

SOUTH AFRICA / JUDGMENT

Williams v Nolan NO and Others (60400/2017) [2019] ZAGPPHC 259 (20 June 2019)

[2019] ZAGPPHC 259

COURT

North Gauteng High Court, Pretoria

BEFORE

N.E. Ramapupputla

CASE / FILE NUMBER

60400/2017

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IN THE HIGH COURT OF SOUTH
AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 60400/2017

20/6/2019

In

the matter between:

RALPH
HILTON WILLIAMS
APPLICANT
And
ANNE
MARIE NOLAN
N.O.
FIRST RESPONDENT
MASTER
OF THE HIGH
COURT
SECOND RESPONDENT
PRETORIA
THE
REGISTRAR OF
DEEDS
THIRD RESPONDENT
ROLAND
CHRISTOPHER MELLOW
INTERESTED PARTY

JUDGMENT

RAMAPUPUTLA AJ:

INTRODUCTION

- [1] This is an application for an order in terms of section 87(1), alternatively, section 88 of the Deeds Registries Act 47 of 1937 (the Act).[1] The applicant, Ralph Hilton Williams, is the son of Mina Williams. He approaches this court for an order which will have as its end, the registration in the Deeds Registry of an ante-nuptial agreement regulating the matrimonial regime between Mina Williams and Roland Christopher Mellow (the interested party).

FACTUAL**BACKGROUND**

- [2] On 6 February 2014 Mina Williams and Roland Christopher Mellow (the spouses), signed an ante nuptial contract with the intention to regulate their matrimonial regime (before Attorney Jacobus). On 31 March 2014 the spouses were married without an ante nuptial contract. On 16 November 2014, Mina Williams (the deceased) passed away. The estate was reported to the Master of High Court, Pretoria (the second respondent), as though the spouses were married with an antenuptial contract. A liquidation and distribution account, dated 13 March 2017, was lodged with the second respondent who refused to confirm it because it reflects that the spouses were married out of community of property whereas the marriage certificate reflects in community of property. As a result, the applicant has approached this court for relief.
- [3] According to Mr Jacobus, the spouses signed a power of attorney in terms of which they Instructed him to appear before a notary public, Mr Adriaan Booysens, and have their ante.nuptial contract attested and registered with the Deeds Registry.
- [4] However, Mr Jacobus did not appear before the notary public because he did not receive payment of the registration fee in the amount of R1 500-(One Thousand Five Hundred Rands) as per fee agreement signed between the deceased and Jacobus Attorneys. Consequently, the ante-nuptial contract was never attested to by a notary public and was not lodged with the Deeds Registry for registration.

DISPUTE BETWEEN THE APPLICANT AND THE INTERESTED PARTY

- [5] The applicant contends that the ante-nuptial contract was duly executed since it was signed by the deceased and Roland Christopher Mellow (the interested party) in the presence of their attorney and was in the process to be attested to by the notary public.

Now the applicant is approaching this court for the following orders:

1. That the time period provided in section 87(1) of the Deeds Registries Act 47 of 1937(as amended) be extended.
 2. That he be granted leave to register the ante-nuptial contract which was executed on 0 February 2014 and which is attached to the founding statement as annexure "RWS".
 3. That this order will lapse if the ante-nuptial contract is not registered by the registrar of Deeds within 3 months from the date of granting of this order.
 4. That this order will not prejudice the rights of any creditor of the applicant as at date of the registration of the ante-nuptial contract. (This court notes that the applicant is the son of the late spouse, therefore this judgement does not concern the creditors of the applicant but it concerns the creditors of the spouses to the marriage).
 5. Further and alternative relief.
- [6] The interested party signified its intention to oppose the application, filed his answering affidavit but failed to file his heads of argument and to appear in court on the 23rd of April 2019 despite having received a notice of set down on the 20th of February 2019. His opposing affidavit states that he opposes this application on two grounds.
1. The first is a point in limine. The interested party stated in his affidavit that section 87 of the Act is only applicable where an ante-nuptial contract is executed by a notary. For this reason, the interested party argues that the applicant is not entitled to the relief sought and the application should be dismissed.
 2. Secondly, the interested party states that he and the deceased had no intention of continuing with the registration of the ante-nuptial contract and thus they did not pay the registration fee (as per agreement with their attorney).

LEGAL ISSUES RAISED

[7] The issues for determination by this court are:

- i. Whether the mere signing of an antenuptial contract regulating a marriage without attestation by a notary public is regarded as execution of such.
- ii. Whether the practice directive applies in circumstances where parties seek to change the existing matrimonial regime by registration of an ante-nuptial contract in terms of sections 87 or 88 of the Deeds Registries Act.
- iv. Whether the beneficiary or heir has locus standi to make an application for postnuptial execution of ante-nuptial contract.

