REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION (MAIN SEAT)

Case Number: 2015/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

3 March 2023

In the matter between:

G [....] J [....] C [....] **Plaintiff**

and

S [...] -M [....] C [....] **Defendant**

This judgment was handed down electronically by circulation to the parties' representatives by email and by its release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 3 March 2023.

JUDGMENT

Roelofse AJ:

INTRODUCTION

[1] The parties are in the midst of divorce proceedings. All I am required to pronounce is whether the antenuptial contract entered into between the parties is null and void and therefore unenforceable (as the defendant counter-claims) or if the antenuptial contract must be rectified to reflect the parties' true intention (as the plaintiff claims).

THE ANTENUPTIAL CONTRACT

[2] The parties married on 3 March 2001 at Lydenburg out of community of property with the inclusion of the accrual system. Prior to the registration of the antenuptial contract and prior to their marriage, the parties signed a draft thereof in the presence of witnesses. The evidence confirmed that the registered antenuptial contract is exactly the same as the draft antenuptial contract that was signed by the parties.

[3] Clauses 4 and 5 of the antenuptial contract are the core of the dispute.

[4] Clause 4 of the antenuptial contract reads:

> 'Dat vir die doel van die bewys van die netto waarde van hulle onderskeie boedels by die aanvang van die voorgenome huwelik die voordenome gades verklaar dat die netto waarde van hulle onderskeie boedels soos volg is:
>
> ……'
>
> [In the remainder of this paragraph 4, the parties proceed to list specific items and the value of those items. The plaintiff recorded the value of the items to be R 2 767 000.00 and the defendant recorded that the value of the one item she lists was R 30 000.00]

[5] Clause 5 of the antenuptial contract reads:

> ‘Dat die bates van die partye of een van hulle twee wat hieronder gelys word en wat die getoonde waardes het, asook alle laste wat tans daarmee in verband staan, of enige ander bate verkry deur sodanige party uit hoofde van sy besit of vroeëre besit van sodanige bate, nie by óf the aanvang óf die ontbinding van die huwelik in aanmerking geneem word as deel van sodanige party se boedel nie.’

No assets were listed under this clause. Instead, the values set out in clause 4 were repeated.

[6] In the action, the plaintiff prays in prayer 9 of his particulars of claim as follows:

> ‘That paragraph 5 of the parties’ antenuptial contract be rectified in the following manner:
>
> 9.1 That the words: “ is R 2 767 000,00 (TWEE MILJOEN SESHONDERD EN SEWE EN SESTIG DUISEND RAND)’’ Be replaced by the words: “ GEEN”, and furthermore that the words: “is R 3 000,00 (DRIE DUISEND RAND)” Be replaced by the words “GEEN”.

[7] As basis for the order sought in paragraph 9.1 of the particulars of claim, the plaintiff pleads that clause 5 of the antenuptial contract should have read that no assets of any of the parties shall be excluded from the calculation of the accrual because the “mistake” *‘…[w]as occasioned by an oversight by the author of the ante-nuptial contract, and the parties signed the special procuration in the bona fide but mistaken belief that the ante-nuptial agreement will reflect the true agreement and intention between the parties.*’[1]

[8] The defendant pleads in her counter-claim that:

[1] Paragraph 7.5 of the particulars of claim.

‘Clauses 4 and 5 of the purported ante-nuptial contract of the Plaintiff and the Defendant are materially contradictory and cannot be reconciled with each other as clause 4 thereof intends that the assets of the Plaintiff and the Defendant which are listed would be subject to the accrual system but form part of the net commencement value whereas clause 5 of on the other hand states that those same assets will not be taken into account as part of the Plaintiff and Defendant’s estate at either the commencement or the dissolution of the marriage of the parties.’

‘By virtue of the fact that it cannot be established what the parties intended to execute in terms of the accrual system and the fact that the honourable Court cannot create a contract between the parties the contract of the parties is not rectifiable and ought to be declared null and void ab initio by virtue of the vagueness of the terms of the ante-nuptial contract’

‘The parties ought accordingly to be declared to be married in community of property and the Defendant is entitled to a division of the joint estate of the parties.’

[9] In paragraph 2.1 of the counter-claim, the defendant prays that the registered antenuptial contract of the parties be declared null and void *ab initio* and that the parties be declared to be married in community of property.

