Source:
Unreported Judgments, Juta's/CHRONOLOGICAL LISTING OF CASES/2021/Serial No 0801 - 0900/DB v CB 2021 JDR 0896 (GP)

DB v CB 2021 JDR 0896 (GP)

Citation	2021 JDR 0896 (GP)
Court	Gauteng Division, Pretoria
Case no	A135/2020
Judge	NN Bam AJ and Collis J
Heard	March 3, 2021
Judgment	April 28, 2021
Appellant/ Plaintiff	DB
Respondent/ Defendant	CB

Summary

Marriage — Divorce — Proprietary consequences — Marriage out of community of property — Antenupial contract — Enforceability of prenuptial executory donation with terms contradicting those of parties' antenuptial contract — Enforcing such inconsistent with court's discretion under Divorce Act 70 of 1979, s 7(2).

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE AND TIME OF HAND DOWN SHALL BE DEEMED TO BE 28 APRIL 2021 AT 12H00

Judgment

Bam AJ:

INTRODUCTION:

1. This is an appeal from the Regional Court for the Regional Division of Gauteng, held at Springs, in which appellant contends that the court *a quo* erred in holding that the written agreement

concluded between the parties on 15 February 2015 - the terms which are diametrically opposed to those of their registered ante-nuptial contract - is enforceable and could be read together with the parties' ante-nuptial contract. For the reasons that appear in this judgement, we uphold the appeal with costs. At first a truncated version of the background facts is necessary.

2. The parties married each other on 19 May 2015. In terms of their ante-nuptial contract, which was registered 15 January 2015, they are married out of community of property and excluding accrual. On 15 February 2015, the parties concluded a written agreement, referred to as the 'B agreement' or the 'donation agreement' in the court *a quo*. For ease of reference we adopt the same nomenclature in this

---

2021 JDR 0896 p3

judgement. The preamble of the B agreement, loosely summarised and translated from Afrikaans to English states that (a) the parties are unmarried; (b) they intend to marry one another on 14 March 2015 and that the marriage, in terms of their ante-nuptial agreement will be out of community of property, without the application of the accrual; (c) that they still wished to marry according to the terms of the ante nuptial agreement; (d) that they wished for this agreement [the B agreement] to be read with their ante-nuptial contract. The agreement then goes on to record the donations that appellant agreed to make upon dissolution of their intended marriage, either by divorce or death, as respondent's sole and exclusive property. They are: (1) a residential dwelling to the value of R 1 500 000, as shall be identified by the respondent, with costs of transfer payable by the appellant; (2) a motor vehicle to the value of R250 000, as shall be identified by the respondent. In addition, appellant shall pay: (i) monthly contributions in respect of respondent's medical aid membership, which membership shall be similar to respondent's current medical aid membership; (ii) an amount of R20 000 per month, in respect of respondent's life long maintenance. The amount shall be paid into respondent's bank account, on or before the 7th day of each month; and, (iii) premiums, whether monthly or otherwise, for a Life Assurance Policy with Momentum, on respondents life, under policy number 211448146. The parties further agreed that the written memorial constitutes their entire agreement and that no amendment thereof shall be valid unless in writing and signed by both parties.

PROCEEDINGS IN THE COURT A QUO:

2021 JDR 0896 p4

3. Based on the pleadings, it appears that the marriage ran into trouble, to the point of being unsalvageable and on 8 August 2018, appellant sued for a decree of divorce and sought costs in

the event of opposition. Together with her plea, respondent filed a counter claim in which she set out the material terms of the B agreement and prayed for a divorce decree incorporating the terms of the B agreement, along with costs. In his plea to the counter claim, the appellant admitted that the parties had indeed concluded the B agreement after their ante-nuptial contract had been registered. He submitted that the parties had concluded the agreement under emotional circumstances and upon insistence by the respondent. He added that after signing the B agreement, the parties decided to abandon the terms thereof. He denied that the agreement was enforceable given the existence of the ante-nuptial contract. Alternatively, appellant pleaded that in the event the court were to find that the B agreement should be enforced, which he denies, then respondent had made herself guilty of gross ingratitude and in the premises, he was entitled to revoke the donations. After extensive submissions by both counsel in the court a quo, it was decided that the question of validity and enforceability of the B agreement would be decided separately in terms of Rule 29 (4) of the Magistrate's Court's rules and that all the other issues pertaining to the divorce would be postponed *sine die*. The matter was set down for 21 November 2019.

