

## 5 Conclusion and final remarks

In the final analysis I am of the opinion that compliance with the definition of “incidental credit agreement” in section 1 of the Act creates a tie between the credit provider and the consumer. Though an incidental credit agreement in the sense intended by the legislature has not yet come into existence, the fact that the tie between the parties is recognised in law is evidenced by the application of certain sections in the Act (mentioned in s 5(1)(a)–(e) and (g)) in the interim period until the incidental credit agreement is deemed to have been made (in terms of s 5(2)). Once the agreement is deemed to have been made, Parts D and E of chapter 5 become applicable as well.

It therefore seems that the reaching of consensus between the parties to supply goods or services, to pay for the goods or services, to defer payment and so forth, does constitute an incidental credit agreement. The legislature in fact calls the agreement an “incidental credit agreement” (in the introductory sentence to s 5(1)) before the agreement is deemed to have been made. However, it is an agreement that, until it is deemed to have been made in terms of section 5(2), “hinkende in die lug bly hang” (to use the words of Basson J in *Van der Westhuizen v BOE Bank Bpk* 2002 1 SA 876 (T) to describe the position – in terms of the Act’s predecessor, the Credit Agreements Act 75 of 1980 – where a credit agreement that was initially void – or unenforceable – due to the initial non-payment of the deposit, was revived by the later payment of the deposit by means of instalments). Be that as it may, perhaps the name of the agreement says it all. It is an agreement that “incidentally” comes into existence once there is compliance with a requirement (the charging of interest), the occurrence of which is uncertain. That said, the reason for the 20 business days-provision in section 5(2) remains unclear and there appears to be no reason why an incidental credit agreement could not come into existence as soon as interest is charged for the first time.

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<p><b>THE CUT-OFF DATE FOR DETERMINING ACCRUAL CLAIMS: A CRUEL DECISION AND A BETTER DECISION</b></p>
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### 1 Introduction

Despite the fact that the accrual system has been in operation for over 26 years, there is very little case law dealing with the operation and principles of this system (see Schulze “Some thoughts on the interpretation and application of section 8(1) of the Matrimonial Property Act 88 of 1984” 2000 *THRHR* 116 117; Ferreira “Protection of the right to accrual sharing” 2002 *THRHR* 287). In this note I refer to two recent cases that dealt with the operation of the accrual system but resulted in conflicting judgments. The first is the as yet unreported case of *Le Roux v Le Roux* (case no 1245/2008 (NCK), delivered on 2009-10-30) and the second is *MB v NB* 2010 3 SA 220 (GSJ). Both cases concern the cut-off date for the determination of accrual claims where marriages are dissolved through divorce. As these cases propose totally different approaches, it may be useful to ascertain what is done in other jurisdictions under similar circumstances. As the

current default matrimonial property system in Germany operates very similarly to the accrual system in South Africa, the position in Germany is discussed briefly for purposes of comparison. After the above-mentioned cases have been discussed and German and South African law compared, some suggestions are made and practical pointers provided on how and when information is to be obtained to enable parties to determine accrual claims.

## 2 Decision in *Le Roux v Le Roux*

In *Le Roux* the plaintiff issued divorce summons against the defendant and claimed payment at the time of the trial of her accrual claim (ie half the difference between the accrual in the parties' respective estates in terms of s 3(1) of the Matrimonial Property Act 88 of 1984), together with a divorce order. The defendant opposed her claim for payment of her accrual claim on the basis that any claim that she may have would only arise once the marriage was dissolved. The defendant relied on *Reeder v Softline* [2000] 4 All SA 105 (W), 2001 2 SA 844 (W), where the court recognised the difference between a party's right to share in the accrual of the other party's estate and a party's claim to half the difference between the accrual in the respective estates. In terms of sections 3(1) and 3(2) of the Matrimonial Property Act, a party's claim is acquired or arises only upon the dissolution of the marriage by divorce or death. In *Reeder* the court therefore concluded that during the subsistence of the marriage one spouse merely has a contingent right to the accrual in the other spouse's estate and that the right becomes vested only when the marriage is dissolved, provided of course that there is an accrual claim. The defendant also relied on the unreported case of *Willemse v Willemse* (case no 3600/2004 (O), delivered on 2006-09-12), where the plaintiff successfully applied for an order in terms of rule 33(4) of the Uniform Rules of Court to the effect that her accrual claim be adjudicated separately, after the issues concerning the dissolution of the marriage and the interests of minor children had been decided.

