



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO Of Interest to other Judges: YES/NO Circulate to Magistrates: YES/NO
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Case number: 5231/2016

In the matter between:

H. J. T.

Plaintiff

and

M. J. T.

Defendant

HEARD ON: 23 MAY 2018

JUDGMENT BY: LEFENYA, AJ

DELIVERED ON: 7 JUNE 2018

Introduction:

- [1] This is an action for divorce. The plaintiff and the defendant were married on 01/12/2001 out of community of property with the exclusion of the accrual system. There are no children born out of this marriage. The parties have also entered into an Ante -Nuptial Contract (the ANC).
- [2] At the commencement of the trial there was an amendment to prayer 2 of the applicant's particulars of claim. Initially the plaintiff sought payment in the amount of R1 750 000, 00. This was then amended to an amount of R 975 000, 00. The plaintiff further abandoned prayer 3 in which she prayed for an order that the defendant retain her on his medical aid scheme.
- [3] On 23/05/2017 after the case for the defendant was closed, the parties agreed that the marriage between the plaintiff and the defendant was irretrievably broken down and that an order may be made for the dissolution of the marriage and judgment be reserved in relation to the remaining disputes. Pursuant to this I made the following order;
1. Decree of divorce is granted
 2. As per agreement between the parties, judgment in relation to the plaintiff's prayer 2 and costs is reserved.

- [4] The plaintiff therefore, now seeks an order that the defendant pay her the amount of R 975 000 00 being a half share from the proceeds of the property situated at Portion 1 of Plot 7, Rayton, Bloemfontein (the property) or the value thereof. Plaintiff further prays for an order that the defendant pay the costs of the action.
- [5] In his opposition the defendant argued that the plaintiff is not entitled to this amount and that the plaintiff's claim be dismissed with costs.

The evidence / Facts

- [6] The plaintiff testified and called Mr. Driaan Coetzee (Mr. Coetzee) to testify on her behalf. The defendant did not testify nor was any witness called to testify on his behalf.
- [7] The plaintiff testified that according to clause 4 of their ANC, she is entitled to an amount of R 975 000 00. This clause reads as follows; *"Dat indien die huwelik tussen hulle ontbind sou word as gevolg van 'n egskeiding die eiendom bekend as Gedeelte 1 van plot 7, Rayton Bloemfontein, hetsy verkoop of gewaardeer sal word en elke party geregtig sal wees op een- halwe aandeel van die opbrengs van die eiendom, of die waarde daarvan."*
- [8] The clause was loosely translated in exhibit "C", and accepted by both parties to read as follows; *" That in the event the marriage is dissolved as a result of divorce, the property known as part 1 of plot 7 of Rayton Bloemfontein,*

either be sold or valued and each party will be entitled to one half share of the proceeds of the property or the value thereof”.

- [9] The plaintiff's evidence was that before their marriage, the defendant proposed that they marry out of community of property. She testified that as she was concerned about her future, she asked the defendant as to what would she be left with in the event of a divorce. According to the plaintiff, the defendant told her not to worry, whereupon an ANC was concluded. In this contract it was agreed that the plaintiff would benefit as in the above named clause 4. The plaintiff further testified that, at some stage, early in their marriage, the defendant raised the idea of the property being sold or transferred to a trust and that she supported the idea. She however denied that this was pursued further. She therefore believed that at all times her interests were protected by this clause.
- [10] According to the defendant, in cross examination to the plaintiff, the property was transferred to MJT Trust (the trust) in 2003 and the plaintiff had full knowledge thereof. A page 75 of the court bundle (exhibit D) was submitted as a document purported to be signed by the plaintiff. In this document the plaintiff allegedly acknowledged having knowledge of the sale of the said property to the trust.
- [11] In her testimony the plaintiff did not dispute that the property was transferred to the Trust at some stage. She however denied that she

knew when was this done and which Trust it was. She further testified that she never saw a copy thereof. She also denied ever signing any document, acknowledging that she knew of the sale or transfer of the property to the trust. She testified that she started seeing exhibit D from her attorneys only after the divorce proceedings were commenced. Counsel for the defendant disputed this and insisted that she knew of the transfer. She further denied that she knew that the property was sold to the trust to the amount of R 51 850, 00. According to the plaintiff, when they married the defendant told her he bought the property for about R 550 000, 00 and that she could not have agreed to the sale price of R51 850, 00 as it was not the correct value of the property. She also denied that she promised the defendant that she would not insist on the terms of the ANC.

