REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 4846/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

2 SEPTEMBER 2016 **FHD VAN OOSTEN**

In the matter between

J. G. **PLAINTIFF**

and

J. G. **DEFENDANT**

Matrimonial action for a decree of divorce - matrimonial proprietary regime governing marriage-separate adjudication of in terms of rule 33(4) - issue whether accrual system specified in chapter 1 of Act 88 of 1984 applied - antenuptial contract erroneously failed to record whether accrual system applied - evidence by the parties - opposing versions - both parties honest and their evidence reliable - test to be applied - common continuing intention of the parties - absence of acceptable motivation by plaintiff for insisting on exclusion of accrual - held that accrual system applied.

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] This is an action for divorce. At the commencement of the trial and at the instance of the parties I ordered that the proprietary regime governing the parties' marriage should be determined first in terms of rule 33(4). The nub of the issue between the parties is the following: the plaintiff contends that, as pleaded in Claim A of the plaintiff's particulars of claim, the marriage was out of community of property with the *exclusion* of the accrual system as opposed to that of the defendant that the marriage regime was out of community of property *including* the accrual system.

[2] The plaintiff's cause of action, as pleaded in claim A, is for rectification of the antenuptial contract, which is alleged incorrectly describes the marriage regime as out of community of property including the accrual system. The antenuptial contract was drawn up on the plaintiffs' telephonic instructions and subsequent confirmation in an email, by Geyser Attorneys in Pretoria. A draft antenuptial contract was prepared by Geyser Attorneys, delivered to and signed by both parties who were at the time residing on a small holding near Sasolburg. The signed original was returned to the attorneys for execution and registration in the Deeds office in Pretoria.

The antenuptial contract

[3] Before I deal with the evidence adduced at the trial it is necessary to refer to the content of the antenuptial contract. It is not in dispute that the plaintiff instructed Geyser Attorneys to draft an antenuptial contract *excluding* the accrual system. The antenuptial contract that was signed and registered however does not reflect that. Neither is it capable of an interpretation providing for a marriage out of community of property *including* the accrual system.

[4] The relevant parts of the antenuptial contract are reproduced in their original form:

'**ANTENUPTIAL CONTRACT**

with the

Application,

in terms of the

MATRIMONIAL PROPERTY ACT, 1984'

…

And the appearers declared that whereas a marriage has been agreed upon, and it is intended to be solemnized between them, they have agreed and now contract with each other as follows:

1. That there shall be no community of property between them.
2. That there shall be no community of profit and loss between them.
3. That the assets of the parties or either of them, which are listed hereunder, having the values shown, and all liabilities presently associated therewith, or any other asset acquired by such a party by virtue of his possession or former possession of such asset, shall not be taken into account as part of such party's estate at either the commencement or the dissolution of the marriage.

The assets of	**J. G.**	
So to be excluded are		NIL
		and
The assets of	**J. K.**	
So to be excluded are		NIL'

[5] Ms Geyser, the sole proprietor of Geyser Attorneys, testified and readily admitted that the antenuptial contract was incorrect which she ascribed to her failure to peruse and check the document after it had been typed by her typist, who had utilised a template. Ms Geyser further confirmed the plaintiff's instructions to her to draft an antenuptial contract in respect of an intended marriage out of community of property *excluding* the accrual system.

The issue and the onus of proof

[6] Against this background and premised on an admitted mistaken recordal of the alleged oral agreement between the parties concerning the proprietary regime that was to govern their marriage, rectification of the antenuptial contract is called for. The issue between the parties concerns the crisp question whether the marital property regime, which it is common cause was to be out of property, was either with application or without application of the accrual system.

[7] A brief consideration of the applicable legal principles is apposite. It was assumed by counsel for both parties that the plaintiff bears the onus of proving the common continuing intention of the parties specifically pleaded by him in order for an

entitlement to rectification to bring the antenuptial contract into accord with that intention. That assumption in my view is correct (*Odendaal v Odendaal* 2002 (1) SA 763 (W) para [2]). It is as well to emphasise that the common continuing intention of the parties may be proved by antecedent oral agreement or, in the absence thereof, in some other manner provided such proof is clear and convincing (*Meyer v Merchants' Trust* 1942 AD 244 at 253/258).

Factual matrix

[8] The plaintiff and defendant met each other some eight to ten months before they were married to each other on 7 February 2004. They started living together in November 2003 when the defendant moved into his homestead at Rapid Horns, a 7 hectare small holding near Sasolburg. This was the plaintiff's first marriage and the defendant's second marriage, her husband from the first marriage having passed away. Two children were born from that marriage, both in their teens when she married the plaintiff.