The question *in casu* was therefore whether the plaintiff was entitled to proceed with her case for the payment of her accrual claim as part of divorce proceedings. The court referred to the wording of sections 3(1) and 3(2) of the Matrimonial Property Act (ie that an accrual claim is acquired or arises upon the dissolution of the marriage) and the so-called golden rule of interpretation that the language in a document is to be given its grammatical and ordinary meaning unless this would result in some absurdity, repugnancy or inconsistency with the rest of the instrument (paras 17–18). Olivier J said that although such an interpretation of the above sections could result in a piecemeal adjudication of issues that originate from one and the same marriage, it could not in his view "be described as an absurd result" (paras 19 and 31). He concluded that it would be impossible to accurately and finally calculate and determine the amount of the plaintiff's accrual claim before the marriage was dissolved (para 30) and ruled that the plaintiff was not entitled to proceed with her accrual claim as part of divorce proceedings and prior to the dissolution of the marriage (para 34). He referred to the fact that the position would be similar to the position in respect of marriages in community of property where the court, in the absence of an agreement between the parties on the division of the joint estate, merely orders that the joint estate is to be divided. Should the parties not be able to do this, they can then approach the court for the appointment of a liquidator and possibly again for further directions in the course of such liquidation (paras 21–22).

Although Olivier J said that it would be desirable to finalise all litigation and issues between spouses at the same time, he pointed out that the wording of the relevant provisions prevents this (para 36). He also said that on the pleadings it was going to be difficult for the defendant to know “what the plaintiff’s case was going to be as regards the net value of the defendant’s estate at the dissolution of the marriage and the actual amount that the plaintiff intended claiming” (para 40).

Olivier J further concluded that because section 9 of the Matrimonial Property Act reads that the right to share in the other spouse’s accrual may be declared forfeited “on divorce” and not “upon the dissolution of the marriage” as in sections 3(1) and (2) of the Act, a claim for forfeiture may indeed be included in a divorce summons (paras 45–51) even though an accrual claim may not be included as such.

Finally, before penalising the plaintiff with a cost order (paras 58–63), Olivier J stated that although an accrual claim may not be included in a divorce summons, divorcing parties may nevertheless be entitled to request particulars of the other spouse’s estate in terms of section 7 of the Matrimonial Property Act in anticipation of the dissolution of the marriage and with a view to a later claim for payment of an accrual claim (paras 52–54) and that such particulars may also be relevant for purposes of a maintenance claim in terms of section 7(2) of the Divorce Act 70 of 1979 (paras 55–57).

### 3 Decision in *MB v NB*

Like the *Le Roux* case, *MB v NB* entails a fiercely contested divorce case that went to trial. The plaintiff had a fairly significant claim under the accrual system, but the parties hotly contested the value to be assigned to the defendant’s estate for purposes of her accrual claim. The basis of the plaintiff’s case was that the defendant had, since separation, been hiding and squandering his assets so as to reduce his liability in respect of her accrual claim. On her behalf the request was made that the court should nevertheless consider the value of these hidden or squandered assets for purposes of determining her accrual claim (232E–F). Brassey J subsequently asked the parties why they did not simply take the date of separation as the point in time at which the assets in each party’s estate should be valued (232G). The court mentioned that, apart from considerations of convenience, this approach would do justice to the principles underlying the accrual system, namely, that marriage is seen as a partnership or at least some kind of joint venture in which the parties go some way towards pooling their resources and making them the subject of joint decision making (232G–H). The court referred *inter alia* to *Kritzinger v Kritzinger* 1989 1 SA 67 (A) 77B–C, where the court stated that such a relationship may be resiled from at any time. However, the defendant’s counsel firmly denounced this suggestion as contrary to law since, according to *Reeder*, the right to share in the accrual of the other spouse’s estate only becomes a vested right or claim upon divorce (232J–233A–B).