4. As will appear from the court *a quo's* judgment, the question of enforceability of the B agreement was the only issue before the court, with the issue of validity having receded to the back. In the main, appellant's counsel submitted that (i) the respondent had not pleaded rectification of the ante-nuptial contract and the parties

---

had not followed the legally recognized mean, of amending their ante-nuptial contract, either before or after it was registered, even though they had been legally advised of such requirements. Therefore, the B agreement, the terms of which are antonymous to the ante-nuptial contract, cannot be enforced; (ii) the B agreement is unenforceable because it is an attempt to settle a divorce before a marriage is concluded; and, (iii) enforcing the B agreement alongside the registered and legally enforceable ante-nuptial contract, which is binding not only *inter partes* but on third parties, is an attempt at varying or amending the ante-nuptial, which is legally impermissible.

5. On behalf of respondent, it was submitted that the case is a simple one in that respondent seeks neither rectification, variation nor amendment of the ante-nuptial contract with the B agreement. Rather, submitted counsel, his client seeks that the two agreements be read together. As for the point that the B agreement's terms are contradictory to those of the ante-nuptial agreement, counsel argued that parties in divorce proceedings decide the patrimonial consequences upon divorce by entering into

settlement agreements that often differ from the matrimonial regime applicable to the parties' marriage. He urged the court for a finding that the two agreements can co-exist and that the B agreement is enforceable.

6. In its reasons delivered on 11 December 2019, which were distributed to the parties on 16 January 2020. the court upheld the point that the B agreement is enforceable and that it can be read with the ante-nuptial contract. It dismissed, with costs, appellant's point *in limine* that the agreement is unenforceable. The court leaned on

---

the principles of *pacta sunt servanta* and sanctity of contracts for its decision as apparent from the extract below, which has been slightly adjusted for ease of reading:

> ... if the agreement were found to be a variation of the ante-nuptial contract then there is no reason to hold that it is not valid and enforceable *inter [partes]* if it was not meant to be valid and enforceable *inter [partes]* then what was its point? It is a valid contract. Due heed must be paid to the principles of [*pacta sunt servanta*] and the sanctity of contracts. The agreement is not attacked on the basis that it is illegal [*contra bonos mores]*, [incoherent] or that it is uncertain or vague and embarrassing. Its enforceability is attacked simply because of the existence of a registered ANC concluded prior to it being signed by the parties. I can find no reason to find that the agreement is not enforceable based on the laws of contract

ARGUMENTS ADVANCED BY THE APPELLANT:

7. Below I deal with the submissions made by counsel before this court. Owing to the view we take of the matter, I do not necessarily record all of the submissions. Counsel first touched on the purpose of an ante-nuptial contract; viz, that it is there to, *inter alia*, provide certainty to the parties, to the court and to third parties upon dissolution of the marriage, and to those dealing with the estate. Counsel again emphasised that the terms of the B agreement cannot be enforced given the existence of a registered ante-nuptial agreement with materially different terms. In this regard, counsel pointed out that the terms of the ante-nuptial state that there shall be no community of property and profit and loss and no accrual, yet the donation contract refers to the appellant donating property of R1.5 million and a car, to mention a but a few, all of which are meant to come out of appellant's profits.

Counsel argued vehemently that the two agreements cannot co-exist alongside each other and to do so would be tantamount to introducing an amendment via the back door, which is legally impermissible. Most importantly, added counsel, the court *a quo* had overlooked the fact that the parties had entered into the B agreement before they were married. Thus, upholding that the agreement can be enforced, meant that it would be dealt with as though it were a divorce settlement agreement. In this regard, appellant argued that a divorce action can never be settled prior to the parties entering the marriage. Dealing with the legal implications of upholding the B agreement, counsel argued that it means the court's jurisdiction has been ousted from exercising its discretion in respect of the matters provided for in sections 7 (2) and 9 of the Divorce Act.

ARGUMENTS ADVANCED BY THE RESPONDENT:

8. On behalf of the respondent, counsel submitted that he no longer persists with the preliminary point raised in the respondent's heads of argument. The point had to do with the question whether the court *a quo*'s judgment was appealable, in the sense espoused in *Zweni v Minister of Law and Order of the Republic of South Africa*[1] . Counsel first made submissions stating that there is no dispute as to the validity of the ante-nuptial agreement [2] and that his client had never sought to vary or amend the ante-nuptial contract with the B agreement. His client only sought an order that that the ante-nuptial contract and the B agreement be read together. He stated that

---

the B agreement was not a settlement agreement as envisaged in section 7 (1) of the Divorce Act but an executory donation [3] . He added that the respondent does not contend that the donation agreement was concluded in anticipation of a divorce nor does she seek to enforce the agreement in settlement of any dispute or a *lis* between the parties. Counsel asked the court to dismiss the appeal with costs

DISCUSSION:

9 Sections 7 (1) and (2) of the Divorce Act [4] provide

'(1) A court granting a decree of divorce may in accordance with a written agreement between the parties, make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other (own underlining)

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in

respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.'

