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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:67085/2014

9/3/2018

In the matter between:

M T

PLAINTIFF

and

R M T

DEFENDANT

JUDGMENT

RANCHOD J:

[1] This matter was on the trial roll before Rabie J on 13 June 2016 for determination of the parties' divorce action. The learned Judge ordered in terms of Rule 33(4) of the Uniform Rules of Court that the issue of which marital regime was applicable to the marriage between the parties be determined separately from the other issues. The trial was postponed *sine die* with costs to be costs in the cause.

[2] Accordingly, the issue for determination before me is whether or not the parties had concluded a verbal ante-nuptial contract prior to the solemnisation of their civil marriage on 18 September 2012 before a marriage officer at an office of the Department of Home Affairs.

[3] It is the plaintiff's case that the parties had in fact concluded a verbal ante-nuptial contract prior to the solemnisation of their marriage and that it was a specific term of the said agreement that the accrual system was not applicable to their marriage.

[4] The defendant on the other hand denies the existence of such a verbal ante-nuptial contract. She avers that the parties never even discussed the issue of which matrimonial property regime would apply to their marriage. It is further contended by the defendant that the issue of their matrimonial property regime was also not raised by the marriage officer during the solemnisation of their marriage on 18 September 2012.

[5] It is clear that there is a factual dispute as to whether the parties entered into a verbal ante-nuptial contract with the exclusion of the accrual system as alleged by the plaintiff.

[6] At the commencement of the trial plaintiff's counsel stated that the plaintiff's case was based on claim 1 of the particulars of claim. The other claims are claims in the alternative to claim 1. It was conceded that the onus was on the plaintiff to prove his case. However, it is not in dispute that the parties concluded a civil marriage on 18 September 2012. It was also common cause that the main reason for the plaintiff wanting to conclude a civil marriage was that he intended to establish a Church and to that end he had to appear to be a pastor in good standing by registering his marriage to the defendant to whom he had been married by customary law in 1996. The parties had first met in 1991. I will revert to this aspect presently.

[7] At the commencement of the trial plaintiff's counsel also sought to hand up a supplementary trial bundle which contained documents that were not previously discovered by the plaintiff. Defendant's counsel objected and plaintiff's counsel then said she was prepared to proceed with the trial without the supplementary bundle. I ruled that no documents in the supplementary trial bundle discovered only during course of the trial week may be used as evidence in the trial.

[8] The plaintiff is a practising specialist medical doctor and also a professor at a University. The defendant is a housewife. She matriculated in Zimbabwe whereafter she studied for a course in office administration and typing at a

technical college. She also did a course in beauty therapy.

[9] Their marriage is the plaintiff's fourth and the defendant's first. The parties have two children, namely, a son over 20 years of age and a twelve year old daughter. The plaintiff also has a child from his second wife. The child is presently eleven years old.

[10] A brief chronology of the background facts which are common cause between the parties are as they emerged from the evidence is:

- 10.1 The parties met each other in 1991;
- 10.2 The plaintiff married his first wife T N in-community- of-property in 1992;
- 10.3 In 1996, whilst still going through divorce proceedings with N , the plaintiff paid lobola for the defendant and they had a 'white wedding'. (The plaintiff referred to it as a 'blessing' rather than as a wedding or marriage when he testified). The customary marriage was not registered;
- 10.4 The plaintiff and N were eventually divorced in 1997;
- 10.5 The plaintiff and defendant's son was born in 1997;
- 10.6 In 1999 the plaintiff married Rosemary Nkosi by ante-nuptial contract and the accrual system was applicable to the marriage;
- 10.7 Plaintiff's marriage to Nkosi ended in divorce in 2007;
- 10.8 In the s me year plaintiff entered into a written ante-nuptial contract with the defendant with exclusion of the accrual system. (More on this aspect later);
- 10.9 In 2009 the plaintiff instituted proceedings in the North Eastern Divorce Court in Lebowakgomo to have the customary marriage entered into with the defendant in 1996 declared void. The proceedings were, however. not finalised because according to the plaintiff the parties reconciled;
- 10.10 In 2011 the plaintiff married B M out of community of property but with the exclusion of the accrual system. They were divorced in 2012.
- 10.11 On 18 September 2012 the plaintiff and defendant registered their

marriage at the office of the Department of Home Affairs in Akasia, Pretoria.

10.12 It is apparent that the customary marriage between the plaintiff and defendant remained in force until the registration of their marriage in 2012.

