Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – GRAHAMSTOWN

Case no:975/2012
Date Heard: 18/03/2014
Date Delivered: 29/05/2014
Reportable

In the matter between:

T. H. **APPLICANT**

and

C. J. H. **RESPONDENT**

JUDGMENT

SMITH J:

Introduction

[1] The plaintiff sues for a decree of divorce and certain ancillary relief. Before the commencement of the trial on 18 March 2014, the parties applied for the question whether the accrual system applies to their marriage in terms of Chapter 1 of the Matrimonial Property Act, 88 of 1984 (“the Act”), to be heard and disposed of separately from the other issues. That issue had been defined in terms of paragraphs 5, 6, and 7 of the defendant’s amended counter-claim, and in terms of

prayer 2 thereof, he seeks an order declaring that section 2 of the Act does not apply to the parties' marital regime. I was satisfied that it would be convenient for that issue to be disposed of separately in terms of Uniform Court Rule 33(4), and accordingly granted the order and postponed the remaining issues for hearing at a later date.

[2] Essentially then the following discrete issues fell for decision:

(a) does the notarial contract, concluded by the parties in terms of a Court order issued on 20 December 1989, have the effect of an antenuptial contract as contemplated in terms of section 2 of the Act? and;

(b) if so, did the parties in any event expressly agree, in terms of the said notarial contract, to exclude the accrual system in the manner contemplated by section 2 of the Act?

[3] Mr *Knoetze,* who appeared for the defendant, assumed the duty to commence leading evidence without conceding that the defendant bore the *onus*. The defendant was the only witness to testify, since the plaintiff closed his case without calling any witnesses.

The Evidence

[4] Save for his assertion that the notarial contract expressly excluded the accrual system, the defendant's testimony served to confirm that the material facts were largely common cause. They are as follows.

[5] The parties got married to each other on 16 June 1989, in community of property. On 20 December 1989, however, they successfully applied to this Court

for an order granting them leave to change the matrimonial regime which applied to their marriage, and authorizing them to enter into a notarial contract to that effect. In his affidavit in support of that application, the defendant said that he and the plaintiff had orally agreed (before their marriage) that they should get married in terms of an antenuptial contract. At the time he was aware of the legal consequences flowing from a marriage in terms of an antenuptial contract, because his parents had been married in terms of that regime. He was also cognizant of the fact that the legal consequences of that marital regime would result in him and the plaintiff retaining ownership and control of their respective assets.

[6] He stated furthermore that he instructed his attorney to proceed with the application since he and the plaintiff had desired to carry out their, *"original intention of being married out of community of property, by antenuptial contract, excluding community of property, profit and loss and with the exclusion of the marital power."*

[7] On 20 December 1989 Erasmus J granted an order, *inter alia*, allowing the parties to change the matrimonial property system which applied to their marriage, and authorizing them to enter into a notarial contract. They thereafter duly executed and registered the notarial contract.

[8] Paragraph 1 of the notarial contract provides:

> "That there shall be no community of property between the said consorts, but that he or she shall respectively retain and possess all his or her estate and effects, movable and immovable, in possession, expectancy or contingency, or to which he or she has or may have any eventual right or title, as fully and effectually as he or she might or could have if the said intended marriage did not take place."

[9] It was on the basis of this factual matrix that the defendant contended that:

(a) the notarial contract was postnuptially concluded pursuant to a court order, and can therefore not have the effect of an antenuptial contract as contemplated in terms of section 2 of the Act; and

(b) the accrual system had in any event been expressly excluded in terms of paragraph 1 of the notarial contract, more particularly by the phrase: "*as fully and effectually as he or she might or could have if the said intended marriage did not take place*"

The onus

[10] While the question of the *onus* did not materially affect the determination of the question whether the notarial contract has the effect of an antenuptial contract as contemplated by section 2 of the Act (that being essentially a question of legal interpretation), it was, however, germane to the inquiry whether the accrual system had in fact been expressly excluded in terms of the notarial contact.

[11] In this regard Mr *Smuts SC*, for the plaintiff, correctly submitted that: the defendant seeks an order to the effect that section 2 of the Act does not apply to the parties' marital regime; that he has in addition averred an agreement to exclude the accrual system, and he must accordingly bear the *onus* to prove it. In *Odendaal v Odendaal* 2002 (1) SA 763 (W) the learned Judge in the *court a quo* had been asked to only pronounce on the issue of the parties' proprietary regime, and in particular, whether the parties had agreed to exclude community of property and the accrual system. On appeal, when called upon to decide which party bore the *onus*, Goldstone J (at paragraph 2) concluded that:

> "The Court a quo assumed without deciding that the *onus* of proving the agreement in issue was on the respondent who alleged it. In my view, the *onus* was in fact on the respondent. It was he who relied on an oral agreement specially pleaded by him. Moreover that agreement varied the normal matrimonial property regime, 'the presumption is in favour of the lesser deviation from the normal…' and the *onus* is on him who alleges such deviation. See *Edelstein v Edelstein NO and Others* 1952 (3) SA 1 (A) at 10A-B."

