

SOUTH AFRICA / JUDGMENT

G v G (17650/14) [2018] ZAGPJHC 499 (21 September 2018)

[2018] ZAGPJHC 499

COURT

South Gauteng High Court, Johannesburg

BEFORE

J Hiemstra

CASE / FILE NUMBER

17650/14

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 17650/14

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

21/9/2018

In the matter between

G: B (born J) PLAINTIFF

and

G: Y DEFENDANT

J U D G M E N T

HIEMSTRA AJ

THE PLEADINGS

[1] This is a claim and a counterclaim in which both parties seek divorce and ancillary relief. There are two issues for determination.

1. Whether the parties are married in community of property, or, in terms of an ante-nuptial contract, out of community of property with exclusion of the accrual system; and
 2. Whether the plaintiff is entitled to maintenance for life or until remarriage, or for a limited duration.
- [2] The plaintiff alleged in paragraph 4 of her particulars of claim that the parties were married in community of property on 25 November
2002. The defendant admitted the marriage but alleged that the parties had married out of community of property in terms of an antenuptial contract, with the express exclusion of the accrual system. As proof, he attached a document, marked “CC1”.

Ex facie the document, it is an antenuptial contract between the parties, signed by both and attested by a notary public.

- [3] In her reply to a request for trial particulars the plaintiff states as follows:

“1.1.1 the plaintiff never entertained the necessary intention to enter into and/or conclude the antenuptial contract and/or to marry the defendant out of community of property in terms thereof;

1.1.2 at all times prior to and at the time of entering into the marriage the plaintiff and the defendant agreed and intended that they would be married in community of property;

1.1.3 accordingly, and, in the event of the defendant having intended to conclude the antenuptial contract and to marry the plaintiff out of community of property, which the plaintiff denies, there was no meeting of the minds of the parties in relation to the entering into the antenuptial contract and/or their marrying each other out of community of property;

1.1.4 as a result, the parties did not enter into a valid and binding antenuptial contract whether in the form of annexure “CC1”

to the defendant’s counterclaim or at all;

1.1.5 in any event, the alleged antenuptial contract, Annexure “CC1” to defendant’s counterclaim, was not properly and lawfully entered into and/or executed and is accordingly not binding and/or enforceable as between the parties, ...”

- [3] It is not clear from this plea how the plaintiff alleges that her signature came to appear on the document. For that reason the defendant gave notice of intention to call a handwriting expert to testify whether the signatures and initials purporting to be those of the plaintiff, are authentic. However, on the first day of the trial, the plaintiff sought to amend her plea to the counterclaim in such a manner that it became clear that she does not dispute the authenticity of her signature. Counsel for the defendant objected to the amendment, but I allowed it in order for the matter to proceed to finality. Apart from the issue of the costs of the expert witness, the amendment did not prejudice the defendant. The only effect of it was to make clear exactly what the nature of her case is. It is not so far-reaching that counsel would not have been able to obtain instructions on the new version in a matter of minutes.

[4] The amendment inserted the following new paragraph:

“Plaintiff appended her signature to the document marked “CC1” attached to the defendant’s counterclaim, but pleads that she is not bound by the terms of the thereof because she signed it without reading it, and in error on the assumption that the document pertained to the registration of her marriage to the defendant with the Department of Home Affairs in order to change her surname from J to G, and to apply for a passport bearing the surname G in order to accompany the defendant to Hajj in Saudi Arabia.”

