HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A306/2021 and A307/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 8 DECEMBER 2022

SIGNATURE

In the matter between:

PETER HERBERT LE MOTTEE NO.	First Appellant
LLOYD ROBERT BALL NO.	Second Appellant
SINQUMILE NGOBANI NJONGWE MKHWANAZI-SIGEGE	Third Appellant
AMANDA CLAIRE GILLET	Fourth Appellant
NTOKOZO JACK MKHWANAZI	Fifth Appellant
ANDILE PATRICK MKHWANAZI	Sixth Appellant
BANELE JAMES MKHWANAZI	Seventh Appellant

and

BONGEKILE CYNTHIA MKHWANAZI First Respondent

THE REGISTRAR OF DEEDS Second Respondent

Summary: *Applications – dispute of fact – post-marital registration of disputed pre-marital notarial deed – approach to disputes – dismissal of application – overturned and appeal upheld – order replaced with one of referral to trial*

ORDER

---

1. The appeal is upheld.

2. The order of the Court ***a quo*** is replaced with the following:

    2.1 The application is referred to trial;

    2.2 The notice of motion shall be deemed to constitute a simple summons and the notice of opposition shall be deemed to constitute a notice of intention to defend;

    2.3 The applicants are directed to deliver a declaration within 20 (twenty) days from date of this order whereafter the normal rules as applicable to pleadings, notices and discovery shall apply as for trial;

    2.4 The costs of the application shall be reserved to be determined in the trial.

3. The costs of the appeal shall similarly be reserved for determination by the trial court.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] The issue in this appeal is whether the learned Acting Judge in the Court ***a quo*** was correct in dismissing the application before her without considering a referral to oral evidence or to trial.

[2] The applicant in the Court ***a quo*** has since passed away. He was the husband of the first respondent and the application was one for authorisation of the post-marital registration of a pre-marital notarial deed. The consequence of the relief sought was to change the marital property regime of the spouses from one of in community of property to one of out of community of property. As a precursor hereto a declaratory order was sought relating to the preparatory documents thereto, notably a power of attorney and a draft antenuptial contract (ANC).

[3] The validity of the documents required for registration and in fact the reaching of an agreement relating to the marital property regime were disputed. The learned Acting Judge in the Court ***a quo*** acknowledged the dispute of facts

and summarily dismissed the application. The appeal is about whether the correct approach to the facts and the dismissal had been taken.

Brief summary of background facts

[4] At the time that the application was heard in the Court a quo, the initial applicant, Mr Mkhwanazi had already passed away. He was subsequently referred to as the deceased and I shall for sake of continuity do the same. The deceased initially intended having his application heard as one of urgency on 14 January 2020. The deceased passed away on 4 January 2020 resulting therein that the executors of his deceased estate subsequently pursuing the application.

[5] The deceased and the first respondent (Mrs Mkhwanazi) were married to each other on 18 February 2016. At the time of marriage no antenuptial contract (ANC) had been registered with the office of the second respondent, the Registrar of Deeds. Accordingly the marital property regime was that of a marriage in community of property.

[6] The deceased, in his founding affidavit claimed that it was, from the outset the intention of the parties to the marriage to be married out of community of property. The deceased further stated that, for this purpose, he and Mrs Mkhwanazi had signed a special power of attorney and also initialled a draft ANC in January 2016. The power of attorney was intended for a person so authorised to appear before a notary public to have the ANC executed on their behalf.

[7] A notary public, Mr Grant Williams, also deposed to an affidavit. Therein he stated that he was instructed to draft and register the ANC and that he was in possession of an original signed ANC. He however only had a scanned copy of the signed power of attorney and the initialled draft ANC when the documents were entered into his protocol.

[8] These documents indicated that a certain Wendy Noila Kapp (Kapp), acting in terms of a special power of attorney, purportedly signed by the deceased and Mrs Mkhwanazi (then still Ms Makatini) on 17 January 2016, had appeared before the notary on 17 February 2016. The purpose thereof was to declare that the proposed marriage would be out of community of property with exclusion of the accrual system. The ANC which was signed by Kapp and witnessed by two unknown persons and thereafter notarized by the notary was never registered in the Deeds Office.

[9] The notary has subsequently been unable to locate the copy of the signed power of attorney which was claimed to have been "scanned" and e-mailed to him and which would have been filed in his protocol. He avers that he would not have notarised the ANC without having had sight of the power of attorney, even though only scanned. He however confirmed that he had not lodged the notarised ANC to be registered in the deeds office because he was still waiting for the original power of attorney and attached initialled ANC to be forwarded to him but in the end, he never received these documents. This is why the ANC signed by Kapp was never lodged in the Deeds Office and registered. The deceased stated in his affidavit, that he only found out about this three years later. The only documents currently available are the ANC referred to in paragraph 8 above, an unsigned power of attorney and an un-initialled draft ANC.

