

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: 6246/2008

In the matter between:

L G V Plaintiff

and

J H V (born F) Defendant

JUDGMENT DELIVERED ON 6 DECEMBER 2010

ALLIE, J

[1] This matter came before me as the determination of separate issues of law and/or fact in terms of Rule 33(4). The issues to be so decided are set out in the court order granted on 26 March 2010 as follows:

1.1. whether the agreement annexed to the defendant's counterclaim marked "X" which provides *inter alia*, for the exclusion from the calculation of the accrual of the defendant's estate, certain immovable property, is void and unenforceable;

1.2. whether the plaintiff donated to the defendant, the properties so excluded, whether such donation is evidenced by the said agreement and whether as a consequence of the donation, the said properties are excluded from any accrual sharing.

[2] The trial in the divorce action was accordingly stayed pending the determination of the issues in this matter.

[3] The court order provides that for the purposes of determining the issues, the parties record that the following facts are common cause:

3.1. the parties , on or about 26 August 2007, entered into the written agreement which is annexure "X" to the defendant's counterclaim;

3.2. the properties are presently registered in the name of the defendant;

3.3. at the time of concluding the agreement the defendant was the registered owner of Erf 285 Portion of Witpoort Farm JR285, Pinto Place, Beaulieu, Kyalami, Midrand ("the Beaulieu property");

3.4. at the time of concluding the agreement the Beaulieu property was unencumbered;

3.5. at the time of concluding the agreement the defendant made an offer to purchase Erf 1696, Witkoppen, Fourways ("the Fourways property) which was subsequently accepted;

3.6. registration of transfer of the Fourways property was effected thereafter.

[4] The parties are married to each other out of community of property by virtue of an order of the then Witwatersrand Local Division of the High Court which authorised the postnuptial registration of a Notarial Contract in terms of Section 21(1) of the Matrimonial Property Act 88 of 1984. The contract was registered postnuptially on 16 November 2001. The parties were

married on 3 June 1996. The post-nuptial contract provided that there shall be no community of property and profit and loss that the accrual system shall apply and that the nett value of their respective estates at the commencement of their marriage was nil.

[5] The defendant defended the divorce action instituted by the plaintiff and filed a counterclaim which was later amended. In the counterclaim, defendant alleged that the plaintiff commenced an adulterous affair during mid-2007. Defendant alleged that on or about 26 August 2007 subsequent to the plaintiff's admitted adultery the parties entered into the written agreement which is the subject of this determination.

[6] Paragraph 10 of the agreement reads as follows:

"Jane and Lorenzo wish to record that the Beaulieu property and the Fourways property inclusive of the proceeds of the realisation of either or both properties and any growth thereon which would ordinarily constitute part of the accrual of Jane's estate in the marriage is to be specifically excluded from any accrual sharing and/or calculation of the accrual of Jane's estate in the event of the parties' divorce or upon death as if the properties had been excluded as part of the commencement value of Jane's estate as described in the parties' antenuptial contract and in accordance with the provisions of Section 4(1)(a)(ii) of the Matrimonial Property Act of 1984."

[7] In her counterclaim, defendant contends in the alternative, that the plaintiff donated the said properties to her and the agreement is evidence of such donation. In a further alternative, the defendant alleged that it would be just and equitable that the plaintiff forfeits his right to share in the accrual of defendant's assets because plaintiff allegedly had an adulterous affair,

emotionally and mentally abused defendant, falsely represented that he wished to start a family, spent excessive amounts of time away from home and falsely represented that he would provide a permanent home and a stable environment.

[8] In his plea to the counterclaim, plaintiff admitted that he had an adulterous relationship during mid-2007. Plaintiff also admitted that he wished to start a family, that he worked long hours and travelled for work purposes from time to time. Plaintiff admitted the conclusion of the agreement but alleged that it was void and unenforceable by virtue of the fact that the parties did not approach the court to have their agreement dated 26 August 2007, registered postnuptially in terms of Section 21(1) of the Matrimonial Property Act so that their post-nuptial contract could be varied.

[9] Plaintiff relies on the decision in **Honey v Honey 1992 (3) SA 609 (W) at 614 H -1**. It was submitted further on behalf of plaintiff that the common law rule of immutability of a matrimonial property regime applies not only to the change of a matrimonial proprietary regime but also to the purported post nuptial amendment of a registered nuptial contract. On plaintiffs behalf, it was finally contended that the agreement is an amendment of the post-nuptial contract because the agreement states that *"the properties are to be specifically excluded from any accrual sharing and/or calculation as if the properties had been excluded as part of the commencement value of Jane's estate."* It was accordingly contended on plaintiffs behalf that the deeming provision purported to alter the existing commencement value in the post-nuptial contract and therefore purported to alter the post-nuptial contract.

[10] On plaintiffs behalf, the allegation that plaintiff donated the properties was rejected on the

basis that he did not own the properties and he could therefore not donate them.

[11] To determine whether the parties intended to vary the terms of their postnuptial contract with the agreement of 26 August 2007, the court has to first look at the ordinary meaning of paragraph 10.