[11] As I said, the issue for determination is whether an oral ante-nuptial contract was entered into between the parties.

[12] The plaintiff testified that because of the experience he had regarding the matrimonial property regime with his first wife when there was a division of the joint estate because it was a marriage in community of property and the second one where the accrual system applied and he therefore had to share the accrual with his then wife he made sure he married the third and fourth time by ante-nuptial contract with the exclusion of the accrual system. This, it was argued, made the plaintiffs version more probable that he had entered into an oral ante-nuptial contract with the defendant.

[13] A written ante-nuptial contract purportedly entered into by the plaintiff and the defendant was tendered in evidence by the plaintiff. The ante-nuptial contract was signed on 31 October 2007 before Notary Public Johannes Frederick Moolman by Mr Malesela Emmanuel Moloto on behalf of the plaintiff and defendant by virtue of a power of attorney dated 26 October 2007. The Notary's protocol number 602/07 appears thereon. Plaintiff testified that the parties did not thereafter solemnise their marriage.

[14] However, what is not clear is why, if the plaintiff and the defendant had entered into a written ante-nuptial contract he would rely on an oral agreement in the pleadings. The plaintiff repeatedly stated when testifying that the ante-nuptial contract had been 'registered', presumably in the Deeds Office. During the course of the trial, plaintiffs counsel sought to cross-examine the defendant on the written ante-nuptial contract signed by the parties. Defendant's counsel objected on the basis that plaintiffs

case was based on an oral contract. Plaintiff's counsel submitted that plaintiff indeed relied on the oral agreement. The written ante-nuptial contract was introduced in evidence merely to show the intention of the parties as regards choice of the marital regime. Yet during his evidence, the plaintiff repeatedly referred to the written agreement of 2007. When asked in cross-examination which contract he was relying on - the alleged verbal one or the written one he gave the rather convoluted answer that the written one reflected his previous intention but when he was getting married in 2012 (to the defendant) it was the oral one. He said the question was not fair to him as he was a lay person. He then repeated that the written contract was registered in 2007. This begs the question: if it was registered then why rely on an oral contract? The plaintiff was unable to provide a satisfactory answer to this question. Unless, of course, the plaintiff was aware that he would have difficulty relying on the written contract in which case the defendant's version that she was not aware she was signing an ante-nuptial contract but rather a marriage certificate carries weight.

[15] The defendant testified that at some stage in 2007 she and the plaintiff were on their way to a church seminar to be presented by a well-known preacher by the name of Miles Munroe when the plaintiff requested that they pass by his attorney's office. She said on arrival there she was merely told to sign certain documents which were never read or explained to her or their significance. She was only told that it was in her best interests since her husband was a businessman. She thought she was signing a marriage certificate. The defendant also testified, that the Mr Moloto in whose favour the power of attorney was allegedly signed was not present when she signed the papers in the plaintiff's attorney's office. Whilst the power of attorney and the ante-nuptial contract signed by Moloto before the notary are part of the papers, the draft ante-nuptial contract, which it is alleged in the power of attorney was initialled by the parties for identification purposes, is not.

[16] Under cross-examination the defendant said she asked plaintiffs

attorney what the documents were about that she was being asked to sign. The attorney told her she was signing a marriage certificate and she would not be liable for plaintiffs debts. She still believed her marriage was one in community of property.

[17] Curiously, the plaintiff would not admit that his marriage to the defendant prior to 18 September 2012 was a customary marriage. He repeatedly referred to it as a 'blessing' but under cross-examination conceded that he was married to the defendant. It is not in dispute that the defendant had been co-habiting with the plaintiff during the time he was going through all three of his previous divorces.

[18] The plaintiff also relied on the Marriage Register which was completed on 18 September 2012 at the Department of Home Affairs. A copy was introduced in evidence. Under the heading 'Particulars of Marriage' the date and place of marriage is stated as 18 September 2012 and Akasia respectively. Directly next to the date of marriage is written in large capital letters 'A.N.C'. The plaintiff said this was written by the marriage officer on being told that the marriage was to be one with an ante-nuptial contract. The marriage officer was Mr Peter Eric Mogashoa. He did not testify so plaintiff's assertion in this regard is not confirmed by Mogashoa. The plaintiff had apparently subpoenaed Mogashoa to testify in these proceedings and he had attended court on previous occasion when the matter was postponed. It was contended on behalf of the plaintiff that the reason why Mogashoa was not available to testify was that he had since resigned from the Department of Home Affairs and plaintiffs attorneys were unable to have a subpoena served on him to appear before this court. The plaintiffs attorney was not called to testify in this regard. In any event, there is no provision in the register for indicating whether the marriage is in or out of community of property. The letters 'A.N.C.' were simply added in randomly.

