REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/25924

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

....
DATE SIGNATURE

In the matter between:

E: A L Plaintiff

and

E: C E
(born V D W) Defendant

J U D G M E N T

KATHREE-SETILOANE, J:

[1] The plaintiff and the defendant, Mr A L E and Mrs C E E, respectively were married on 30 March 1991, in the Northern Cape, out of community of

property, and with the exclusion of the accrual system, as provided in Chapter 1 of the Matrimonial Property Act 88 of 1984 (“the Matrimonial Property Act”).

[2] The plaintiff seeks, amongst others, a decree of divorce together with an order in respect of parental responsibilities and rights regarding the minor child. The defendant counterclaims for amongst others:

(i) a decree of divorce;

(ii) a declarator that a partnership came into being between the plaintiff and the defendant and has been dissolved as at the date of divorce;

(iii) a declarator regarding the composition of assets of the partnership;

(iv) an order appointing a liquidator with authority to, realise the whole of the partnership assets, liquidate the liabilities of the partnership, prepare a final account and to pay to the plaintiff and the defendant whatever is owing to them by virtue of the partnership agreement;

(vii) an order directing the liquidator to prepare an account reflecting the aforegoing, and to pay the proceeds equally to the plaintiff and the defendant; and

(viii) an order directing that the costs of the liquidator be paid out of the assets of the partnership estate.

[3] The defendant raises a special plea that the defendant’s claims do not disclose a cause of action as the claims, and the evidence required to be tendered in support of them will contradict the terms of the antenuptial contract concluded between the parties, on 2 March 2009, which expressly provides that the parties are married out of community of property with the exclusion of the accrual system. The plaintiff contends that the relief sought by the defendant in her counterclaim is incompetent, and that the evidence

which she will be required to lead in support of her claim will be inadmissible as it will offend against the parol evidence rule, and it will seek to effect and invalid amendment to, or revocation of, the antenuptial contract.

[4] The parties agreed, in terms of Rule 33(4) of the Uniform Rules, to a separation of the issues, and that the plaintiff's plea be determined separately and prior to the remaining issues (*JW v CW* 2012 (2) SA 529 NCK).

Universal Partnership in Conflict with Antenuptial Contract

[5] In Roman Dutch Law two types of universal partnerships were recognized, namely the *universorum bonorum* and the *universorum quae ex questu veniunt.* In the partnership *universorum bonorum,* the contracting parties agree to put in common all their property, both present and future. It covers their acquisitions whether from commercial undertakings or otherwise. In the partnership, *universorum quae ex quaestu veniunt*, on the other hand, the contracting parties contract a partnership of all that they may acquire during its continuance from every kind of commerce. They are considered to enter into this kind of partnership when they declare that they contract together a partnership without any further explanation (*Isaacs v Isaacs* 1949 (1) SA 952 (C)).

[6] The defendant pleads the formation of a *universorum bonorum.* This is apparent from her plea which reads:

"5.8 Immediately prior to the inception of their marriage and at or about (Kathu, Northern Cape), the plaintiff and defendant both acting personally agreed that:

5.8.1. The parties would commence the business of accumulating assets and income for the mutual benefit of each of them and any children to be born of their marriage ("the business").

5.8.2. The business would be owned by a partnership in which the parties were equal partners and would be pursued by way of such partnership."

5.9 The express, alternatively implied, further alternatively tacitly agreed material terms of the partnership were as follows:

5.9.1 The parties in partnership would carry on the business of the partnership through the medium of juristic person/s. The juristic person/s would be registered in the name/s, for the sake of convenience, of one, other, or both parties and/or their nominee/s, and/or independent third party/ies as necessary and/or appropriate.