The plaintiff's version

[9] The plaintiff at the time of the marriage practiced as a junior accountant for his own account, having an office in Vaalpark and a satellite office in Rosebank, Johannesburg. He testified that he and his wife-to-be had often discussed the property regime to govern their intended marriage. He estimated three of four such discussions having occurred of which he was able to recall two: one in the presence of a friend at a coffee house in Cresta and the other during a consultation at his Rosebank office with Ms Van der Walt, who was their mutual financial broker. Ms van der Walt referred them to Geyser Attorneys who were unknown to both of them. He phoned Ms Geyser and instructed her to prepare an antenuptial contract excluding the accrual system. On 16 January 2004 Ms Geyser in a letter transmitted by fax to the plaintiff confirmed the telephonic instructions, to which was attached a standard form to be filled out by the plaintiff in regard to the furnishing of personal and other details.

[10] The plaintiff duly completed the form. It provides for an indication 'MET OF SONDER AANWAS' in respect of which the plaintiff inserted 'WITHOUT'. On 28 January 2004 the plaintiff returned the completed form to Geyser Attorneys and in

the fax cover sheet requested 'for the wedding… some kind of a letter as proof that it is out of community without accrual'. On the morning of day before the wedding ceremony he received the draft antenuptial contract from Geyser Attorneys which they were required to sign. He then phoned Ms Geyser on his cell phone and included the defendant in the conversation by activating the speaker phone facility. He enquired from and confirmed with Ms Geyser whether the document had correctly been drawn up as it contained lingua he not familiar with. She did so and they both signed the document which was returned to the offices of the attorneys.

[11] A further document was introduced into evidence by the plaintiff while testifying, which he had discovered a week or so prior to the commencement of the trial. It is a copy of an application in the name of the defendant, on a standard form, for additional overdraft facilities at Absa Bank. It records a return of assets and liabilities as on 28 February 2010. Although the defendant signed and initialled the four page document it was filled out by the plaintiff. The requested particulars comprise personal particulars and detailed descriptions of the defendant's assets. The plaintiff highlighted paragraph 11 of the application where he had indicated, under 'Huwelikstaat', with a cross in the first square, that the marriage regime is out of community of property and with a further cross in the second square below that, 'ANC/sonder toevalling'. The plaintiff contends that the defendant, in appending her signature to the document, unequivocally confirmed that the accrual system was not of application to their marital regime.

The defendant's version

[12] The defendant in essence denies that the accrual system was excluded. By way of background she described the relationship between her and her deceased husband concerning the running and management of their businesses. He was a hands-on, astute business man leaving her with no less than six video shops, properties, trusts and interests in close corporations. Although a woman of means her involvement in those businesses was limited to administrative functions and financials, such as banking of innings and payment of salaries to staff. Her first marriage was out of community of property but with the inclusion of the accrual system. She considered that regime as fair to both marital partners and added that she would never have given the slightest consideration to marrying without the

application of the accrual system. The defendant, as I understand the defendant's evidence, appears to have been strong willed, assertive and well-suited as far as finances and legal aspects relating to the marriage were concerned. She trusted him unreservedly right from the outset.

[13] The defendant denied that they had at any stage discussed the accrual system. In any event, she added, she would not have discussed a personal matter such as accrual either in the presence of the plaintiff's friend or for that matter, Ms Van der Walt. Based on her previous experience in her first marriage and the absence of any reason for the accrual to be excluded, she incredulously, not ever having raised this aspect with the plaintiff, believed that they would share in the accrual from the date of marriage onwards, while each would retain ownership of their previously owned assets and other interests.

[14] The defendant in particular denied having been included in the cell phone discussion of the plaintiff with Ms Geyer. Her mindset at that time, she testified, was focussed on and fully occupied by the finalisation of the vast array of hectic preparations for the next day's wedding celebration and added thereto, the looming formal solemnisation of the marriage which was to take place later that afternoon.

[15] As for the Absa application, she admitted having signed the document and explained that she did not read the contents thereof on the assumption that her husband, whom she regarded as being in control of matters of that kind, had filled in the correct information.

[16] Lastly, the defendant testified that they had jointly purchased a coastal holiday home in the name of a company, Emerald Sky (Pty) Ltd and that she actively became involved in the conversion of the five cottages situated on the Rapid Horn property for hiring out, following their joint decision a few years after they were married, to derive some income from them. She contributed to the maintenance, upkeep and expansion of the business, which she said she would not have undertaken had she been aware that the accrual system was not of application. In addition she purchased furniture for use in the cottages and incurred expenditure in the maintenance and upkeep of the gardens of the property in general. The plaintiff denied that the defendant had purchased new furniture and that the overflow

furniture from their homes was used for that purpose. The dispute aside, the defendant's involvement in the business remains.