B. THE EVIDENCE

- [5] On 21 November 1999 the parties married in terms of Islamic rites. Since Islamic marriages are not recognised in South African law, the marriage was not registered in the South African population register. Consequently, the plaintiff retained her maiden surname, J. The defendant testified that marriages concluded in terms of Islamic law (Nikah) are out of community of property. Mr Nasser Aboobakar Tayob, an attorney and notary public, supported that view. However, neither of the two witnesses was qualified as an expert in Islamic law. I can, therefore, have no regard to their opinions in this regard. However, this is of no consequence. As Islamic marriages are not recognised, the parties have the same status as unmarried persons. Cohabitation does not create any special property regime or community of property between the parties. It may, however be forged through contract, but this is not the case here. In certain circumstances it may be found that the parties had established a universal partnership with joint ownership of some of all their assets. However, that has not been pleaded by either party.
- [6] Subsequent to the marriage, the parties decided to undertake the Hajj, or pilgrimage to Mecca, which all Moslems, in terms of Islamic faith, are required to undertake at least once in a lifetime, provided they have the financial means. The defendant testified that he had heard that they would be “hassled” at customs in Saudi Arabia if the couple have different surnames in their passports. To resolve this dilemma, it was recommended that they enter into a civil marriage in South Africa in order to have the marriage registered and for his wife, the plaintiff, to assume his surname. The defendant knew of an Imam, who was a marriage officer who had the authority to officiate marriages that could be registered as civil marriages. The person was a certain Mr Hassim, who has in the meantime passed away. The parties then agreed to enter into a civil marriage and to approach Mr Hassim to officiate.
- [7] The defendant arranged with Mr Hassim to officiate the marriage. The plaintiff testified that the parties, together with their 3-year old son, proceeded to the home of Mr Hassim in the early evening of 25 October 2002. She said that only Mr Hassim was present at his home. He conducted some kind of a ceremony and then handed them documents to sign. She duly signed where Mr Hassim had indicated and initialled the separate pages. The defendant also signed the papers. She did not read the documents because she trusted her husband and was satisfied that their marriage would be in community of property. She did not realise that one of the documents was an antenuptial contract. The alleged antenuptial contract was, as

stated before, attached to the defendant's counterclaim, and marked "CC1" Apart from the signatures of the plaintiff and the defendant and Mr Hassim on "CC1", there appear two other signatures: a person named Khumalo, and Mr Nasser Aboobaker Tayob, a notary public. The plaintiff denied that persons named Khumalo or Tayob had been present. (Mr Tayob testified that Ms S Khumalo had been his assistant and that she may have accompanied him to the home of Mr Hassim on the occasion of the marriage. However, he has no independent recollection of the marriage.)

- [8] The defendant declared that he had explained to the plaintiff that they would marry out of community of property with the exclusion of the accrual system. He said that she fully understood it and had explicitly agreed. He further said that Mr Hassim had, before he solemnised the marriage, also explained the consequences of a marriage out of community of property and the exclusion of the

accrual system. After the ceremony, Mr Tayob again explained the antenuptial contract to the parties and presented the contract for them to sign.

- [9] That plaintiff denied that and maintained that she had never met Mr Tayob or Ms Khumalo. She understood the process as merely pertaining to registration of the marriage at the Department of Home Affairs in order to change her surname to that of her husband. She understood that that was necessary in order to apply for a passport bearing her married name. She thought that, in terms of South African law, she was married in community of property.

- [10] Sadly, the marriage turned out to be an unhappy one. The plaintiff pleaded that the defendant had on various occasions and more particularly on 4 May 2014 violently assaulted her and their teen-aged son, Mohammed. As a result, she left the common home on 4 May 2014 with her children and went to live with her parents in Ermelo. Her father had in the meantime passed away.

- [11] The plaintiff instituted divorce proceedings on 16 May 2004 and the defendant entered appearance to defend. It is common cause that the marriage relationship between the parties had irretrievably broken down. As a result very little evidence was presented as to the defendant's alleged violent behaviour. More details appear from the affidavits submitted in the plaintiff's application in terms of Rule 43 for interim relief pending the divorce. I do not find it necessary for the purposes of this judgment to deal with that evidence.

- [12] The defendant has remarried and continues to live in the parties' former common home in Mayfair, Johannesburg. The parties have reached agreement on the primary residence of the children with the plaintiff and the visitation and contact rights of the defendant. They have also agreed on the amount of maintenance to be paid in respect of the children. However, they could not reach agreement on maintenance of the plaintiff.

C. THE MARRIAGE REGIME

[13] The versions of the two parties are mutually exclusive. The plaintiff bears the onus of proof on a balance of probability. The locus of the onus of proof will only be decisive if I cannot make a finding on the evidence before me. In deciding which version is more probable, I am guided by the judgment of Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie and Others* 2003 (1) SA 11 (SCA) (the SFW case) par [5]. Nienaber JA said that the technique applied by courts in resolving factual disputes is to make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. There are also subsidiary

considerations to be taken into account. They overlap to some extent so that it is not possible to consider them *seriatim*. However I take them into consideration

[14] My impression of the witnesses is the following:

The plaintiff

The plaintiff is an exceptionally timid woman. She was hesitating and unsure of herself as a witness. She displayed utter ignorance of the financial affairs of the family. She trusted her husband implicitly in all matters financial. She was restrained in her testimony and throughout hesitated to contradict the defendant. She testified that she never had anything to do with the financial aspects of the marriage and she knew nothing about the defendant's financial affairs. He provided for all the needs of the family and allowed her the use of an unlimited credit card for household purchases, even for relatively major items such as appliances. She never had to concern herself with the question of affordability.

