IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

COURT *A QUO* CASE NO: MRCD33/2015

APPEALCASE NO: A773/2016

Reportable: No

Of interest to other judges: No

Revised.

29 August 2017

In the matter between:

A M **APPELLANT**

and

H M **RESPONDENT**

JUDGMENT

MUDAU J

[1] The respondent husband ('plaintiff' in the court *a quo)* had instituted action for divorce in the Regional Court, Mbombela, Mpumalanga, in which he claimed, *inter alia,* a decree of divorce. His wife, the appellant ('defendant' in the court *a quo)* counterclaimed. In her counterclaim, the appellant not only claimed for a decree of divorce and other ancillary relief, but also a declaratory order that she was entitled to half of his estate based on a written agreement (annexure AM1),

the subject of this appeal. She also claimed maintenance for herself and her minor child. She alleged that the agreement is a settlement which the parties concluded on the understanding that their marriage had irretrievably broken down, that the respondent did not want to continue therewith, and that they would accordingly get divorced. The existence of annexure AM1 and the fact that the respondent signed it is not in dispute in this court. Neither was this an issue in the court a quo.

[2] In this court, shortly before the respondent's counsel could argue the appeal on the merits in response to the appellant's case, in what was termed a point *in limine,* counsel argued that the appellant's notice of appeal was fatally defective and that as a result the appeal should be struck off the roll with costs as the notice of appeal was vague. The procedural anomaly however, was that the point was not taken at the commencement of the appeal proceedings but counsel for the appellant was enjoined to respond thereto after having made his full address with regards to the merits of the matter.

[3] The point raised was not at all dealt with in the heads of argument filed on behalf of the respondent. It was accordingly no surprise that counsel on behalf of the appellant strenuously objected thereto. Apart from the point *in limine* the respondent's counsel also addressed the court with regard to the merits of the appeal. This court was of the view that Supplementary Heads of Argument in that regard were necessary. However, after considering the matter and Supplementary Heads of Argument by both parties, I am of the view that the point raised is without merit. This is particularly against the backdrop that counsel for the respondent had indicated in the practice note addressed to us that the respondent was ready to argue the appeal. I fail to see how the respondent could have been prejudiced in arguing the appeal. The point raised *in limine* is accordingly dismissed.

[4] The background to this appeal is that on 28 August 1993 appellant and the respondent were married to each other out of community of property with the exclusion of the accrual system specified in chapter 1 of the Matrimonial Property

Act 88 of 1984 ('the MPA'). In terms of the said antenuptial contract the standard terms, excluded community of property, community of profit and loss and thus, by implication, accrual sharing in any form, between them. At the time the divorce action was instituted only one of the two children born of the marriage had attained majority.

[5] In paragraphs 3.3 - 3.5 of the appellant's counterclaim, she claimed that the parties had expressly waived the provisions of the MPA which claim was later abandoned. The appellant contended in her counterclaim that annexure AM1 constituted a settlement agreement of the proprietary consequences of the parties' marriage as pleaded in paragraphs 3.6 - 3.9 in contemplation of a divorce action to be instituted by the respondent against the appellant on the common understanding that the respondent desired his freedom and did not want to continue with the marriage relationship. The respondent denied the interpretation placed on annexure AM1 and pleaded that he signed it under duress and undue influence. He also denied that it was a contract or a settlement agreement in contemplation of a divorce action between the parties.

[6] At the commencement of the trial the parties agreed on a separation of issues, namely: the reasons for the breakdown of the marriage insofar as that was relevant with regard to the appellant's counterclaim for personal maintenance; whether annexure AM1 was a valid and enforceable agreement *inter partes,* and whether same constituted a settlement agreement in contemplation of a divorce between the parties. It was agreed that the alleged settlement agreement be adjudicated separately and before any other evidence is presented, and that the adjudication of all other issues be held in abeyance.

[7] The court a *quo* dismissed the appellant's proprietary claims based on the said agreement. The court *a quo* concluded that the agreement was illegal and therefore unenforceable between the parties as a settlement of the proprietary consequences of their marriage. The crisp issue in the present appeal is whether the court a *quo* attached due weight to the contents of annexure AM 1 given the common cause and surrounding facts, and whether its contents are repugnant

against the law and public policy as the learned Magistrate found.

