

SOUTH AFRICA / JUDGMENT

S v S (82452/15) [2017] ZAGPPHC 763 (7 November 2017)

[2017] ZAGPPHC 763**COURT**

North Gauteng High Court, Pretoria

BEFORE

Tlhapi

CASE / FILE NUMBER

82452/15

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE****NUMBER: 82452/15****DATE:**

7/11/2017

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

J

S PLAINTIFF

and

J

S DEFENDANT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This action was first instituted in the Regional Court, Nelspruit and was later transferred to the above court on application by the defendant. The parties agreed to a separation of issues, in order for this court to only determine the proprietary regime of the parties.

[2] It is appropriate to briefly mention what transpired prior to the matter being transferred to this court.

The plaintiff initiated the action in the Regional Court and the defendant filed a plea and counter claim in essence, disputing the parties marital regime, and pleading that the marriage was in community of property because the ante nuptial contract relied upon by the plaintiff, dated 23 August 2006, was registered out of time and was therefore invalid. Thereafter an application was launched by the plaintiff seeking a declaratory that the marriage was out of community of property, excluding the accrual system. Reliance was placed on another antenuptial contract and, an undated Power of Attorney apparently prepared on behalf of the plaintiff through his attorney, a Mr Schoeman. The ante-nuptial contract was dated 20 May 2006

[3] The plaintiff pleaded as follows in his amended particulars of claim:

“4.1. Die partye is, insoverre as wat dit hulle inter partes betref, met mekaar getroud buite gemeenskap van goedere met uits/uiting van die aanwasbedeling op 27 Mei 2006 te Witrivier en hierdie huwelik is nog van krag.

4.2va. Die ooreenkoms tussen die panye ten aansien van hulle voorgenome huweliksbedeling soos voormeld, is bevestig en vervat in ·n

skriftelike ooreenkoms geteken te Nelspruit deur die partye, beide handelende in persoon, op of ongeveer 20 Mei 2006.”

[4] The defendant's amended plea states:

4.2 The defendant specifically denies that the document annexed by the plaintiff to his particulars of claim as annexure "A" is enforceable inter partes or otherwise inter alia for the following reasons:

4.2.1. The Defendant denies that this document was initialled by the parties on the 20th May 2006,

4.2.2. The document which the Plaintiff presented to the Defendant for her signature was presented to her on the day before the parties entered into marriage and therefore on the 26th May 2006.

4.2.3. The Plaintiff presented to the Defendant that the document meant that the parties' marriage should be out of community of property, but in the event of circumstances such as the financial downfall of either of the parties presenting itself during the course of the marriage, each would be entitled to share in the other party's estate and the parties will be able to continue their financial lives through the estate of the other party.

4.2.4. The Plaintiff's representations as such misled the Defendant, as a reasonable would have been so misled.

4.2.5. The Defendant requested the Plaintiff to enable her to consult a legal representative to properly explain to her the terms of the document as she clearly did not understand same, which request the

Plaintiff denied.

4.2.6. The Defendant is English speaking and has a limited understanding of Afrikaans and the Defendant only has secondary education up to Standard 6 (Grade 8), which facts directly and indirectly contributed to the Defendant's error. 4.2.7. At no stage did the plaintiff or any other relevant party explain to the Defendant the terms of the document and the Defendant misunderstood same.

4.2.8. The Defendant was ignorant of the accrual system and its implications or that she would have had the right to exclude some assets from the accrual system or include a commencement value.

4.2.9 Furthermore the defendant pleads that:

4 2.9.1.No agency agreement came into existence in that the power of attorney that appeared to nominate Mr ...Schoeman to be the parties' agent, to sign their ante-nuptial contract and have same registered was not the person who signed and presented the parties initialled contract for registration.

4.2.9.2. The Power of Attorney was not witnessed;

4 2.9.3. The Power of Attorney gave the agent Mr Schoeman the right to enter into an agreement on behalf of the parties and furthermore to amend the terms of their ante-nuptial contract.

4.2.9.4 The contract that was registered in the Registrar of Deeds Office differ from the ante-nuptial contract the Plaintiff now wishes to rely on, therefore constituting no consensus between the parties on any specific terms of an ante-nuptial contract;

4.3The document relied upon by the plaintiff was initialled by the defendant for identification purposes only.

