

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2016/13852

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

J MAISELA

18 JUNE 2024

In the matter between:

M[...]: M[...]

Plaintiff

and

M[...]: P[...] J[...]

Defendant

JUDGMENT

MAISELA AJ:

INTRODUCTION

[1] The plaintiff and the defendant are married out of community of property excluding the accrual system and profit and loss. The plaintiff issued summons for divorce in 2016. The plaintiff has approached this court seeking an order “[f]or a Decree of Divorce incorporating the terms set out in paragraphs 8; 10; 11; 12; 13; 14; 15; 16; 17; 18; and 19 of her particulars of claim.”

[2] The defendant is not opposed to the decree of divorce being granted by this court and prays as follows:

“ [...]

2. *A declaratory order that a universal partnership exists between the parties in equal undivided shares in respect of the assets of the parties;*

3. *An order dissolving the partnership;*

4. *An appointment of a divider in terms of the action communi dividundo and to take charge of all assets of the universal partnership, to dispose of such assets, and to divide the proceeds thereof equally between the parties because the plaintiff has been justifiably enriched;*

5. *Both parties to be vested with the parental rights and responsibilities relating to the minor child, as envisaged in the Children's Act;*

6. *Both parties will remain co-guardians of the minor child as envisaged in Section 18(2)(c), 18(3), 18(4) and 18(5) of the Children's Act;*

7. *The primary care and residency of the minor child to vest with the plaintiff subject to the defendant's rights to reasonable contact with the minor child, and specifically every alternative weekend from 14h00 on a Friday until 17h00 on a Sunday; and*

8. *The Defendant to pay maintenance towards the minor child in the amount of R2500.00 per month.*

ALTERNATIVELY TO PRAYERS 2, 3 AND 4:

9. *The Plaintiff to pay the Defendant an amount of R375 000.00 in respect of the enrichment claim;*

10. *The parties to retain such immovable [sic] assets that belong to them respectively;*

11. *Costs of suit in the event of opposition.”*

ISSUE FOR DETERMINATION

[4] The plaintiff and the defendant are married in terms of an antenuptial contract by which community of property and profit and loss in any form are excluded. The issue to be determined by this court is whether the defendant qualifies for a redistribution order given the antenuptial contract that the parties have entered into and marital regime.

FACTUAL BACKGROUND

[5] The plaintiff and the defendant married each other on 24 February 1996 in terms of the Matrimonial Property Act 88 of 1984. They registered an ante-nuptial contract wherein community of property and profit and loss was excluded. At the time of their marriage the plaintiff was 22 years of age and the defendant was 27 years of age. Out of the marriage, one (1) minor child was born on 14 May 2007, and is currently 17 years of age.

[6] At the time of their marriage, the plaintiff was starting her career working for a company in Edenvale as an Executive Assistant and the defendant was self-employed and worked as a Farrier.

[7] In July 1998 the plaintiff and the defendant bought an immovable property situated at 1[...] L[...] Street, V[...] R[...] Park, K[...] Park at an auction for an amount of R169 765.11. The immovable property was registered in the plaintiff's name and it was financed by ABSA bank.

[8] At the time when the immovable property was bought, the parties intended that it will be their marital home. It is not disputed that the property was bought at an auction from Cahé Afslaaers. It is further not disputed that the defendant and the plaintiff's father attended at an auction and the plaintiff's father paid an amount of R18 700.00 as an auctioneer's fee to secure the property. On 19 April 2014 the plaintiff paid an amount of R73 000.00 towards the bond. This money was taken out of her pension fund and also changed the debit order for the bond repayment from being deducted from the defendant's account into hers.

[9] The parties agreed that the property will be registered in the plaintiff's name. The plaintiff asserts that it was registered in her name because her father would not have paid the deposit if it was registered in both hers and defendant's name. The defendant states differently. He asserts that the property was registered in the plaintiff's name because he was self-employed and did not want to put their home at risk.

[10] The financial roles played by the parties during the marriage were not disputed. The plaintiff was responsible for the day-to-day of the running of their household and she also took the responsibility of paying for the medical aid for the family. The defendant on the other hand was servicing the bond repayment with ABSA Bank and he was also paying for the municipal rates, life policies and his car instalments. The defendant started paying for the bond repayment from the time when the property was bought in 1998 until 2014. In total, the defendant paid for the bond for $\pm$ 16 years.

[11] It was also not disputed that the defendant provided the plaintiff with his vehicle to use for her benefit at the time when the parties got married. The plaintiff sold that vehicle and used the proceeds of R6000 to buy herself a computer. The defendant was responsible for paying for the plaintiff's vehicle instalment as well at the beginning of their marriage until 2009. In 2009 tables were turned because the plaintiff started to earn more than the defendant.