POINT IN LIM/NE

- [8] The interested party raised a point in limine that section 87 of the Act is only applicable where an ante-nuptial contract is executed by a notary. Indeed, the process of execution of an ante-nuptial contract is complete when a notary public attests to such contract. Registration of the ante-nuptial contract shall take place in a deeds registry within three months after the date of execution. The court may, on application, allow extended period of registration.[2] Therefore the assertion by the applicant that the ante-nuptial contract was duly executed because it was signed by the spouses in the presence of Mr Jacobus and was in the process to be attested to by the notary public is incorrect and is therefore rejected.
- [9] The point in limine raised by the interested party that section 87 of the Act is only applicable where an ante-nuptial contract is executed by a notary is correct. Therefore, the applicant is not entitled to the relief sought In terms of section 87 of the Act.

ALTERNATIVE PRAYER

- [10] The applicant seeks an alternative prayer in terms of which the court must order post-nuptial execution of the ante-nuptial contract.

REASONS

FOR JUDGMENT

- [11] The court is expressly bestowed with the power to authorize postnuptial execution of a notarial contract having effect of an ante-nuptial contract under certain circumstances. The court may subject to such conditions as it may deem desirable, authorize postnuptial execution of a notarial contract having the effect of an ante-nuptial contract. The terms thereof must have been agreed upon between the intended spouses before the marriage. In such a case the court may order the registration of the notarial contract so executed within a specified period.[3]
- [12] To be successful, the parties must meet the following requirements:
- (i) they must have agreed upon the terms of the contract before their marriage;
 - (ii) they must show good reason as to why they have failed to execute the contract in proper form before they were married; and
 - (iii) they must act with reasonable promptitude after discovering the necessity for an application to court.[4]
- [13] There is evidence to support the assertion that the deceased and the interested party intended their marriage to be regulated in terms of the ante-nuptial contract. The supporting affidavit of Mr Jacobus confirms that the spouses signed the ante-nuptial contract and hence instructed him to appear before a notary public Mr Booysen. This evidence is also supported by the interested party himself. There is further supporting documentary evidence in the form of a signed power of attorney, fee agreement and a signed ante-nuptial contract.

[14] The terms upon which the spouses agreed are clearly stated in the ante-nuptial contract as follows:-

."(i) There shall be no community of property between the husband and wife.

(ii) The community of profit and loss between the husband and the wife is hereby excluded.

(iii) The accrual system referred to in Chapter 1 of the Matrimonial Property Act No.84 of 1984 but excluding any subsequent amendment thereto will be specifically excluded."

[15] Mr Jacobus explained that he failed to register the ante-nuptial contract for the mere reason that he did not receive payment of the registration fee in the amount of R1 500-(One Thousand Five Hundred Rands) as per agreement with the deceased and the interested party. I accept this as good reason for the failure to register this ante-nuptial contract but not as justification for the failure to take steps to ensure that it is so registered. Furthermore, the interested party fails to disclose why the spouses failed to advise Mr Jacobus or the notary public of their intention to discontinue with the registration of the ante-nuptial contract. I find it highly improbable that they could have taken such a big decision without informing Mr Jacobus. It is only after such disclosure that this court will possibly be satisfied under the general balance of probabilities that the alleged agreement with its specified terms, was no longer needed. I do not accept the interested party's assertion that he and the deceased had no intention of continuing with the registration of the ante-nuptial contract and thus they did not pay the registration fee as per agreement. The interested party did not sign the fee agreement in the first place and I conclude that he never had the intention of paying anyway.

[16] This application was launched with due promptitude because the applicant did not waste time upon hearing that the Master of the High Court has refused to confirm the liquidation and distribution account. There are cases where courts held that the mere lapse of time, being 27 years did not operate to ban the court from being satisfied that the terms of the contract sought to be registered were agreed upon prior to the marriage.[5]

THE REGISTRAR OF DEEDS REPORT

[17] The registrar of deeds compiled a report. The core of the report is the applicant's suitability to make this application. The Registrar of Deeds is of the opinion that the applicant does not have locus standi and therefore is not entitled to make an application in terms of sections 86, 87 and 88 of the Act. According to the report this application cannot succeed because the applicant is not a party to the ante-nuptial contract. The report states "sections 86, 87 and 88 read together state that any application to register an ante-nuptial contract whether before marriage or post-nuptial execution according to section 88 after marriage must-be done by both the parties to the contract and cannot be applied to by a person who is not party thereto".

- [18] The above analysis is completely correct but only covers circumstances where both spouses are alive. Where one or both of the spouses are deceased, the beneficiary or the heir is entitled to make such application.[6] The executor of an estate is also not prohibited from making such application if there is evidence indicating that the parties had the intention to have their matrimonial regime being regulated by ante-nuptial contract.

