask for a settlement agreement to be made an order of court under

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[66] *S T v C T* above n 2 at paras 174 and 178.

[67] Id.

[68] Id at para 174.

section 7(1). Her claim, the Court said, is "a contractual claim for specific performance". But this is not only incorrect; it also ignores the text, context and purpose of section 7.

[95] The relief sought by the respondent was that, upon the granting of a decree of divorce, the trial court should issue an order in terms of the "donations" made in the prenuptial agreement. In other words, she asked the divorce court to enforce the prenuptial agreement as a matter of pure contract, or as the Supreme Court of Appeal put it, she was seeking to enforce "a contractual claim for specific performance". Either way, the respondent was seeking to oust the court's power to determine a just maintenance order in terms of section 7(2) of the Divorce Act.

[96] Parliament has decreed that post-divorce spousal maintenance is obtained in one of two ways. First, through a settlement agreement in a pending or imminent divorce, which may be approved or rejected by an order of court contemplated in section 7(1). Second, in the absence of such agreement, by an order of court under section 7(2). In both instances, the divorce court must consider the factors in section 7(2) in deciding what amount of spousal maintenance is appropriate and just. Those factors guide the court in exercising its discretion under section 7(1).

[97] In my opinion, the finding that the prenuptial agreement is a contractual claim for specific performance takes the judicial and societal understandings of the function of spousal maintenance to new and far horizons. The agreement simply cannot be a donation, enforceable by an order for specific performance, for the reasons advanced below.

[98] The agreement is inimical to the legal policy regarding spousal maintenance, contained in section 7 of the Divorce Act.[69] As was stated in *Claassens v Claassens*[70] and affirmed in *S T v C T*:

> "Public policy frowns on the transaction only when the particular remedy that is waived is one it wants retained. What offends public policy outside the *Schierhout* rule, in other words, is not the exclusion of the Court's jurisdiction per se, but its exclusion from matters which public policy insists on keeping justiciable."[71]

[99] An agreement of the kind in question would allow parties to circumvent section 7, by determining spousal maintenance, even before marriage, under the guise of a contract of "donation". This, in complete disregard of the divorce court's power to determine spousal maintenance, after considering, at the time of divorce, the means and needs of the parties and the duration of, and reasons for, the breakdown of the marriage.

[100] Such a prenuptial agreement subverts the legislative and societal objectives of post-divorce spousal maintenance and ousts the divorce court's power under section 7. The purpose of spousal maintenance is to assist a party in need of it and to relieve economic hardship of spouses arising from the breakdown of the marriage. The order must be just and equitable in the circumstances. That is why Parliament in section 7(2) has determined the factors which a court must take into account when making an order for spousal maintenance. These include the existing and prospective means of the parties; their earning capacities; their financial needs and obligations; their respective ages; the duration of the marriage; their conduct relevant to the breakdown of the marriage; and any other factor the court considers relevant.

[101] Treating the prenuptial agreement as contractually binding means that it can be enforced like any other commercial agreement, regardless of any change in a party's

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[69] Id at para 178.

[70] *Claassens v Claassens* 1981 (1) SA 360 (N) at 366G-H.

[71] *S T v C T* above n 2 at para 179. The principle enunciated in *Schierhout v Minister of Justice* 1926 AD 99 at 109 is that "a thing done contrary to the direct prohibition of the law is void and of no force".

(here, the applicant's) circumstances, such as poverty, unemployment, illness or disability. It also means that the "donee" is entitled to spousal maintenance regardless of whether or not she or he is in need of it at the date of divorce and regardless of whether the "donor" has the means to pay it. This is untenable.

[102] But it goes further. Parliament has specifically empowered the courts, under section 8 of the Divorce Act, to rescind, vary or suspend a maintenance order granted under the Act, if there is sufficient reason for it.[72] Recognition of the prenuptial agreement as an enforceable deed of donation also cuts across this power.

[103] In addition, parties married in community of property, by resort to an enforceable "donation" in a prenuptial agreement regulating the patrimonial consequences of their marriage, can secure benefits of the marriage in community of property, thereby excluding a court's power under section 9 of the Divorce Act, to make an order that they should forfeit the benefits of the marriage in community of property.[73] And this, despite the presence of factors such as substantial misconduct by a party and the fact that he or she would unduly benefit unless such an order is made.

[104] Moreover, the "donor" is effectively precluded from asking the divorce court to make an order for spousal maintenance under section 7(2). This is because he will be confronted with an enforceable "contractual claim for specific performance" – against which an inability to pay maintenance on account of say, poverty, illness or disability,

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[72] Section 8(1) of the Divorce Act provides:

> "A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefore."

[73] Section 9(1) of the Divorce Act provides:

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

is no defence. This cannot be right. It negates the statutory right to maintenance in section 7 of the Divorce Act and renders its enforcement uncertain.