[8] The appellant testified that she had drafted annexure AM 1. The primary purpose was, as she put it, "Ek wil he hy meet my versorg indien iets snaaks gebeur". During the period April and May 2014 the respondent testified that he required his freedom from his marriage with the appellant and did not want to continue with their marriage which he informed her. He wanted to have their marriage terminated because of his on-going relationship with one Vanessa Yuil. According to the appellant, the reason why the respondent refused to sign was because he undertook to work on their marriage. At the stage when the respondent eventually signed annexure AM1 on 10 November 2014, that was after the respondent again brought up the subject of obtaining his freedom from their marriage. She went and printed the document which the respondent read and then signed after assuring him it was reasonable considering that she had also given him two children.

[9] On two occasions prior to 10 November 2014 he refused to sign annexure AM1 as he considered the terms thereof ridiculous and that the appellant wanted his money. When he eventually signed annexure AM1 he did so under stressful conditions He did not want an argument with the appellant as this would have disturbed their daughter in her preparations for year-end examinations. He denied that annexure AM1 represented an agreement in settlement of an anticipated divorce action.

[10) The court *a quo* found in favour of the appellant holding that the respondent's defence of duress or undue influence could not be sustained and was improbable as he signed it only in November 2014. The learned Magistrate also found that the existence of annexure AM 1 is "proof of the fact that divorce was indeed in the contemplation of the parties, more particularly of the defendant" (appellant). A finding was also made that the marriage between the parties had broken down irretrievably and that the probabilities were more in favour of the appellant in the event of a divorce. The court *a quo* cannot be faulted in its approach in this regard.

[11] It was contended on behalf of the respondent that since there was no pending divorce action at the time when the annexure AM1 was signed, it could not have been signed in settlement of the proprietary consequences of the pending divorce. The fact that the annexure was signed before the divorce action was instituted is of no material significant and is irrelevant. As Magid J stated in *Stembridge v Stembridge*[1] it is the effect, not merely the fact, of the agreement which must be assessed.

[12] It is trite that 'public policy demands in general full freedom of contract; the right of men (and women) freely to bind themselves in respect of all legitimate subject-matters'[2]. In *Sasfin (Pty) Ltd v Beukes*[3], it was stated by Smallberger JA that:

> "The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v* St *John-Mildmay* 1938 AC 1 (HL) at 12 ([1937]) 3 All ER 402 at 4078- C),
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> > 'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'.

[13] The appellant contends that the court a *quo* misinterpreted annexure AM1 and in consequence gave the wrong decision. The principal thrust of the respondent's case is that this court should refuse to uphold the appeal but to dismiss it on the basis that it was a 'blackmailing document to prevent the plaintiff from divorcing her' and not a binding agreement between the parties. It is trite

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[1] 1998 2 ALL SA 4 (D) at 14.
[2] Law Union and Rock lnsurance Co Ltd v Carmichael's Executor 1917 AD 593 at 598.
[3] 1989 (1) SA 1 (A) at 98-D

that although the starting point is the words of the agreement in a document, it has to be borne in mind that our courts have consistently held that the interpretative process is one of ascertaining the intention of the parties - in this case, what they meant to achieve by incorporating in the agreement the terms as set out in annexure AM1. To this end the court must examine all the circumstances surrounding the conclusion of the agreement, i.e. the factual matrix or context, including any relevant subsequent conduct of the parties.[4]

[15] The problem is however, that the alleged agreement in part would, in my view, have amounted to a revocation or at the very least an amendment of the very essence of the antenuptial contract in this case. That could not have been done, even with 'the mutual consent of the parties', without an order of court as envisaged in section 21 of the MPA. But the appellant had abandoned this part of her claim.

