IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/15013

(1) REPORTABLE: YES/**NO**

(2) OF INTEREST TO OTHER JUDGES: YES/**NO**

(3) REVISED:

DATE 9/03/2026

SIGNATURE

In the matter between:

W[...] L[...] F[...] *(née v[...] F[...])* Plaintiff

and

R[...] S[...] F[...] Defendant

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on caselines/courtonline. The date for hand-down is deemed to be on 9 March 2026.

JUDGMENT ON TRIAL-WITHIN-A-TRIAL

(Validity of the Antenuptial Contract)

MOGOTSI AJ

Introduction

[1] This matter comes before me as a trial-within-a-trial. The central question is whether the antenuptial contract ("ANC") executed by the parties on 2 September 2004, two days before their marriage, is legally valid.

[2] The parties are involved in divorce proceedings, and it is common cause that the marriage has irretrievably broken down. The remaining disputes relate solely to the applicable marital property regime and the resulting financial consequences of the divorce.

Procedural history and context

[3] Before turning to the merits, it is necessary to outline the procedural history of this litigation. The trial commenced on 3 March 2026, approximately seven years after the summons was issued in 2019. The manner in which the Defendant has conducted these proceedings is relevant to understanding the context in which the validity of the ANC is now challenged.

[4] On 5 November 2019, shortly after the summons was issued, the Defendant admitted in his plea that the marital regime was governed by an ANC subject to the accrual system. At that stage, neither party disputed the validity of the ANC.

[5] On 28 September 2020, 16 months later, the defendant amended his plea to challenge the ANC's validity. This amendment followed the Defendant’s discovery,

through the exchange of section 7 declarations, that the Plaintiff's net worth was substantially higher than he had previously anticipated.

[6] On 9 June 2021, Lamont J delivered judgment in an application by the defendant to have the validity of the ANC determined as a separate issue. That application was dismissed.

[7] In his judgment, Lamont J made pertinent observations about the Defendant's pleadings. At paragraph 3, he noted:

> "The facts alleged are that the assets excluded are not identified. Yet the page of the contract annexed to the pleadings shows a detailed list of assets. I raised this issue with counsel. He submitted that the list contains assets to be excluded which cannot be excluded due to the terms of the Matrimonial Property Act. This is not what is pleaded."

[8] Lamont J further observed at paragraph 7:

> "In the circumstances, the issue which the defendant contends is clear-cut is not. Neither is the issue precisely determined … The main issue is, of course, that the identity of what is to be separated from the other issues has not been established with certainty, nor has the right for evidence to be led as opposed to an attack on the pleading been established."

[9] These observations are instructive. They highlight a recurring feature of the Defendant's approach, of shifting and evolving attack on the ANC. The Defendant's challenge has moved from a general assertion that excluded assets are inadequately identified, to a more sophisticated legal argument concerning the exclusion of future assets and compliance with the Matrimonial Property Act[1] ("MPA").

[10] This conduct must be viewed against the backdrop of the parties' respective financial positions. The evidence shows that the Plaintiff's estate has performed considerably better than the Defendant's since the commencement of the marriage. The financial stakes are significant.

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[1] Act 88 of 1982.

[11] The Defendant having initially admitted the validity of the ANC, now seeks to have it declared void.

The parties' contention

[12] The Defendant contends that the ANC is invalid and void for vagueness, with the result that the parties are married in community of property ab initio. The Plaintiff, in contrast, contends that the ANC is valid and that the parties are married out of community of property, subject to the accrual system as provided for in Chapter 1 of the MPA.

The antenuptial contract

[13] The ANC is a concise document of three pages. Its material provisions are as follows:

> "1. During the marriage, there shall be no community of property or community of profit and loss between the parties.
> 2. The accrual system referred to in Chapter 1 of Act No. 88 of 1984 ("the Act") shall apply to their marriage from the date of conclusion of the marriage.
> 3. The following assets and the proceeds thereof shall be excluded from the accrual system:
>   a. Any inheritances, legacies, and donations accruing to either party during the marriage, including the proceeds of trust funds;
>   b. The following assets belonging to W[...]:
>   i. Immovable property — Erf 1[...] F[...] Extension 15 Township; ii. Motor vehicle — Mercedes SLK 230; iii. Discovery shares and all options thereto; iv. Membership in Clan Percy Property CK 8[...]; v. Endowment Policies; vi. Retirement annuities with Liberty Life and Sage; vii. All

jewellery, except the engagement ring; viii. All pension and provident funds.

c. The following assets belonging to R[...]:

i. Immovable property — Erf 9[...] F[...] G[...]; ii. Motor vehicle — Land Rover TD5; iii. Existing furniture and electrical equipment, currently valued at R300,000.00; iv. All current offshore investments; v. Retirement annuities with Liberty, Old Mutual, and Sanlam; vi. All pension and provident funds.

4. In terms of section 6 of the Act, the parties declared that the net value of their respective estates at the date of execution is:

a. W[...] — Nil

b. R[...] — Nil".

The legal framework

[14] Section 6 of the MPA provides:

> "When a marriage is dissolved by divorce, the court may on the application of a spouse against whom an order for division of accrual is sought order that the net value of the other spouse's estate at the commencement of the marriage be deemed to be such amount as the court considers just, having regard to the evidence. In the absence of such an application, the net value of a spouse's estate at the commencement of the marriage is deemed to be nil."

[15] Section 6 must be read together with section 4(1)(a) of the MPA, which defines the accrual of a spouse's estate as the amount by which the net value of that estate at the dissolution of the marriage exceeds its net value at the commencement of the marriage.