4.4 The defendant pleads that the document that was handed to the defendant by the plaintiff was initialled by the defendant on the assumption that it contained the terms of the agreement which she understood to be that she was able to share in the plaintiff's estate and not that any sharing in the plaintiff's estate in whatsoever form is excluded in the contract;

4.5 The defendant was therefore unaware of the fact, and the plaintiff negligently failed to disclose to the defendant that the documents contained a clause excluding any forms of share in each other's estates;

4.6 The defendant never intended to bind herself to a marriage regime out of community of property with exclusion of the accrual system and under the circumstances pleads that her error in this regard is to be regarded as iustus,

4.7 Therefore the defendant admits that the document relied upon by the plaintiff was initialled by her, but the defendant pleads that she is not bound by the terms of the documents because she signed it is error for the reasons pleaded herein supra;

4.8 The defendant therefore pleads that the alleged initialled document is of no legal force and effect, inter partes or otherwise.

4.9 The defendant pleads that the above Honourable Court will not create a contract between the parties and therefore it should be declared that the parties' marriage regime is that of in community of property ab initio;

The plaintiff's plea to the defendant's counterclaim:

"2.2 Die partye voor sluiting van die huwelik uitdruklik en skriftelik ooreengekom het dat die huwelike buite gemeenskap van goedere sou wees met uitsluiting van die aanwasbedeling;

2.3 Oat 'n prokureur opdrag gegee is om die nodige voorhuwelikse kontrak op te stel ten einde uitvoering te gee aan die ooreenkoms voormeld tussen die partye en toe te sien tot die nakoming van al/le vereistes regtend verbonde aan registrasie van die kontrak;

2.4 Die eiser en verweerder, beide handelende in person, die skriftelike ooreenkomsjeens hulle voorgenome huweliks bedeling buite gemeenskap van goedere met uitsluiting van die aanwasbedeling op of ongeveer 20 Mei 2006 geteken het, 'n afskrif waarvan aangeheg is Aanhangsel "A" to eiser se besonderhede van vordering:

2.5 Beide partye, onder die indruk data aan alle statutere vereistes ten aansien van die voorhuwelikse kontrak voldoen is, met mekaar op daardie veronderstelling in die huwelike getree het;

2.6 Die voorhuwelikse kontrak ten minste inter partes gegeld en bindend is."

BACKGROUND

[5] A brief background follows dealing only with the facts I deem necessary to determine the proprietary regime.

The plaintiff and the defendant met in February 2005 and were engaged in May of the same year. They had agreed that the engagement would endure for a year and later the date of marriage was set for 27 May

2006. They lived together and she was not involved in the plaintiffs businesses or in his financial matters. Although she had been independent before she met the plaintiff and had owned property, he took over completely after they met and provided for her. He helped her open a cafeteria and tavern. On one occasion he gave her a copy of a will where he had appointed her as beneficiary of the bulk of his estate. She was not pleased by this gesture and felt that it was inappropriate to discuss wills at a time when they were going to get married

[6] The defendant had planned to spend the night at her brother's place on the eve of the wedding, the 26 May 2006. When the plaintiff

arrived home, he found her in the bedroom packing an overnight bag. He had brought along some documents for her to sign. The documents

were written in Afrikaans and she was English speaking, this was so despite the fact that her brothers speak the language. This fact was confirmed by her mother. The defendant explained that although her father was Afrikaans speaking, her parents had divorced when she was young and that she had grown up in an English speaking environment. The defendant testified that she did have knowledge that when parties get married they usually sign a contract but she did not understand the intricacies thereof or the meaning and implications of the documents brought along by the plaintiff.