- [12] Mr. Coetzee testified that he is employed by Equity Property Professionals as a candidate valuator and that he works under direct supervision of a principal valuator. He testified in relation to the value of the property. His evidence was that he valued the property at the client's instruction which was for him to determine the market value of the property at the time. He then used a comparable sales method. He explained this as a method whereby he compared the subject property with the properties which were more or less the same in the area. His evidence was that he was not allowed to enter the property by the defendant and he was not even allowed to take pictures of the property. He did not even have access to the title deed. According to him, after

taking all relevant factors that were available to him into consideration, he valued the property to the amount of R 1 950 000 00 as at February 2018.

- [13] Counsel for the defendant in cross examination of Mr. Coetzee disputed this value. According to the defendant, the property was subject to a usufruct, and his submission was that the value of R 1 950 000 00 could not be the correct one as Mr. Coetzee did not take the usufruct into account when valuating the property. Mr. Coetzee conceded that if there was any usufruct in the property it could affect the value. Counsel for the defendant also objected to the market value determination used by Mr. Coetzee and argued that he could have used what is called arms-length method. A further submission on behalf of the defendant was that the value of the property could be an amount of R 1 850 000 00 as contained in the report that was prepared by a Mr. Konig.

The Issues.

- [14] The first issue to be determined pertains to the interpretation of clause 4 of the parties' ANC and whether under the prevailing circumstances this clause can be enforced, and therefore whether the plaintiff is entitled to her claim or not.

The second issue is whether the amount of R 1 950 000 00 as determined by the plaintiff is a correct value of the property or not.

The Legal Principles:

[15] An antenuptial contract is a legally binding agreement between the parties like any other contract. As argued by Counsel for the defendant in paragraph 5 of the defendant's heads, *"a clause in an antenuptial contract must be interpreted in the same way as any other contract."*

In **Bath v Bath [2014] ZASCA 14** the court said the following; *"It is trite that in ascertaining the meaning of a contract a Court must have regard first to its wording. It must also consider the context or factual matrix in which it was concluded. That is so even where the words on the face of it are clear."*

In **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 at 603 (Endumeni case)** the court said *" Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract having regard to the context provided by reading the particular provision or provisions in the light of a document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document..."*

- [16] In Honore's South African Law of Trusts, 5th Edition at page 13, the following is said regarding the duties or legal relationship between trusts and trustee is that , *"a trustee is a person entrusted with the control of property with which they are bound to deal with for the benefit of others."* Therefore, as alluded to by both parties the trustee may not sell the trust property.

Reasons / Finding

- [17] I will first deal with whether clause 4 in the ANC can be enforced after the property was transferred to the Trust.
- [18] Clause 4 of the parties' ANC states that, *"that in the event that the marriage between them is dissolved as a result of a divorce, the property known as Part 1 of Plot 7 Rayton Bloemfontein either be sold or valuated and each party will be entitled to one half share of the proceeds of the property, or value thereof."* (Exhibit C)
- [19] The Counsel for the defendant's submission, that the house does not belong to the respondent, but to the trust and therefore it cannot be sold is correct. The further argument is that, as the property cannot be sold, then clause 4 cannot be enforced. The defendant's submission, following this, is that the defendant cannot perform and there can be no one half that the plaintiff can claim from the defendant. It should be borne in mind that, when the defendant transferred the property to the trust in 2003, he knew very well that clause 4 existed. Further, in 2007 when he subjected the property to

the usufruct, he knew clause 4 of their ANC was still there. He further knew the consequences of the property held in a trust which is also subject to the usufruct.