Brassey J pointed out that although *Reeder* established the date of a divorce to be the moment at which a party’s contingent right to share in the accrual of the other party’s estate becomes perfected, this decision did not establish the moment at which the respective estates of the parties are to be assessed for purposes of determining a party’s accrual claim (233C–D). He said that the problem is “one of procedure, not substance, and owes its origin to the fact that litigation takes time to complete” and indicated that “[o]n this matter the established

principle is that the operative moment is *litis contestatio* (ie close of pleadings), for that is the moment when the dispute crystallises and can be presented to the court for decision" (233D–E). Brassey J further stated that since *litis contestatio* is the lodestar for the applicable decision, transactions which take place after this moment are irrelevant and should be left out of account (233F). He also mentioned that this principle of using *litis contestatio* as the effective date for determining the value of the parties' respective estates for purposes of an accrual claim will do much to limit the temptation to squander assets that some spouses seem to find irresistible and will also expedite the trial (233G).

The court stated that, *in casu*, *litis contestatio* occurred on the date when a filing of a replication to the plea on the plaintiff's claim in convention had come and gone (ie 15 court days after the plea was filed) and determined that this date must be somewhere towards the end of November 2008 (233J–234A). At that date it was clear that the net accrual of the defendant's estate amounted to R3 167 688 (as could be established from his formal notice in terms of s 7 of the Matrimonial Property Act). However, as the plaintiff did not request the court to find that the net accrual of the defendant's estate exceeded R2 186 440, the court worked with this figure, thereafter calculated the difference in the accrual in the parties' respective estates to be R1 542 964, and awarded half of this amount (ie R771 482) to the plaintiff (234B–G).

#### **4 Matrimonial property regime of *Zugewinnngemeinschaft* in German law and the accrual system in South Africa**

In his article on the interpretation and application of section 8(1) of the Matrimonial Property Act, Schulze 2000 *THRHR* 116 117 refers to the current default German matrimonial property system of *Zugewinnngemeinschaft*, which is in effect a postponed community of accrued gains. It operates very similarly to the accrual system in South Africa, which can also be described as a type of postponed community of profit (see Heaton *South African family law* (2010) 97).

Subtitle 1 of Title 6 of the German Civil Code of 1896 (*Bürgerliches Gesetzbuch (BGB)*) in the version promulgated on 2 January 2002 and last amended by statute dated 4 December 2008) deals with the statutory matrimonial property system of community of accrued gains. In terms of section 1363(1) *BGB*, "spouses live under the property regime of community of accrued gains if they do not by marriage contract agree otherwise" (except where indicated otherwise, all translations of the *BGB* are provided by the Langenscheidt Translation Service, available at <http://bit.ly/ISXobj>). Although the accrual system is not the default matrimonial property system in South Africa, it applies automatically to all marriages out of community of property concluded after 1 November 1984 (s 2 of the Matrimonial Property Act).

As under the accrual system, each spouse in the system of *Zugewinnngemeinschaft* (community of accrued gains) retains and controls his or her own estate, but if the community of accrued gains terminates upon the dissolution of the marriage, the spouses share equally in the gains or growth that their estates have shown during the subsistence of the marriage (ss 1363(2), 1364, 1371 and 1372 *BGB*). In terms of section 1373 *BGB* "[a]ccrued gains means the amount by which the final assets of a spouse exceed his or her initial assets" and in terms of section 4(1)(a) of the Matrimonial Property Act the accrual of the estate of a spouse is the amount by which the value of his estate at the dissolution of his marriage exceeds the value of his estate at the commencement of that marriage.

Both the system of *Zugewinnngemeinschaft* and the accrual system work with the net end value of the parties' estates upon the dissolution of the marriage (s 1375(1) *BGB* and s 4(1)(a) of the Matrimonial Property Act), but the German system goes a bit further by adding the following in section 1375(2) *BGB*:

"Final assets of a spouse are increased by the amount by which these assets are reduced as a result of the fact that a spouse, after the beginning of the property regime,

1. made gratuitous dispositions by which he was not fulfilling a moral duty or showing regard for decency,
2. squandered property, or
3. performed acts with the intention of disadvantaging the other spouse."