The defendant

In contrast, the defendant is a forceful and self-assured man. Comparing the parties' personalities in the witness box, I am convinced that the defendant completely dominated the plaintiff. He appeared insincere in his testimony, giving glib, one-line answers.

[15] But, evaluation of the credibility of witnesses merely on impressions gained under cross-examination is unreliable. Evaluation of the contrasting versions on their probabilities is more substantial. In my view the probabilities overwhelmingly favour the plaintiff's version. The purported antenuptial contract is so patently contrary to the plaintiff's financial interests that it is improbable that she would have consented to it after rational consideration. Had she understood that she would have no claim against the estate of the defendant in the event of divorce or death, she is unlikely to have entered into the contract.

[16] The plaintiff wishes to resile from the antenuptial contract on the ground of *iustus error*, or reasonable or pardonable error. Counsel for both parties provided excellent summaries of the legal principles around the concept of *iustus error*, for which I thank them. I do not intend to exhaustively reiterate the law. I have no quarrel with the positions set out by counsel. The point of departure is the general principle, expressed by Innes CJ in *Burger v Central South African Railways* 1903 TS 571, namely that:

“it is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. It is for the party seeking relief from an agreement that he has signed to convince the Court that he was misled as to the purport of words to which he was thus signifying his assent”

‘A unilateral mistake, other than a mere error in the motive, also does not allow a party labouring under the erroneous belief to repudiate his apparent assent to a contract except in very narrow circumstances, ...’

The court referred to a number of judgments and continued:

“The effect of these decisions is that, for a unilateral mistake to vitiate the necessary assent to a contract, the error must be a iustus error. In this respect the ‘courts in applying the test have taken into account the fact that there is another party involved and have considered his position. They have, in effect said; Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself.”

[17] Davis AJ (as he then was) provided a useful guide in deciding whether a party acted in justifiable error. In *Prins v Absa Bank Ltd* 1998(3) SA 904 (C), he proposed the following series of questions that can be used to determine whether reliance in terms of the conduct of the party allegedly creating the impression of consensus and the conduct of the other party in believing the impression:

“(a) Is there consensus?

(b) *If not, is there dissensus caused by a mistake?*

(c) *Is the other party aware of the resiler’s mistake?*

(d) *Who induced the mistake and was done by commission or omission, which was either fraudulent or even innocent?”*

[18] Applying these questions, *mutatis mutandis*, I find that the plaintiff cannot be held to the terms of the antenuptial contract. There was patently no consensus; the dissensus

was caused by mistake on the part of the plaintiff; the defendant was probably aware that the plaintiff did not appreciate the implications of the antenuptial contract. I reject, as improbable, the defendant’s evidence that he had explained the antenuptial contract to the plaintiff. I also accept the plaintiff’s evidence that Mr Tayob had not explained the antenuptial contract to her. As I have already said, it is highly unlikely that any person by their full senses can conclude a contract which is so clearly against his or her interests. I cannot find that the defendant by commission induced the mistake on the part of the plaintiff, but I find it probable that he ‘snatched the bargain’ when he knew that the plaintiff was oblivious of the implications of the contract.

[18] I therefore find that the plaintiff entered into the contract in error. Given the personalities of the parties I believe that her error was justified.