5.9.2 Notwithstanding the aforegoing registration, the partnership would own the entities.

5.10 The parties would:

5.10.1 Share in the assets of the partnership equally;

5.10.2 Share in the liabilities of the partnership equally;

5.10.3 Share in the profits of the partnership equally;

5.10.4 Share equally in the losses resulting from the partnership;

…"

[7] The defendant pleads that the universal partnership agreement was entered into immediately prior to the marriage of the parties, and the execution of the antenuptial contract, which was concluded on 2 March 1991, some 4 weeks prior to the marriage. A universal partnership, such as alleged by the defendant, is an agreement in terms of which all of the parties' movable and immovable assets, both present and future, form part of the assets of the

partnership between them, without limitation. An agreement of this nature would clearly be irreconcilable with the antenuptial contract entered into by the parties, which expressly excludes community of both existing and future property of the parties.

[8] I am of the view that the establishment of a universal partnership, such as contended for by the defendant, contradicts the clear purpose, and terms agreed upon by the parties in paragraphs 1 and 2 of the antenuptial contract, which expressly excludes community of property and profit and loss. The clear intention of the parties, as reflected in the antenuptial contract concluded between them, was that each of them would retain his or her pre-marital property, as well as the assets acquired after marriage, and the liabilities acquired after marriage.

[9] As is apparent from the counterclaim, the universal partnership agreement, which the defendant contends for, was concluded either prior to the conclusion and execution of the antenuptial contract between the parties, or at the same time. A universal partnership, in the terms contended for by the defendant, would in effect amount to a marriage in community of property. This much is apparent from the defendant's founding affidavit (deposed to on 18 June 2009) in her Rule 43 application, wherein she stated:

"I mention briefly that the Respondent immediately prior to our marriage and the execution of our antenuptial contract, expressly assured me that the antenuptial contract would apply only in respect of third parties such as creditors but that as between the two of us, our marriage would be a partnership and everything established during the course thereof would be ours for the equal benefit of both of us and any children born of our marriage. "

She goes on in her Rule 43 affidavit to say:

"I loved the Respondent and believed and trusted him without question, in his assurances in this regard. Accordingly, I was prepared to and did sign the antenuptial contract which excluded the accrual system."

Invalid Amendment or Revocation of Antenuptial Contract

[10] I am of the view that the universal partnership agreement, contended for by the defendant, 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 contract, with a regime which would have the opposite effect.

[11] There can be little doubt, therefore, that a universal partnership agreement, such as contended for by the defendant, would constitute a revocation, or at the very least, an amendment of the very essence of the antenuptial contract, which was entered into between the parties. Such a step, even with the mutual consent of the parties, can only be effected by an order of the High Court on good cause shown (Ex *parte Dunn et Uxor* 1989 (2) SA 429 NC; *Honey v Honey* 1992 (3) SA 609 (W)). No such order was sought by the parties or granted by the Court. Hence, any evidence which the defendant may seek to lead, of an invalid revocation or amendment of the terms of the antenuptial contract, would be inadmissible on the basis of being irrelevant, as an antenuptial contract cannot be revoked or varied without the leave of the High Court (*JW v CW* 2012 (2) SA 529 (NCK) at para 29).

Parol Evidence Rule

[12] As alluded to, the defendant contends for a universal partnership agreement, which either precedes the conclusion of the antenuptial contract, or was concluded contemporaneously. The defended would, in order to prove this partnership agreement, need to lead evidence at the trial. The plaintiff, however, contends that the leading of any such evidence would be inadmissible, as it offends against the parol evidence or integration rule.

[13] The parol evidence rule provides that where a jural act is incorporated in a document, it is not generally permissible to adduce extrinsic evidence of its terms. In *Venter v Birchholtz* 1972 (1) SA 276 (A) 282, the Appellate Division accepted Wigmore's description of the parol evidence rule as the "integration rule". This description was later endorsed in *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) SA 16 (A) 26, as follows:

"The rule is well summarised by Wigmore, Evidence, *3rd ed vol 9 sec 2425, as follows:*

> *This process of embodying the terms of a jural act in a single memorial may be termed the* integration *of the act, ie its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purposes of determining what are the terms of their act."*

[14] Similarly, in the earlier decision of *Union Government v Viannini Ferro Concrete Pipes (Pty) Ltd,* 1941 AD 43 at 47, Watermeyer, JA observed:

"Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."