10. Absent the settlement agreement envisaged in section 7 (1), where the court still retains the discretion to make the agreement an order of court, where it deems

---

appropriate, the court retains the statutory power to enquire into the reasonable needs of the spouse who requires maintenance, the existing and prospective means of the spouses, their ages, to mention but a few, and make an order accordingly. In a word, in terms of sections 7 (1) and (2) the authority to make orders in respect of matters such as maintenance, even where the parties have agreed, vests with the court. As illustration, I refer to the matter of *ST v CT*[5] in which, amongst the issues challenged by the appellant on appeal, was the question of refusal by the trial court to uphold a waiver of maintenance by the wife, which waiver was incorporated in the parties' ante-nuptial contract. The SCA held that the waiver was invalid and unenforceable and in so doing, confirmed the High Court's decision on this aspect. Writing for the majority, Madjiet JA reasoned thus:

'[174] In my view there is a stark difference between waiver upon divorce of the right of a spouse to seek variation of a maintenance order, as envisaged in s 8(1), and a prenuptial waiver of maintenance. The main, compelling, difference is that at the time of divorce both spouses have full knowledge of their respective financial means and needs. That is not the case before the parties have married.'... [178]...For present purposes, however, it is in my view sufficient to find that the impugned clause offends public policy as it is inimical to the legal policy regarding maintenance, encapsulated in s 7 of the Divorce Act . . Such a finding accords with well-established sound legal precedent developed over decades in this country...' [179] In Claassens v Claassens, Didcott J was confronted with the question whether a waiver of the right to apply for an increase in maintenance, contained in a divorce settlement, offends public policy. The learned Judge held that it did not. With reference to Schierhout, Didcott J pointed out that **'public policy frowns on the transaction only when the particular remedy that is waived is one it wants retained**. What offends public policy outside the Schierhout rule, in other words, **is not the exclusion of the court's jurisdiction per se, but its exclusion from**

---

matters which public policy insists on keeping justiciable. . This is the approach which I think should be followed in this case' (own emphasis)

11 In the present case, we are not dealing with a waiver of maintenance but an executory donation with terms that are contradictory to those of the parties' ante-nuptial contract I propose to park for a moment the question of whether the B agreement has any place or role in light of the existence of the registered ante-nuptial agreement. A cursory perusal of the B agreement will confirm that it is concerned with, *inter alia*,

maintenance of the respondent. The net effect of the court *a quo's* holding that the B agreement is enforceable, and can be read with the ante-nuptial agreement, is that instead of a court exercising its discretion as is required in terms of section 7(2), the respondent will end up with an order of life long maintenance [6] , couched as a donation, where no agreement existed in terms of section 7 (1) and in circumstances where the court would effectively have been ousted from exercising its discretion in terms of section 7(2) of the Divorce Act. Such a result cannot be countenanced. On this score, the court *a quo* erred. The ineluctable conclusion we reach is that the B agreement cannot be enforced.

12. In a recent decision of the SCA, in *H M v A M*[7] , a decision subsequently confirmed by the Constitutional Court, the parties had concluded an agreement, which sought to amend the parties' registered ante-nuptial agreement, at a time when there was no *lis* between them and not even divorce proceedings were contemplated. The

---

agreement according to the testimony of the respondent was her insurance policy [8] . Upon the husband instituting divorce proceedings, the respondent sought to make the agreement an order of court but the trial court refused and provided its reasons. Following the High Courts decision to uphold the agreement, the appellant, took the matter to the SCA. In its reasoning, overturning the decision of the High Court, the SCA stated:

> [9] . . .For present purposes I am prepared to accept that the agreement was entered into between the parties. The central question is whether it was made in contemplation of a divorce [10]. It is settled law that a court may only make an agreement between parties an order of court if it is competent and proper to do so. First and foremost, the agreement must, either directly or indirectly, relate to a legal issue or *lis* between the parties. It must bear some relation to litigation. (*Eke v Parsons* [2015] ZACC 30, 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 25). This means that, while it is not necessary for divorce proceedings to have been instituted at the time of the signing of the agreement (ie. 10 November 2014), a divorce must have been contemplated by the parties at that time. The respondent who, as stated, counterclaimed on the agreement bore the onus of proving this fact on a preponderance of probabilities. For the reasons that follow, I am of the view that the respondent failed to discharge this onus. [14] On the respondent's version it must be accepted therefore that it was only on 30 November 2014 that the divorce was contemplated for the very first time by the parties. The respondent's testimony and the objective facts lead ineluctably to the conclusion that the agreement did not embody the settlement of any *lis*, more particularly a divorce action. No divorce was contemplated when the agreement was signed on 10 November 2014. In the premises, the high court erred when it upheld the appeal and concluded that the agreement was a valid and enforceable settlement agreement.' (own underlining)