[10] Mrs Mkhwanazi conceded in her answering affidavit that after the lobola negotiations had been concluded, the possibility of the signing of an ANC was discussed between her and the deceased. This discussion was however not acted upon although she admitted that she and the deceased had consulted the notary, and that he had been requested to draft an ANC but that "*thereafter consultations with my husband who really saw no need in having such a*

stringent contract in our marriage which he was convinced was to be eternal and for the best, we did not proceed with the ANC".

[11] On instructions of the deceased, his then current attorney had prepared an ex-parte application for the post-marital execution and registration of an ANC which accords with the one which he claims was authorised by the power of attorney referred to in paragraph 6 above.

[12] When presented with a confirmatory affidavit to be deposed to for purposes of this ex-parte application, Mrs Mkhwanazi declined, denying that she and the deceased had concluded any agreement or that she had signed any power of attorney. These are the denials which she persisted with in the subsequent application which served before the court a quo.

The proceedings in the Court *a quo*

[13] The learned Acting Judge in the Court ***a quo*** in her judgement indicated that it was "*evident*" that there was a dispute regarding the agreement between the parties to enter into an ANC prior to their marriage in February 2016 and that there is a dispute as to whether Mrs Mkhwanazi had ever signed a power of attorney and initialled the draft ANC.

[14] The learned Acting Judge then proceeded in finding that "*it is trite that motion proceedings are decided on the papers filed by the parties and in case there is a factual dispute which can only be resolved to oral evidence, it is appropriate that actual proceedings should be used unless the factual dispute is not real and genuine*". Hereafter the learned Acting Judge referred to *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd*[1], *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd*[2], *National Director of Public*

[1] 1957 (4) SA 234 C at 235E – G.
[2] 1984 (3) SA 623 A at 634H to 635C.

Prosecutions v Zuma[3] and *Lohans Civils (Pty) Ltd v Tokologo Local Municipality*[4]

[15] In her judgement and after referring to the facts and disputes in the matter, the learned Acting Judge accepted the notary's evidence in the following fashion: "*I accept Mr Williams' statement but he would never have notarised the ANC without having a sight of the signed power of attorney together with the attached draft ANC, but without the signed documents and in view of the first respondent's denial that she signed these documents, I cannot find that it was the first respondent's signature on these documents*". The learned Acting Judge then further accepted the notary's version that the importance of the originally signed documents was such that without it he was not prepared to lodge the ANC for registration in the deeds office. Dealing with the denial of the agreement between the parties by Mrs Mkhwanazi, the learned Acting Judge concluded that she was not persuaded that Mrs Mkhwanazi's version was "*unattainable*" or false and (correctly in my view) found that it should not be rejected on the papers.

[16] Hereafter the judgement simply concluded as follows: "T*he parties' version about the agreement to enter into an ANC is material and cannot be resolved on the papers. I therefore grant the following order: the application is dismissed with costs*".

The applicable principles

[17] In *National Director of Public Prosecutions v Zuma*[5] the Court said the following at paragraph 26: "*Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts.*

---

[3] 2009 (2) SA 277 (SCA).
[4] *Saflii* (2676/2019) ZAFSHC 20 2021 (14 February 2020).
[5] Supra at footnote 3.

Unless the circumstances are special they cannot be used to resolve factual disputes because they are not designed to determine probabilities".

[18] The same Court has almost half a century before determined this very same principle as follows in Da *Mata v Otto NO.*[6] at 865G – H where affidavits delivered in motion proceedings lead to a dispute of fact: "*If the dispute of fact is genuine and is of such a nature that it cannot be satisfactorily determined without the advantages of a trial, which affords the opportunity of estimating the credibility of witnesses and observing their demeanor, it is undesirable to attempt to settle disputes of fact solely on the probabilities disclosed by affidavit evidence*".

[19] A few years later, in *Trust Bank of South Africa Ltd v Western Bank Ltd*[7] at 293H to 294E the Supreme Court of Appeal had, after "*careful perusal*" of the affidavits in an opposed application which had served before a court *a quo* come to the conclusion that the judge in the court *a quo* "*did not have sufficient reason to accept that the balance of probabilities, which in his view, favoured Western Bank, would not be disturbed by the hearing of oral evidence*" (this translation is taken from that utilised in *Essential Judicial Reasoning*[8] at paragraph 27).

[20] The issue of it being undesirable to determine real and genuine disputes of fact (as opposed to spurious disputes which might be addressed by way of a "*robust approach*"[9]) is derived from the principle that "*it is generally undesirable to endeavour to decide an application upon affidavit where the material facts are in dispute. In such a case it is preferable that oral evidence*

---

[6] 1972 (3) SA 858 (A).
[7] 1978 (4) SA 281 (A)
[8] Southwood, *Essential Judicial Reasoning*, Lexis-Nexis, 2015
[9] *Soffiantini v Mould* 1956 (4) SA 150E at 154E - H

be led to enable the Court to see and hear the witnesses before coming to a conclusion"[10]

[21] Ordinarily the approach of the Court is that where a factual dispute has been foreseeable and when it does then actually arise, it would lead to a dismissal of the application[11]. The exception to this approach is that where a party had been by statute obliged to proceed by way of motion procedure, he cannot be penalized when a factual dispute arises[12].