[12] Due to the breakdown of the marriage relationship between the parties, they separated in February 2016, and the defendant vacated their marital home to live with his sister and took their son's bed only with him.

[13] The plaintiff asserts that the breakdown of the marriage relationship was occasioned by the defendant's gambling habits, causing him to be manipulative. He also suffered from depression and defaulted on his depression treatment causing him to have suicidal tendencies. The defendant also quit his work as a Farrier, started playing golf most of the days and not earning an income. His gambling habits and quitting his job affected his income and it reduced drastically to a point where he started selling his other assets without the knowledge of the plaintiff.

ISSUES NOT IN DISPUTE

The Minor Child

[14] On 27 October 2016 an order was made in respect of the minor child's interest in this honourable court by Van Oostsen J. I need not repeat what the order stipulated. However, a mention should be made that the maintenance, contact and well being of the minor has been determined already and an order has been made thereto. The only outstanding issue to be determined by this court from that order, is the issue of costs. Which were deferred to be determined during the divorce action. Which shall be dealt with below.

Movable Property

Furniture, Household Effect, Motor Vehicles and Shares

[15] The plaintiff has listed the movable household effects which each party will retain at the dissolution of the marriage and the defendant has agreed to that. The identified movable furniture, household effects, vehicles and shares are listed at paragraphs 18.2 to 18.4 and their subparagraphs of the particulars of claim.

Pension Fund

[16] Both parties did not make any submissions pertaining to their pension funds. Save to say that the plaintiff made a submission that he is unemployed.

Policies

[17] The parties did not address the court regarding any of their policies.

ISSUE IN DISPUTE**Ownership of the Immovable Property / Redistribution Order at Dissolution of The Marriage**

[18] The parties were married to each other subsequent to the enactment of the Matrimonial Property Act 88 of 1984 and registered an antenuptial contract wherein community of property and profit and loss was excluded.

[19] The plaintiff asserts that the property is registered in her name and therefore it is hers and hers alone to the exclusion of the defendant. She also indicates that even at the time when the immovable property was purchased, the intention was that the property was hers. The defendant denies the plaintiff's assertion and indicates that his employment risk motivated him to elect that the property should be registered in the plaintiff's name.

[20] He also asserts that the bank could not have approved the bond for the immovable property on plaintiff's salary alone, because at the time when it was purchased, the repayment was R3440.65 and she earned R6000.00. Therefore, the parties had to put their salaries together in order to qualify for the bond. The defendant said that he earned more than the plaintiff at the time. The plaintiff indicated that she could not remember how much she earned at the time when the immovable property was purchased.

[21] The plaintiff wants to enforce the terms of the antenuptial contract, but the defendant asserts that he is entitled to a portion of the immovable property as a result of:

- 21.1 A universal partnership; alternatively
- 21.2 Unjust enrichment; alternatively
- 21.3 In terms of section 7(3) of the Divorce Act.

LAW

Universal Partnership

[22] A universal partnership is defined as a long-term relationship between two people, including same-sex partners, who decide not to get married.

Requirements of a Universal Partnership

[23] In order to exist as a universal partnership, the following elements must be present:

- 23.1 each of the partners must bring something into the partnership, whether it be money, labour or skill;
- 23.2 the partnership should be carried on for the joint benefit of the parties;
- 23.3 the object should be to make profit;
- 23.4 The contract should be a legitimate one.

Assets of a Universal Partnership

[24] Universal partnerships have both assets brought in at the time of formation and assets acquired during their existence.

[25] Partners cannot alienate partnership assets or use them as personal securities without the consent of their fellow partners, and they cannot exclude a partner entirely from partnership control.

[26] When the relationship ends, partners cannot share in the pension assets of their partners, even if they can prove a universal partnership.

[27] This is due to the fact that the Pension Fund Act makes reference to a “divorce” and a universal partnership is not a marriage and cannot therefore be terminated by a divorce.

[28] The defendant has pleaded in the alternative that his entitlement to the immovable property derives from the universal partnership between himself and the plaintiff.

[29] Based on the facts as stated above and the requirements for the plaintiff and defendant’s relationship to qualify as a universal partnership, it is evident that the court cannot find that the plaintiff and the defendant had a universal partnership. The parties are married in terms of the Matrimonial Property Act 88 of 1984.

