

SOUTH AFRICA / JUDGMENT

P.R.V v E.V (A515/2016, 60053/2016) [2018] ZAGPPHC 611 (16 April 2018) [2018] ZAGPPHC 611

COURT

North Gauteng High Court, Pretoria

BEFORE

J W Louw, L M Molopa-Sethosa, TA Maumela

CASE / FILE NUMBER

A515/2016, 60053/2016

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IN THE GAUTENG DIVISION OF THE
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(2)

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(3)

REVISED

APPEAL

CASE NO: A515/2016

COURT A QUO CASE NO: 60053/2016

16/4/2018

In

the matter between:

P

R

V

Appellant

and

E

V

Respondent

JUDGMENT

LOUW, J

- [1] This is an appeal against the judgment and order of Thlapi J in a divorce dispute between the appellant and the respondent. The parties were married on 8 January 2011. The divorce proceedings were instituted by the appellant in October 2012. The appellant alleged in his particulars of claim that the parties concluded an ante-nuptial contract in terms of whereof they were married out of community of property with the exclusion of the accrual system. A copy of the ante-nuptial contract is annexed to the appellant's particulars of claim. It purports to have been signed by Stephanus Almero Weyers on behalf of the appellant and the respondent in terms of a special power of attorney signed by the parties on 7 January 2011. Mr. Weyers is the attorney who was instructed by the appellant to prepare the ante-nuptial contract. The appellant only sought a decree of divorce.
- [2] The respondent filed a plea and counterclaim in which she admitted that Mr. Weyers had signed the ante-nuptial contract, but denied that the parties had agreed that the accrual system would be excluded. The respondent pleaded that at the time of the signing of the contract, it was the continuing common intention of the parties that the accrual system would be applicable to their marriage; that the contract did not reflect the common intention of the parties in that it erroneously reflected that the accrual system was excluded; that the appellant had admitted that the contract did not correctly reflect the parties' common intention and had agreed that the contract should be amended to reflect their common intention; and that the appellant subsequently alleged that the contract had been rectified, which the respondent bona fide believed had been done. The respondent accordingly pleaded that she was entitled to rectification of the ante-nuptial contract by replacing clause 3 thereof with a clause that the accrual system would be applicable to the marriage. In his plea to the respondent's counterclaim, the appellant denied these allegations and pleaded in the alternative that, if it was found that the accrual system was applicable, the respondent should forfeit the benefit of any accrual by reason of the short duration of the marriage and the alleged misconduct of the respondent.
- [3] The trial commenced on 21 May 2014. It was common cause that the marriage between the appellant and the respondent had irretrievably broken down. A decree of divorce was accordingly granted by Thlapi J. The appellant thereafter testified and Mr. Weyers testified on his behalf. The witnesses who testified on the respondent's behalf were Mr. M, who is the respondent's brother, and her mother Mrs. M. The respondent thereafter herself testified. The matter was then postponed for argument
- [4] Respondent's counsel, Adv. J W Olivier SC, presented written heads of argument to the trial court when the matter resumed, a copy of which was made available to us, and in which it was stated that, having regard to the evidence which had been presented during the trial, a notice of amendment of the respondent's plea and counterclaim in terms of Rule 28(10)

would be delivered with the heads of argument. A copy of the notice of amendment was annexed to the heads of argument as annexure "A" and copies of the respondent's plea and counterclaim incorporating the amendments were annexed thereto, marked "1" and "2" respectively. We were informed that the respondent had earlier, in paragraph 1.4 of her trial particulars, given notice of her intention to amend her plea and counterclaim, the details of which amendment are not relevant for present purposes.[1] The Rule 28(10) notice annexed to the heads of argument, notifies the appellant of the respondent's intention to apply for that amendment and for a further amendment by introducing a further paragraph in her plea as paragraph 2.2.5. The whole of paragraph 2 of the respondent's plea had been incorporated by reference into her counterclaim. The following is a translation of the further amendment :

"2.2.5 Alternatively, if it is found that it was the intention of the plaintiff to exclude the accrual system:

2.2.5.1 Defendant did not intend to exclude the accrual system, so that there was no consensus between the parties to exclude the accrual system ;

2.2.5.2 Defendant is therefore, in any event, entitled to an order declaring that the accrual system for which provision is made in Chapter 1 of the Matrimonial Property Act 88 of 1984, is applicable."

