

SOUTH AFRICA / JUDGMENT

**Barnard NO v Van der Merwe (7706/2007
– A767/2009) [2011] ZAGPPHC 228; 2012
(3) SA 304 (GNP) (2 December 2011)****[2011] ZAGPPHC 228****COURT**

North Gauteng High Court, Pretoria

BEFORE

EM Makgoba, E Bertelsmann, FG Preller

CASE / FILE NUMBER

7706/2007 – A767/2009

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Source record**REPORTABLE****IN THE NORTH GAUTENG HIGH COURT,
PRETORIA****(REPUBLIC OF SOUTH AFRICA)****DATE: 02/12/2011****30/11/2011****CASE NO: 7706/2007 - A767/2009****In the matter between:**

CELESTE

BARNARD.....APPELLA
NT(In her capacity as the executrix
of the estate of the lateWillem van der Merwe subsequently
substituted by Shirley Anne Le Noury)

And

CAROLINE VAN DER MERWE (formerly

BARTUM).....RESPONDENT

JUDGMENT

MAKGOBA. J

[1] This is an appeal against a decision of a single judge of this division (PHATUDI J) who found that:

1.1 The applicant has a claim against the estate of the late Willem Karel van der Merwe (“the deceased”) for the accrual as envisaged in clause 6 of an ante-nuptial contract entered into between the applicant and the deceased;

1.2 That the applicant’s accrual claim arose as of right and no separate claim has to be lodged with the respondent in order for the accrual principle to apply;

1.3 That clause 6 of the ante-nuptial contract entered into between the applicant and the deceased shall be interpreted by the respondent to include the following in the accrual due to the applicant:

All movables, all immovable properties, all insurance policies, all household furniture and goods and the joint banking accounts, if any, acquired subsequent to their marriage;

1.4 The accrual, as aforesaid, be determined and included in the final liquidation and distribution account in the estate of the deceased.

[2] The present appellant, who is the executrix in the estate of the late Willem Karel van der Merwe, was the respondent/defendant in the court a quo. The respondent in this appeal is the widow of the late Willem Karel van der Merwe and was the applicant/plaintiff in the court a quo.

For purposes of this appeal the parties will be referred to as the appellant and respondent respectively.

[3] The main issues in this appeal are the findings set out in paragraph 1.2 and 1.3 above. In practical terms the said findings had the following effects for the parties:

3.1 The executor had to include a claim for the respondent’s accrual in his liquidation and distribution account and there was no need for her to lodge such a claim.

3.2 Clause 6 of the ante nuptial contract between the parties had to be interpreted to take into account for the respondent’s claim the increase in the deceased’s estate arising from the following assets: all movables, all immovable properties, all insurance policies, all household furniture and goods and the joint banking accounts, if any, acquired subsequent to the marriage.

- [4] The dispute in the matter arose from the winding-up of the deceased estate of the respondent's spouse, the late Mr Van der Merwe ("the deceased"). The parties made their marriage subject to the accrual system in terms of an ante-nuptial contract executed on 30 October 1986. The deceased passed away on 21 January 2004 and the appellant as the appointed executrix dealt at all material times with the administration of the deceased estate.
- [5] The administration of the estate was uneventful. Notice for the lodgement of claims was given on 5 March 2004 as provided for in terms of section 29 of the Administration of Estates Act 66 of 1965.

No claim was lodged on behalf of the respondent although she was informed of the aforementioned advertisement. The first liquidation and distribution account was prepared and same was advertised on 10 September 2004. The first liquidation and distribution account did not include an accrual claim. The respondent had knowledge thereof and was specifically made aware of her right to lodge an objection.

No objections were received and distribution to the heirs was effected after the expiry of the objection period as a result whereof substantial amounts were paid out to the heirs and legatees, which included the respondent.

- [6] During early 2005 and belatedly so, the respondent raised a potential accrual claim against the estate in terms of the provisions of the Matrimonial Property Act 88 of 1984.

Material disputes arose between the executor and the respondent as to the nature and extent of the accrual claim and it thus became necessary to have the disputes resolved by the court a quo.

- [7] It is significant to mention that an attorney, Mr Coetzee, had all along been engaged by the respondent during the whole process of the administration of the deceased estate.