[16] However, turning to the wording of the agreement, in the second paragraph thereof read within the context of annexure AM1 as a whole, it has to be borne in mind that the nature and purpose of the contractual relationship between the parties was that of a married couple whose marriage, the court a *quo* found, had irretrievably broken down and who were contemplating a divorce. Stripped to their bare essentials, the rights and obligations of the parties in terms of annexure AM1 was that the respondent gave half of his estate to the appellant against the backdrop that he wanted a divorce. In my view, this wording clearly conveys that the respondent not only intended that the appellant be entitled to the full half of his estate, but that he will maintain her. To the extent that there is any further doubt to that end, he committed to pay over to her 50% of his net income/dividend and pension every month as maintenance in the same standards that she was used to.

[17] Against the above background, annexure AM1 was in my view, entered into in contemplation of the divorce, and with the object of reaching a binding

[4] See Novartis SA PM Ltd v Maphil Trading (Ptv) Ltd 2016 (1) SA 518 (SCA) para 27. See also G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carrv (Pty) Ltd and Another 2017 (2) SA 24 (SCA) para 12.

agreement on the consequences that would regulate the time when they are no longer husband and wife. That being so, it constituted in my view, a valid and enforceable agreement *inter partes* and same constituted a settlement agreement in contemplation of a divorce between the parties which the Court a *quo* should have found accordingly. For all the above reasons I conclude that the appeal has merit. With regard to costs, the appellant, as the successful party is entitled to her costs.

[18] In the result the following order is made:

1. The appeal is upheld with costs;
2. The orders made on 27 July 2016 by the learned Magistrate, Mr N A Khumalo, are herewith set aside and substituted with the following :

'2.1 It is declared that the defendant is entitled to 50% (FIFTY PERCENT) of the nett asset value of the plaintiffs estate, calculated as at 10 November 2014, for the purpose of which:

2.1.1 The plaintiff is ordered to pay 50% (FIFTY PERCENT) of the value as agreed to between the parties, within 14 (FOURTEEN) calendar days of such agreement , into the nominated account of the defendant, alternatively, and failing agreement;

2.1.2 The parties are ordered to a debatement of the nett asset value of the plaintiff's estate, and for the plaintiff to pay 50% (FIFTY PERCENT) of the nett asset value of the plaintiff's estate, within 14 (FOURTEEN) days from final debatement of the estate as aforesaid;

2.2 The plaintiff is a member of the KMPG Retirement Annuity Fund with number M00251518, for the purpose of which it is ordered that:

2.2.1 The defendant is entitled to 50% (FIFTY PERCENT) of the value of the aforementioned fund, as at 10 November 2014;

2.2.2 In terms of section 7(8) of the Divorce Act, Act 70 of 1979, and Section 370 (1)(e) of the Pension Fund Amendment Act:

2.2.2.1 Payment of 50% (FIFTY PERCENT) of the plaintiff's interest in the aforementioned fund must be paid to the defendant, within 45 (FOURTY FIVE) days following the date upon which the defendant has exercised her selection referred to *infra;*

2.2.2.2 The fund must within 45 (FOURTY FIVE) days *after* the submission of this order by the defendant to the Fund, request the appellant in writing to exercise her selection with reference to payment of 50% (FIFTY PERCENT) of the plaintiff's interest in the Fund to the defendant directly, alternatively transfer the 50% (FIFTY PERCENT) of the plaintiff's interest to a fund as nominated by the defendant.

2.3 If the parties are unable to come to a resolution of the quantum of the amount payable by the plaintiff to the defendant pursuant to the debatement anticipated above, the aggrieved party is granted leave to approach this court on application for appropriate relief.

2.4 It is declared that the plaintiff is liable to make monthly maintenance payments to the defendant in the amount calculated as 50% (FIFTY PERCENT) of his nett monthly income as from the date of their divorce .

3. The plaintiff is ordered to pay the costs of the action'

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MUDAU T P

[Judge of the High Court,

Gauteng Division Pretoria]

I agree

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MALUNGANA P H

[Acting Judge of the High Court,
Gauteng Division Pretoria]

Date of Hearing:	9 June 2017
Date of Judgment:	29 August 2017
APPEARANCES	
For the Appellant:	Adv. D.A. Smith SC
Instructed by:	Schoeman & Associates
For the Respondent:	Adv. I Vermaak-Hay
Instructed by:	Swanepoel & Partner