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**IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION**

Case no: EL139/14; ECD 439/14

Dates heard: 27-28/7/16

Date delivered: 18/10/16

Reportable

In the matter between:

R. L. M.

Plaintiff

and

B. G. M.

Defendant

JUDGMENT

PLASKET, J:

[1] The plaintiff, Ms B. M., and the defendant, Mr B. M., were married on 12 December 1998. It is common cause on the pleadings in the action for divorce instituted by Ms M. that the marriage has broken down irretrievably.

[2] In her particulars of claim, Ms M. stated that the marriage was one 'purportedly out of community of property and by Antenuptial Contract, with the application of the accrual system in terms of the Matrimonial Property Act of 1984'.

She made this allegation because she seeks an order, inter alia, declaring the antenuptial contract (ANC) to be void and her marriage to be one in community of property. In the alternative, she seeks the rectification of the ANC. In his counterclaim, Mr M. seeks an order rectifying the ANC too, albeit in a different way, and, in the alternative, an order to the effect that the ANC 'be interpreted in accordance with Section 4(1)(b)(ii) of the Matrimonial Property Act of 1984 to reflect that all the business interests of the Defendant, as recorded in paragraph 4.1 of the Ante-Nuptial Contract, are excluded from the commencement value of the Defendant's estate'.

[3] While virtually every issue apart from the irretrievable breakdown of the marriage is in dispute, I was requested to order the separation of the issues that I have outlined in paragraph 2 above. I agreed to do so because, it seemed to me, they form a discrete bundle of issues and their resolution is probably both essential for and a pre-condition for the resolution of the remaining issues.

[4] Before turning to the separated issues, it is necessary to sketch the legislative framework within which the issues must be decided.

[5] Section 2 of the Matrimonial Property Act provides:

'Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, except in so far as that system is expressly excluded by the antenuptial contract.'

[6] Section 3 outlines how the accrual system functions. It provides:

'(1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

(2) Subject to the provisions of section 8 (1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not

transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.'

[7] Section 4 deals with the accrual of a party's estate. It states:

'(1) (a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.

(b) In the determination of the accrual of the estate of a spouse-

- (i) any amount which accrued to that estate by way of damages, other than damages for patrimonial loss, is left out of account;
- (ii) an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage;
- (iii) the net value of that estate at the commencement of his marriage is calculated with due allowance for any difference which may exist in the value of money at the commencement and dissolution of his marriage, and for that purpose the weighted average of the consumer price index as published from time to time in the Gazette serves as prima facie proof of any change in the value of money.

(2) The accrual of the estate of a deceased spouse is determined before effect is given to any testamentary disposition, donation mortis causa or succession out of that estate in terms of the law of intestate succession.'

The ANC and its validity

[8] The relevant provisions of the ANC reads as follows:

'And the Appearers declared that whereas a marriage has been agreed upon and is intended to be solemnised between them, they have agreed and now contract with each other as follows:-

1. That there shall be no community of property between them.
2. That there shall be no community of profit and loss between them.
3. That the marriage shall be subject to the accrual system in terms of the provisions of Chapter 1 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984).
4. That for the purpose of proof of the net value of their respective estates at the commencement of the intended marriage the intended spouses declared the net value of their respective estates to be as follows:-

4.1 That of B. G. M. is R810 105.00 consisting of:-

4.1.1 Farm [...] M. R.	480 000.00
4.1.2 Elliot Brothers Loan Account	100 000.00
4.1.3 Elliot Brothers Shares	100.00
4.1.4 Tomlinson & Wootton Loan Account	30 000.00
4.1.5. Tomlinson & Wootton Shares	5.00
4.1.6 Livestock and Implements	160 000.00
4.1.7.Motor Vehicle	<u>40 000.00</u>
	810 105.00

4.2 that of the said R. L. J. is R20 000.00 in respect of cash on hand.

5. That the assets of the parties or either of them, which are listed hereunder, or any other asset acquired by such party by virtue of his/her possession or former possession of such assets, shall not be taken into account as part of such party's estate at either the commencement or the dissolution of the marriage.

The assets of B. G. M. so to be excluded are:-

- (a) All business interests presently owned or to be acquired in the future.

The assets of R. L. J. so to be excluded are NIL.'