Thus, any evidence which the defendant would seek to adduce, during the trial, to prove the preceding or contemporaneous universal partnership agreement would contradict the terms of antenuptial contract entered into between the parties, and in so doing seek to redefine its terms. Any such evidence would therefore be inadmissible as it would be precluded by the parole evidence rule.

[15] The defendant, however, contends that the circumstances of this case fall within the exceptions to the parol evidence rule. She relies, in support of this contention, on the decision of *Johnston v Leal* 1980 (3) SA 927 (A) where Corbett JA observed (at 944B-C):

"Where a written contract is not intended by the parties to be the exclusive memorial of the whole of their agreement but merely records a portion of the agreed transaction, leaving the remainder as an oral agreement, then the integration rule merely prevents the admission of extrinsic evidence to contradict or vary the written portion; it does not preclude proof of the additional or supplemental oral agreement…"

[16] The defendant does not, in this regard, contend that the antenuptial contract, which was concluded between the parties, is inchoate. However, relying on the decision in *Johnston v Leal* (at 944B-C), she contend that there is a preceding or contemporaneous oral agreement that supplements

the contents of the antenuptial contract concluded between the parties which, importantly, does not seek to add to or remove from the contents of the antenuptial contract. She contends that where extrinsic evidence can be advanced without regard being had to the antenuptial contract, such evidence would be admissible as constituting an exception to the parol evidence rule in the form of a partial integration of the preceding or contemporaneous oral agreement. She contends that parties are entirely capable of determining an agreement, and incorporating the terms of the agreement in a written document that may be termed a choate agreement, but nothing prevents the same parties from reaching an oral agreement on ancillary issues that do not purport to replace any of the written terms of the agreement.

[17] In order to fall within the ambit of the exception to the parole evidence rule, as contemplated in *Johnston v Leal* (at 944B-C), the defendant would be required to plead that the antenuptial contract, which was entered into between the parties, was not intended by them to be the exclusive memorial of the whole of their agreement, but that it merely recorded a portion of their agreement, leaving the remainder as an oral agreement. The defendant has, however, failed to plead this in her counterclaim. I am of the view that in the absence of any such allegations in the defendant's counterclaim, the antenuptial contract − which was reduced to writing, was attested to by a notary public, and was duly registered by the Registrar of Deeds in terms of s 87(1) of the Deeds Registries Act, 47 of 1937 − would be conclusive of the terms of the agreement that was concluded between them. It must, therefore, be regarded as the exclusive memorial of the transaction between them, and no extrinsic evidence to prove its terms may be adduced. Nor may its contents be contradicted.

[18] Thus any other actions, whether in the form of oral or documentary communications, or other conduct, of the parties, that preceded or accompanied the act of concluding the antenuptial contract, simply forms no

part of such agreement. Any such actions are irrelevant to the antenuptial contract, and consequently inadmissible as a matter of evidence. In *De Klerk v Old Mutual Insurance Co Ltd* 1990 (3) SA 34 (E) at 39 D-E, the Court observed:

"[W]here a contract has been reduced to writing, the written document is regarded as the sole memorial of the transaction and deprives all previous inconsistent statements of their legal effect. The document becomes conclusive of the terms of the transaction which it was intended to record. The result is that previous statements by the parties on the subject can have no legal consequences and are accordingly irrelevant and evidence to prove them is inadmissible."

[19] The circumstances that existed in *Johnston v Leal* are, in any event, distinguishable from those in the current matter. *Johnston v Leal* dealt with the parol evidence rule in the context of a contract for the sale of land (which in terms of statute had to be reduced to writing) where the written contract contained blank spaces. Corbett JA observed (at 943B-F):

"*Dealing first with the integration rule, it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. The object of the party seeking to adduce such extrinsic evidence is usually to enforce the contract as re-defined or at any rate, to rely upon the contractual force of the additional or varied terms, as established by the extrinsic evidence. On the other hand, in a case such as the present where* ex facie *the document itself the contract appears to be incomplete, the object of leading extrinsic evidence is not to contradict, add to or modify the written document or to complete what is incomplete so that the contract may be enforced thus completed, but merely to explain the lack of completeness, to decide why the parties left blanks in a particular clause and what their integration actually comprises, and in this way to determine whether or not the document constitutes a valid and enforceable contract and is in conformity with s 1*