[7] The plaintiff explained to her that since they were starting off in life, they should understand what was contained in the contract, that it meant that, "what was hers was hers and "what was his remained his." Furthermore, that the contract meant that when one of them went "Bank" (bankrupt) they could always rely on the other. It was meant to protect them in the business when it went 'bank' and, that they would live like before. She also did not understand the implications of out of community of property. She then understood his explanation to mean that if one went 'bank', he/she would rely on the other to survive. The plaintiff did not explain anything about the accrual system or the implications thereof, nor did they discuss anything about assets which had to be excluded, or for the inclusion of a commencement value. She expressed a desire to see somebody to explain the document to her and the plaintiff discouraged her from doing so. Although her signature appeared on an undated document giving one Mr Deon Gerrit Schoeman, Power of Attorney, she had never met him or consulted with him before and she had no idea how he was paid for his service. She testified that she would not have signed the document if she had been given a proper

explanation of the contract and the implications thereof. She denied that she initialled the ante-nuptial contract on 20 May 2005 and according to her no date was inserted and that the date appearing on the first page of the ante nuptial contract was in the plaintiff's handwriting. She further had no knowledge of the ante nuptial contract purporting to be theirs and which was lodged for registration with the Registrar of Deeds on 24 August 2006 neither did she know one Jacqueline Gibson who is purported to have Power of Attorney to sign on their behalf and her signature does not appear on the said document. It was her attorney who for the first time after the action was launched who explained to her the meaning of the accrual system. She also denied having had any conversation with a mutual friend of theirs where it is alleged she professed and understood the marriage regime the plaintiff was alleging.

- [8] The defendant's mother testified that she never discussed the marital regime with her daughter. She was not present at her daughter's

residence on the 20th or 26th May 2006 when the Power of Attorney or Ante-nuptial contract is alleged to have been signed. She was therefore not seated about 8 metres away from the couple when discussions around these documents were held. She confirmed that defendant was English speaking and that she was not fluent in Afrikaans.

- [9] The plaintiff testified that he had been in a relationship with a lady Michelle for 5 years before he met the defendant. It is the experience he had with Michelle when they broke up, which made him resolve not to enter into any relationship which would cause him to share his assets. Michelle had sued him for half his estate and the matter was finally settled. He had related the incident to the defendant. When he proposed marriage to the defendant he also informed her that he wanted to enter into an ante-nuptial contract. He explained to her that he wanted what was his to remain his before and after the marriage and what was defendant's to remain hers before and after the marriage. The defendant did not respond to his suggestion and he thought that she had accepted because she did not say really say no to it.

- [10] He went to see his attorney Mr Schoeman to tell him that he was getting married and he gave instructions to draw up the contract. Mr Schoeman was involved in the Michelle matter. He had also asked him prior to his intended marriage to draw up a will where he intended bequeathing the larger portion of his estate to the defendant. He fetched the contract on 20 May 2006 and proceeded to the defendant's residence where she lived with her mother. The kitchen and living rooms are in an open plan area. The defendant was in the kitchen and her mother in the dining area. They discussed the documents and he asked her to sign. The defendant commented that the documents were all in Afrikaans. He offered to explain the contract as far as it was possible because Mr Schoeman also did not explain the contract to him. He then told the defendant to sign where there were markings. The defendant's mother had pronounced that she did not want to get involved in their business. He went on further to state that the defendant was not unwilling to sign the contract, she just could not read it and she accepted his explanation.

- [11] The Plaintiff explained the meaning of the paragraphs quoted below. He stated that paragraphs 1 and 2 of the contract meant 'what is yours is yours, what is mine is mine before and after the wedding; and that paragraph 3 meant "outside community of goods what is yours is yours and what is mine is mine, before and after the wedding stays the same"

Paragraphs 1, 2 and 3 on the ante-nuptial stated:

"...dat hulle huwelik aan die volgende bepalings onderworpe sal wees naamlik;