APPLICATION OF THE PRACTICE DIRECTIVE

- [19] Counsel for the applicant submits that paragraph 15.6 of this court's practice directive is not applicable. This submission is completely wrong because paragraph 15.6 of the practice directive recognizes change to any matrimonial regime. Paragraph 15.6 gives directions that must be followed in all instances having an end result changing of any matrimonial regime. The purpose of complying with the practice directive is to ensure that creditors are treated fairly. This is a procedural step prescribed as indispensable by the practice directive for all applications resulting in a change to any matrimonial regime, including this application.
- [20] Without publication, the ante-nuptial contract is only valid and effective as between the parties themselves and their heirs. It has no force or effect as against anyone not a party to it. [7] Where parties have agreed informally that their marriage is to be out of community of property, that is the basis of the marriage. The effect of registration is to give notice to the world of the existence of the ante-nuptial contract , and to bind persons who are not parties thereto including creditors.[8]
- [21] Therefore without publication as per the practice directive, the parties are married in community of property (as reflected on the marriage certificate) as against third parties and creditors. The only people who were bound by the antenuptial contract were the deceased (while she was still alive) and the interested party. The practice directive applies to all applications changing the matrimonial regime including this application.

CONCLUSION

- [22]. The terms of the agreement perspicuously state that the spouses intended to regulate their matrimonial regime. However, such agreement was not formalised in that it was never attested to by the notary public and never registered with the Registrar of Deeds. The spouses failed to execute the ante-nuptial contract as envisaged by section 86 of the Act. The execution of the ante-nuptial contract would have been complete if the notary public had attested thereto.
- [23] There is enough evidence to corroborate the spouses intention to have their matrimonial regime being regulated by an ante-nuptial contract. Such evidence is found in the affidavits submitted by the interested party, Attorney Jacobus, signed power of attorney, fee agreement and the signed ante-nuptial contract albeit unattested. The existence of a signed ante-nuptial contract justifies an inference that the spouses intended to regulate their matrimonial regime. There is also an explanation why the spouses failed to complete the registration of the ante-nuptial contract. I am incredulous at the assertion that the spouses failure to pay their attorney's fees is an indication of their change of intention to register the

ante-nuptial contract. I find this highly improbable.

- [24] This application was also brought to court with reasonable promptitude. The applicant did not waste any time after learning of the second respondent's objection to the estate being reported as if the spouses were married in community of property.
- [25] It is evident that section 88 of the Deeds Registries Act is applicable in the present case, in so far as it allows this Court to authorize the execution of a postnuptial contract having the effect of an ante-nuptial contract. The court has a discretion to grant or refuse application for postnuptial execution and registration of a notarial contract provided it is satisfied that the necessary requirements have been met.
- [26] The applicant being a beneficiary, has locus standi to make this application. Therefore the Registrar of Deeds report is incorrect in this regard.
- [27] The practice directive does apply in the present application because it only prescribes the procedure for publication for fair treatment of creditors.
- [28] I am now satisfied that all requirements have been met. In order to avoid prejudicing the rights of existing creditors, the order is not retrospective.

Wherefore, I make the following order:

ORDER

1. Condonation for late filing of the replying affidavit is granted.
2. The postnuptial execution of a notarial contract entered between the deceased and the interested party having the effect of an ante-nuptial contract is authorised.
3. The applicant is granted leave to complete the execution of the antenuptial contract.
4. The applicant must publish this order in a government gazette within (seven) days.
5. The Registrar of Deeds must make an endorsement that the parties are married in terms of an ante-nuptial contract within a period of 90 days.
6. This order is not retrospective.
7. No order as to costs.

N.E. RAMAPUPUTLA

Acting Judge, Gauteng Division of
the High Court of South Africa,
Pretoria

Heard on:

26 April 2019

Date of Judgment:

20 June 2019

APPEARANCES

On behalf of Applicant:

Adv S F Fisher-Klein

Counsel:

On behalf of Respondent:

NO APPEARANCE

[1] Deeds Registries Act 47 of 1937 (herein referred to as the Act).

[2] Section 87 of the Act.

[3] Section 88 of the Act .

[4] Ex parte Kloosmon 1947 (1) All SA S1 (T) 55 .

[5] Ex parte Roche 1947 3 All SA 536 (D) page 540.

[6] See In re Langston' s Estate 1932 NPD 191.

[7] Ex Parte Kloosman et Uxor 1947(1) SA 342 (T) 347.

[8] Ex Parte Spinazze and Another NNO 1985(3) SA 650 (A) 658; Section 86 of the Deeds Registries Act

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