

SOUTH AFRICA / JUDGMENT

**K.J.S v M.J.S (14396/2010) [2015]
ZAKZDHC 43; 2016 (1) SA 64 (KZD);
[2015] 3 All SA 85 (KZD) (25 May 2015)
[2015] ZAKZDHC 43**

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Kruger

CASE / FILE NUMBER

14396/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: 14396/2010

In

the matter between:

K[...]

J[...]

S[...].PLAINTIFF

and

M[...]

J[...]

S[...].DEFENDANT

JUDGMENT

(delivered on: 25th May 2015)

KRUGER J

[1] The Plaintiff claims a decree of divorce and certain other relief. On the day of the hearing (2nd March 2015), the issues were separated, in terms of Rule 33(4), and after the Plaintiff testified, I granted the following orders:

“1. Decree of divorce.

2. The Plaintiff and the Defendant are to remain co-holders of all parental rights and responsibilities in respect of the minor child, B[...] M[...] S[...], born on [...] 1997.
3. The primary residence of the minor child will remain with the Defendant.
4. There will be a separation of issues in terms of paragraph 23 of the answering affidavit together with the rider that the order will not affect the Plaintiff’s right to claim maintenance for herself.
5. CAV.”

[2] The issues that were separated and referred to in the aforesaid “paragraph 23” were the following:

1. Whether the signing of the Power of Attorney by the parties and the initialling of the draft Antenuptial Contract constitute concluding an Antenuptial Contract prior to the commencement of the marriage and accordingly whether the parties are married in or out of community of property.
 2. In the event that the parties are married out of community of property with the application of the Accrual system, whether the date for determination of any such accrual should be *litis contestatio* or the date of divorce.
- [3] The parties were married to each other on the 4th April 1992 at Bryanston. Prior to the marriage and on the 1st April 1992, the Plaintiff and the Defendant signed a power of attorney in favour of William Faraday Watson (“Watson”).

This power of attorney authorised Watson to appear before a Notary Public and to execute an Antenuptial Contract on behalf of the

parties. The Antenuptial Contract was annexed to the Power of Attorney and was initialled by the parties in confirmation thereof. The Antenuptial Contract provided, *inter alia*, that:

- (a) There shall be no community of property between the parties.
- (b) There shall be no community of profits and loss between the parties.

- (c) Each party shall be answerable for his or her own debts.
- (d) The accrual system, as set out in Act 88 of 1984, shall be applicable to the marriage between the parties; and
- (e) The parties declared the commencement value of their respective estates to be the following:
 - (i) That of the Plaintiff – R108 000,00.
 - (ii) That of the Defendant – R80 000,00.

It is common cause that due to some reason, unknown to the parties, the aforesaid Antenuptial Contract was not executed and registered in the Deeds Office.

- [4] The Plaintiff accordingly contends that the marriage is in community of property as the Antenuptial Contract contemplated and intended by the parties was not registered. As I understand Counsel's submissions on her behalf, the Plaintiff contends that it was the intention of the parties to enter into a properly executed Antenuptial Contract. This did not happen. The Plaintiff further contends that as the parties did not intend to enter into an informal Antenuptial Contract, there was no agreement between them, either expressly, tacitly or implied. Accordingly, it has been submitted, the parties' marriage must be regarded as one in community of property.
- [5] It is not in dispute that the Antenuptial Contract was not registered in the Deeds Registry as is required in terms of Section 87 of the Deeds Registries Act No. 47 of 1937, as amended. Because of this, there can be no doubt that no formal Antenuptial Contract exists between the parties. What however emerges is the concession by the Plaintiff that prior to the marriage the parties agreed that their (future) marriage would be governed by an Antenuptial Contract in the terms and conditions as set out in paragraph 3 supra. This is what motivated and caused them to consult with an attorney (Watson) in order to record same in writing. The Plaintiff further conceded that as a result, she considered the marriage to be governed in terms of the Antenuptial Contract agreed upon.
- [6] Chapter vii of the Deeds Registries Act provides for the registration of Antenuptial and Postnuptial Contracts. Sections 86 and 87(1) provide:

"86. Antenuptial Contracts to be registered – An antenuptial contract executed before and not registered at the commencement of this Act or executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in Section 87, and unless so registered shall be of no force or effect as against any person who is not a party thereto.
- 87. Manner and Time of Registration of Antenuptial Contracts – (1) An Antenuptial Contract executed in the Republic shall be attested by a notary and shall be registered in a Deeds Registry within three months after the date of its execution or within such extended period as the Court may on application allow."

- [7] It is clear from the provisions of Section 86 – that an antenuptial contract which has not been registered in accordance with the provisions of Section 87 is of no force or effect as against any person who is not a party thereto.

“The effect of registration is to give notice to the world of the existence of the Antenuptial Contract and thereby to bind persons who are not parties thereto, including creditors” ex parte Spinazze and Another NO 1985(3) SA 650(A) at 658.