1. Oat daar geen gemeenskap van goed tussen hulle sal wees nie;
 2. Oat daar geen gemenskap van wins of verlies tussen hulle sal wees nie;
 3. Oat die Aanwasbedeling waarvoor daar ingevolge Hoofstuk 1 van die Wet of huweliksgoedere. 1984 (Wet No. 88 van 1984) voorsiening gemaak word, uitdruklik uitgesluit word."
- [12] According to the plaintiff the contract was signed a week before the wedding and not on the day before the wedding. He inserted the date '20 Mei' on the first page of the contract because that was the first day he appended his signature and he denied that there was no date as testified to by the defendant. He testified that he signed the contract before he gave it to the defendant and that she did not see him sign the contract. Regarding the receipt dated 26 April 2006 for R885.00 he could not recall that he went to see Mr Schoeman as far back as April 2006, rather that the receipt dated 24 May 2006 for R880.00 was more realistic. He testified that the contract was not signed on 26 May 2006 because that was the eve of the wedding. He had last seen the defendant in the morning and when he arrived home she had left to spend the night at her brother's place. He further testified that he had no knowledge of the ante-nuptial contract dated 23 August 2006 and he had not met the Notary Mr Deon Janse van Rensburg.
- [13] Ms Jeanette Gouws testified that her husband was employed by the plaintiff. During 2010 at a Braai held at the home of the plaintiff she went to the kitchen where the defendant was busy preparing food. The defendant informed her that she had discovered that she was married out of community of property without the accrual and defendant expressed a wish to divorce with the plaintiff and that they remarry again. It was during 2016 at a dinner with the plaintiff where he discussed his divorce and the defendant's claim about the accrual that she related her 2010 with the defendant conversation to him.

THE LAW

- [14] It was trite that after 1 November 1984 and in terms of the Matrimonial Property Act 88 of 1984, marriages out of community of property where community of profit and loss were excluded, became marriages which were made subject to the accrual system on dissolution of the marriage, unless the parties expressly excluded the accrual system in the ante-nuptial contract.

The undated Power of Attorney;

[15] Contrary to what was pleaded by the plaintiff, it is common cause that the defendant was never invited to consult with plaintiff's

attorney regarding the marriage regime. She also did not seek independent advice. She testified that she was discouraged by the

plaintiff to seek independent advice on the day that he presented the document to her for signature. The undated Power of Attorney

authorises Mr Deon Gerrit Schoeman to appear before a Notary Public and to conclude an Ante-nuptial contract on behalf of the plaintiff

and the defendant. This document was signed by the prospective spouses in the absence of witnesses and I assume that this document

was prepared by Mr Schoeman. Given the complexity of the issues pertaining to the applicable marriage regime, the fact that the

defendant was not present at any consultation with him, I would have expected the Power of Attorney to particularly state that he was authorized to exclude the accrual system. It is important to note that this document when signed it was not dated and yet if one has regard to the two ante-nuptial contracts dealt with below, both give a date on which such Power of Attorney was purportedly signed by the parties.

The Unregistered Ante-nuptial Contract and the registered Ante-nuptial Contract

[16] It is not uncommon for attorneys to draft ante-nuptial contracts however, since these contracts have to, by law be registered with the Registrar of Deeds, such contract may only be registered if executed by a duly admitted Notary Public. In my view it is also not proper for an attorney to use the protocol document of a Notary if he is not one. The ante-nuptial contract must be entered into before the intended consummation of the marriage and must be registered with the Registrar of Deeds within three months of it been entered into. Appearing before the Notary would be the prospective spouses alternatively such person duly appointed and authorised by the prospective spouses, in this instance Mr Schoeman, had to append his signature in the presence of two competent witnesses who also had to sign in the presence of the Notary. The Notary's seal would be affixed to the last page with each page being initialled by all present.

[17] According to the plaintiff this Ante-nuptial contract was given to him by Mr Schoeman to present to the defendant for signature. Mr Smith who was standing in for Mr Brand for the plaintiff, first of all based most of his argument on the affidavit filed in the application for a declarator which was dismissed. This is not a matter where during the application there existed disputes of fact and where the matter had been referred to oral evidence with the founding affidavit being the plaintiff's declaration and the defendant's answering affidavit her plea. It is the evidence before the court that is being considered. Mr Smith argued that

the principle of caveat subscriptor was applicable. The principle entails that the defendant would be held liable by merely signing the contract on the bases of the reasonable impression created to the other contracting party that she was willing to be bound by it. In my view this is not as simple as Mr Smit suggests is the case. Although the documents is titled an Ante nuptial contract it was not signed by the parties as the contracting parties, as the parties who appeared before the notary. Actually their signatures were not even required to give legality to the contract. Their signatures appear as initials which would have been initialling a document which was validly concluded only if they would have been competent witnesses before the Notary or if they were signing as witnesses and the following is important:

- (i) The contract was not executed by the alleged Notary Jan Hendrik Coetzee, neither did he insert the date of the 20 May 2006, this date was inserted by the plaintiff;
- (ii) Mr Deon Gerrit Schoeman did not appear before him as the duly authorised person on the 19 May 2006 and Mr Schoeman did not append his signature to the documents neither did the Notary Mr Coetzee or any competent witnesses and the Power of Attorney alleged therein is one dated the 19th with no month stated of 2006.
- (iii) Can we tell by looking at and reading the document in which capacities the plaintiff and the defendant signed? The answer is no.