The amendment also sought to introduce an alternative to the existing prayer 2 of the respondent's counterclaim, which was for the rectification of clause 3 of the ante-nuptial contract, by renumbering it as prayer 2(a) and inserting an alternative prayer as prayer 2(b). The following is a translation thereof:

"2(b) an order declaring that the accrual system for which provision is made in Chapter 1 of the Matrimonial Property Act 88 of 1984 is applicable to the parties' marriage."

- [5] The argument presented in the respondent's heads of argument at the trial was that according to s 2 of the Matrimonial Property Act 88 of 1984 (the Act) every marriage out of community of property in terms of an ante-nuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of the Act, is subject to the accrual system specified in Chapter 1 of the Act except insofar as that system is expressly excluded by the ante-nuptial contract.
- [6] The appellant's counsel during the trial was Adv. Haupt. She appeared with Adv. Bergenthuin SC for the appellant during the appeal. We were informed that Ms. Haupt had no recollection of whether there had been such an amendment. She only recalled the earlier amendment to which I have referred and to which Thlapi J referred in her judgment. As I have mentioned, notice of the respondent's intention to effect the earlier amendment had been given in the respondent's trial particulars, but the formal notice of that amendment and of the further proposed amendment was given in a single notice of intention to amend, a copy of which was annexed to the respondent's heads of argument, to which I have

referred. In her judgment, Thlapi J refers to the respondent's amendment to her plea requested in terms of Rule 28(10) which she says was not objected to. She then quotes the earlier amendment, but not the later amendment. I have little doubt that if there had been an objection to the later amendment, this would have been dealt with by her. We were also informed by respondent's counsel, Adv. Olivier SC, who also appeared for the respondent at the trial, that his heads of argument with the Rule 28(10) notice and the respondent's plea and counterclaim in their amended form, in the event that there was no objection thereto, were sent to Adv. Haupt by email after the matter was postponed for argument, so that, by the time that the matter was argued, the appellant's representatives were in possession of the respondent's amended plea and counterclaim. He said that no objection to the proposed amendments was made on behalf of the appellant during argument. The respondent's Rule 28(10) notice also expressly stated that the respondent intended to apply at the hearing on 3 October 2014, which was the date on which the matter resumed for argument, for the amendment. It must in all the circumstances be accepted that the amendment sought by the respondent was not opposed and that it was granted.

- [7] The appellant's evidence was that he was advised by attorney Weyers to marry out of community of property with the exclusion of the accrual system, that he discussed the marriage dispensation with the respondent and that they agreed that the marriage would be out of community of property without accrual. He said that on the day before the marriage, 7 January 2011, the respondent did have reservations of marrying without the accrual system but that he made it clear to her that he was not willing to marry with inclusion of the accrual system, and that the respondent eventually, after a discussion, agreed to a marriage excluding the accrual system and signed the power of attorney which attorney Weyers had brought for them to sign.
- [8] The respondent's evidence was that she and the appellant had discussed the marital regime before the marriage; that she told the appellant that she had been advised to marry out of community of property subject to the accrual system; that the appellant explained to her that such regime would be tantamount to a marriage in community of property; that she thereafter consulted a friend who indicated that the appellant's explanation was wrong; and that she then told the appellant during a further discussion about what she had been advised. The respondent testified that she at no stage had any contact with Weyers about the ante-nuptial contract or the signing thereof.
- [9] The respondent testified that on 7 January 2011, the day before the marriage, she was at a place where she and her bridesmaids were going to spend the night before the marriage when she was telephoned by the appellant and requested to come to a gravel road outside Wellington to sign the contract which he had had prepared for them. Her brother took her there. When they arrived at the gravel road, the appellant, Weyers and the latter's wife were waiting for her. This was the first occasion she had contact with Weyers. Documents were then presented to her for signature. She asked the appellant what she would be signing, and he explained to her that it was an ante-nuptial contract for a marriage out of community of