[9] ANC's in this form have been dealt with by the courts before. In *JCK v RK*,¹ Louw J held that where two clauses – clauses 4 and 5 in that case as well – contradicted each other materially and irreconcilably, the ANC was void for vagueness.² The result was that the marriage of the parties was one in community of property.³

[10] Louw J had arrived at the same conclusion in *Bath v Bath*,⁴ again on similar facts and in respect of an ANC structured in the same way as the one in this case. In arriving at the conclusion that the ANC was void for vagueness, he held:⁵

'Clauses 4 and 5 are clearly contradictory. Clause 4 clearly intends that the assets of the parties which are listed will be subject to the accrual system. Clause 5, on the other hand, clearly states that those same assets will not be taken into account as part of such party's estate, i.e. will not form part of the accrual of such party's estate. The assets cannot at the

¹ *RCK v RK* [2014] ZAGPHC 242.

² Para 10.

³ Para 13.

⁴ *Bath v Bath* GPHC 5 November 2012 (case no. 8681/10) unreported.

⁵ At 6.

same time be included in and excluded from the accrual of each party's separate estate. The clauses cannot both be given effect to. They are irreconcilable.'

[11] His judgment was upheld on appeal to the Supreme Court of Appeal. In *Bath v Bath*.⁶ Lewis JA, having identified the problem with the ANC as being the conflict between clauses 4 and 5, held that the 'wording makes no sense on the face of it' with clause 4 listing assets of each party for purposes of commencement values while clause 5 excludes those same assets from the accrual.⁷ She proceeded to hold:

'[19] It is clear to me that the parties did intend to exclude community of property and profit and loss and to adopt the system of accrual: but it is far from clear *how* they intended to do that. If the contract had included only the first three clauses they would effectively have achieved a contract out of community of property, subject to the accrual system regulated by the Act. But the clauses that followed are so contradictory and incoherent that in my view they vitiate the contract as a whole. No certainty has been achieved as to what the contract meant – what the parties intended to achieve. The contract does not embody terms that enable this court to give effect to what their intention might have been.

[20] And it is trite that a court cannot make a contract for the parties. This court cannot determine whether the parties intended to exclude certain assets from the accrual, or stated values of assets from the value of the accrued estate. Nor can it ascertain what was meant by clause 5 where it stated that particular assets (without any certainty as to what they were) would not be taken into account at the beginning or the dissolution of the marriage. And since they did not have a common continuing intention as to what they wished to do, rectification (one of the alternative claims by Mrs Bath) is also not possible.

[21] Accordingly the high court correctly concluded that the antenuptial contract between the parties was void for vagueness and the appeal must be dismissed with costs.'

[12] There is no material difference between the ANC in the *JCK* case and this matter. In both, clause 4 specified certain property of the parties and ascribed a value to each item and clause 5 excluded from the accrual the husband's property or part of it so listed and recorded the wife's property to be excluded as 'nil'. In *Bath*, the only difference from this case is that no values were ascribed to the assets listed in clause 4, but the assets referred to in clause 4, of both husband and wife, were all excluded in clause 5.

⁶ *Bath v Bath* [2014] ZASCA 14 (24 March 2014).

⁷ Para 6.

[13] I do not consider that there is any basis for distinguishing this case from either *JCK* (which I consider to be correctly decided) and *Bath* (by which I am bound). For the reasons set out in those matters, I arrive at the conclusion that, clauses 4 and 5 of the ANC in this matter are contradictory, and irreconcilably so, and, being material, are incapable of severance from the rest of the ANC. The result is that the ANC is void on account of its vagueness. As it was void at its inception, that means that the parties were in fact married in community of property.⁸

[14] The interpretation of the ANC contended for by Mr M., as an alternative to rectification, is simply that the assets listed in clause 4.1 were not to be taken into account in the calculation of the accrual. This is no solution to the problem created by the conflict between clauses 4 and 5: it is predicated on wishing clause 4 away and ignoring it. Inconvenient provisions of contracts cannot be ignored: the whole document must be interpreted and given meaning and if that cannot be done, the contract will, subject to the possibility of severance, be void. Put differently, the proposed interpretation does not address the problem identified in *JCK* and *Bath*, namely the implacable conflict between clauses 4 and 5 which give rise to the voidness of the ANC.

The claims for rectification

[15] As Ms M.'s claim for rectification was pleaded in the alternative to her claim for a declarator that the ANC was void, there is no need to deal with it.

[16] Mr M.'s claim for rectification is now in its fourth edition, having been amended from time to time. It now reads:

'11.1 In all the premises the Defendant pleads that the Ante-Nuptial Contract falls to be rectified as follows: by the deletion of paragraph 4.1 in its entirety and the substitution therefor of the words "*that of the said Bruce Gordon M. is nil*".

