IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO A QOU: 47545/2007

APPEAL NUMBER: A427/2011

DATE: 25 NOVEMBER 2014

In the matter between:

M[...] K[...] Appellant

and

H[...] J[...] Respondent

JUDGMENT

MOTEPE AJ:

[1] The Court *a quo,* presided by Botha J made the following order:

> "*1. The marriage between the parties is dissolved.*
>
> *2. It is declared that in terms of the agreement dated 14 December 2004 the defendant will be entitled to transfer of a 50% ownership in the property situate at 54 E[...] A[...] H[...] as soon as he has complied with clause 2.4 of that agreement.*
>
> *3. The defendant must pay the plaintiffs costs."*

[2] The parties are common cause that their marriage has broken down irretrievably. There is consequently

no appeal against order 1 granting a decree of divorce. This appeal concerns only orders 2 and 3 of the Court a *quo*, leave to appeal to the Full Court of the North Gauteng High Court having been granted by the Court a *quo.*

Background facts

[3] The facts relevant to the determination of this appeal and as aptly summarised by the Court a *quo* are that the parties were married by antenuptial contract on 27 March 2004. The appellant was 63 years old and the respondent some 18 years younger.

[4] The appellant owned a house in P[...] which was the communal home between the parties. They have been living together since 1999. The respondent also owned a house in O[...] G[...] which she was letting. She was an Interior Decorator by trade and used her skill to contribute to the improvements to the Parkwood house although the degree of such improvements are in dispute.

[5] While the parties have no children together, the respondent had two sons who were to live with her. As a result, the parties agreed to purchase a house in H[...]. The appellant made an offer to purchase the H[...] house in his name. The sale of his house in P[...] was going to fund the purchase of the H[...] house. However, after the sale of the Parkwood house and the cancellation of the appellant's bond, the appellant was left with a shortfall of R400 000.00 with the result that the appellant needed a mortgage loan.

[6] In view of the appellant's age and the fact that he had retired, he could not obtain a loan. Due to the fact that the respondent was able to obtain a bond in her name, the parties agreed that the house would be bought in the name of respondent. Consequently, the H[...] property was registered in her name in January 2005.

[7] Before registration of the H[...] property in the name of the respondent, the parties had signed a typed written agreement, both initialling each page on 14 December 2004 in relation to the H[...] property.

[8] The contract *inter alia* records that the appellant signed an offer to purchase the H[...] property on 20 September 2004 for a purchase price of R1 650 000.00. The purchase price of this Houghton property was intended to have been funded by the sale of the appellant's P[...] property. In addition to the purchase price, the appellant required an amount of approximately R400 000.00 to cover the shortfall on the H[...] property.

[9] The respondent was able to obtain a loan from SA Home Loans in the amount of R400 000.00 on condition that the H[...] property be registered in her name. The contract between the parties was entered into with an intention to regulate their relationship *inter se* in connection with their rights to the H[...] property.

[10] The typed clauses 2.2 and 2.5 of the contract read as follows:

"2.2. *Despite the property being registered to reflect J[...] as the sole owner, the parties agree that as between the two of them, K[...] shall be entitled 50% (fifty percent) rights of ownership in and to the property.*

...

2.5. Simultaneously with the cancellation of the mortgage bond in favour of SA Home Loans, alternatively subsequent thereto, it is agreed that the parties shall cause K[...]'s 50% (fifty percent) share of ownership in the property to be registered at the office the Registrar of Deeds."

[11] Reference to J[...] in the above quoted clauses is reference to the respondent while reference to K[...] is reference to the appellant. The typed 50% in clause 2.2 is deleted by means of two parallel lines drawn over it and a figure of 100 is then inserted above the deleted 50% in manuscript. The typed 50% in clause 2.5 is deleted in a similar manner but there is no insertion of a figure 100 in manuscript. The typed fifty percent in brackets is however unchanged in both clauses. Clause 5 of this contract states that the agreement constitutes the whole agreement between the parties relating to the subject matter thereof and no amendment, alteration, addition, variation, or consensual cancellation shall be of any force or effect unless reduced to writing and signed by both parties.

[12] The appellant's case was that the hand written amendments were reflective of the true intention of the parties to the effect that the appellant would have a 100% interest in the property and that he would be entitled to the transfer of the property in his name upon the cancellation of the bond, which he tendered.

[13] The respondent's case was that no amendments were effected to the typed contract and consequently that she was entitled to a 50% share in the H[...] property and that the appellant would be entitled to registration of his 50% share as soon as he had effected the cancellation of the bond.