[12] I am accordingly of the view that the *onus* was on the defendant to prove that section 2 of the Act does not apply to the notarial contract concluded by the parties pursuant to the court order of 20 December 1989, and that the parties had agreed to exclude the accrual system from their matrimonial property regime. However, the issue of the *onus* had very little impact on my findings, since the material facts were largely common cause.

Is the notarial agreement an antenuptial contract?

[13] Mr *Knoetze* argued that the notarial contract is a postnuptial agreement concluded by the parties pursuant to a court order. He submitted that the parties did therefore not conclude an antenuptial contract in terms of section 2 of the Act, and Chapter 1 of the Act accordingly does not apply to their marriage. In my view this argument cannot be upheld.

[14] Section 2 of the Act provides as follows:

> "**Marriages subject to the accrual system**. –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."

[15] In terms of sections 86 and 87 of the Deeds Registries Act, 47 of 1937 ("the Deeds Registries Act"), an antenuptial contract, in order to have any effect against a person who is not a party thereto, must have been executed by a Notary Public, and tendered for registration in a Deeds Registry within three months after the date of its execution, or within such extended period as the Court may allow.

[16] Section 88 of the Deeds Registry Act allows for postnuptial execution of an antenuptial contract, "*if the terms thereof were agreed upon between the intended spouses before the marriage".* An antenuptial contract which has not been registered in accordance with these provisions, however, remains valid and effective between the parties thereto. Even a properly proved verbal contract would bind the parties thereto. (*Ex Parte Spinazze and Another NNO* 1985 (3) 650 (A)at 658 A-C*;* also *Lagesse v Lagesse* 1992 (1) SA 173 (D), at 176 G-J).

[17] In *Mathabathe v Mathabathe 1987 (3) SA 45 (WLD)* at 51, the Court held that section 88 of the Deeds Registries Act recognizes informal antenuptial contracts. Thus, "*if an antenuptial agreement (in the broad sense)"* was concluded by the intending spouses, no matter how informally, the Court is empowered by the Legislature to authorize the postnuptual execution thereof before a Notary Public; and its registration.

[18] The term "*antenuptial contract"* can thus mean either an informal agreement, or a properly executed contract, duly registered in terms of the Deeds Registries Act. The only difference is that the former is valid and binding only between the parties thereto, whereas the latter is universally enforceable.

[19] The question which now arises is whether the parties concluded such an informal antenuptial contract before their marriage and, if so, whether they agreed upon the terms thereof. In my view they clearly did.

[20] There can be little doubt that the parties agreed to get married to each other out of community of property. They have both unambiguously asserted this fact in their respective affidavits filed in support of their application for leave to change their matrimonial regime.

[21] In my view the notarial contract, registered pursuant to the court order of 20 December 1987, is therefore an antenuptial contract within the meaning of both sections 88 of the Deeds Registries Act and 2 of the Act, since the terms thereof had been agreed upon before the marriage.

[22] Mr *Knoetze* submitted furthermore that the application to change the parties' matrimonial property system was brought in terms of section 21 of the Act. In terms of that section a Court may allow spouses to change their matrimonial property system if it is satisfied that: there are sound reasons for the proposed change; sufficient notice had been given to creditors; and no other person will be prejudiced by the change. According to *Mr Knoetze*, section 21 makes no reference to section 2 of the Act, and the postnuptial changing of a matrimonial property regime in terms of that section does therefore not have the legal consequences of an antenuptial contract contemplated in section 2 of the Act.

[23] The fundamental problem with this argument is that it is simply not borne out by the evidence. It must have been clear from my summary of the evidence that, in

the application of 20 December 1989, the parties sought leave to execute and register an agreement which they had concluded before their marriage.

[24] In addition to the averments contained in the parties' supporting affidavits, to which I have alluded above, their attorney, Mr Sellick, significantly also said in his affidavit that the parties consulted him in regard to an antenuptial contract. He averred further that: *"they seemed to know about antenuptial contracts and what their purpose was and were disappointed when I advised them that the document should have been signed before the marriage."*

[25] There can therefore be little doubt that the parties had approached Court on the basis that they had agreed, before their marriage, to get married in terms of an antenuptial contract which would have excluded community of property and of profit and loss. They had, however, failed to reduce it to writing and register it before their marriage, because they were ignorant of the legal requirements.

[26] The logical consequence of these findings is that, unless I find that the accrual system had been expressly excluded by the notarial contract, the parties' marriage would be subject to the provisions of Chapter 1 of the Act.

Was the accrual system expressly excluded?