11.2 The Defendant pleads that the Ante-Nuptial Contract falls to be further rectified by the insertion of the following list of excluded assets, after the words "*presently owned*" where

⁸ Van Heerden, Cockrell and Keightley *Boberg's Law of Persons and the Family* (2 ed) at 182-183; Du Bois (ed) *Wille's Principles of South African Law* (9 ed) at 265; *Ex Parte Minister of Native Affairs*; *In Re Molefe v Molefe* 1946 AD 315 at 318; *JCK v RK* (note 1), para 13.

they appear in paragraph 5(a) of the Ante-Nuptial Contract (and before the words “*or to be acquired in the future*”):

“Namely:

5(a)(i) *Farm [...] M. R.*

5(a)(ii) *Elliot Brothers loan account*

5(a)(iii) *Elliot Brothers shares*

5(a)(iv) *Tomlinson & Wootton loan account*

5(a)(v) *Tomlinson & Wootton shares*

5(a)(vi) *livestock and implements*

5(a)(vii) *motor vehicle*”.

[17] A party seeking the rectification of a contract bears the onus of proving that the document that records the terms of the contract concerned does not reflect the common intention of the parties as a result of an error in its drafting – and, obviously, what the common intention was.⁹ While the doctrine of rectification ‘generally presupposes . . . the existence of a term of the real agreement, antecedent to the written contract, which has not been properly recorded’¹⁰ an antecedent agreement is not an essential element of a claim for rectification: it may be the ‘best proof of the common intention which the parties intended to express in their written contract, and in many cases would be the only proof available, but there is no reason in principle why that common intention should not be proved in some other manner, provided such proof is clear and convincing’.¹¹

[18] There were, probably not surprisingly, given the passage of time, differences in recollection on the part of the three witnesses who testified, namely Ms M., Mr M. and the attorney concerned, Mr Nico Schultz. By and large, in my view, these differences do not raise credibility issues of any importance.

[19] Ms M. recalls only one meeting with the attorney responsible for the drafting of the ANC – and she cannot recall his name. According to her, Mr M. had told her, shortly before their marriage, to be ready to consult with an attorney to sign

⁹ *Wadsworth v Wadsworth* ELCLD 21 August 2012 (case no. EL 376/2008; ECD 776/2008) unreported, paras 7-9 and the cases cited therein. See too *Spiller & others v Lawrence* 1976 (1) SA 307 (N).

¹⁰ *Kathmer Investments (Pty) v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A) at 503B-C.

¹¹ *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253. See too *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 288; *Edelson v Glenfields Estates (Pty) Ltd* 1955 (2) SA 527 (E) at 530A-B.

documents. When they met the attorney, the ANC was already drafted. The attorney gave them each a copy and went over the document, along with a basic explanation of the accrual system. He asked them to sign the ANC. She did so without having read it.

[20] Mr M. testified that he had been dealing with the attorneys firm Bate, Chubb and Dickson in connection with a business transaction. He had mentioned that he intended getting married soon and was placed in contact with Mr Schutz, an attorney in the firm. Mr Schultz told him to draft a list of his and Ms M.'s assets and their values, pending a consultation with him.

[21] Mr M. drafted his list of assets and their values one evening at home. (These appear in clause 4.1 of the ANC.) When he showed the list to Ms M., she asked what she could list as she owned nothing. He suggested that a value of R20 000 be ascribed to her estate. (That figure appears in clause 4.2 of the ANC.)

[22] The parties later consulted with Mr Schultz. In the consultation, he explained to them the various matrimonial property regimes that were available to them. All that appears to have been agreed was that they would be married in terms of the accrual system with an ANC.

[23] They later met with Mr Schultz again. The ANC had been drafted and he went through it with them. It was, Mr M. testified, in accordance with his wishes. He and Ms M. signed the document in front of Mr Chris Kay, a notary who was an attorney at Bate, Chubb and Dickson.

[24] Mr Schultz testified about his usual way of dealing with instructions from couples who were about to get married. He would request them to bring full details of their assets to a consultation. When he consulted with them, he explained the matrimonial property options available to them. He would then obtain a firm instruction as to what they wanted and would proceed to comply with their instructions. If an ANC was to be drafted, that would be done by his secretary who would arrange a consultation with the couple and one of the notaries in the firm for purposes of signing the ANC. If he was available, he would give the couple a copy of

the ANC to read and he would go over it for them, answer any questions and escort them to the notary for signing. While he had no recollection of this particular case, his way of doing things had become consistent and he had no reason to believe he would have deviated from his usual practice.