The value of squandered, concealed or certain donated assets must therefore be added to the net end value of the parties' estates.

In both systems the party whose estate has accrued less gains or accrual at the termination of the matrimonial property regime or upon the dissolution of the marriage, has a claim against the other spouse. In this regard s 1378 *BGB* determines that "[i]f the accrued gains of one spouse exceed the accrued gains of the other spouse, the half of the surplus is due to the other spouse as an equalisation claim". Likewise, section 3(1) of the Matrimonial Property Act provides that accrual sharing is brought about by giving the spouse whose estate shows the smaller accrual or no accrual at all "a claim against the other spouse for an amount equal to half of the difference between the accrual of the respective estates of the spouses". The German system again goes further and gives more direction by prescribing the date on which the value of spouses' final assets must be ascertained in divorce cases. Although section 1376(2) *BGB* determines that "[t]he calculation of the final assets is based on the value that the assets in existence at the end of the property regime had at that date", section 1384 provides that "[i]f the marriage is dissolved by divorce, then when the accrued gains are calculated, the date of the end of the property regime is replaced by the date when the divorce petition was first pending in court". Schulze 2000 *THRHR* 116 118 translates this section freely as follows: "In the case of divorce the date for the calculation of the amount of accrued gains will be the date of the pendency of the summons for divorce instead of the date of termination of the matrimonial regime." He states that the pendency of a claim is effected by the service of the summons. He stresses that it is important to note that, with regard to the termination of the matrimonial property regime by divorce, the date of the divorce remains the decisive date for any equalisation claim to become due for payment; it is only for purposes of ascertaining the value of the spouses' final assets and any accrued gains that the earlier date of the service of the summons is used. Schulze 2000 *THRHR* 116 118–119 further points out that the rationale underlying this section (and I suppose also section 1375(2) *BGB*) is to prevent spouses from concealing or diminishing their final assets and any accrued gains upon the deterioration of their marriage relationship and in the heat of the moment after summons is issued.

A spouse's right to share in the other spouse's accrued gains or accrual is also protected during the subsistence of the marriage in both Germany and South Africa. Section 1386 *BGB* makes provision for the premature equalisation of accrued gains under circumstances where, for example, one spouse negligently failed to fulfil the economic obligations inherent in a marital relationship over a long period of time and it can be presumed that he will also fail to fulfil them in

future or where he diminished his assets through one of the acts mentioned in section 1375(2) *BGB* (see above). Here, too, the German system dictates in section 1376 *BGB* that the value of the spouses' final assets should be ascertained on the date on which the claim for premature equalisation is instituted. Similarly, but without the specification as to the date on which the value of the spouses' estates should be determined, section 8(1) of the Matrimonial Property Act provides for the immediate division of the accrual during the subsistence of the marriage in circumstances where a spouse seriously prejudices or will probably seriously prejudice the right of the other spouse to share in the accrual of his or her estate at the dissolution of the marriage. Schulze 2000 *THRHR* 116 120 indicates that the German legislator's intention with section 1386 *BGB* was to enable spouses to terminate their matrimonial property system of accrued gains with the premature equalisation claim without having to terminate their marriage. With reference to section 8(1) of the Matrimonial Property Act, Van Aswegen "The protection of a spouse's right to share in the joint estate or accrual" 1987 *De Rebus* 59 62, expresses doubts as to whether this protective measure will be used to any great extent, the argument being that a marriage where such a drastic measure is required to protect a spouse's economic interests has probably broken down irretrievably in any case, in which case a divorce would be preferable.

Lastly, in both systems a spouse has a duty to furnish particulars of the value of his or her estate to the other spouse when it is necessary to determine the accrued gains or the accrual in his or her estate (s 1379 *BGB* and s 7 of the Matrimonial Property Act).