[18] Is it possible to determine from the evidence of the plaintiff and the defendant that there was consensus by both parties as to the type of marriage they both wanted to enter into being a marriage out of community property? The conclusion I arrive at is that the plaintiff's understanding of the marriage he wanted to enter into, was not exactly a marriage out of community of property. He explains it in his evidence as 'what was hers was hers and what was his remained his'. Ms Ferreira took the plaintiff to tasks during cross examination that he added to what was 'hers was hers and what was his remained his, the words before and after the wedding', (my emphasis)

[19] This does not bring a different complexion to the meaning he attributed to the marriage regime. It is the same explanation he gave to the defendant and that is how she understood it and added to that was the explanation to her that if anyone of them went 'bank' they would depend the others estate. The plaintiff did not deny that this explanation was also given and according to his testimony he gave this explanation even where Mr Schoeman had not explained to him what the meaning and implications of the marriage recorded in the ante-nuptial contract meant. In examination in chief the plaintiff was specifically asked to give his understanding of paragraphs 1 and 2 and then 3 of the Ante- nuptial contract, he understood all three paragraphs to mean the same thing. It is my view that the plaintiff and defendant as prospective spouses had no understanding what the meaning and implications of the recorded marriage were. It would therefore be unconscionable to find that defendant created an impression to the plaintiff that she wished to enter into a marriage out of community of property, excluding the accrual system. The fact that each were not involved

in each others business during the subsistence of the marriage, does not mean that this was in support of an understanding that the accrual system was excluded.

[20] It was ruled at the commencement of the trial that the defendant had a duty to begin and Ms Ferreira argued in the end that the court should look to how the matter was decided in *Odendaal v Odendaal* 2002 (1) SA 763 (W) when the issue of who bore the onus rested upon the plaintiff and where it was found that the plaintiff had failed to discharge the onus of establishing that the parties agreed to exclude the sharing of the increase of their estates in their future marriage'.

[21] In this instance the plaintiff relied on the ante-nuptial contract to which their signatures were appended as establishing the marriage regime entered into. I am of the view that the defendant discharged her onus by proving on a balance of probabilities that the marriage pleaded by the plaintiff was not what they both understood it to be on 20 or 26 May 2006. Furthermore, the ante-nuptial contract relied upon cannot be held to be valid inter partes. It would not be just to hold her to a contract where both had no understanding what the exclusion of the accrual system meant as at that dated when the signatures were appended. Plaintiff and defendant testified that a proper understanding came to light after

commencement of the divorce proceedings.

[22] In my view the evidence of Mrs Gouws does not advance the case for the plaintiff because both the plaintiff and defendant had no understanding of the accrual system prior to them entering into marriage. Regarding the registration of the Ante-nuptial contract

during August of 2006, both the plaintiff and defendant testified that they had no knowledge of how it came to be registered after the three months had expired. It suffices to state that it was not valid in that it was registered out of time without the parties seeking an Order of Court authorising such late registration.

[23] Ms Ferreira argued apparently relying on *K v K* (38878/2007) ZAGPPHC 242 an unreported judgment that since it was unclear what marriage the parties intended it must be declared that the marriage is that of a community of property. I agree with this submission because on the evidence of both parties effect cannot be given to the ante-nuptial contract and for the reasons stated above.

[24] In the result the following order is given:

1. The ante-nuptial contract relied upon by the plaintiff is void ab initio and the parties are married in community of property.
2. Each party is to pay his or her own costs of the hearing.

TLHAPI W

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON : 27 FEBRUARY 2017

JUDGMENT

RESERVED ON : 22 JUNE 2017

ATTORNEYS FOR THE APPLICANT : CHRISTO SMITH ATT.

ATTORNEYS FOR THE RESPONDENT : EUNANDA FOURIE I NC.

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