[25] I am of the view that the probabilities favour the version of Mr M. that, having been introduced to Mr Schultz, he and Ms M. later consulted with him, the ANC was drafted, in more or less standard form on the basis of fairly minimal instructions, and they returned to sign the document at a later stage. It is improbable that only one consultation would have occurred and that the ANC was signed at that first and only consultation. That version is also at odds with Mr Schultz's evidence, which strikes me as probable and a rational way of doing things, that as a matter of course he consulted with both parties to a proposed marriage prior to drafting the ANC and arranging for them to sign it.

[26] It is clear from the evidence of both parties that prior to the signing of the ANC there had been no agreement as to its content: apart from an acceptance that they were to marry in terms of the accrual system, no further terms were agreed upon. The first time they were confronted with clauses 4 and 5 was when the ANC was presented to them for signing.

[27] Ms M.'s understanding of what was involved was, as she put it, whatever they 'built together' while married was 'one cake' that would be shared on the dissolution of the marriage. (This seems to accord with the way in which Mr Schultz explained the workings of the accrual system to the parties.)

[28] Mr M., on the other hand, had consulted, albeit briefly, with Mr Schultz on his own when they first met. He had told Mr Schultz that he wanted to exclude assets from the accrual. He had not, however, discussed a matrimonial property regime with Ms M.. The first time that she was party to a discussion of this nature was when the parties consulted with Mr Schultz and he advised them of their options. After that consultation all that was agreed was that they would be married by ANC with the accrual system.

[29] To the extent that Mr M. attempted to establish that he and Ms M. had agreed about excluding his current business assets, his evidence is unconvincing and improbable. He never gave evidence of this in chief and only sought to introduce it in cross-examination. It was clearly an afterthought that he hoped would strengthen his position. More importantly, however, he had to concede that at the time this was supposed to have occurred – before their consultation with Mr Schultz – Ms M. did not have knowledge of, and could not have understood the workings of, the accrual system. She could not properly have agreed to anything at that stage. Later in his cross-examination he conceded that no agreement had been reached. When he had shown Ms M. his list of assets and their values, she never agreed to anything: she ‘never said yes or no’.

[30] Mr M.’s intention, it would appear, was to exclude his current business interests from the accrual. There was, however, no discussion in either of the consultations with Mr Schultz of the exclusion of his future business interests. The first time he became aware of this was when he read clause 5 of the ANC shortly before signing it. This had never even been discussed by the parties and so no common intention could have been formed in relation to it. When Mr M. saw that clause 5 purported to exclude both current and future business interests, he was happy to sign the ANC.

[31] The position may be summarised thus. No agreement was reached or could have been reached between the parties at the time Mr M. drafted the list of his assets and their values. No agreement was reached at the first consultation about the exclusion of assets. Similarly, no agreement was reached at any time prior to the signing of the ANC. At best for Mr M., the common intention of the parties was no more than that they would marry by ANC with the accrual system.

[32] That falls well short of the common intention that was pleaded, namely ‘that all business interests then owned by the Defendant, and to be acquired by the Defendant in the future, should be excluded from the Defendant’s estate, both in respect of the commencement value and at the dissolution of the marriage’. That being so, Mr M. has failed to discharge the onus that rested on him to prove his claim for rectification.

[33] As a result of my finding that the claim for rectification has not been established, it is not necessary for me to consider and decide upon two arguments raised by Mr De La Harpe. They are: first, that as the invalidity of the ANC had the result that the parties were married in community of property, rectification is not competent in this case as it would have the effect of altering their matrimonial property regime, a result that can only be achieved by way of the specialised process provided for in s 21 of the Act; and secondly, that rectification is not possible because of the possible prejudicial effect it could have on third parties. Interesting as these issues are, they will have to wait for another day.

The order

[34] I make the following order in respect of the separated issues that are dealt with in this judgment.

- (a) The ante-nuptial contract signed by the plaintiff and the defendant and dated 12 December 1998 is declared to be void and, in consequence, the parties were married in community of property.
- (b) The defendant's counter-claim for the rectification of the ante-nuptial contract is dismissed.
- (c) The defendant is directed to pay the plaintiff's costs in respect of the determination of the separated issues.

C Plasket

Judge of the High Court

APPEARANCES

For the plaintiff: D De La Harpe instructed by Bax Kaplan Inc

For the defendant: S Cole instructed by Cooper, Conroy, Bell & Richards Inc