Discussion

[17] As is apparent form the summary of the evidence the court is faced with two mutually destructive versions. The correct approach to be adopted when dealing with mutually destructive versions was succinctly set out in the case of *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) 440E-G, where Eksteen AJP said:

> '… Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[18] This approach was approved by the Supreme Court of Appeal in *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) para [5], where it was held:

> 'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend

> on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

(See also *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014) para [50])

[19] The principle is therefore firmly established that when there are mutually destructive versions before the court, the plaintiff's onus of proof can only be discharged if he establishes his case on a preponderance of probabilities. The corollary principle is also established that the requirement that a court has to be satisfied that the plaintiff's version is true and that of the defendant false in order for the plaintiff to succeed in discharging his onus of proof, is only applicable in cases where there are no probabilities one way or the other (see *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 324 (W)).

[20] Applied the above principles to the facts of the present matter it is first necessary to consider the credibility of the plaintiff and the defendant. Both, in my view, were honest and their evidence credible. I am unable to find nor was anything to the contrary suggested in argument, that they were untruthful in any respect. The plaintiff's version is corroborated by the documentary evidence and also the evidence of Ms Geyser. Ms Geyser, it must be remembered, testified as to events

having occurred some 14 years ago with the obvious erosion of memory. There exists no good reason not to accept that the plaintiff in fact intended the exclusion of the accrual system to their marriage. But, the enquiry does not end there. The real question concerns a determination of the common continuing intention of both parties. Put differently, did the plaintiff properly communicate his intention to the defendant and did the defendant expressly agree with such intention in accordance with the pleaded facts and testimony of the plaintiff.

[21] The plaintiff's evidence concerning his discussions with the defendant leaves me with a measure of unease. For the plaintiff this was an uttermost important aspect in respect of which he, having been paced in possession of the draft, sought and obtained the assurance of Ms Geyser that it correctly accords with his intention. But as for the defendant, he was less meticulous: the notion of discussing this important aspect with the defendant in the presence of a friend and later their broker, in view of the fact that they were living together, appears to me as improbable. His version concerning the speaker cell phone call to Ms Geyser is contradicted by Ms Geyser who testified that she explained the different matrimonial regime options to the plaintiff during the first telephone call made by the plaintiff. Ms Geyser testified that during one of the telephone calls a third person was involved, which she assumed was the defendant, but she was unable to place it in its proper time sequence.

[22] This brings me to an aspect that has caused me concern. The plaintiff contends for a matrimonial proprietary regime which clearly varies the normal regime which is out of community of property including the accrual system. Section 2 of the Act provides that every marriage out of community of property in terms of an antenuptial contact by which community of property and profit and loss are excluded,…is subject to the accrual system specified in this chapter (Chapter 1), except insofar as that system is *expressly excluded* by the antenuptial contract'. [my emphasis]

[23] Important and crucial for present purposes, is the requirement of express agreement in regard to a deviation from the default matrimonial property regime. Whether the parties in the present matter expressly agreed on the exclusion of the accrual system, requires me to carefully consider the evidence and in particular to consider what the plaintiff's motivation was for insisting on the exclusion of the accrual system. A sound and acceptable motivation, having regard to the

circumstances of the parties at the time, would obviously tend to strengthen the probabilities in favour of exclusion (cf *Bath v Bath* (952/12) [2014] ZASCA (24 March 2014); 2014 JOL 31724 (SCA) para [13]). On this aspect the plaintiff testified that he considered the exclusion of the accrual system as necessary because 'we both had businesses'. That plainly does not constitute sufficient reason. The plaintiff was unable to recall the verbatim exchanges during the discussions with the defendant, but had this been the sum total conveyed by him to the defendant as the reason for preferring exclusion of the accrual system, it is hardly surprising that she maintained the view that she had.

[24] The defendant's failure to raise with the plaintiff the matrimonial property regime which was to govern their marriage was much criticised by counsel for the plaintiff. I am unpersuaded that in the circumstances I have referred to, any negative inference against the defendant is warranted. The totality of the evidence, in my view, falls short of establishing express consensus between the parties to exclude the accrual system. It follows that the plaintiff has failed in discharging the onus of proving the agreement relied on.

Costs

[25] In view of the nature of the dispute between the parties, the pending divorce action and the credibility findings I have made, I consider it just and fair that the costs of this hearing should be costs on the divorce action.

Order

[26] For all the above reasons I make the following order:

1. It is declared that the matrimonial property regime governing the marriage between the parties is out of community of property excluding community of property and profit and loss, subject to the accrual system specified in Chapter 1 of Act 88 of 1984.
2. The costs of this hearing shall be costs in the divorce action.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF	***ADV A FRIEDMAN***
PLAINTIFF'S ATTORNEYS	***PILLAY ATTORNEYS***
COUNSEL FOR DEFENDANT	***ADV A JANSE VAN VUUREN***
DEFENDANT'S ATTORNEYS	***LEAHY ATTORNEYS***
DATE OF HEARING	***24, 25 AUGUST 2016***
DATE OF JUDGMENT	***2 SEPTEMBER 2016***