(1) of the Act [Formalities in Respect of Contracts of Sale of Land Act 71 of 1969]. Consequently, it does not seem to me that the admission of such extrinsic evidence for this purpose in a case of the kind presently under consideration would be either contrary to the substance of the integration rule or likely to defeat its objects. To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered; the evidence which it is suggested could be adduced in this case would be to explain an overt lack of completeness in the document and at the same time to determine what has been integrated with a view to deciding upon the validity of the document as it stands."

[20] Therefore, in *Johnston v Leal* blank spaces in the contract rendered the validity of the contract questionable as the blank spaces created ambiguity and was incapable of interpretation. The court found that the issue as to whether the document was a valid and enforceable contract, and complied with s 1(1) of Act 71 of 1969, in the particular circumstances of that case were not resolvable as a pure question of law, as it depended partly on the facts, namely the intention of the parties and the reason why clause 11 was left incomplete (at 942D-E). It was ultimately decided that extrinsic evidence would be admissible in order to explain the lack of completeness in the written contract, and to thus determine its validity. The current matter is, therefore, distinguishable from *Johnston v Leal,* on the additional basis that there is no ambiguity or lack of completeness in the terms of the antenuptial contract concluded between the parties, which expressly exclude community of property, and profit and loss. These terms can easily and readily be interpreted without any reference to extrinsic evidence.

[21] Our courts have often, in the past, been concerned with the question of whether evidence may be given to prove a collateral oral agreement, as well as an additional consideration, which is inconsistent with the written contract. This issue came to head in the matter of *Du Plessis v Ne*l 1952 (1) SA 513 (A), where the Court had to consider the situation where a written deed of sale

of immovable property had been concluded, and one of the parties thereto claimed that an oral agreement had been entered into collaterally, conferring upon that party a servitude over the land in question. The court had to determine whether evidence could be led regarding a prior oral agreement, in relation to a property contract, which was in conflict with the written deed. The Court held that evidence of a prior oral agreement collateral to a written agreement, and which induced the written agreement was admissible only when its terms did not conflict with the terms of the written contract.

[22] Van den Heever JA, with whom the majority of the Court agreed, stated thus (at 534):

"A written agreement is normally a document drawn with due caution and deliberation. Where, therefore, parties have crystallized their agreement into written form,

'it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory".

(The Countess of Rutland's case, 5 Co. Rep. 25 (b); 75 E.R., p. 90.)

In Clifford v Turrell, 14 L.J. Ch. 390 at p. 397, the LORD CHANCELLOR observed:

'Now, the settled rule of law is that you may prove a further consideration which is consistent with the consideration stated on the fact of the deed. You cannot be allowed to prove a consideration inconsistent with it, but you may prove another which stands with it.'

This statement of law was adopted by this Court in Avis v Vereput, *1943 AD 331 at p.379."*

Van den Heever JA, speaking for the majority, held (at 539):

*"What then is a collateral oral contract not inconsistent with the written instrument and therefore capable of being proved? The explanation seems to me to be this: where the written contract purports to reflect the whole contract on a particular subject matter between the parties, where the pleadings aver that it is the whole contract or the Court is satisfied that it is, no additional or oral terms may be proved; in that manner greater and lesser performances than those promised in the written contract may not be proved (*Angell v Duke *(1875) 32 LT 320). But the parties are not by this rule compelled to reduce their legal relationships, however remotely related to such subject matter, to writing. Even where the subject matter of an oral contract is so closely related to that of the written instrument that the conclusion of one is consideration for the other, the oral contract may be proved if truly extrinsic and therefore not in conflict with the contract."*

So whilst it may be permissible for the defendant to prove a prior or collateral agreement, which is consistent with the antenuptial contract, it would be impermissible for her to prove a prior or collateral universal partnership agreement with reference to extrinsic evidence that is inconsistent with the antenuptial contract, which she concluded with the plaintiff. The two are incompatible, and therefore cannot stand together.