The respondent's testimony

[14] The respondent testified that the P[...] property was bought for R480 000.00. She then effected some improvements to the P[...] property. When asked in her examination in chief as to how much she spent on the improvements she answered that "*there were about R400, R500 000.00 of improvements to the house."* The P[...] house was then sold for R1.9 million after the improvements. She testified that the reason the written agreement was entered into between the parties was because the appellant had reservations that the respondent owned a house at O[...] G[...] and that the H[...] property was now registered in her name, meaning she had two houses when the appellant had none in his name. She then advised the appellant to approach a lawyer to prepare an agreement "*to say that, the house belong to us, 50/50."* Most importantly, she testified as follows: "*And I even took it a step further to say, I am going to sell my house because now*

this house needs to be renovated." She sold her house at O[...] G[...]. When she was asked what she did with the proceeds of the sale, she answered as follows: "*I actually then refurbished the house that we live in at the moment."* That is reference to the H[...] property.

[15] The respondent paid approximately R50 000.00 to get the house transferred into her name. The appellant had told her that he would be able to pay off the bond by around March 2005 from the proceeds of the sale of his shares. She testified that from around March or April 2005 she started making bond repayments at a rate of R5 400.00 per month. When the trial commenced, which was on 26 May 2010, she was still paying the bond on the property at a rate of R6 700.00 per month. She was also paying for property rates at the rate of R2 200.00 per month with the appellant only paying for water and electricity at a rate of between R1 300.00 to R2 000.00 depending on the season.

[16] She disputed the written amendments on clauses 2.2 and 2.5. She testified that the appellant told her to initial next to the two clauses because they were important clauses dealing with 50/50 ownership. She trusted him because he was her husband. She only became aware of the written amendments after she had issued summons. The appellant had not given her a copy of the agreement.

[17] In cross-examination, her evidence on the bond repayments and property rates payments was not disputed. It was further not disputed in cross-examination that she sold her O[...] G[...] property and used the proceeds of that sale to refurbish the H[...] property which according to her was in a dilapidated stage when it was bought. It was however disputed in the cross-examination that she spent about R400 000.00 on the improvements on the P[...] property. The dispute however seem to be limited only to the amount she spent on the P[...] property but not on the fact that she did spent some money refurbishing that property.

The appellant's testimony

[18] The appellant testified that the written agreement between the parties was prepared by Mr Katz, the same attorney who had attended to their antenuptial contract. This agreement was brought about by the discussions and agreement that the parties reached to share the property 50% each even if it was registered in the name of the respondent. After the attorney prepared the typed written agreement as the parties had agreed, the appellant brought it home and showed it to the respondent. The respondent then made the abovementioned hand written amendments telling him that he can keep the house because she still had the O[...] G[...] property.

[19] During cross-examination he testified that he took the signed and initialled agreement to his attorney. The attorney asked him why the words "*fifty percent'* in brackets were not removed. He told the attorney that it was an oversight.

[20] He denied that the respondent paid for improvements at the P[...] property. He also initially denied that the respondent paid for any improvements at the H[...] property. However, later in his cross-examination he conceded that they shared expenses of improving the house with the respondent improving the kitchen and putting in some cupboards in that house. He testified that he bought the respondent motor vehicles for which he was paying monthly instalments.

[21] The respondent told him that she sold her house at O[...] G[...]. He would have paid an amount of R400 000.00 mentioned in the written agreement from his dividends but could not do so because the company was liquidated and there was consequently no dividends. He would have paid the R400 000.00 off around March 2005. When it was put to him that he had not paid this R400 000.00 despite claiming 100% of the H[...] property, he answered that he had not complied with this obligation because he was unable to do so, as he was unemployed. He intended paying this amount from the proceeds of the sale of the H[...] property.

[22] When asked what would happen to the interest on the bond that the respondent had been paying all along, he answered that he would consider paying it.

The probabilities

[23] The Court a quo correctly found that there was an irreconcilable dispute of fact as to whether the respondent brought about the manuscript alterations to clauses 2.2 and 2.5. It found it impossible to decide the case with reference to credibility of the parties. It decided the case on the probabilities[1].

[24] The approach to be followed by this Court was restated by Zulman JA in **Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd**[2]**,** he stated as follows:

> "*[24] A trial court has the obvious and important advantage of seeing and hearing the witnesses and of being steeped in the atmosphere of the trial. These advantages were not possessed by the Full Court and indeed this Court. Although Courts of appeal are slow to disturb findings of credibility they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour but predominantly upon inferences from other facts and upon probabilities. In such a case a Court of appeal with the benefit of an overall conspectus of the full record may often be in a better position to draw inferences, particularly in regard to secondary facts."*

[25] I agree with the observations of the Court a *quo* that there was no material difference between the version of the respondent in evidence and the version she pleaded. I may also add that as it appears below, the probabilities are in her favour. The same cannot be said of the version of the appellant.