Actio Communi Dividundo

[30] The defendant is seeking for an order for an appointment of a divider in terms of the action *communi dividundo* to take charge of all assets of the universal partnership, to dispose of such assets, and to divide the proceeds thereof equally between the parties because the plaintiff has been unjustifiably enriched.

[31] To succeed with the action *communi dividundo*, the defendant must prove that the parties are co-owners of the immovable property. The property

is registered in the plaintiff's name only. The defendant cannot succeed on that claim.

Divorce Act 70 Of 1979¹

Division of Assets and Maintenance Of Parties

[32] Section 7(3) of the Divorce Act provides:

(3) A court granting a decree of divorce in respect of a marriage out of community of property-

(a) entered into before the commencement of the Matrimonial Property act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded;

(b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988; or

(c) entered into in terms of any law applicable in a former homeland, without entering into an antenuptial contract or agreement in terms of such law, may subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just, be transferred to the first-mentioned party.

¹ Divorce Act 70 of 1979.

(4) *An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would have otherwise have been incurred, or in any other manner.*

(5) *In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account-*

(a) *the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3)(b) of this section may have in terms of section 22(7) of the Black Administration Act, 1927 (Act 38 of 1927);*

(b) *any donation made by one party to the other during the subsistence of the marriage, or*

(c) *any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and*

(d) *any other factor which should in the opinion of the court be taken into account.*

[33] In ***EB (born S) v ER (born B) and others and a related matter***:²

² *EB (born S) v ER (born B) and others and a related matter* (1) BCLR 16 (CC).

“the Constitutional Court considered the issue of divorce, proprietary rights, redistribution order in terms of subsection 7(3) of the Divorce Act and found that this subsection was inconsistent with the Constitution and invalid to the extent that it fails to include marriages concluded on or after the commencement of the Matrimonial Property Act 88 of 1984. The declaration of invalidity was suspended for 24 months to enable Parliament to remedy the constitutional defect. Pending the remedial legislation, paragraph (a) of subsection 7(3) to be read as excluding the words ‘**entered into before the commencement of the Matrimonial Property Act, 1984.**’” [Emphasis mine]

[34] Case *CCT 158/22 KG v Minister of Home Affairs and others*³, concerns the absence of a redistribution remedy where the marriage is entered into on or after 1 November 1984:

“At paragraph [104] It was held that “With the exception of customary marriages, the purpose of the differentiation is the one identified earlier. The lawmaker made the redistribution remedy available to those spouses who got married out of community of property under a marital regime where accrual was not the default regime. The lawmaker’s thinking was that if the accrual regime was applicable by default but the spouses chose to exclude it, the redistribution remedy should not be available. In general, the legislative philosophy was that parties should be bound by their choices. The uncertainties inherent in a judicial remedy should be confined to cases of complete economic separation where there was no choice to adopt or exclude the accrual system.

At [105] In *Barkhuizen*, [82] Ngcobo J, writing for the majority, said:

“*Pacta sunt servanda* is a profound moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. But, the general rule that agreements must be honoured

³ *EB (born S) v ER (born B) and others and a related matter* (1) BCLR 16 (CC).

cannot apply to immoral agreements which violate public policy.... Furthermore, the application of *pacta sunt servanda* often raises the question whether a purported agreement or pact is indeed a real one, in other words whether true consensus was reached. Therefore, the relevance of power imbalances between contracting parties and the question whether true consensus could for that matter ever be reached, have often been emphasised.

[132] First, there are degrees of voluntariness when it comes to contractual choices. For this reason, Parliament has intervened in other spheres of relations, such as employment, consumer law and the granting of credit. Some prospective spouses may be commercially savvy or have the benefit of independent advice, but for many others this is not the case. Prospective spouses are often young, in love and looking forward to a long relationship. A prospective spouse may readily succumb to pressure to sign a standard antenuptial contract excluding the accrual regime. The pending marriage may have been announced and organised by the time the prospective spouses come to consider an antenuptial contract. The danger of imprudent decision making is ever present in this setting.

[133] Second, valuing spousal choice and allowing a redistribution remedy does not have to be a binary choice. In terms of section 7(5)(d) of the Divorce Act, a court considering a redistribution claim can take into account “any other factor which should in the opinion of the court be taken into account”. The fact that the parties concluded an antenuptial contract excluding the accrual regime could be taken into account. The weight this fact should receive would depend on the circumstance.