[16] The applicable principles of contractual interpretation are well established. In Natal Joint Municipal Pension Fund v Endumeni Municipality[2], Wallis JA stated:"

> "Interpretation is the process of attributing meaning to the words used in a document … having regard to the context provided by reading the particular provision in the light of the

[2] 2012 (4) SA 593 at 603

document as a whole and the circumstances attendant upon its coming into existence. 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 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 that undermines the apparent purpose of the document."

[17] This approach has been consistently affirmed by the Constitutional Court.[3]

[18] In the context of antenuptial contracts specifically, a court must have regard to the statutory framework within which such contracts operate. As held in RP v PP[4] , a clause must be construed within the context of the antenuptial contract as a whole, the prevailing law governing the proprietary consequences of marriage, the parties' intention, and the purpose for which the provision was included.

[19] Both parties placed significant reliance on the Full Bench decision of this Division in FB v FR[5] ("the Sutherland judgment"). What is notable about that decision is that the court did not declare the entire ANC void. Rather, it made a declaration as to which assets fell to be excluded from the accrual, thereby upholding the validity of the contract while giving effect to the statutory framework.

Evaluation

[20] The Defendant placed emphasis on the word "conclusion" as used in paragraph 2 of the ANC. Read in context, the word plainly refers to the commencement of the marriage and in my view, this does not give rise to ambiguity.

[21] The word "proceeds" does not appear in section 4(1)(b)(ii) of the MPA, which refers to "any other asset which he acquired by virtue of his possession or former

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[3] *National Credit Regulator* v *Opperman* 2013 (2) SA 1 (CC), *Airports Company South Africa* v *Big Five Duty Free (Pty) Ltd* 2019 (5) SA 1 (CC), and *University of Johannesburg* v *Auckland Park Theological Seminary* 2021 (6) SA 1 (CC).
[4] 2016 (4) SA 226 (KZP).
[5] [2019] (4) SA 145 (GJ).

possession of the first-mentioned asset." The parties' use of "proceeds" appears to have been intended to encompass the fruits of excluded assets such as dividends, interest, or sale proceeds. To the extent that "proceeds" covers assets acquired by virtue of possession or former possession of excluded assets, such assets would, in any event, be excluded under section 4(1)(b)(ii) of the MPA.

[22] However, if the parties intended "proceeds" to carry a broader meaning that would exclude assets falling outside the scope of section 4(1)(b)(ii), that intention would be legally ineffective as it would be contrary to the MPA.

[23] Defendant conceded that some of the assets listed in the ANC are capable of identification by reference to extrinsic evidence. Having carefully considered the relevant paragraph, I am satisfied that all of the listed assets can, in fact, be identified through extrinsic evidence. The circumstance that some assets may have been disposed of during the marriage, or replaced by other assets, does not render their description vague. It merely raises the question of whether the replacement assets fall within the exclusion, a question to be resolved by application of section 4(1)(b)(ii) of the MPA.

[24] The Defendant's counsel asserted that there is a contradiction between paragraphs 3 and 6. Paragraph 3 removes all the parties' current assets from the accrual calculation. Paragraph 6 records the net value of each party's estate at the date of execution as "NIL." Because paragraph 3 excludes all existing assets from the accrual system, there is literally nothing left to place in the "accrual estate" on the day the parties sign. Therefore, declaring the net value for accrual purposes as "NIL" is not a contradiction; it is an accurate and logical reflection of the parties' agreement. The contract is not attempting to both include and exclude the same assets. It clearly excludes them in paragraph 3 and then, in paragraph 6, confirms that the starting point for the accrual that will grow during the marriage is zero. I am not persuaded by counsel's submissions in this regard.

[25] The Sutherland J's judgment in the FB V FB[6] establishes the principle that assets to be acquired after the commencement of a marriage cannot validly be excluded from the accrual in anticipation of future acquisition. This principle applies directly to certain items listed in paragraph 3 of the ANC. The Plaintiff conceded in evidence that at the commencement of the marriage, neither party was a beneficiary of any trust fund, and she did not own any endowment policies or a Sage retirement annuity. These assets did not exist at the relevant date. However, this does not render the ANC void in its entirety. Consistent with the approach in the Sutherland judgment, the appropriate remedy is to interpret the ANC in a manner that is compatible with the MPA.

[26] In respect of assets that did exist at the commencement of the marriage, such as the Discovery shares and options, the immovable properties, and the retirement annuities then in existence, the exclusions are valid. Section 4(1)(b)(ii) of the MPA expressly permits the exclusion of such assets.

[27] The Plaintiff's contention that her after-acquired Discovery shares were obtained pursuant to a share options scheme in which she held a real right before the marriage raises a factual question that was not fully ventilated in this trial-within-a-trial. If such rights did exist at the commencement of the marriage, shares subsequently acquired through the exercise of those rights may fall within the exclusion. This is a matter to be determined at the main trial, with the Plaintiff bearing the onus of proof and does not invalidate the ANC.

[28] The parties consulted with a notary, gave instructions, and signed the ANC. Both testified that they understood the legal implications of what they were signing. The notary was, presumably, satisfied that the document gave effect to the parties' intentions. To attack the ANC on the basis of linguistic imprecision when the parties' common intention is not in dispute is to elevate form over substance.

[29] Having considered the ANC, the applicable legal principles, the submissions of counsel, and the broader context of this litigation, I am satisfied that the ANC entered into by the parties is valid.

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[6] *2017/5018A Gauteng Local Division*

Order

[30] In the circumstances, I make the following order:

1. The antenuptial contract concluded by the parties on 2 September 2004 is declared valid.
2. The parties are married out of community of property, subject to the accrual system as provided for in Chapter 1 of the Matrimonial Property Act 88 of 1984.
3. The matter is to proceed to the main trial for the determination of the patrimonial consequences of the divorce in light of this judgment.

P J MOGOTSI

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

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Date heard: 4 March 2026

Date of Judgment: 09 March 2026