- [8] The Antenuptial Contract would however be valid and binding as between the parties thereto. This is because the unregistered

contract clearly reflected the common intention of the parties at the time the contract was entered into.

- [9] Mr Skinner SC, on behalf of the Plaintiff, has submitted that as the nominated agent, Watson, had not executed the contract before a Notary Public, no contract came into being and accordingly the marriage must be regarded as being one in community of property.

- [10] I am of the view however that an informal Antenuptial Contract existed between the parties. This is evident in the light of the concessions by the Plaintiff as outlined earlier in this judgment. In Mathabathe v Mathabathe 1987(3) SA 45, Stegmann J held, at 51(D-G):

“The expression “Antenuptial Contract” used in a broader sense included not only the Antenuptial Contracts in that narrow category, but also extended to informal contracts not complying with the formalities required by Section 87 of the Deeds Registries Act

1937. The latter Antenuptial Contracts were of no concern to third parties. As far as third parties were concerned, a marriage regulated only an informal or unregistered Antenuptial Contract, was no different from a marriage in community of property and profit and loss and from which the marital power was not excluded. Third parties had to conduct their business with the spouses on that basis. Nevertheless, as between the parties, such an antenuptial contract was valid, effectual and enforceable to the extent that the rights of third parties were not affected.”

- [11] I accordingly find that an Antenuptial Contract was entered into and agreed upon by the parties prior to the solemnisation of their marriage. It is also evident from the Antenuptial Contract annexed to the said Power of Attorney that the parties intended the marriage to be subject to the accrual system.

- [12] I turn now to consider the date for determination of accrual.

- [13] Before considering the arguments of the respective parties, I will record, which I deem to be relevant and important, certain dates and events relating to this matter (these are common cause between the parties).

The parties were married to each other on the 4th April 1992. The parties separated during the beginning of October 2010 with the settled intention of terminating their marriage relationship. The Plaintiff instituted divorce proceedings on 23rd November 2010. In the pleadings, both the parties confirmed that the marriage had irretrievably broken down and that there were no prospects of restoring a normal marriage relationship between them. The pleadings closed during mid-September 2011 when the dies, for filing and delivering a replication to the plea in reconvention, expired. The main issue for determination was whether the parties were married in community of property (as averred by the Plaintiff) or by Antenuptial Contract with the inclusion of the accrual system (as averred by the Defendant). A determination of this issue would impact upon the division of the parties' estates – namely whether the Plaintiff was entitled to a 50% claim to the joint estate or a share of the accrual, if any. During January and February 2015 the pleadings were amended. These amendments did not affect the central issue that was to be determined, namely whether the parties were married in community of property or by antenuptial contract with accrual.

[14] The Defendant contends that the date for determination of any accrual in the estate of the parties is mid September 2011, when pleadings closed and *litis contestatio* was reached. The Plaintiff, on the other hand, contends that the date for determination should be that of the date of divorce.

[15] Mr Skinner SC, on behalf of the Plaintiff, has submitted that in the present matter it would make no difference if the Court concluded that the date for determination was *litis contestatio*. The reason for this, as I understand the submissions, is that because of the amendments to the pleadings (which he submits are substantial),

litis contestatio was achieved again at the commencement of the trial – 2nd March 2015. In this regard he has relied upon the judgment of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA593 (SCA). At paragraphs 14 and 15 he held:

“The origin of the concept of litis contestatio is the formulary procedure of the Roman Law in which the litigants appeared before the praetor; who formulated the issues that the Judge had to decide. Once the issues had been formulated, the stage of litis contestation was reached. In Government of Republic of South Africa v Ngubane Holmes JA said:

“In modern practice litis contestatio is taken as being synonymous with close of pleadings, when the issue is crystallised and joined And in modern terminology, the effect of litis contestatio is to “freeze the plaintiff’s rights as at that moment.”

There is no problem with this formulation when the parties abide by their pleadings and conduct the trial accordingly. Frequently,

however they do not do so because other issues arise that they wish to canvass and either formally, by way of amendment to the pleadings, or informally, as in the present case, the scope of the litigation is altered. Here the defendant sought to add new issues specifically relating to the validity of the amendment that introduced the proviso. Up until then the parties were at one that

the proviso was in force and available to be relied on by the Fund, subject to the issues around its interpretation. If the plaintiff's rights were frozen at the close of pleadings, the basis would have been that the proviso was in force. It would make a mockery of the principles of *litis contestatio* to permit Endumeni to depart from its previous stance by challenging the validity of the proviso, but to bind the Fund to a factual situation at the close of pleadings that had altered by the time that Endumeni sought to challenge the validity of the proviso.

[15] The answer is that when pleadings are reopened by amendment or the issues between the parties altered informally, the initial situation of *litis contestatio* falls away and is only restored once the issues have once more been defined in the pleadings or in some other less formal manner. That is consistent with the circumstances in which the notion of *litis contestatio* was conceived. In Roman Law, once this stage of proceedings was reached, a new obligation came into existence between the parties to abide the result of adjudication of their case.....When the parties decide to add or to alter the issues they are submitting to adjudication, then the "agreement" in regard to those issues is altered and the consequences of their prior arrangement are altered accordingly."

