



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG**

Case No: 2422 / 2024

In the matter between:

H[...] M[...] M[...]

(BORN M[...])

APPLICANT

And

E[...] B[...] M[...]

1st RESPONDENT

DOUGLAS CLIFFORD KRUGER

2nd RESPONDENT

GOVERNMENT EMPLOYEES

PENSION FUND

3rd RESPONDENT

CORAM: MAODI AJ

Date judgment reserved: 4 September 2025

*Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is **23 March 2026 at 10h00**.*

ORDER

1. The Prayers 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the notice of motion are granted.
2. I make no order in respect of prayers 3 to 5. Prayers 3 to 5 of the notice of motion are referred to the second respondent to be dealt with in line with his powers.
3. The first respondent to pay costs on scale B including costs of counsel.

JUDGMENT

MAODI AJ

Introduction

- [1] The applicant seeks various orders, amongst them is variation of the divorce decree under case number DIV94/2018. That the parties' joint estate be divided in equal shares, both parties' pension interests be endorsed to be divided equally and that pending division of the joint estate, the applicant and her two minor children be allowed to occupy the immovable property at 1[...] S[...] Close, Unit 0[...], Mmabatho (the immovable property). The first respondent to vacate such property. The application is brought in terms of rule 42(1)(c) of the uniform rules of

court and is opposed. The second respondent was appointed receiver and liquidator of the parties' estate, however, no order is being sought against him.

Applicant's case

- [2] The parties entered into a civil marriage on 9 November 2007. Subsequent to the marriage, the first respondent insisted that the parties consult his attorneys to conclude an antenuptial contract. This was to ensure that their marriage regime was out of community of property with accrual system. On 26 November 2007 the parties signed a document known to the applicant as an antenuptial contract (the contract). The first respondent is the one who insisted on this and the applicant had to obey and abide by same even though she was not happy. The attorneys who attended to the contract are those of the first respondent.
- [3] Since 26 November 2007 the applicant had laboured under the impression that the parties were married out of community of property with the accrual system. She instituted divorce proceedings against the first respondent and their marriage was dissolved by the Court on 31 October 2022. Since 2018 she has been providing primary residence for their minor children. Hence her prayer that she be allowed to occupy the immovable property. The second respondent was appointed receiver and liquidator of the parties' property with certain powers incorporated in the divorce decree.
- [4] On 8 April 2024 the second respondent issued an interim report which raised concerns about the validity of the contract between the parties. The main concern was that the antenuptial contract was signed after the parties had entered into a marriage, rendering their marriage

automatically in community of property as there was no antenuptial contract at the time of marriage. This led to the application before me.

First respondent's case

- [5] The application is brought in terms of rule 42(1) which requires that there should have been a mistake common to the parties. There has never been a mistake common to the parties as the parties signed the contract and knew that they were married out of community of property and out of community of profit and loss. His insistence on a marriage out of community of property was to protect his interests given that he had been married prior to marrying the applicant. He took the applicant to his attorney to ensure that the applicant understood the consequences of the matrimonial regime he wanted them to enter into. He also gave applicant money to seek her own attorney.
- [6] The notarial execution and registry of the contract happened on 26 November 2007 which makes it a post-nuptial notarial execution. However, the contract was entered into before 9 November 2007 and a certificate confirming same was issued by Smit Stanton Attorneys on 8 November 2008 which is attached to the papers. The applicant only challenged the contract after the interim report by second respondent. He is the one who insisted on the conclusion of the contract in order to protect his interests. The applicant agreed to enter into the contract and it is valid, given the case of *Schimtz v Schimtz* [2015] 3 All SA 85 (KZD).
- [7] In the divorce proceedings the applicant was represented by attorneys and pleaded that the marriage was out of community of property. There was no settlement agreement between the parties and as such the divorce decree was not granted pursuant to a settlement agreement.

Applicant's reply

- [8] The conclusion of the contract post-nuptial instilled a mistaken belief that the contract was valid and marriage was out of community of property with accrual. The first respondent's admission that he insisted on conclusion of the contract is a clear indication of lack of free and voluntary act on her part. She does not know Smit Stanton Attorneys and denies ever having attended to them. The first respondent has not told the Court what the marital regime between the parties was between the period 9 November 2007 to 26 November 2007. The Court in Schimtz case dealt with an issue of an ante-nuptial contract concluded prior to the marriage but registered afterwards. There was no agreement or whatsoever prior to the conclusion of the marriage between the parties.