[19] The plaintiff testified that he told the marriage officer that the parties had an ante-nuptial contract, the defendant confirmed it and the marriage officer noted it. He said he did not produce it because it was

registered and it could therefore be traced. I think I can take judicial notice of the fact that where a written ante-nuptial contract is said to exist a marriage officer will insist on a letter from the attorney or notary confirming that fact and it would be noted accordingly. In any event, the plaintiff relies on a verbal agreement which I deal with below.

[20] The defendant testified that when she signed the marriage register the letters 'A.N.C' were not written in the register and she did not know who wrote them. She also did not hear the plaintiff telling the marriage officer that their marriage was by ante-nuptial contract. She testified that a certain lady at the Department of Home Affairs counselled the parties before they signed the marriage register. The defendant says she signed before this lady to be married in community of property. When asked in cross-examination whether this lady said anything about their marriage system she said she does not remember her talking about it. The lady referred to was not called to testify.

[21] The defendant testified that she has been married to the plaintiff for twenty-one years and she has always believed it to be a marriage in community of property. In my view, no inference can be drawn that the letters 'A.N.C.' were meant to indicate that the parties were married by a verbal ante-nuptial contract or that they were written by the marriage officer. As I said Mogoshoa did not testify to confirm that he wrote the letters and why he did so.

[22] The plaintiff's case is that because of his experience with regard to his previous marriage she would never have consented to register their marriage as one in community of property. It was always his intention to marry out of community of property and this intention was communicated to the defendant. However, at no stage did he testify that the defendant agreed to his intention to be so married.

[23] The plaintiff's reliance on an alleged oral agreement simply does not make sense. As I said, he does not rely on the written ante-nuptial contract which, he insists, was registered. No evidence that it was registered in the Deeds Office was tendered. And if it was not so

registered it would still be valid inter-partes as would a verbal ante-nuptial contract. So the question arises why enter into another (verbal) contract?

[24] It is of significance in this regard that the plaintiff testified that he only became aware of the fact that the ante-nuptial contract entered into between the parties in 2007 was not binding on their marriage when informed of this by his attorney when instituting the divorce proceedings. This means that until then he believed that the written contract was valid but when informed that it was not, he changed his stance and alleged that there was a later verbal ante-nuptial agreement. This, in my view, is opportunistic.

[25] The plaintiff also testified as further evidence that the marriage was one out of community of property the fact that after the registration of the marriage in 2012 he acquired an immovable property for R4 000 000.00 in his own name and ABSA bank registered a mortgage bond over it without requiring the defendant's consent. This would not have been possible if they were married in community of property. It seems to me that the only inference that can be drawn is that the bank must have relied on the written ante-nuptial contract of 2007. I think it highly improbable that a financial institution would rely on a verbal ante-nuptial contract.

[26] It is clear, in my view, and notwithstanding plaintiff's assertion that the payment of lobola resulted in a 'blessing' whatever it means, that it in fact resulted in a customary marriage.

[27] Section 4(9) of the Recognition of Customary Marriages Act 120 of 1998 (the Act) provides that failure to register a customary marriage does not affect the validity of that marriage. It seems to me therefore that a valid customary marriage subsisted between the parties from April, 1996 until 18 September 2012.

[28] Subsections (1) and (2) of section 10 of the Act provide -

'(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No.25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.'

[29] It would seem therefore that up until 18 September 2012 the parties' marriage was governed by customary law. When the marriage was registered on 18 September 2012 and no acceptable or convincing evidence is produced that the marriage was to be governed by the terms of a verbal ante-nuptial contract then the marriage is one in community of property.

[30] The plaintiff bears the onus to prove his case on a balance of probabilities. He has failed to do so.

[31] In the circumstances I make the following order:

31.1 It is hereby declared that the marriage between the plaintiff and the defendant which was registered on 18 September 2012 is one in community of property.

31.2 The costs are to be paid by the plaintiff.

RANCHOD J

JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff	: Att. M de Klerk
Instructed by	: DDKK Attorneys
Counsel on behalf of Defendant	: Att. V Mabe
Instructed by	: T.C Rampatla Inc.
Date heard	: 31 October 2018
Date delivered	: 9 March 2018