[134] Other jurisdictions have adopted this approach. In England, the leading case is *Radmacher*. [111] where the range of relevant circumstances was discussed at length, [112] the fundamental test being encapsulated thus:

*“The court should give effect to a nuptial agreement that is freely entered into by each party with a **full** appreciation of its implications*

unless in the circumstances prevailing it would not be fair to hold the parties to their agreement".[113]

CONSIDERATION OF THE FACTS

[35] The plaintiff and the defendant got married when the plaintiff was 22 years old and the defendant was 27 years old. They were married for a period of 20 years before the defendant vacated the marital home in 2016. They were both at the beginning of their careers. The plaintiff will turn 50 years old in November 2024 and the defendant is now 55 years old and unemployed.

[36] The issue to be determined by the court pertains to redistribution of the immovable property purchased during the subsistence of the marriage and registered under the plaintiff's name. The parties are married in terms of the Matrimonial Property Act 88 of 1994 and they registered an antenuptial contract excluding the accrual system and excluding profit and loss.

[37] The plaintiff asserts that the immovable property belongs to her and that at the dissolution of their marriage, due to their marital regime, the defendant does not have a claim over the immovable property and the defendant is disputing that assertion.

[38] Evidence before the court and which was led show that the parties were young at the time of their marriage. That they both contributed towards the running and maintenance of the household. They both contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.

[39] The defendant paid the repayment of the bond over the immovable property for 16 years between 1998 and 2014. The plaintiff has been paying the bond from 2014 to date. In any relationship, reciprocal support is a

fundamental obligation which both parties had a duty to perform towards each other.

[40] Section 7(5)d provides that any factor which should in the opinion of the court be taken into account should be. The court considers that the defendant is 55 years old and unemployed. He has expended his life earnings towards the upkeep and maintenance of the family and household. At the age of 27 years old the defendant could not have appreciated the consequences of the marital regime that he entered into. At the age 55 years old it would not be easy to source employment. The defendant gave evidence that he entered into their marital regime with good intentions and buying the immovable property was the first decision that they made as a married couple and that at that time he anticipated that their marriage would last forever.

[41] The court is satisfied that the defendant has made a contribution to the maintenance and or increase of the estate of the plaintiff, either directly or indirectly as contemplated in subsection 5(a) to (d).

COSTS

[42] Costs of the Rule 43 Application were deferred to be determined during the divorce hearing. In family matters the usual order in this division is an order that each party pay its own costs. From time to time, the facts may indicate that a different order is required depending on the conduct of the parties. In the present circumstances the court is satisfied that each party should pay its own costs

ORDER

[43] In view of the above, I grant the following order:

1. The plaintiff is granted the decree of divorce.

2. The parties shall have an evaluation of the immovable property calculated using an agreed professional property evaluator to determine the market value of the property as at the date of divorce.
3. The plaintiff and the defendant each are entitled to half of the total value of the property, as per paragraph 2.
4. The plaintiff shall pay half of the total value of the immovable property after deducting the outstanding amount, if any, to the defendant over a period of twelve (12) months with the first instalment on or before 30 September 2024 and the last instalment on or before 31 August 2025.
5. The plaintiff to produce the bank statement as at the date of divorce from ABSA bank for the immovable property bond account. Any amount still outstanding for the bond should be subtracted from the value of the immovable property
6. Each party shall retain the following household furniture and effects as their sole and exclusive property:

6.1. Plaintiff:

- 6.1.1. Black bedroom suite and posture premium mattress with mirror table and pedestal;
- 6.1.2. Black blanket box;
- 6.1.3. Small safe, firearm and personal items (jewellery);
- 6.1.4. Binoculars x 2 & 1 AGFA camera;
- 6.1.5. Speed Queen washing machine;
- 6.1.6. LG Tumble dryer;
- 6.1.7. Brown diamante headboard — queen size;
- 6.1.8. 38 cm Phillips television;
- 6.1.9. Practica set;
- 6.1.10. Nintendo Wii game set;

- 6.1.11. Run x Trojan treadmill;
- 6.1.12. Cabinet with Dell Laptop and Canon Printer & Samsung 10.1 tablet;
- 6.1.13. Cabinet with Brother Sewing Machine and Finess Overlocker;
- 6.1.14. Paintings – horse and cheetah;
- 6.1.15. Vacuum cleaner;
- 6.1.16. Alva small gas heater;
- 6.1.17. Casio Keyboard;
- 6.1.18. Dining room table and 6 chairs;
- 6.1.19. Small wall unit – glass breakware;
- 6.1.20. 2 X prints in dining room;
- 6.1.21. 1 X large coffee table;
- 6.1.22. 3 X small coffee table;
- 6.1.23. 5 piece black wall unit;
- 6.1.24. TV unit;
- 6.1.25. Sansui 73 cm Television;
- 6.1.26. Phillips video recorder;
- 6.1.27. Samsung microwave;
- 6.1.28. Phillips micro music system;
- 6.1.29. Defy double door fridge/freezer;
- 6.1.30. LG dishwasher;
- 6.1.31. Nespresso coffee machine;
- 6.1.32. Cutlery and Argilla cookware;
- 6.1.33. 3 X sets of pots and pans;
- 6.1.34. Sunbeam mixer;
- 6.1.35. Phillips blender;
- 6.1.36. Phillips juice extractor;
- 6.1.37. Tupperware;
- 6.1.38. Glassware – glasses, salad dishes;
- 6.1.39. Salon hot tray;
- 6.1.40. Soup maker;
- 6.1.41. Rolux generator;
- 6.1.42. Candyfloss machine;