MAINTENANCE

- [19] The plaintiff and her three children live in Ermelo with her mother in a three-bedroomed house. She shares a room with her eldest son and the other two children share a room. She works in the family jewellery business and earns a salary of R5 000 per month in cash. She probably pays no tax on her earnings. The defendant pays her R10 000 per month for the maintenance of the children.
- [20] The defendant made a with-prejudice offer of settlement to the plaintiff in terms of Rule 34. He tendered maintenance in respect of the children, which the plaintiff has accepted. In respect of the plaintiff, he tendered rehabilitative maintenance in the sum of R3 500 per month for a period of twenty-four months. He has in the meantime increased the tender to R5 000 per month for 36 months.
- [21] The parties have disclosed their financial positions, and it is clear that the defendant can afford to pay maintenance to the plaintiff, not only for a limited period, but indefinitely. At the same time, the plaintiff can survive financially in her current living conditions. However, that is largely through the largesse of her mother. She cannot indefinitely share a room with her son, who is 17 years old. She will soon be compelled to find her own accommodation. In any event, during her marriage, she became accustomed to a life of relative luxury and the defendant is obliged to maintain her on the level she had become accustomed to.
- [22] In his testimony, the defendant argued that the plaintiff should be able to find much more lucrative employment, or conduct her own business. According to the defendant's answering affidavit in the plaintiff's Rule 43 application, he had paid, during the marriage, over R20 000 for the plaintiff to attend a full-time sewing and dress design course, which she completed. She also completed an advanced workshop in Abaya (traditional clothing) construction as well as drawing & illustration workshop. The defendant admitted as such, but maintained that these courses do not assure her employment of business opportunities. I got the impression that the plaintiff is not an enterprising person. She did nothing to pursue career opportunities that these qualifications may have presented. However, the plaintiff never worked during her marriage. She never had to concern herself with the family's financial affairs. That is not conducive to developing an entrepreneurial mind-set. She does not appear to me to have the personality or the drive to start and maintain a business of her own. She works in the family business, which is well-established. She may progress in that business, but one cannot predict to extent to which she may become self-sufficient.
- [23] The defendant is obliged to maintain the plaintiff for as long as she is dependent on his support to maintain her living standard. It cannot be predicted when she will be able to fully maintain her living standard. If the plaintiff becomes self-sufficient, the defendant will be able to approach a court with the requisite jurisdiction for a reduction of the maintenance payable to the plaintiff.

In the result, I make the following order:

A decree of divorce is hereby issued;

It is declared that the marriage concluded between the parties on 25 October 2002 is in community of property;

The joint estate of the parties is to be divided equally between the parties;

The plaintiff and the defendant shall retain full parental responsibilities and rights as contemplated in section 18(2) of the

Children's Act 38 of 2005 of their minor children;

The children's primary residence shall be with the plaintiff;

The defendant shall have parental responsibilities and rights with regard to contact with the minor children as contemplated in section 18(2) of the Children's Act as set out in paragraph 7 below;

The implementation of the defendant's contact with the minor children is subject to the following provisions:

7.1 Dr V.A. Jaggan, a psychologist, is forthwith appointed in order to:

7.1.1 provide guidance and assistance to the minor children in order to prepare the children concerning the implementation of sleepover contact with the defendant and to assist them with the issues pertaining to contact with the defendant, as well as any emotional difficulty they may be experiencing;

7.1.2 provide as far as possible, or facilitate individual, reunification, and/or bonding therapeutic assistance in order to strengthen the relationship between the defendant and the minor children, if required;

7.1.3 evaluate, monitor, structure, facilitate and/or phase in extended contact between the defendant and the minor children when deemed to be in the interests of the minor children. In the event that Dr Jaggan has deemed it to be in the best interests of the children to implement a phase-in contact schedule;

7.1.4 guide the parties and/or provide or facilitate therapy and/or parental guidance and/or an anger management course concerning both of the parties;

7.1.5 monitor the situation and make recommendations regarding any element pertaining to the application of the parties' parental responsibilities and rights, if necessary.

7.1.6 Assist the parties with the resolution of any future disputes and the compilation of a parenting plan

The defendant shall pay maintenance to the plaintiff in respect of their minor children in an amount of R10 000.00 per month, which payment shall be made monthly in advance by no later than the 7th day of each month with effect from 7 September 2018;

Notwithstanding the contents of paragraph 8 above, same shall not be construed as a waiver by either of the parties' rights to forthwith apply to court for a variation of such maintenance;

The defendant shall make payment either to the plaintiff or to the creditor/s concerned against statements of amounts produced to him of:

10.1 all reasonable medical and dental expenses in respect of the minor children and for this purpose he shall retain the minor

children on the hospital plan at his costs and pay all of the reasonable excess medical and dental expenses not covered by the

benefits of such plan;

10.2 all reasonable school fees and levies including the reasonable cost of prescribed books, stationery and school uniforms;

10.3 all reasonable extramural, sporting, cultural and academic activities and sporting equipment and attire relating thereto;

The defendant shall pay maintenance to the plaintiff in an amount of R10 000.00 per month, which payment shall be made monthly in advance by no later than the 7th day of each month with effect from 7 September 2018, until her death or remarriage, whichever occurs first;

The defendant shall make payment either to the plaintiff or the creditor/s concerned against statements of amounts to be produced to him or all reasonable medical and dental expenses in respect of the plaintiff and for this purpose shall retain the plaintiff on the hospital plan at the defendant's cost and pay all of her reasonable excess medical and dental expenses not covered by the benefits of such plan;

Save for the costs of the handwriting expert, Mr Cecil Greenfield, the defendant shall pay the plaintiff's costs of this action.

J. HIEMSTRA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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