[105] Applied to the present case, a deserving claim by the applicant for maintenance under section 7(2) would be meaningless, because the respondent has an enforceable claim for "lifelong spousal maintenance" of R20 000 per month, quite apart from her claims for medical and insurance premiums – all for the rest of her life. The fact that the respondent may have remarried, and may not be in need of maintenance at all, would make no difference. And precisely because the prenuptial agreement is contractually binding, the applicant would not be entitled to apply for a reduction of the lifelong spousal maintenance of R20 000 or the medical and insurance premiums, despite an adverse change in his circumstances.

[106] The suggestion that the applicant is entitled to apply for an order under section 7(2) of the Divorce Act is also illogical. How can the applicant sensibly seek maintenance from the respondent, when he is *already* contractually obliged to provide her with spousal maintenance? And the ouster of the court's power under section 8 of the Divorce Act to vary a maintenance order is self-evident. The result? The applicant is left without a remedy: an order under section 7 cannot be granted after dissolution of the marriage.[74] This, in turn, may cast the burden of the applicant's support onto the state, which is manifestly unjust in a case where the respondent has the means to provide spousal maintenance.

[107] This is the clearest indication of the court's power under section 7 being ousted, and why public policy dictates that spousal maintenance is in the discretion of the divorce court. This principle is not new and has stood the test of time. It affirms the decision in *S T v C T*.[75] More than a century ago, the principle was emphasised in *Braude*.[76] The case concerned the enforceability of a postnuptial agreement in favour

[74] *Schutte v Schutte* 1986 (1) SA 872 (A) at 884A.

[75] *S T v C T* above n 2 at paras 178-9.

[76] *Braude v Braude* (1899) 16 SC 565 (*Braude*).

of the wife. It provided that, if the husband ill-treated her, making it necessary for her to leave him, he would pay her half of his estate and maintenance of £5 per month. The trial court held that the agreement was unenforceable. Maasdorp J said:

> "In my opinion a contract of this nature, even if there is in it nothing objectionable or contrary to the policy of the law, is merely one of the circumstances which the court would take into consideration in using its discretion with respect to the provision which the husband should be ordered to make for the wife, and will not be enforced as a matter of course, and without further enquiry. Under the contract of marriage the husband is under certain obligations to the wife which determine her claim upon him when she obtains a degree of separation. These claims may to a certain extent be made the subject of an agreement which the court may sanction or not in its discretion. Where immediately before or at the time of the trial of a suit for separation the parties agree with reference to the division of the estate and alimony, such agreement may be a fair guide in determining the matter, but it is quite a different thing when the agreement has been made more than two and a half years before the trial of a suit. Notwithstanding such agreement, the court must in my opinion have proof of the approximate value of the estate, the present income of the husband and the necessities of the wife."[77]

[108] On appeal, the Supreme Court in *Braude* held:

> "A specially objectionable feature of this contract, made in contemplation of future separation, is the provision made for the wife, irrespective altogether of the means of the husband at the time of actual separation. The husband might be in good circumstances when he made the contract and might afterwards fall into poverty while community was existing between the spouses. . . . Such an agreement ought to be carefully scrutinised by the Court. . . . The matter of alimony was wholly in the discretion of the Court."[78]

[109] In the same appeal, Buchanan J said:

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[77] Id at 568.

[78] Id at 572.

> "[O]ur own authorities are clear that questions of alimony are in the discretion of the Court, independently of any agreement between the parties. Any such agreement might be an element to guide the Court in its discretion, but it is for the Court to exercise its judicial discretion."[79]

[110] What is more, the enforcement of a prenuptial agreement of the kind in this case is an inducement for persons to conclude similar contracts with their prospective spouses with the view to divorce at the earliest opportunity, in order to enforce the contract and claim the benefits under it. I do not think it is wrong to say that public policy and the law of this country support marriage and encourage married people to stay married.

[111] What all of this shows is that a prenuptial agreement, purportedly determining spousal maintenance to the exclusion of a divorce court's powers under section 7 of the Divorce Act, cannot be sanctioned by a court. The agreement violates section 7 which, in light of the section 7(2) factors, ensures consistency, transparency and certainty in the law in the area of spousal maintenance. Allowing the respondent's claim would introduce inconsistency and uncertainty into the law. The prenuptial agreement is tainted by illegality, is against public policy and is therefore, void. It cannot found a cause of action.

[112] It is a general principle of our law that an act performed contrary to a statutory prohibition is invalid, has no legal effect, and must be regarded as never having been done.[80] The fact that there is no criminal sanction for a violation of section 7 of the Divorce Act, does not, in my view, change the position or render the illegality principle inapplicable. In any event, our common law of contract does not recognise agreements contrary to public policy.[81] It follows that neither party can acquire rights under the

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[79] Id.

[80] *Cool Ideas* above n 47 at para 90 and 168, affirming *Schierhout v Minister of Justice* 1926 AD 99 at 109.

[81] *Robinson v Randfontein Estates G M Co Ltd* 1925 AD 173 at 204; *Magna Alloys & Research (SA) (Pty) Ltd. v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A) at 891G, affirmed in *Beadica 231 CC v Trustees, Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 27.

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