[8]

8.1 The case started as an opposed motion which was referred to trial on the following issues in terms of an order by SHONGWE DJP:

"6. The issues to be decided at the trial are limited to:

6.1 Whether there was just reason for the Respondent not to have dealt with the accrual claim of the Applicant in the first liquidation and distribution account in the estate of the late Willem Karel Van der Merwe;

6.2 Whether it was necessary for the Applicant to have lodged and to prove her accrual in the aforesaid deceased estate;

6.3 The quantum of the Applicant's accrual claim."

8.2 At the commencement of the trial the parties asked the court a quo to decide whether three categories of assets were subject to the accrual. The specific assets were:

8.2.1 Three agricultural holdings (Holdings 31, 32 and 33 Wheatlands, Randfontein, valued at R435 000.00, R90 000.00 and R120 000.00 respectively);

8.2.2 Two investments in unit trusts (a Sanlam unit trust and an Old Mutual unit trust, valued at R12 527.41 and R62 415.68 respectively); and

8.2.3 Various insurance policies totalling R5 872 681.00.

[9] In order to resolve the first issue in this appeal, whether the respondent's accrual claim arose as of right and required no separate claims to be lodged with the executrix, one has to determine whether an accrual interest is a claim against the estate or whether it is an asset or an inheritance in the estate.

[10] The above question can be answered in the light of the description of the "accrual system" applicable to the matrimonial regime. The accrual system has been described as "a deferred community of property" or "a deferred sharing of the profits of spouses married out of community".

See: Sinclair: Law of Marriage page 142

[11] On dissolution of marriage, whether by death or divorce, the net increases in the spouses' respective estates are notionally added up and then divided equally. The accrual is thus the difference between the net of the estate at commencement, properly escalated, and the net value at dissolution. At dissolution of marriage a calculation is made by allowing to the spouse, whose estate had no or a smaller accrual, a claim against the other spouse or his/her estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses. In short, the accrual of each separate estate is first established, the accruals are added together and then divided by two. Each spouse is entitled to half of the total established in this fashion. The spouse who holds more than a half share of the accrual assets is obliged to pay half of the difference to the other. See: Radebe and Another v Sosibo NO and Others 2011 5 SA 51 at 54C-E.

[12] Accordingly, in the present case the first step to be taken was the determination of the accrual of the separate estates of both the deceased and the respondent and then to calculate what claim, if any, either spouse or their executor had against the estate of the other.

Section 3(1) of the Matrimonial Property Act 88 of 1984 provides:

"At the dissolution of a marriage subject to the accrual system, by divorce or by death of one or both 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."

The word “claim” means “a demand for something as due; a statement of one’s right to something” as defined in the Oxford Shorter Dictionary, 5th ed. 2002, and accepted in *Van Immerzeel & Another v Santam Ltd* 2006

(3) SA 349 (SCA) on p 354 par [12]:

“[12] The natural meaning of ‘claim’ is ‘a demand for something as due; an assertion of a right to something’ (The Shorter Oxford Dictionary). This definition was also accepted in respect of a ‘claims policy’, by Stocker LJ in Thorman v New Hampshire Insurance Co. (U.K.) Ltd and Home Insurance Co. [1988] 1 Lloyd’s Rep. 7 (CA) at 15. In the same case Donaldson LJ at 11 agreed ‘that a claim within the meaning of the policy was the assertion by a third party against the insured of a right to some relief because of the breach by the insured of the duty referred to in section 1 of the policy, i.e. professional negligence.’ (per Streicher JA)

See further *Albert v Pearse, N.O. & Another* 1973 (3) SA 633 (N) at 637H to 638A.

The Afrikaans text of the Matrimonial Property Act has been signed. The Afrikaans text uses the word “vordering” where the English term is “claim”. “Vordering” means exactly the same as “claim”: *Kommissaris van Binnelandse Inkomste v Boedel Du Toit* 1985 (4) SA 594 (NC) at 598D-E.

[13] Section 4(2) of the Matrimonial Property Act provides that the accrual is to be determined before effect is given to any testamentary disposition or donatio mortis causa.

It is therefore clear that the quantum of the accrual has to be determined and a claim for it be lodged against the estate. Hence in the liquidation and distribution account an accrual claim will appear as an ordinary claim against the estate and not as a part thereof which is to be excised before any claim or inheritance is considered.

[14]

14.1 It stands to reason that the duty must of necessity lie on the surviving spouse to inform the executor of the existence of such a claim and to quantify it. This was not done by the respondent until after the first liquidation and distribution account had become finalised. It is not incumbent upon the executor (the appellant in this case) to consider any claim which has not been duly lodged and which he could not possibly quantify.