##### 5 Discussion and suggestions

The decision in *Le Roux* (see para 2 above) is flawed in many respects and could be described as a cruel decision. The most disturbing aspect is the effect of the decision, namely that accrual claims are to be divorced from divorce proceedings and that these claims are to be postponed – supposedly either to be instituted under a new case or to be adjudicated separately in terms of rule 33(4) of the Uniform Rules of Court after the date of the divorce. In terms of rule 33(4) the court must grant an application for the separation of the trial on certain issues unless this does not appear to be convenient (see Cilliers, Loots and Nel in *Herbstein and Van Winsen The civil practice of the high courts and the Supreme Court of Appeal in South Africa (Part 2)* (2009) 1414–1415). According to *ABSA Bank v Botha* 1997 3 SA 510 (O), the word "convenience" in this regard does not concern only expediency, efficacy and desirability, but also fairness, justice and reasonableness. However, it is my submission that it is neither desirable nor fair to adjudicate accrual claims in isolation after the date of the divorce. Accrual claims and the division of assets are intrinsically linked to other issues bound up in the divorce decision, such as housing, the provision of maintenance for spouses and children, and the arrangements regarding the contact and care of minor children (see McEwen, Rogers and Maiman "Bring in the lawyers: Challenging the dominant approaches to ensuring fairness in divorce" 1995 *Minnesota LR* 1317 1340–1341; Burman, Dingle and Glasser "The new Family Court in action: An initial assessment" 2000 *SALJ* 111 123; De Jong and Kruger "The postponement and separation of children's issues upon divorce – quick relief or a glaring mistake? *K v K* 2008 5 SA 431 (W)" 2010 *THRHR* 153 155). As is illustrated below, it is quite obvious that if accrual claims are separated from the

other issues upon divorce, this may have undesirable and unfair consequences for both children and spouses, especially wives.

As far as children are concerned, the decision about who is to retain or stay on in the matrimonial home is often closely related to the outcome of an accrual claim. This decision also affects children's issues such as residence, contact and care orders. If, however, the accrual claim is postponed, it might be very difficult for the court to make a ruling on these issues and to fulfil its constitutional duty (in terms of s 28(2) of the Constitution of the Republic of South Africa, 1996) of ensuring that all arrangements made upon divorce are in the best interests of the children involved in a divorce matter (see also *J v J* 2008 6 SA 30 (C) para 20).

As wives are usually financially weaker than their husbands upon divorce (see Heaton "Family law and the Bill of Rights" in *Bill of Rights compendium* (loose-leaf) (1998) para 3C27), the postponement of the accrual issue might have alarming repercussions for them. First, it should be noted that section 7(2) of the Divorce Act couples a maintenance order with a decree of divorce (see Heaton *South African family law* 151). Consequently, a wife can only institute a maintenance claim for herself in the course of divorce proceedings and not after the divorce order has been granted. When the court then has to determine a wife's maintenance claim upon divorce, it is required *inter alia* to look at the existing or prospective means of the parties (in terms of s 7(2) of the Divorce Act). However, if the accrual issue is postponed, there is no way in which the court can ascertain with certainty what a wife's existing means are or what her prospective means will be and the court may be reluctant to make a maintenance order in her favour. In addition, if the accrual claim is postponed, a woman may, for example, decide not to pursue a maintenance claim because she expects to receive a substantial amount in respect of accrual. But later, when the accrual claim is finalised, she might find that the accrual amount is not what she expected it to be and the dilemma is then that she can no longer institute a maintenance claim against her ex-husband. Secondly, it is possible that a woman may desperately need the capital that she will receive in terms of an accrual claim to pay a deposit on a new home or to finance her relocation costs after the divorce, but may have no access to her money on account of the postponement of the accrual claim. Lastly, it could be very costly and time consuming to approach the court again at a later stage with her accrual claim, especially if this has to be done under a new case.