[20] The defendant's Counsel further argued that the plaintiff was bringing in the second part of the clause only at a later stage after they accepted that the property cannot be sold as this was never raised in their pleadings. A question posed to the plaintiff in cross examination was, where would the defendant's half share come from if the property could not be sold but if he paid the plaintiff one half share of the value of the property. As alluded to by the defendant, a clause in the ANC should be interpreted in the same way as any other contract. **(Page 2, para 5, of the defendant's heads of argument).**

[21] It is therefore correct to read and interpret clause 4 which the plaintiff relied on in its entirety. In this regard it is important to look at the remainder of the clause which clearly provides that, *"each party will be entitled to one half share of the proceeds or the value thereof."* In my view, reading the entire clause is important and will indeed assist the Court in *"ascertaining the meaning of the contract and consider the context or factual matrix in which it was concluded"*. **Bath v Bath** *supra*.

[22] The argument by Counsel for the plaintiff was therefore correct that the last part of the clause should also be read into the terms of the clause and be taken into consideration and the property be valued. What the plaintiff wants at this stage is clearly that the property be valued and that the defendant pays her half share of the value thereof.

In **BC v CC 2012 (5) SA 562 ECP**, the court said the following; “...*the plaintiff does not seek transfer of the assets held on behalf of the trust to herself. She only seeks that the value thereof be considered in determining the accrual...*”

I take this to be relevant in this regard even though the case deals with marriage subject to accrual system and the determination thereof. Counsel for the plaintiff’s submission was therefore correct that it does not mean that when the property is transferred to the trust it cannot be valued.

[23] It is also important to note that the defendant does not dispute the existence and the terms of clause 4. It is common cause that when the parties married in 2001 the property belonged to the defendant. The couple after their marriage stayed in the property and the defendant continued to occupy the property after the applicant moved out. The defendant is one of the trustees. He solely enjoys the alleged usufruct. If all these are taken into account, then, the indication is that, the trust, and the property in question are closely interlinked to the defendant. I therefore, cannot find what can prevent the property that

is still there from being valuated. As correctly submitted by Counsel for the plaintiff *"it is either that the property is sold or it is valuated"*.

Clause 4 should therefore be interpreted as such. I am therefore satisfied that clause 4, if read in its entirety can be enforced and I disagree with Counsel for the defendant's submission that the defendant cannot perform as the clause is unenforceable.

[24] The second leg of the first question is whether the plaintiff under the circumstances is entitled to her claim. It was argued for the defendant that the plaintiff as a broker with many years of experience knew about trusts and that she was aware that the property was transferred to the trust. It is indeed correct that the plaintiff admitted having knowledge of how trusts operate. She further testified that she supported the idea of a trust. It is however not sufficient to say that on this basis the applicant knew of the transaction, the amount the property was sold for and that she approved same.

[25] Another submission on behalf of the defendant was that at the time when the agreement was entered into no restrictions were placed on the defendant's right to deal with the property in whichever way. This is true. Similarly, as Counsel for the plaintiff submitted, when the parties signed the ANC it was not said what the position would be in the event of a property being transferred to a trust or if it is a subject to the usufruct. Pursuant to these arguments, it is appropriate that I look at the intentions of the parties or the objective of the ANC at the

time of signing the thereof. This can be ascertained from the evidence of the plaintiff, which is the only evidence before the court in this regard. According to the plaintiff, before they entered into the marriage, the defendant suggested that their marriage be out of community of property. This, according to the plaintiff, prompted her to want to know what her security would be in the event of a divorce. She was assured by the defendant, and her assurance came in the form of clause 4 which was drafted by the defendant and which the plaintiff took for legal advice. After she was satisfied with its meaning and content she signed it. At that stage the property belonged to the defendant and it was neither a Trust property nor was it subject to a usufruct.