14.2 The respondent seems to have regarded her position as similar to that of a widow who was married in community of property. An executor dealing with an estate where the marriage was in community of property knows that after taking care of the debts of the joint estate, one half of what remains belongs to the widow and is awarded to her before even beginning to consider inheritances. There is no need for her to prove a claim against the estate and he knows that the heirs have no claim on what belongs to her.

[15] I turn to the second issue raised in this appeal. This involves the identification of the assets that should be considered to determine the accrual claim. It hinges upon a proper interpretation of the provisions of clause 6 of the ante-nuptial contract which provides as follows:

“6. The accrual system referred to in chapter 1 of the Matrimonial Property Act No 88 of 1984 (herein referred to as the Act) (but excluding any amendments thereof) shall apply to the following assets of the said Willem Karel van der Merwe and Caroline Bartum:

- (a) any movable or immovable property acquired by one or both of the intended consorts subsequent to their marriage which is ordinarily used by both of them while they are residing together for shelter or transportation, or for household, educational, recreational, social or aesthetic purposes.

Save as aforesaid the said accrual system is expressly excluded in respect of the intended marriage.”

[16] The general provision in respect of the acquisition of any movable or immovable property by either or both spouses subsequent to their marriage is qualified in clear and specific terms in clause 6. The first qualification is that the accrual relates to acquired property which was ordinarily used or enjoyed by both of them while they reside together. The further qualification is that the property acquired must have been used and enjoyed by both for the specific purpose of shelter or transportation or household or educational or recreational or social or aesthetic purposes.

The accrual regime applies only to those assets that meet both qualifications.

[17] The respondent has claimed that the assets listed in paragraph 8.2 above should be taken into account when calculating the accrual. The court a quo granted an order in her favour in this regard. With the provisions of clause 6 of the ante-nuptial contract in mind we now have to decide whether the court order a quo was correct.

[18] The three agricultural holdings, namely Polt 31, Wheatlands, Randfontein, Plot 32 and 33 Wheatlands, Randfontein were acquired by the deceased. There were offices and workshops for the deceased’s transport business on the properties. Neither of those activities carried on the holdings or uses fall within the terms of clause 6 of the ante-nuptial contract. The properties are therefore not taken into account when calculating the accrual.

[19] The insurance policies and unit trusts clearly do not fall into any category listed in clause 6 of the ante-nuptial contract and cannot be part of the accrual of the deceased’s estate.

[20] The respondent is entitled to half of the funds in the joint banking account, if any. The remainder cannot form part of any accrual.

[21] The loose assets in the form of farming equipments do not fall into any category listed in clause 6 of the ante-nuptial contract and cannot form part of any accrual.

- [22] The appellant has conceded and/or accepted that movables in the form of motor vehicles, furniture and household goods are subject to the accrual, regime.
- [23] I come to the conclusion that the judgment and/or order of the court a quo cannot stand. The appeal is accordingly upheld with costs, including the costs occasioned by the employment of two counsel and the following is substituted for the order of the court a quo:
1. It is declared that there was just reason for the defendant not to have dealt with the accrual claim of the plaintiff in the first liquidation and distribution account in the estate of the deceased;
 2. It is declared that it was required of the plaintiff to have lodged and proved an accrual claim in the estate of the deceased and that the normal principles relating to the late claims should be applied in respect of the plaintiff's accrual claim as envisaged in clause 6 of the ante-nuptial contract entered into between the plaintiff and the deceased;
 3. Clause 6 of the ante-nuptial contract entered into between the plaintiff and the deceased shall be interpreted as not including the following in the calculation of the share of the deceased's accrual that is due to the applicant:
 - 3.1 Plots 31, 32 and 33, Wheatlands, Randfontein;
 - 3.2 The two investments in unit trusts reflected as items 8 and 9 in the first liquidation and distribution account; and
 - 3.3 The insurance policies listed as items 44 to 58 and 64 of the first liquidation and distribution account,
 4. It is declared that the plaintiff is entitled to half of the funds in the joint banking account, if any.
 5. Subject to the above, the plaintiff accrual claim be quantified and included in the final liquidation and distribution account in the estate of the deceased.

The applicant/plaintiff to pay the costs on party and party scale.

EM MAKGOBA

JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

E BERTELSMANN

FG PRELLER

7706/2007/sg

Heard on: 5 October 2011

For the Appellant: Adv S J Maritz SC & N J Louw

Instructed by: Rooth & Wessels, Pretoria

For the Respondent: Adv A Knoetze

Instructed by: Uys Matyeka Swartz Attorneys

c/o Hack Stuppel & Ross, Pretoria

Date of Judgment:

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Prepared on 11 October 2026 · Esheria