13. In *casu*, the question whether the B agreement was concluded between the parties in contemplation of litigation, much less of a

divorce, can confidently be answered in

the negative and this is apparent from respondent's heads of argument [9] before this court. What is more, the parties were not even married at the time of concluding the B agreement. They married only on 19 May 2015 with the B agreement having been concluded on 15 February 2015. According to the reasoning espoused in *H M and A M*[10] . it was for the respondent to establish that the B agreement related to a *lis* or legal issue between the parties at the time of its conclusion. The respondent has already stated upfront that at the time of concluding the B agreement, there was neither litigation nor legal issue between them. In our view, the fact that the B agreement carries the name 'executory donation' does not exempt it from the requirement that for a court to lend its imprimatur to an agreement and make it enforceable, it must, in the first place, relate to some litigation or some legal issue between them at the time of its making. This was not the case with this agreement. On this basis alone, the B agreement cannot be enforced.

14. There is a further reason why the B agreement cannot be enforced. I note in this regard that the court *a quo* relied on the maxim *pacta sunt servanta* in holding that the B agreement can be enforced and can be read together with the ante-nuptial. But such a conclusion is legally untenable in the face of the requirements of section 21 of the Matrimonial Property Act [11] . This is so because the B agreement introduces terms that are contradictory to the ante-nuptial contract. Before marrying each other, and by

following the relevant provision of the Deeds Registry Act [12] , the parties could have effected changes to the ante-nuptial via registration with the registrar. Having decided to marry without introducing the donation terms to the registered ante-nuptial, the only option for the parties to achieve what they now seek, was to apply to court for an amendment of the terms of their ante-nuptial contract, in terms of section 21. In *S B v R B*[13] the court, refusing to uphold a claim for a universal partnership because it was directly opposed to the parties' marital regime, noted:

> '... The problem is, however, that the alleged agreement [of a tacit universal partnership] would in my view have amounted to a revocation, or at the very least an amendment, of the very essence of the ante-nuptial contract in this case. That could not have been done, even with "the mutual consent of the parties" without an order of court.'

[See also EA v EC (09/25924) [2012] ZAGPJHC 219 (25 October 2012) at paragraph 10 - 11; and P V v E V (843/2018) ZASCA 76 (30 May 2019) at paragraph 21).

CONCLUSION:

15. Counsel for the respondent persisted in his submission that his client had not sought to amend or vary the parties' ante-nuptial agreement but that the two agreements be read together. It is clear that one cannot do this without ignoring the essence of the ante-nuptial agreement as stated in this judgment. We conclude, for all the reasons

---

set out in this judgment that the appeal must be upheld, with costs, and an order in this regard shall be issued.

ORDER:

16 Accordingly, the following order is made:

16.1. The appeal is upheld with costs,

16.2. The court *a quo's* decision that the B agreement is enforceable and it is to be read together with the antenuptial contract is set aside and is replaced with an order that the B agreement s found not to be enforceable, for the reasons set out in this judgment.

NN BAM

ACTING JUDGE OF THE HIGH COURT,

PRETORIA

I agree

COLLIS J

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:	
APPELLANT'S COUNSEL:	Adv Ferreira
Instructed by:	Chris Liebenberg Attorneys Breytenbach Street Springs
RESPONDENT 'S COUNSEL:	Adv West
Instructed by:	Kruger & Okes Attorneys Kingsway Avenue Nigel
DATE OF HEARING:	3 MARCH 2021

DATE OF JUDGMENT: 28 APRIL 2021

1 (310/91) [1982] ZASCA 197 [1993] 1 All SA 365 (A) (20 November 1992)
2 Caselines 052: page 5 paragraph 16
3 Caselines 052 page 4; paragraph 14
4 (Act 70) of 1979
5 (1224/15) [2018] ZASCA 73 (30 May 2018)
6 refer to paragraph 2 of this judgment for the full details of the donation
7 (1317/17) [2019] ZASCA 12 (14 March 2019)
8 A M v H M (CCT 95/19) [2020] ZACC 9; 2020 (8) BCLR 9C3 (CC) (26 May 2020), at paragraph 34
9 Caselines 052 para 14
10 paragraph 12 of this judgment
11 Act 88 of 1984
12 Act 47 of 1937, as amended
13 (13622/2011, 36/2009) [2014] ZAWCHC 56, [2015] 2 All SA 232 (ECLD George) (16 April 2014), at paragraph 36