- [26] The objective of the ANC can also be gleaned from the terms of clause 4. Counsel for the plaintiff argued in this regard in the plaintiff's heads of arguments and referred me to the following paragraph in **Bath v Bath [2014] ZASCA 14**; *"It is trite that in ascertaining the meaning of a contract a Court must have regard first to its wording. It must also consider the context or factual matrix in which it was concluded. That is so even where the words on the face of it are clear."*
- [27] The intentions of the parties and the objective of the contract in my opinion, from clause 4, were very clear that, in the event of a divorce, the plaintiff would be protected and will not be left without anything. The parties' intentions should therefore be given effect to. When interpreting the clause in an antenuptial contract the following was

said in **RP v PP 2016 (4) SA 226 (KZP)** at page 244, paragraph 30; *“Clause 6 must therefore be construed within the context of the antenuptial contract as a whole, the prevailing law relating to the proprietary consequences of the marriage when the marriage took place, the intention of the parties in concluding the antenuptial contract and the purpose for which the provisions of clause 6 was included in the contract.”*

[28] I agree with Counsel for the defendant that indeed MJT Trust is not a sham and that there is no evidence adduced to aver that. In support of this argument reference was made to **BC v CC** (supra).

Even though the Trust is not a sham the defendant transferred the property into a trust well knowing the terms of ante clause 4 of ANC. It cannot therefore be argued that when he did this it was to the advantage of the plaintiff whom he knew had to benefit in the event of a divorce.

[29] Another point to consider is that the property was in the defendant's names before the marriage and up until it was transferred to a trust. He is the one who came with the idea of a trust. He therefore had the opportunity to consider all the implications and consequences of a property being transferred to a trust. The plaintiff, on the other hand, even though she had the knowledge of how trusts operate, the terms, meaning and implications of MJT Trust in particular, were not fully discussed with her at the time the property was transferred.

- [30] Therefore the plaintiff would not have accepted the transfer of property into a Trust not knowing what potential risks were there in the event of a divorce. I therefore accept that the plaintiff was never involved in the transactions of MJT Trust, and therefore could not have known what consequences would be. The plaintiff's belief was that her interests were at all times protected because of the terms of clause 4.
- [31] It is evident that the plaintiff did not want to be left in the cold in the event of a divorce. Consequently, she could not have been comfortable with a property being subject to a usufruct well knowing this would affect the value and subsequently her claim. It does not make sense. I therefore, under these circumstances, accept her version that she had no knowledge of the fact that the property was subject to a usufruct, as none existed at the time of the signing of the marriage contract.
- [32] Counsel for the defendant argued that there was no need for the defendant to testify or call witnesses. I disagree. The plaintiff testified that she was never involved in the transfer of the property to the trust. She denied that the defendant involved her in the transactions and also denied being aware of the existence of the usufruct. It was therefore up to the defendant to testify and rebut these allegations and explain when it was that the plaintiff was made aware of this and in what manner.

- [33] It was put to the plaintiff in cross examination that Ms. Swanepoel would say that the plaintiff was present when exhibit "C" was signed and that she would testify that it was the plaintiff who signed this document. The plaintiff denied this, but still Ms. Swanepoel was not called to rebut her denial. I am in the circumstances inclined to agree with Counsel for the applicant's argument that a negative inference should be drawn against the defendant for failure to testify and to call the above-mentioned witnesses.
- [34] I am therefore not persuaded by the Counsel for the defendant's submission that the plaintiff was involved in the transaction in relation to the transfer of the property to the Trust. I am also not persuaded that it is her signature that appears on exhibit "C".
- [35] Another argument on behalf of the defendant was that he is still in love with the plaintiff. It was further argued for the defendant that plaintiff had full knowledge of the Trust and that it was impossible that, being a beneficiary, she would not be aware of the trust.
- [36] As Counsel for the plaintiff correctly submitted, the Trust does not name the applicant in her personal capacity as a beneficiary, but rather makes whoever that will be the respondent's legal spouse a beneficiary.

Taking all these into account, even though the plaintiff as a spouse was a beneficiary, I find it hard to believe that, she was involved in the formation of the trust and I further find it hard to believe that she was aware that she was a beneficiary. As indicated above it is the defendant, and not the plaintiff who is one of the trustees, and the defendant solely benefits from the alleged usufruct. In my opinion, therefore, when the defendant transferred the property into the trust name, he did not do this in good faith and with the plaintiff's interest at heart. So to claim the defendant is still in love with the plaintiff and that the plaintiff as the beneficiary would know of the terms of the Trust does not hold water.