- 6.1.43. Lawnmower;
- 6.1.44. Blue gas bottle and top;
- 6.1.45. 2 X Bicycles (Marlene and Duanne);
- 6.1.46. Plastic patio table and 3 chairs;
- 6.1.47. Blue pool slide;
- 6.1.48. 5 X miniature dachshunds;
- 6.1.49. 1 X cuisine convention oven.

6.2. **Defendant:**

- 6.2.1. 50cm Sony Bravia LCD Colour Television;
- 6.2.2. Samsung mini DVD Camcorder;
- 6.2.3. Road angel GPS system;
- 6.2.4. Rhapsody HTS-8001 p DVD home theater system with AM/FM tuner and speakers;
- 6.2.5. Binoculars;
- 6.2.6. Safe with hunting rifle;
- 6.2.7. Jewellery – own and inherited from father;
- 6.2.8. Queen size base and cloud nine mattress;
- 6.2.9. Bed side table in son's room;
- 6.2.10. 1 x Gas heater and 2 gas bottles;
- 6.2.11. 1 x Black and Decker mini vacuum;
- 6.2.12. 3 x Campmaster caravan sleeping bags;
- 6.2.13. Fold up camping table;
- 6.2.14. Snappy Chef induction cooker;
- 6.2.15. DSTV Explorer;
- 6.2.16. Yamaha DCD/video CD/player and surround sound;
- 6.2.17. 3 piece Black leather lounge suite;
- 6.2.18. Additional speakers connected to TV;
- 6.2.19. All rechargeable lights kept in wall unit;
- 6.2.20. Kanonkop wines (1997 - 2014);
- 6.2.21. Russel Hobbs filter coffee machine;
- 6.2.22. Sunbeam indoor braai;
- 6.2.23. Waterwell ice maker;

- 6.2.24. Imperial table ware – stoneware dinner service;
- 6.2.25. Knives/forks/spoon set in wooden box – wedding gift from parent;
- 6.2.26. Marcat Atlas pasta maker set and drying rack;
- 6.2.27. Pressure cooker;
- 6.2.28. Potjiekos pots and other bread pans;
- 6.2.29. Picnic table and bench set;
- 6.2.30. Fridge;
- 6.2.31. Freezer;
- 6.2.32. Camping chairs;
- 6.2.33. Mirage weber braai;
- 6.2.34. Cooler bags and boxes;
- 6.2.35. Camping table;
- 6.2.36. All tools kept in garage;
- 6.2.37. Braai on patio;
- 6.2.38. 2 X Tents;
- 6.2.39. 2 X Awnings;
- 6.2.40. Weedeater;
- 6.2.41. Bicycle;
- 6.2.42. 2 X Cadac braai.

7. The Plaintiff shall retain the BMW 320d – 2013 motor vehicle with registration number C[...] as her sole and exclusive property and shall be solely liable for expenses incurred in respect of the day to day running of the aforementioned motor vehicle.

8. The defendant shall retain the following motor vehicles as his sole and exclusive property and shall be solely liable for expenses incurred in respect of the day to day running of the aforementioned motor vehicles:

- 8.1. Challenger trailer 5 foot with registration number: X[...]
- 8.2. White Corsa bakkie with registration number V[...]

9. The Defendant shall retain the following shares as his sole and exclusive property and the Plaintiff shall have no related claims against the Defendant and *vice versa*:

9.1. Magaliespark time share - Account no: 9[...]: 1[...]; and

9.2. Easy Holidays – Member no: E[...] / First Exchange – Member no: 7[...]

10. Each party to pay their own costs.

J. MAISELA

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard 29 January 2024

Judgment 18 June 2024

Appearances:

For Plaintiff J Wilkins
Instructed by Wilkins Attorneys

For Defendant In Person