[16] I do not agree with Mr Skinner's submissions. Nor do I understand the judgment of Wallis JA to mean that any amendment,

however immaterial or minor it may be, would result in a fresh *litis contestatio*. It is when the parties "add to or alter the issues they are submitting to adjudication" by amendment or agreement, that "a new obligation" comes into existence and a fresh situation of *litis contestatio* arises.

[17] In casu, the issue to be determined has remained the same, notwithstanding the late amendment of the pleadings.

[18] The question therefore still remains – whether the date for determination of accrual is at *litis contestatio* or the date of divorce.

[19] Section 3 of the Matrimonial Act 88 of 1984, provides as follows:

"3. Accrual system – (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] In *M B v N B* 2010(3) SA 220(GSJ) Brassey AJ considered this issue. The learned Judge recognised that the interest which spouses to an accrual marriage have in the amount by which each others estate improves over the course of the marriage is “purely equitable, forit becomes exigible only at the dissolution of the marriage” He went on to hold that the effect of Section 3(1) (quoted above) is that “each party receives a half share of the amount by which the other spouses estate has increased in value during the course of the marriage” (at 37) (my emphasis).

[21] Having referred to the judgment of Cloete J (as he then was) in *Reeder v Softline Ltd and Another* 2001(2) SA 844 (WLD), he held, at 40-41:

“(40) The decision establishes the moment at which the contingent right becomes perfected and, in consequence, the spouses become invested with legally enforceable entitlements. This is, as the learned judge makes clear, at the moment when the divorce court makes the applicable order. What the decision does not do is establish the moment by reference to which the respective estates of the parties must be assessed. This problem is one of procedure, not substance, and owes its origin to the fact that litigation takes time to complete. On this matter the established principle is that the operative moment is litis contestatio, for that is the moment when the dispute crystallises and can be presented to the court for decision”

(41) Since litis contestatio is the lodestar for the applicable decision, transactions after this moment are irrelevant and should be left out of account. By saying this, I do not mean to suggest, of course, that the pleadings are fixed in stone; if they erroneously reflect the true state of affairs, they can (subject to the normal exceptions) be corrected so that they accurately state the facts. What cannot be done, however, is to make amendments or otherwise tender evidence in order to bring transactions into account that occurred only after close of pleadings.”

[22] This approach found favour with Lopes J in *M B v D B* 2013(6) SA 86 (KZD), although his remarks in this regard were clearly obiter. In *J D v D A* 2014(6) SA 233(GJ), Sutherland J disagreed with the views expressed by Brassey AJ and Lopes J and held that “It is manifest that the date of

dissolution is the only relevant date upon which to calculate the respective estates”. He disagreed with the views that the right to accrual which existed during the marriage and which become crystallised at litis contestatio, are perfected at the date of dissolution of the marriage.

[23] I respectfully disagree with the view expressed by Sutherland J. If it is to be accepted that the date of determination is the date of dissolution, then it would result in a peace-meal adjudication of issues resulting in further litigation between the parties. (*Le Roux v Le Roux* [2010] JOL 26003 (NCK)). This certainly could not have been the intention of the Legislature. Sutherland J appears to have been alive to this and offered some suggestions to alleviate the obvious problems that would arise.

[24] The practical effect of *litis contestatio*, being the date of determination of accrual will, as remarked by Brassey J, expedite the trial and “do much to limit the temptation to squander assets that some spouses seem to find irresistible”. It will also discourage (as is frequently experienced in divorce litigation) the situation where a spouse deliberately delays the proceedings in order to increase his/her claim when the divorce order is eventually granted. In this regard it would be inequitable to allow a spouse to share in the other’s estate in circumstances where the parties have been separated for a number of years and have each moved on with their lives and the one party’s estate has grown over this period. Perhaps a more compelling reason for *litis contestatio* being the date for determination of accrual is the fact that at *litis contestatio* at the latest, the underlying partnership between the parties to a marriage has reached its end. This will enable the parties to correctly ascertain the accrual, if any, that has occurred during the course of the marriage.

[25] I am accordingly of the view that the date for determination of accrual is at *litis contestatio*. This would ensure consistency and economic equity between the parties.

[26] I accordingly make the following order:

1. It is declared that the marriage relationship between the parties is one out of community of property and subject to the accrual system.
2. The date for determination of accrual is at *litis contestatio*.
3. The Plaintiff is ordered to pay the Defendant’s costs, such costs to include the costs of the hearing of the 2nd March 2015.

Date of hearing: 2nd March 2015

Date of judgment: 25th May 2015

Counsel for the Plaintiff: Skinner SC

Instructed by: Shepstone & Wylie

Counsel for the Defendant: Stokes SC

Instructed by: Benita Ardenbaum Attorneys

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