[27] In this regard Mr *Knoetze* submitted that the words, "*as fully and effectually as he or she might or could have if the said intended marriage did not take place",* must be construed to mean that the parties have expressly excluded the accrual system. He argued that the use of this phrase clearly evinces the parties' intention

to exclude any form of sharing in each other's estates, either through community of profit and loss, or the accrual system.

[28] Mr *Knoetze* has relied for his submissions in this regard heavily on the judgment of Kriek J in *Lagesse v Lagesse (supra)* where the learned judge interpreted similar words, used in respect of an intention to exclude community of profit and loss, as excluding the accrual system. The learned Judge in that case was, however, required to rule on the basis of a stated case, in terms of which, *inter alia,* it had been agreed that an election for a marriage to be governed by the provisions of Ordinance 50 of 1949 (Mauritius), would automatically have the effect of excluding the accrual system. Section 2 of the Act, however, requires express agreement by way of an antenuptial contract.

[29] The defendant has conceded during his testimony that he did not have the accrual system in mind when he and the plaintiff concluded the notarial contract. This much is evident from the following answers to Mr Smuts's questions in this regard:

> "Q - Now did I understand correctly from your affidavit in the proceedings that were before the Motion Court in Grahamstown last Thursday that at the time when you concluded this agreement you were wholly unaware of the existence of such a thing as the accrual system.
>
> A - That is correct.
>
> Q - Mr Sellick didn't draw it to your attention, didn't tell you about the accrual system?
>
> A - I unfortunately can't remember 25 years ago, what he did draw my attention was that it was as good as not having been married.
>
> Q - Well if he had drawn it to your attention you couldn't have said under oath in an affidavit that was before court last Thursday that you were unaware of the existence of this Matrimonial Property regime?

A - I cannot remember the accrual but I can definitely remember him discussing that with me.

Q - You can definitely remember him discussing?

A - Saying that to me and pointing that out to me.

Q - Yes, and it is correct, is it not, Mr Hume that this agreement which appears from page 19 to 21 of this bundle which was concluded between you and your wife makes no reference to the accrual system?

A- That is correct.

Q - Certainly it doesn't record an agreement between the two of you that the accrual system should be excluded from this marriage, there is nothing like in this contrary?

A - I don't know.

Q - Well have a look at it then. It is before you. See if you can find any agreement recorded which expressly excludes the application of the accrual system to your marriage, it is in front of you pages 19 to 21.

A - I am quite sure if you have checked that then it will be like that."

[30] In *Odendaal v Odendaal (supra)*, at 769D-H, Goldstone J concluded that, since the respondent was ignorant of the accrual system at the time of contracting, he did not discharge the *onus* of proving that the parties had agreed to exclude the sharing of the increase of their estates in their future marriage.

[31] Mr *Smuts* has, in my view, correctly argued that in this matter also, given the parties' ignorance of the accrual system, the phrase, *"as fully and effectually as if the said intended marriage did not take place"*, could clearly only have been intended to emphasize the exclusion of community of property, and not as a reference to the accrual system.

[32] In terms of section 2 of the Act, the accrual system can only be excluded expressly. While I do not intend to embark on an extensive discourse on the meaning of the term "expressly", I do not think that is possible for parties to "expressly" agree to contract out of legal consequences - the existence of which they are not even aware of at the time - by virtue of some oblique phrase which could serendipitously be construed to have that effect. The legislature intended the accrual system to be beneficial, and it has thus been made applicable to every marriage, unless it has been "expressly" excluded by agreement in terms of an antenuptial contract. (*Odendaal v Odendaal (supra),* at 768H-I.) The term "expressly" must therefore, in my view, at the very least, denote a conscious decision by consenting parties, who are cognizant of the accrual system, to contract for its exclusion.

[33] In summary then, I conclude that:

(a) the notarial contract, executed and registered pursuant to the court order of 20 December 1989, qualifies as an antenuptial contract as contemplated in section 2 of the Act; and

(b) the accrual system has not been expressly excluded by the notarial contract, and accordingly applies to the parties' matrimonial property system.

[34] Regarding the question of costs, Mr *Knoetze* submitted that if I find for the plaintiff, I should not award costs of two counsel. I agree with Mr *Smuts*, however, that the issue of the matrimonial property regime which applies to the parties'

marriage is a significant element of the dispute between them, and the employment of two counsel was therefore a wise and necessary precaution.

Order

[35] In the result the following order issues:

(a) Prayer 2 of the defendant's claim in reconvention is dismissed.

(b) The defendant is ordered pay the plaintiff's costs, such costs to include the costs attendant upon the employment of two counsel.

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J. E SMITH
JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff	:	Advocate Smuts, SC
Assisted by	:	Advocate De La Harpe
Attorneys for the Plaintiff	:	Wheeldon Rushmere and Cole 119 High Street Grahamstown Ref: O Huxtable/Michelle/S14613
Counsel for the Defendant	:	Advocate Knoetze
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