[12] The paragraph commences with a mutual acknowledgment that the Beaulieu and Fourways properties and the proceeds of their realisation and any growth thereon would form part of the accrual in the defendant's estate. This fact is not in dispute. The paragraph goes on to provide that in the event of divorce or death, the properties will be treated as if they had been excluded as part of the commencement value of defendant's estate.

[13] When this latter part of paragraph 10 is read in the context of the entire paragraph, it becomes clear that the parties agreed to exclude the properties from the accrual of the defendant's estate rather than from the commencement value of her estate.

[14] The deeming provision in paragraph 10 of the agreement merely creates a situation where the properties are deemed to be excluded from the value of defendant's estate on death or divorce. In this regard see **Pinkey v Race Classification Board and Another 1966 (2) SA 73 (E) at 77 A - B** where the court referred to the comments of Cave J in **R v Norfolk County Council (1891) 60 L.J.Q.B 379 at 380**:

"Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that

particular thing, nevertheless ...it is to be deemed to be that thing."

[15] When the contract is viewed against the common cause fact of the plaintiffs adulterous relationship and the parties' attempt to reconcile then the rationale of paragraph 10 becomes clear. Plaintiff at the time, made the concession of the properties because he acknowledged his culpability in the adulterous relationship and the problems in the marriage at the time. Plaintiff does not allege that any coercion or undue influence was brought to bear on him which compelled him to sign the agreement. By all accounts the agreement appears to be one entered into by two mutually consenting adults.

THE PURPOSE OF REGISTRATION OF NUPTIAL CONTRACTS

[16] In the case of ***Ex Parte Spinazze & Another*** NNO 1985 (3) SA 650 (AD) the Law of Holland was considered with regard to formalities in the execution of nuptial contracts. It was found that no registration of the contract was required *inter partes*.

[17] The Deeds Registries Act 47 of 1937 makes provision in Section 87 for the registration of an ante-nuptial contract and for the formalities required for such registration to occur. Section 86 provides that an ante-nuptial contract that is not registered shall have no force and effect against a person who is not a party. The formality of registering of an ante-nuptial contract is clearly a requirement if a party wishes to rely on the ante-nuptial contract as against third parties.

[18] Section 21 (1) of the Matrimonial Property Act provides further for a court's authority if a nuptial contract is to be registered post-nuptially. Such an application to court must satisfy the requirement that third parties will not be prejudiced by the intended change in the matrimonial property regime and creditors may accordingly object should their rights be adversely affected by such a course.

[19] In ***Ex Parte Spinazze* at 658 A - C** the court found that an ante-nuptial contract that was not registered in accordance with the legal formalities is valid as between the parties thereto. See also Boberg's Law of Persons and The Family, 2nd edition at 195.

[20] Section 6 of the Matrimonial Property Act makes provision for the filing in the protocol of a Notary Public of a statement declaring the commencement value of a party's estate where it was not given in the ante-nuptial contract registered. Accrual sharing "*inter partes*" is clearly not regarded as an aspect that is vital to third parties and the legislature provided for a situation where an registered. Accrual sharing "*inter partes*" is clearly not regarded as an aspect that is vital to third parties and the legislature provided for a situation where an aspect that affects accrual sharing need not be subject to the formalities of registration in the Deeds Registry.

THE AGREEMENT MARKED "X"

[21] Clearly the parties agreed when they entered into the agreement in dispute, that the properties would have formed part of the accrual in the estate of the defendant. At that stage

however all that plaintiff had was a hope that the defendant's acquisition of the properties would increase the value of her estate. For example, after 26 August 2007, the properties could have been sold at a loss as opposed to a gain.

[22] Plaintiff had no rights to the properties and could accordingly not donate them to defendant. What he clearly did was to relinquish his right to share in the accrual of defendant's estate in an amount equal to the value of the properties at the time of divorce. Paragraph 10 expressly refers to death or divorce and also provides for no accrual sharing in the properties and its growth, meaning its growth up to the date of death or divorce.

[23] While the agreement dated 26 August 2007 is not an ante-nuptial or postnuptial agreement registered in the Deeds Registry in accordance with the legal formalities, it is a bilateral agreement between the parties varying the method of the determination of the accrual in the estate of defendant.

THE IMMUTABILITY OF THE MATRIMONIAL PROPERTY REGIME

[24] The principle of immutability of a matrimonial proprietary regime is clearly designed to protect third parties. The requirement of registration in the Deeds Registry fulfils the same objective.

[25] The agreement *in casu* unlike the agreement in the case of Honey, does not purport to vary the matrimonial property regime. The marital regime remains one of out of community of

property with the inclusion of the application of accrual system. The value of the accrual in the estate of the defendant does not impact on the rights of creditors and third parties. The immutability of the matrimonial property regime is not an issue to be decided in this case. In a matter of this nature the costs should follow the result.

It is ordered that:

1. The agreement entered into between the parties marked "X" and which is attached to the defendant's counterclaim and more particularly paragraph 10 thereof, is valid and enforceable as between the parties.
2. The plaintiff did not donate the properties in question to the defendant but he waived his right to share in the accrual of defendant's estate up to an amount equal to the value of the properties or the value of the realisation of the properties on death or divorce in terms of the agreement marked "X" annexed to defendant's counterclaim.
3. The plaintiff shall pay the costs.

ALLIE, J