[23] It is contended, on behalf of the defendant, that to disallow evidence at the trial to prove a universal partnership would perpetuate the discrimination experienced by women as identified by Sinclair, in *The Law of Marriage* (Vol 1) 1996 (at 139), where she comments:

"Stereotypical role-allocations for women have been a major source of their general disempowerment and financial impoverishment. In addition, great changes have occurred in the transmission of family wealth..."

…

Young women still rely heavily on the dangerous notion that they will marry, have children and be supported throughout their lives by their husbands. Within marriage the unequal distribution of the domestic burden, which has its own further effect of channelling married women into lower part-time jobs, inhibits the development of a stable career and diminishes the chance that a married woman has of securing 'a good job with good fringe benefits' – Professor Charles Reich's definition of 'new property'. After divorce, the incidence of which is ever increasing, it is not surprising that that women are unable suddenly to compete for scarce jobs and to become financially dependent."

Sinclair, however, goes on to write (at 142):

"South Africa is a country whose common law is based on universal community of property and of profit of loss, has incorporated both these features into its matrimonial property law. There can be no doubt that the introduction of the accrual system (which amounts to a deferred sharing of profits of spouses married out of community), and the provision for judicial interference with the consequences of complete separation of goods via the transfer of property from one spouse to the other on divorce, have mitigated the harsh consequences that ensue from a system that excludes all sharing, Such a system contradicts the wider accepted view that marriage produces a form of partnership."

[24] It certainly must not be overlooked, as observed by Sinclair (at 142), that the accrual system is frequently excluded in the antenuptial contracts in situations which usually reflect the choice of the husband, whose estate is most likely to increase, rather than the informed choice of both parties. However, in the current matter, the defendant does not allege that she was induced by fraud, duress, or mistake to conclude the antenuptial contract with the plaintiff. Nor does she allege that she was forced to enter into the antenuptial contract excluding the accrual system on terms that infringed her constitutional rights to equality and dignity, such that this Court must assess

the constitutionality of antenuptial contracts excluding the accrual system, as a matrimonial property regime that applies to marriages.

[25] The defendant's counterclaim, and affidavit in her Rule 43 application, reveal that despite the existence of the purported prior universal partnership agreement, she, nevertheless, entered into an antenuptial contract excluding the accrual system, on the basis that it would apply only in respect of third parties, such as creditors, whilst as between the parties, there would be a universal partnership. The defendant was certainly, in my view, aware of exactly what she was doing, when she concluded the antenuptial contract excluding the accrual system, with the plaintiff.

[26] The refusal, by reason of the parol evidence rule, to allow inadmissible evidence to be lead in circumstances where the defendant was well aware of exactly what she was doing when she concluded the antenuptial contract excluding the accrual system, will not, in my view, perpetuate discrimination against women. Nor would it offend against the rights and values of equality, dignity, and autonomy of women, as enshrined in our Constitution.

[27] One sincerely hopes that women have transcended the belief in the unrealistic and naive notion that they will marry, have children and be supported for the rest of their lives by their husbands. The vast majority of women, today, certainly do not fit this mould. Most women, today, are strong, intelligent, educated, and independent. They share equally in the support of their homes and families − and will stand for nothing but equality in their marriages − regardless of their socio-economic circumstances. To the extent, however, that some women may not be fully apprised of their rights – surely the solution does not lie with interfering with the parole evidence rule, but rather with introducing programmes to educate and empower women to

transcend any discrimination which they may still face on marriage, or upon divorce.

[28] In the result, I make the following order:

(1) The Special Plea is upheld.

(2) It is declared that any evidence in substantiation of the allegations in paragraphs 5.7 to 5.17 of the defendant's counterclaim will be inadmissible.

(3) The costs are to be costs in the cause of the main action.

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F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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Attorneys for the Defendant:	Tim Fourie Attorneys
Date of Hearing:	13 September 2012
Date of Judgment:	25 October 2012