The authorities and reasons for judgment

- [9] There are two major issues that I have to determine. The first being whether, given the facts and circumstances of this case, the application falls within the ambit of uniform rule of court 42 (1) (c). The second being whether the applicant has established grounds for variation of the decree of divorce under case DIV 94/2018 which will affect the other ancillary orders sought.

- [10] Rule 42 provides as follows:

“(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) An order or judgment in which there is ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) An order or judgment granted as a result of mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.”

[11] The major issue under sub-rule 42(1)(c) is whether there was mistake and whether the mistake was common to both parties. The rule gives the court a discretion which must be exercised judicially.

[12] It is common cause that at the time the parties entered into and solemnised their marriage, there was no ante-nuptial contract in place. The respondent himself has admitted that the contract was only entered into on 26 November 2007 whereas the marriage was entered into on 9 November 2007. Therefore, at the time the divorce decree was granted, both parties laboured under the mistaken position that their marital property regime was one out of community of property with accrual system. That this was a mistake is clear from the common cause I referred to above.

[13] The application is targeted at the order or judgment to be varied itself and not the pleaded case of the parties. However, in order to ascertain if the order was based on mistake common to the parties, the parties’ pleaded case has to be considered. Simply put, was the judgment based on a mistake as pleaded by the parties, not the introduction of a case which was not pleaded. There must be a link between the order sought to be varied and the cause of action or defence with the evidence, as the case may be. The pleaded case is very important.

[14] The authorities are clear that the mistake must be common to the parties.

“This means that both parties are mistaken as to the correctness of certain facts; such a mistake occurs where both parties are of one mind and share the mistake. A typical case would be where the parties had agreed upon a statement of facts which was afterwards found to be incorrect.” See *Erasmus, Superior Court Practice, Second Edition, Van Loggerenburg, Volume 2, Juta at D1 Rule 42-32*.

[15] This approach was postulated in the case of ***Tshivhase Royal Council and Another v Tshivhase and Another, Tshivhase and Another v Tshivhase and Another 1992 (4) SA 852 (AD)*** and applied in the case of ***R v R 2023 (9) BCLR 1126 (CC)*** at par 50 where the court stated as follows:

"[50] In *Tshivhase*, the Supreme Court of Appeal dealt with the requirements that must be satisfied before rule 42(1)(c) is invoked and said:

“In relation to sub-rule (c) thereof, *two broad requirements must be satisfied. One is that there must have been a ‘mistake common to both parties’*. I conceive the meaning of this expression to be what is termed, in the field of contract, a common mistake. This occurs where both parties are of one mind and share the same mistake; they are, in this regard, ad idem A mistake of fact would be the usual type relied on. Whether a mistake of law and of motive will suffice and whether possibly the mistake must be reasonable are not questions which, on the facts of our matter, arise. *Secondly, there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been ‘as a result of’ the mistake.* This requires . . . that the mistake relate to and be based on something relevant to the question to be decided by the Court at the time. . . . The principle is that cannot subsequently create a retrospective mistake by means of fresh evidence which was not relevant to any issue which had to be determined when the original order was made. The reason is obvious: the Court would at that time have had before it no evidence and thus no wrong evidence on the point; hence

there would have been no mistake. Contrast this with the case where the subsequent evidence is aimed at showing that the factual material which led the Court to make its original order was, contrary to the parties' assumption as to its correctness, incorrect." (Emphasis)

[16] In casu, the statements of fact which was placed before Hendricks JP was that the marriage between the parties was out of community of property as per the purported ante-nuptial contract between the parties entered into on 26 November 2007. This fact was never disputed by the first respondent. In fact, the first respondent aligns himself with this fact. This is clearly a mistake common to the parties.

[17] On the issue of whether the applicant has established grounds to sustain the application, and the discretion which the court may exercise, the first respondent referred me extensively to the case of *Schimtz v Schimtz* [2015] 3 All SA 85 (KZD) (Schimtz) that although the antenuptial contract was not registered, it is enforceable as between the parties themselves; and LAWSA Second Edition (Volume 16 paragraph 114) where he states that there are no formal requirements for the validity of antenuptial contracts with the result that informal marriage contracts are valid between the spouses.

[18] I disagree with the findings in *Schimtz* and LAWSA as put forward by the first respondent. The main contention on the ante-nuptial contract is that the applicant says there was no contract between the parties at the time of marriage while the first respondent says there was a contract, albeit not registered. The first respondent relies on a purported certificate issued by Smit Stanton Attorneys in confirming this unregistered contract. However, the first respondent has not attached any confirmatory affidavit by Smit

Stanton Attorneys to that effect. The approach by the first respondent is untenable and cannot be allowed. Even if the first respondent had established some sort of a contract between the parties, if it was not registered at the time of the marriage it cannot be said to be an ante-nuptial contract. The provisions of s 21 of the Matrimonial Property Act, 88 of 1984 (MPA) would have to apply.