Although Olivier J in *Le Roux* is adamant that his interpretation of section 3 of the Matrimonial Property Act does not lead to an absurdity, it clearly does, as in terms of this case an accrual claim may now no longer be included in a divorce summons, while requests for forfeiture of patrimonial benefits or pension sharing must be included in terms of the Divorce Act (ss 9 and 7(7)(a)). The question which arises is how a court would be able to order total or partial forfeiture of benefits upon divorce if it has no idea what the benefits from the marriage for a specific party are in terms of the matrimonial property system applicable to the marriage. And as a spouse's pension benefits are now deemed to be part of his or her assets upon divorce (in terms of s 7(7)(a) of the Divorce Act), these benefits will undoubtedly form part of the accrual in a spouse's estate and consequently of an accrual claim. It would therefore be impossible for the court to make a ruling on what percentage of a spouse's pension benefit has to be awarded to the other party if the accrual claim is not dealt with and finalised upon divorce.

Furthermore, the court's argument as to why forfeiture orders may be included in divorce summons but accrual claims may not, is flawed (see para 2 above). The words "on divorce" as opposed to the words "upon the dissolution of the marriage", are used in section 9 of the Matrimonial Property Act because forfeiture orders can only be made upon divorce and not upon the dissolution of a marriage through the death of a spouse. Accrual sharing can take place upon the dissolution of a marriage through death or divorce however, and it is for this reason that the legislator used the words "upon the dissolution of the marriage" in section 3 of the Matrimonial Property Act (which deals with accrual claims), but did not do so in section 9 (which deals with the forfeiture of patrimonial benefits). To conclude that the distinction in the use of language in these two sections means that forfeiture orders may be included in divorce summons but that accrual claims may not be included, is totally nonsensical.

It also seems that Olivier J completely lost sight of section 8 of the Matrimonial Property Act (see para 4 above). If a party may protect his or her right to share in the accrual of the other party's estate and approach the court with an application for the immediate division of the accrual during the subsistence of the marriage, surely a party would be allowed to do so upon divorce.

The decision in *Le Roux* is therefore clearly wrong and should not be followed. This decision was nevertheless hailed as the correct decision at a recent family law workshop presented by the Gauteng Law Council (on 20 July 2010 at the SA Reserve Bank). If this decision is followed in practice, parties should be advised to make more frequent use of the protective measure contained in section 8 of the Matrimonial Property Act. I would suggest that a section 8 application or interdict should then be instituted simultaneously with a divorce action to prevent the other spouse from dissipating his (or her) assets.

By contrast, Brassey J in *MB v NB supra* (see para 3 above) should be congratulated on showing great insight and realising that for an accrual claim to become perfected or payable upon divorce, it has to be determined or quantified at an earlier stage. Although he initially proposed to the parties that the cut-off date for determining the plaintiff's accrual claim should be the date on which the parties separate, he finally ruled that the decisive date should be the time when pleadings close, that is *litis contestatio*. In practice, the time frame between *litis contestatio* and the actual date of the divorce may be anything between two weeks and two years, depending on whether the case is contested or not. This period of time could therefore give parties in contested divorce cases ample time to do what Van Aswegen 1987 *De Rebus* 59 63 calls "preventative estate planning", which "consists of placing one's own assets out of the reach of one's spouse by means of discretionary trusts or similar measures". But the problem is that the temptation to do preventative estate planning, or in plain English, to start dissipating one's assets, is already a real danger when the marriage relationship between the spouses starts to deteriorate, which may be a long time before *litis contestatio*.

In terms of rule 29 of the Uniform Rules of Court, pleadings shall be considered closed

- (a) if either party has joined issue without alleging any new matter, and without adding any further pleading;
- (b) if the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;



- (c) if the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or
- (d) if the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.

It appears that it is not always a straightforward matter – or even possible – to determine exactly when *litis contestatio* took place, as was in fact the case in *MB v NB*, where the court had to guess that *litis contestatio* must be somewhere towards the end of November 2008 (see para 3 above).

The question is therefore whether it might not be better to use an earlier and more easily-determinable date, like the date on which the divorce summons was issued, as under the German system of *Zugewingemeinschaft* (see para 4 above), for the decisive date for determining accrual claims. It should be borne in mind that, unlike death, which happens on a specific date, the dissolution of a marriage through divorce is a protracted process which commences on the day the divorce summons is issued and culminates on the date of the divorce order. Brassey J touched upon this issue when he said that the problem “is one of procedure, not substance, and owes its origin to the fact that litigation takes time to complete”.

