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

Reportable:	/NO
Of Interest to other Judges:	/NO
Circulate to Magistrates:	/NO

Case number: 1226/2018

In the matter between:

D M¹

PLAINTIFF/RESPONDENT

and

M M²

DEFENDANT/EXPIENT

HEARD ON: **19 OCTOBER 2018**

CORAM: **M OPPERMAN, J**

DELIVERED ON: **26 OCTOBER 2018**

¹ Respondent/DPM

² Excipient/MCM

JUDGMENT BY: M OPPERMAN, J

INTRODUCTION

1. The overarching subject for adjudication *in casu* is the law of contract. The vessel that brought the matter before court is Rule 23(1); an exception. The contracts and subsequent conflict stem from a marriage between the parties from which originated an Antenuptial Contract and a Partnership Contract.
2. The excipient is the Defendant (M M) in an application for a decree of divorce that prays for:
 - 2.1 A decree of divorce;
 - 2.2 Cost of suit;
 - 2.3 An order for confirming the dissolution of the partnership; An order appointing a liquidator with authority to realise the whole of the partnership assets, to liquidate the liabilities of the partnership, to prepare the final account and to pay to the parties whatever is owing to them by virtue of the Partnership Agreement.
3. The legality of both contracts *in singuli* stands undisputed. The contracts were concluded in 1996³ and 2010.⁴ It existed concurrently without controversy for eight years and even in the face of the fact that the parties have been living apart since June 2007.⁵ The pending divorce caused the proverbial pot to boil over.

THE EXCEPTION

4. The exception lies in the claim that prayer 2.3 above is bad law and fails to disclose a cause of action.

³ Page 4, paragraph 4 of the record.

⁴ Page 4, paragraph 7.1 of the record.

⁵ Page 4, par 6.3 of the record.

5. The “bad law” is set out in the factors noted by excipient:
 - 5.1 “The plaintiff pleads that the alleged partnership automatically terminated due to the breakdown of the marriage relationship between the Plaintiff and the Defendant.
 - 5.2 From the above pleaded averments, the Plaintiff pleads that a universal partnership was established between the Plaintiff and the defendant, which partnership was subject to the existence of the marriage between the Plaintiff and the Defendant.
 - 5.3 The existence, alternatively, the formation of a partnership, as pleaded, is in direct contradiction and irreconcilable with the terms of the Antenuptial Agreement concluded between the Plaintiff and Defendant. (The detailed terms of the antenuptial contract is not known to the court except for the fact that the parties were married to each other out of community of property with exclusion of the accrual system on 26 September 1996.)
 - 5.4 The pleaded Partnership Agreement serves to redefine the very nature and essence of the Antenuptial Contract, and by so doing, effectively, seeks to substitute the matrimonial property regime agreed upon in the Antenuptial Agreement, with a regime which would have the opposite effect.
 - 5.5 The substitution of the matrimonial property regime can only be affected with leave of the court upon good cause shown. No such relief is pursued by the Plaintiff.”

THE CENTRAL ISSUES

6. The law of contract is predominant in the adjudication of the matter.
 - 6.1 The two contracts; Antenuptial and Partnership Contracts must be evaluated.
 - 6.2 The general principles of contracts as it stands in law must be applied on the above.
 - 6.3 The above will conclude in a finding on the exception.