[22] In *Standard Bank of South Africa Ltd v Neugarten & Others*[13] Flemming J (as he then was) at *699 C – D* stated that the "*court's function if there is factual dispute is to select the most suitable method of employing viva voce evidence for the determination of the dispute*". The learned Judge then proceeded in discussing whether oral evidence would be convenient, for example where the dispute is "*comparatively simple*". If not, a referral to trial would be more convenient.

[23] A referral to trial is also often advisable if the dispute of fact does not fall within a "*narrow compass or if its eventual scope is unclear*"[14].

Evaluation

[24] In the present instance the learned Acting Judge in the Court *a quo* did not consider whether the factual dispute was foreseeable or not. Had she done so, this should have led to the conclusion that the deceased did not foresee any dispute as, on his version, the agreement had been discussed, a notary had been

---

[10] Harms, *Civil Procedure in the Supreme Court* at B6-45 relying on *Frank v Ohlson's Cape Breweries Ltd* 1924 AD 289 at 294

[11] *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 T at 1165

[12] *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B) at 497E -G and *AECI Ltd v Strand Municipality* 1991 (4) SA 688 (c) at 698I.

[13] 1987 (3) SA 695 (WLD).

[14] See: Harms (supra) at B61 referring inter alia to *Pressma Services (Pty) Ltd v Schuttler* 1990 (2) SA 411C at 419.

visited, a draft notarial deed had been prepared and a written power of attorney had been signed by him and the respondent and all this has been confirmed by the notary. The conclusion should then have been that it was not an appropriate matter where the application should simply be dismissed.

[25] In addition hereto, where part B of the application claims relief for the execution of a post-nuptial notarial deed, this was claimed in terms of section 88 of the Deed Registries Act 47 of 1937 which obliged the utilization of motion procedure. The exception referred to in paragraph 21 above, would then have militated against the penalty of the dismissal of the application.

[26] There was also no apparent consideration given as to whether the leading of oral evidence might "disturb" probabilities either way which may have assisted the Court in determining whether Mrs Mkhwanazi had in fact signed the power of attorney and once this has been determined, it might impact on the probabilities relating to her denial of an agreement regarding the marital property regime.

Conclusions

[27] In our view the learned Acting Judge in the Court ***a quo*** had misdirected herself and had either not properly or otherwise at all considered the issue of oral evidence being of assistance to the Court. None of the more "suitable methods" referred to in paragraph 22 above had been considered. In our view the order of dismissal should be replaced by an order catering for this. In the present instance, particularly where the executors will have to step into the shoes of the deceased as it were, the customary order for referral to oral evidence which will allow those who made affidavits to be called as witnesses would not be appropriate[15]. The customary order that the founding papers (or

[15] *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Company (Pty) Ltd* 1971 (2) SA 388 W at 396

the notice of motion), should stand as simple summons, leading to the exchange of pleadings as for a trial should be followed[16]. This would also cater for the adjudication of Part B of the Notice of Motion, leading to a curtailment of proceedings, which is one of the aspects of which the executors of the deceased estate contend for.

[28] Pursuant to the fact that the right to relief claimed and the reasonableness of both the launching of the application and the opposition thereto can be better determined by a Court with more benefit than either the Court *a quo* or this Court, being the benefit of oral evidence, it would be appropriate that costs should follow that event.

Order

[29] In the premises the following should be made:

1. The application is referred to trial;

2. The notice of motion shall be deemed to constitute a simple summons and the notice of opposition shall be deemed to constitute a notice of intention to defend;

3. The applicants are directed to deliver a declaration within 20 (twenty) days from date of this order whereafter the normal rules as applicable to pleadings, notices and discovery shall apply as for trial;

4. The costs of the application shall be reserved to be determined in the trial;

5. The costs of the appeal shall similarly be reserved for determination by the trial court.

---

[16] See: *Hy-Cap Valcanising Co. (Pty) Ltd v S A Motor Trade Association* 1946 WLD 495

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree.

S N I MOKOSE
Judge of the High Court
Gauteng Division, Pretoria

I agree.

M BALOYI-MBEMBELE
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 12 October 2022

Judgment delivered: 8 December 2022

APPEARANCES:

For 1st and 2nd Appellants:	Adv B D Stevens
Attorney for the 1st and 2nd Appellants:	Kotze & Roux Attorneys Inc., Pretoria
For 3rd to 7th Appellants:	Adv C H J Badenhorst SC together with Adv N Notjé
Attorney for the 3rd to 7th Appellants:	Aaron Stranger & Associates, Johannesburg c/o Jacobson & Levy Inc., Pretoria
For the 1st Respondent:	Adv K Mvubu together with Adv W Isaacs and Adv B Phala
Attorney for the 1st Respondent:	Ningiza Horner Attorneys, Johannesburg c/o Ledwaba Maswai Attorneys, Pretoria