[19] This issue was dealt with at length in the case of **VVC v JRM and Others 2026 (3) BCLR 234 (CC)** when Majiedt J stated as follows:

“[50] The default position for matrimonial property in our country is universal community of property. Parties who wish to deviate from that norm must enter into an ANC prior to their marriage, or must fulfil the requirements and follow the procedure outlined in section 21 of the MPA. As stated, section 7(5) of the Recognition Act makes section 21 applicable to customary marriages concluded after the enactment of the Recognition Act, provided that the husband does not have more than one spouse. In terms of section 21, spouses may jointly apply to court for authorisation to execute a postnuptial notarial contract, which after its execution has the effect of regulating the future proprietary consequences of the marriage. Under the common law, ANCs are immutable. This strict principle was relaxed by the MPA. Any extra-judicial agreement entered into by parties that effectively alters the spouses’ matrimonial property system will be invalid. Self-evidently, an ANC can only be concluded prior to a marriage – this is one of the *essentialia* (essential terms) of the contract. Parties can only change their matrimonial property regime by approaching a court in an application under section 21 of the MPA. A court order pursuant to section 21 would be the only instance where the Registrar of Deeds will register a change to the matrimonial property system.

[58] ... **It bears repetition that it is plain that an ANC is immutable and that parties cannot execute such a contract postnuptially, save under section 21 of the MPA.**

[66] Those provisions are unequivocal:

(a) Section 86 clearly states that ANC's not registered in accordance with section 87 will have no force or effect against persons not party to the contract.

(b) Section 87 stipulates that ANC's must (i) be attested by a notary and (ii) be registered in the Deeds Registry within 3 months of its execution. Section 87 therefore contains the legislative requirements for a valid ANC.

[67] In light of these provisions, it is inconceivable that parties' intentions must be favoured over the statutory regime applicable when parties understand that the consequence of getting married without an ANC is that the marriage will be in community of property with profit and loss. To the extent that they were indeed unaware of this, section 21 of the MPA is available to afford them flexibility to change their regime. Moreover, sections 86 and 87 refer to an "ante" nuptial contract, which means that the agreement must be concluded before the nuptials. For these reasons, to interpret the phrase otherwise would result in an absurdity.

[111] Judicial oversight when changing matrimonial property regimes is not a mere formality and is no trivial matter at all. It is a structured process which must be fully motivated – the section requires that there must be sound reasons for the change – and must be considered by a judge. That process may give the parties an opportunity to pause and reflect on the change being effected. This may give a weaker spouse time to obtain sound legal advice or think carefully about the effect that the proposed change may have on her financial position. The second judgment's criticism of this observation loses sight of the fact that a reason the weaker spouse may be more careful may be because at the time of the change in matrimonial property regime, the weaker spouse may, through the marriage, have acquired some assets and wealth with which she does not wish to part. This is different from when the parties first marry and are in an impecunious position. There may also be children involved whose interests they may wish to protect.

[112] Therefore, the section 21 application does not only serve to protect the interests of creditors. This may be the direct purpose of the section, but there are plainly benefits for the parties as well, even if only indirectly. A party may well sign a contract blindly, hence the caution of *caveat subscriptor*, but it is difficult to imagine a party being passive throughout a lengthy and detailed section 21 court process. Through the process, a weaker party may become

better apprised of the change being effected and may be in a better position to recognise prejudice and object to it. The section 21 court process introduces formality and an impartial umpire to the change in the property system, which is necessary at all times when spouses are effecting a fundamental change to the way in which they will deal with their matrimonial property.”

[20] The marriage between the parties is therefore one in community of property as there was non-compliance with s 21 of MPA. The application is for variation of the divorce decree. There is no application to review the powers of the second respondent. I am as such unable to entertain prayers 3; 4 and 5 in the notice of motion. This aspect is left to the second respondent to consider in line with powers vested in him. The property of the parties is to be dissolved in line with the marriage of the parties in community of property.

Costs

[21] I see no reason why costs should not follow the suit.

Order

[22] I therefore make an order as follows:

1. Prayers 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the notice of motion are granted.
2. I make no order in respect of prayers 3 to 5. Prayers 3 to 5 of the notice of motion are referred to the second respondent to be dealt with in line with his powers.
3. The first respondent to pay costs on scale B including costs of counsel.

J. T. MAODI

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG**

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Date judgment reserved:

Date of Judgment:

4 September 2025

23 March 2026