The fact that section 8 (see para 4 above) is included in the Matrimonial Property Act is in my opinion indicative of the fact that the legislator clearly does not want to give a spouse the opportunity to defeat the other spouse’s right to an appropriate share in the accrual of his or her estate. If a spouse is not allowed the opportunity to diminish the accrual in his or her estate during the subsistence of the marriage, why should he or she be given such an opportunity after the institution of a divorce action by deferring the accrual issue until after the date of the divorce or by not making the cut-off date for determining accrual claims the earliest possible date? As the issuing of divorce summons, for all practical purposes, ends the marriage ‘partnership’ between the parties (as was referred to by Brassey J in *MB v NB*), it is therefore my opinion that the cut-off date for determining accrual claims should be either the date on which the divorce summons is issued or even an earlier date as agreed upon by the parties. Whatever happens after the date of the issuing of the divorce summons should be irrelevant and left out of account for purposes of an accrual claim. Policy considerations should, in my opinion, justify preventing a spouse from sharing in increases which accrue to the other spouse’s estate after the end of the marriage ‘partnership’ between them.

#### **6 How and when information should be obtained for the determination of accrual claims**

My last concern about the *Le Roux* case (see para 2 above) is the fact that the plaintiff was reproached for not stating her case properly in respect of her accrual claim in the pleadings before the court. (A similar situation arose in *Reeder*, a case which was referred to in both the decisions under discussion in this note. In *Reeder* the applicant was rebuked for not even quantifying the value of her alleged right in an application for immediate division of the accrual.) The problem is that the plaintiff would hardly have been able to do so if she did not know exactly what her husband’s estate consisted of at the time of issuing the divorce summons. She would only have been able to state her case properly and quantify her accrual claim after her request for further particulars in terms of section 7 of the Matrimonial Property Act had been complied with and after full discovery had taken place in terms of rules 35 and 37(1) of the Uniform Rules of Court.

And in terms of rule 35(1), save with the leave of a judge, discovery may not be sought until after the pleadings are closed. In other words, the plaintiff would not have been able to properly state her case until after the close of pleadings unless an application for early discovery had been made.

There is another route through which informal discovery can take place at an earlier stage, and that is mediation. Brassey J referred to this route in *MB v NB* when he penalised the attorneys in this matter for their failure to send their clients to mediation at an early stage by depriving them of their full attorney and client fees (paras 49–60). I fully agree with Brassey J's viewpoint in this regard. In my opinion, parties should be referred to mediation at an early stage after the issuing of divorce summons, not only to determine or quantify accrual claims, but also to negotiate on all issues holistically with the facilitation of a trained and accredited mediator (see De Jong "A pragmatic look at mediation as an alternative to divorce litigation" 2010 *TSAR* 515 529; De Jong "An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation" 2005 *TSAR* 33 37–40). Brassey J (para 58) emphasised that "[i]n the process of mediation the parties would have had ample scope for an informed, but informal, debate on the levels of their estates, the amount of their incomes and the extent of their living costs" and said that "[n]udged by a facilitative intermediary, I have little doubt that they would have been able to solve most of the monetary disputes that stood between them". It should also be borne in mind that the determination or calculation of a party's accrual claim is a straightforward mathematical exercise that must be done in accordance with sections 3 to 6 of the Matrimonial Property Act after all relevant information has been openly and honestly put on the negotiating table – there is really no need for a party to build a case regarding his or her accrual claim to be put before the court. If spouses are married with the accrual system, the spouse with the smaller accrual is entitled to claim payment of half of the difference between the accrual in the parties' respective estates when the divorce order is granted – and, as proposed above (see para 5), the decisive moment for determining what the accrual in the spouses' respective estates is should be the date of the issuing of the divorce summons. If, however, the parties are referred to mediation before the issuing of the divorce summons, the cut-off date for determining a party's accrual claim should be an earlier date agreed upon by the parties.

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