THE EVIDENCE

[10] The plaintiff called two witnesses and also testified himself. Only the defendant testified in pursuit of her counter-claim. Attorney, Mr. Stenekamp, who consulted the plaintiff and the defendant over the antenuptial contract and who produced the draft that the parties signed, testified over what he remembers about his consultations with the parties. The parties consulted Mr. Stenekamp twice. The first consultation was about

the parties' resolve to enter into a marriage out of community of property with the accrual. The second consultation was for the signature of the draft antenuptial contract and the power of attorney for a notary in Pretoria to register the antenuptial contract.

[11] The plaintiff's second witness was Mr. Breekman. At the time of the first consultations of the parties with Mr. Stenekamp, Mr. Breekman was an article clerk with Mr. Stenekamp. Mr. Breekman was called to refute the defendant's version that was put to Mr. Stenekamp that the parties (or the defendant alone) also sought the advice of Mr. Breekman. Mr. Breekman denied the defendant's version.

[12] The plaintiff testified that he and the defendant resolved to marry out of community of property with the accrual but excluding certain of the parties' access from the accrual after their marriage. The plaintiff denied that the parties consulted Mr. Breekman over the antenuptial contract.

[13] The defendant confirmed in her testimony that the parties had resolved to marry out of community of property with accrual. The defendant testified that she specifically required that the assets the plaintiff that originated from the plaintiff's deceased father and which constituted farming assets and be excluded from the accrual system. The defendant also testified that she was adamant that the farming assets be mentioned in the antenuptial contract be excluded to prevent loss to both the parties if the plaintiff's estate is perhaps sequestrated. She specifically mentioned that she did not want to expose her assets to the risks associated with farming.

[14] Both parties testified that during their marriage of seventeen years, they acquired property individually and also in both their names. Both parties testified that they accepted Mr. Stenekamp's advice and at all times considered themselves bound in union in terms of the antenuptial contract. No question or doubt existed in their minds over the content of the antenuptial contract.

[15] The defendant testified that she was advised for the first time by her former

attorney that the antenuptial contract was null and void due to a perceived contradiction between clauses 4 and 5 of the antenuptial contract. Until she had received that advice (in the parties' prior divorce proceedings which was abandoned), she had no issue with the antenuptial contract and the parties had arranged their affairs in terms of the provisions of the antenuptial contract.

[16] The evidence established that the parties at all times wanted to marry out of community of property with the accrual subject to the exclusion of certain of both of their assets as set out in clause 4 of the antenuptial contract.

DISCUSSION

[17] The Matrimonial Property Act 88 of 1994 ('the Act') regulates matrimonial property and provides for matters connected therewith.

[18] Section 2 of the Act provides:

> 'Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, except in so far as that system is expressly excluded by the antenuptial contract.'

[19] Section 3 of the Act provides for the effect of the accrual system. It reads:

> '(1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

(2) Subject to the provisions of section 8 (1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.'

[20] Section 4 of the Act provides for the determination of the accrual of the estate of a spouse. It reads:

'(1)(a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.

(b) In the determination of the accrual of the estate of a spouse—

(i) any amount which accrued to that estate by way of damages, other than damages for patrimonial loss, is left out of account;

(ii) an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;

(iii) the net value of that estate at the commencement of his marriage is calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the weighted average of the consumer price index as published from time to time in the Gazette serves as prima facie proof of any change in the value of money.

(2) The accrual of the estate of a deceased spouse is determined before effect is given to any testamentary disposition, donation mortis causa or succession out of that estate in terms of the law of intestate succession.'

[21] At the time of the conclusion of a marriage parties may own assets themselves. They may then decide to include or exclude some or all of their assets from accrual or they may exclude accrual all together.

[22] The default position in respect of the calculation of a spouse's accrual is provided for in sub-section 1(a). The nett value of the spouse's estate, i.e by taking into account all of the spouse's assets and liabilities at the end of the marriage is deducted from the nett value of that spouse's estate at the commencement of the marriage.