- [37] The last aspect to look at is the value of the property. Argument by Counsel for the defendant is that the plaintiff failed to prove prima facie the value of the property. Evidence was adduced for the plaintiff as to the value of the property. The defendant queried the method of valuation which was used by the valuator, Mr. Coetzee and disputed the amount of R1 950 000 00 as the correct value. The argument was that there are other methods he could have used. It is correct as argued by the defendant's Counsel that Mr. Coetzee knew very well what arms- length method is which it was argued is the method he could have used. Counsel for the plaintiff further conceded that Mr. Coetzee's testimony during cross examination in this regard was not impressive. I agree. However, as far as the valuation that was

conducted by Mr. Coetzee is concerned, in my opinion his evidence could not be faulted. The defendant failed to call a witness to testify regarding any other method that could have rebutted Mr. Coetzee's. This could have allowed Counsel for the plaintiff to challenge or accept such method and the different value.

[38] A further argument is that because of the usufruct in the property the value according to Mr. Coetzee's finding can be affected. The argument might be legitimate, as Mr. Coetzee also conceded that if there was a usufruct, it could have affected the value and it could have been different.

[39] As submitted by Counsel for the plaintiff, the indication was that Mr. Konig would be called to testify in relation to the value of the property and to dispute Mr. Coetzee's finding, but he was not called. It is correct, as argued by the Counsel for the defendant, that information pertaining to this is in the papers, however, in my opinion, just as Counsel for the defendant had had the opportunity to challenge the plaintiff's version, equally Counsel for the plaintiff could have challenged the defendant's version. Counsel for the plaintiff was correct in saying that the court should draw an adverse inference and conclude that had Mr. Konig being called, he perhaps, could have testified in a manner that could not be of benefit to the defendant as far as the value of the property was concerned. One should further bear in mind that it is because of the defendant's conduct that Mr.

Coetzee could not access the property to inspect it inside or its title deed. Mr. Coetzee therefore did not know and could not have known if there was a usufruct in the property if the defendant did not tell him. This, further substantiate the finding that, the plaintiff had no knowledge that there was a usufruct in the property, because, if she knew, she could have informed Mr. Coetzee before the valuation.

[40] I therefore agree that it could have been appropriate to call a witness who would dispute the version of Mr. Coetzee and further explain to the court what were the terms of the usufruct and what value could then be attached to the property. The only evidence therefore regarding the method of valuation and the value determined thereafter is that of Mr. Coetzee. In the absence of any disputing evidence I have no choice but to accept Mr. Coetzee's version. Be that as it may, I am also in agreement with the Counsel for the plaintiff that at the time the parties signed the ante-nuptial contract, there was no usufruct. There was also no agreement that the property would be sold subject to a usufruct and there is therefore no reason why the value of the property should be determined subject to a usufruct. Mr. Coetzee at the end testified that if there is no usufruct he stood by the value of R 1 950 000 00. The Counsel for the plaintiff's submission that the businesslike interpretation should also be adopted in interpreting clause 4, which is that the property should be valued at market value also carries more weight. See *Endumeni* *supra*.

[41] I am therefore satisfied that the plaintiff discharged its onus on the balance of probabilities that clause 4 of the parties' ante-nuptial contract is enforceable. I am further satisfied that the amount of R 1 950 000,00 is the correct value of the property as determined by Mr. Coetzee. Consequently I am satisfied that the plaintiff is entitled to her claim in the amount of R975 000,00 being a half share of the value of the property. The award of costs is in the discretion of the court unless otherwise stated, and as a general rule though with exceptions, the cost must follow the result.

[42] I accordingly make the following order;

1. Defendant to pay the plaintiff the amount of R 975 000,00.
2. Defendant to pay costs of this action.

B.R. LEFENYA, AJ

On behalf of the plaintiff: Adv. M.C Louw
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the defendant: Adv. S.J Reinders
Instructed by:
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