THE REALITIES OF THE CASE

7. The common denominator in the case is the matrimonial relationship between the parties. Although the Partnership Agreement stands uncontested in essence, it interweaves with the matrimonial relationship.
- 7.1 The parties were married to each other out of community of property with exclusion of the accrual system⁶ and the clear intent was that at the time of the contract they wanted all their resources to be separated in terms of matrimonial law in regard to past, present and future. This was in 1996 and there was absolute consensus.
- 7.2 They separated in June 2007. Clearly the marriage did only exist in law but not in fact from then onwards.
- 7.3 Moving away from matrimonial law and clearly because a *de facto* marriage did not exist anymore; the parties had consensus to create a partnership. The inference is clearly justified because the partnership was entered into fourteen years after the marriage and Antenuptial Agreement, the marriage did not exist *de facto* anymore, the contract is a business and commercial venture and focused on one particular asset accrued for the purpose of the partnership and also based on the income from that. It is a separate legal entity in purpose, fact and law.
- 7.4 What entwines the contracts again is the clause that: “The Partnership Agreement would endure for the lifetime of the parties *or the duration of the marriage relationship between them.*”
- 7.5 “Marriage relation” is inferred to mean marriage in law and the termination being a divorce. The marriage has ceased to exist *de facto* at this time.
- 7.6 The phenomenon *in casu* has been recognised and pondered in our case law. In **Muhlmann v Muhlmann** 1984 (3) SA 102 (A) the possibility of a universal partnership in the form of a *universorum quae ex quastu venit* between spouses married out of community of property was recognised. **JW v CW** 2012 (2) SA 529 (NCK), **Rene Smalberger v Gabriel Jacobus**

⁶ No children were born of the marriage.

Stols High Court of South Africa, Eastern Cape Division, Port Elizabeth, case number 1112/2012, Butters v Mncora 2012 (4) SA 1 (SCA) and RD v TD 2014 (4) SA 200 (GP) followed the central dictum. The outcomes were of course, dependant on the diverse merits of the cases.

- 7.7 The Partnership Agreement terminated as a result of the reality that the marriage relationship finally and irretrievably broke down and is now culminating into divorce and the Defendant repudiated the partnership by cancelling the cession of the life policy which repudiation the Plaintiff accepted. Again, consensus subsists.
8. Counsel for both parties conceded that the premise from which the court must adjudicate the case is that there was consensus between the parties at all times and during all their actions and the contracts up until this time.
9. That said the only complication to consensus might be the fact that during the duration of the Partnership Agreement the Defendant acted as the sole manager of the partnership business and conducted all the partnership transactions and was in sole control thereof and she; despite her obligation to do so, failed to render to the Plaintiff an account of the partnership transactions. It is, however, not material to the exception.
10. The Partnership Agreement terms are:
- 10.1 The Defendant would buy a townhouse in the Homewood Town House Complex in her name, which townhouse she would hold on behalf of the partnership;
 - 10.2 That the said townhouse would be rented out and the monthly rent would accrue to the Partnership;
 - 10.3 The purchase price would be financed partly by a cash contribution by the parties and the balance of a mortgage bond from ABSA Bank;
 - 10.4 Defendant would take out a life policy in her name for R400 000-00 and cede her rights in terms thereof to the Plaintiff;

- 10.5 The Partnership Agreement would endure for the lifetime of the parties or the duration of the marriage relationship between them.

THE LAW

11. The Law of Contracts is clear.

- 11.1 In **Basson v Chilwan and Others** 1993 (3) SA 742 (A) at 762H Eksteen JA referred to: “The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible ...” Further, “if there is one thing that is more than public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.”
- 11.2 Justice Ackermann in **Ferreira v Levin NO; Vryenhoek v Powell NO** 1996 (1) SA 984 (CC) at paragraph 26 described it as “a central consideration in a constitutional state.” These statements aim for reasonable certainty, so that parties can go about their business knowing the rules of the game; constitutional economic integrity is vital.”
- 11.3 Moseneke J (as he then was) pointed out in his dissent in **Barkhuizen v Napier** 2007 (5) SA 323 (CC) at paragraph 98 that: “Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties.”
- 11.4 At the heart of the last sentence above is the basic principle that commercial transactions, freely and honestly entered into, and not vitiated by fraud, misrepresentation, duress or public policy, should be respected and enforced.

FINDING

12. The above demands that there cannot be any other finding than that the Partnership Agreement is not in contradiction and irreconcilable with the terms of the Antenuptial Agreement. The Partnership Agreement does not redefine the nature and essence of the Antenuptial Contract, and does not substitute the matrimonial property regime agreed upon. The establishment of the Partnership Agreement within the marriage was specifically intended by the parties to operate outside of the matrimonial law sphere.

ORDER

The exception is dismissed with costs.

M OPPERMAN, J

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