[23] Sub-section 1(b) which provides for the departure from the default position. Relevant in the context of this matter is the provisions of sub-section 1(b)(ii). The wording of the sub-section is clear – assets identified by the parties at the conclusion of the antenuptial contract are excluded form accrual during the subsistence of the marriage. The parties are at will to exclude one or more or all of their assets from the accrual. The assets the parties decide to exclude is excluded from accrual. The assets that may be owned by a party which such party decides not to exclude accrues in the estate of each of the parties during the subsistence of the marriage. These assets will be subject to accrual and the final determination of the spouses' ultimate entitlement at the end of the marriage through divorce.

[24] The provisions of an antenuptial contract must be *'….[i]nterpreted in context and against the background in which it was concluded.*[2] (Also see: Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para [18]).

[2] Mills v Mills [2017] 2 All SA 364 (SCA) at para. [7].

[25] In Mills *supra* (see footnote 2 below), the husband excluded some of his property from accrual but left others subject to the accrual of the estate. The Supreme Court of Appeal, after interpreting the provisions of the antenuptial contract, dealt with the property excluded and included in terms of the antenuptial contract differently. The property that was included was taken as part of the accrual while the property excluded in terms of the antenuptial contract did not accrue to the husband's estate.

[26] The clear intention of the plaintiff and defendant, not only through the provisions of their antenuptial contract, but also having regard to the context within which they contracted and their conduct thereafter, leaves no doubt in my mind that the property listed in clause 4 of their antenuptial contract was and remained excluded for purposes of calculating the accrual of their estates. Other property that they may have owned or now own, but which was not excluded in the antenuptial contract, is subject to accrual as contemplated in sections 2 and 3 of the Act.

[27] The failure of the parties to record the assets mentioned in clause 4 of the antenuptial contract and instead only repeating the values attributed to those assets in clause 5 does not make sense. Therein perhaps lies the error of the drafter of the antenuptial contract. Despite this, I do not believe that the parties ever intended that no assets would be excluded from the accrual as the plaintiff now seeks to claim. I also do not believe that the parties ever intended to marry in community of property which would be the effect if the defendant is suited in her counter-claim.

[28] The parties' antenuptial contract, having regard to the factual matrix and context, together with the parties' conduct and understanding of the antenuptial contract, is not such that the contract is to be considered so vague that the antenuptial contract must be regarded as void for vagueness as was the case in Bath v Bath (952/12) [2014] ZASCA 14 (24 March 2014). In any event, Bath is distinguishable from this case as in Bath, in addition to a clear vagueness of the antenuptial contract, consensus was absent.

[29] Having considered the pleadings, having listened to the evidence and, upon application of the principles applicable to the interpretation of contracts, I find that no ambiguity exists in the antenuptial contract to such an extent that same is unenforceable. The antenuptial contract properly reflects the clear intention of the parties when the antenuptial contract was concluded and they considered themselves bound to its terms though the entire existence of their marriage. In addition, for these reasons also, the antenuptial contract is not open for rectification for, despite its deficiencies, it reflects the true intention of the parties.

[30] In order to dispel any remaining doubt, notwithstanding the aforesaid findings, I conclude by finding that the parties are married out of community of property with the accrual, such accrual to exclude the property at the commencement of the marriage as listed in clause 4 of the parties' antenuptial contract.

COSTS

[31] Both parties were unsuccessful. In the circumstances, each party should pay their own costs.

CASE MANAGEMENT

[32] After having disposed of the preliminary dispute in the divorce action, the divorce action must now be finalized. The order hereunder shall direct the parties in this regard.

[33] In the premises, I made the following order:

(a) Prayer 9.1 of the plaintiff's particulars of claim is dismissed.

(b) Prayer 2.1 of the defendant's counter-claim is dismissed.

(c) Each party shall pay their own costs.

(d) The parties are hereby directed to:

(i) Conduct a pre-trial conference by no later than 31 March 2023 in strict compliance with sub-rules 37A(7) to 37A(10) and Clauses 2.14 and 2.18 of this Court's Practice Directive;

(ii) Approach the Registrar of this Court with a duly completed Form A of this Court's practice Directive for purposes of enrolling the action on the First Case Management Roll.

Roelofse AJ
Acting Judge of the High Court

DATE OF HEARING: 27 February 2023
DATE OF JUDGMENT: 3 March 2023

APPEARANCES

For the plaintiff:
Ms. I Vermaak-Hay on instructions of Swanepoel and Partners Incorporated.

For the defendant:
Ms. M Fabricius on instructions of Shapiro & Ledwaba Inc.