property excluding the accrual system. She then told the appellant that that was not the way she wanted to marry and was not what they had agreed. His response was that if she did not sign the document, they could not get married the next day. She became very emotional as a result whereof her brother telephoned her mother, who then arrived at the scene-. The respondent felt pressurised to sign something she did not- want to sign. Weyers then said that the contract could not be changed before the marriage, but what he could do was to bring an application to the High Court to amend it to a marriage out of community of property with inclusion of the accrual system . The defendant agreed that the contract would be amended and the respondent then signed the document on the strength of the assurance

given to her that it would be amended. The respondent's mother testified and confirmed that an undertaking was given by the appellant that the correction would be effected after the parties' honeymoon. It is common cause that the ante-nuptial contract was not amended.

[10] The trial court did not make any credibility finding against any of the witnesses. It found that it was clear from all the evidence that the appellant and the respondent both wanted a marriage out of community of property and that, on the one hand, the appellant did not wish the accrual system to be applicable while the respondent, on the other hand, wanted it to be included. In my view, this finding is consistent with the evidence which was presented to the court and cannot be faulted.

[11] After making that finding, the court said the following in its

judgment:

"I can only conclude that a marriage out of community of property was concluded and that the agreement be rectified to that extent." This conclusion was, in my view, correct in view of the provisions of s 2 of Chapter I of the Act which reads as follows:

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.

[12] The common intention of the parties was to be married out of community of property. They, however, did not have a common intention with regard to the exclusion or inclusion of the accrual system. The trial court was therefore, in my view, correct in finding that the ante-nuptial contract should be rectified

"to this extent". The court accordingly declared that the accrual system as provided for in Chapter 1 of the Act be applicable to the parties' marriage. This was the alternative order sought by the respondent in terms of prayer 1(b) of her amended counterclaim.

[13] It was submitted on behalf of the appellant that the undertaking on which the respondent relied, was a condition which failed and that, therefore, the ante-nuptial contract should remain in its present form. In my view, the undertaking was not a condition but a term agreed upon between the parties. Conditions are either resolute or suspensive. The undertaking could clearly not be a resolute condition. The difference between a suspensive condition and a term of a contract was set out as follows by Botha J in *Design and Planning Service v Kruger*[2]:

"In the case of a suspensive condition, the operation of the obligations flowing from the contract is suspended, in whole or in part, pending the occurrence or non-occurrence of a particular specified event. A term of the contract, on the other hand, imposes a contractual obligation on a party to act, or to refrain from acting, in a particular manner. A contractual obligation flowing from a term of the contract can be enforced, but no action will lie to compel the performance of a condition."

[14] On the respondent's version, the appellant had an obligation to act by causing the ante-nuptial contract to be amended, and the respondent would have been entitled to enforce compliance with that obligation. The conclusion of the court a quo that the ante-nuptial contract should be rectified to the extent that the accrual system is applicable to the marriage was therefore correct. Clause 3 of the ante-nuptial contract which provides for the accrual system to be excluded, is clearly severable from the rest of the ante-nuptial contract and can therefore be deleted.

[15] At the commencement of the trial, the court was informed that the parties had agreed that the appellant's alternative plea to the respondent's counterclaim that the respondent's right to share in any accrual be forfeited in the event of it being found that the accrual system was applicable to the parties' marriage, be postponed sine die. Such order was not made by the court, probably due to an oversight, and should now be made.

[16] In the result, I make the following order:

- (a) The appeal is dismissed with costs.
- (b) Prayers 2.3 and 2.4 of the appellant's plea to the respondent's counterclaim are referred to the court a quo for determination.

J W LOUW

JUDGE OF THE HIGH COURT

I agree

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree

TA MAUMELA

Counsel for appellant : Adv J G Bergenthuin SC; Adv. L Haupt.

Instructed by: Bernhard van der Hoven Attorneys.

Counsel for respondent: Adv. J W Olivier SC.

Instructed by: Bill Tolken Hendrikse Inc; Couzyn Hertzog & Horak

[1] The respondent's trial particulars were not included in the record.

[2] 1974 (1) SA 689 (T) 695

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