[26] The respondent testified that the appellant was to pay the amount of R400 000.00 referred to above from the proceeds of sale of his shares. In his evidence, the appellant testified that he was to pay this amount from his dividends. When the Court informed him that the respondent had testified that it was from the proceeds of the sale of his shares and not dividends, he persisted that it was from his dividends and not shares. It was only after the Court a *quo* had referred him to clause 2.3 of the contract which specifically refers to the sale of his shares that he conceded.

[27] The appellant initially denied early in cross-examination that the respondent contributed to the payment of the repairs that were done for maintenance of the H[...] property. He testified that he paid for all the repairs from his *'little pension funcf'* he had when he left the company. He however conceded later in cross-examination that they shared the expenses of improving that house. When asked by the Court as to what did she pay for. He answered:

> "*The kitchen. She improved the kitchen and she put in some cupboards into the house."*

[28] His version that the handwritten amendments were in fact written by the respondent herself was never put to the respondent in her cross-examination. All that was put to her was that she initialled next to those alterations. One would have expected this version to have been put to the respondent, bearing in mind its importance to the appellant's case.

[29] The respondent testified that when the appellant told her that he was uneasy that the H[...] property will be registered in her name, with the result that she will have both the H[...] property and O[...] G[...] property in her name while he had nothing in his name, she not only agreed that they should enter into an agreement in which they shared the H[...] property on equal basis but that she went a step further and sold her O[...] G[...] property in order to refurbish the H[...] property, which according to her was in a dilapidated state.

Once more, this crucial evidence was never challenged in her cross-examination nor did the appellant deny it in his evidence in chief.

[30] When it was put to him in cross-examination that his testimony was that the respondent had told him that he can keep 100% of the Houghton house because she had another house in O[...] G[...], he confirmed this testimony. It was however put to him that the respondent had sold the O[...] G[...] property. He conceded that the respondent did tell him that she sold the O[....] G[...] property. He however did not challenge the respondent's evidence, even at this belated stage, that she used the proceeds of that sale to refurbish the H[...] property.

[31] In his evidence in chief, it was put to him that the respondent "*has further testified that you have contributed absolutely nothing towards the household expenses, save for the water and electricity"*. He does

not deny this. He in fact testified that he is unemployed since he retired in 2002 and that he is not receiving any income whatsoever except little rental from his children. He is then asked if he is unemployed how is he able to service the water and electricity. He answers that it is from the service from his retirement together with what the gets from his children.

[32] He then introduces new evidence that he bought the respondent "a *state of the art Mercedes Benz"* which he paid R10 000.00 per month for, for sixty months. He later traded in this car and bought her an "*SUV Lexus"*. Quite apart from the fact that this evidence about motor vehicles was never put to the respondent, he still does not state that he is responsible for any household expenses over and above for water and electricity.

[33] The appellant testified that after the handwritten alterations to the contract he took the agreement back to his lawyer. When asked by the Court a *quo* whether he had asked his lawyer about the amendments and whether he was satisfied, he answered yes he did ask him. His lawyer asked him why didn't they remove words "f/ïy *percent'* in brackets in clauses 2.2 and 2.5. He told his lawyer that it was an oversight. The important question is therefore why at that stage did he not correct the oversight by for example having the lawyer retyping the agreement reflecting his 100% ownership? On his own version, the relations between him and the respondent were quite good at the time and there is therefore no reason why he would not have corrected the agreement and taken it back to her for her signature.

[34] I agree with the Court a *quo* that on the probabilities, the respondent has proved that she had 50% ownership of the H[...] property. It is improbable that she would sell her O[...] G[...] property thereby having no fall back property; use the proceeds of the sale to refurbish the H[...] property; pay for the bond on the H[...] property for approximately 5 years; pay for property rates and on the appellant's version, pay for refurbishment of the kitchen and yet give away her 50% share in the H[...] property.

[35] While several grounds were raised in the notice of appeal, the only argument advanced at the hearing of the appeal was the attack on her evidence that when she signed the agreement, there were no handwritten amendments. Her evidence on the improvements she made to the house was also heavily criticized. The grounds of appeal other than what I have referred to above were not persisted with in argument. They are consequently not dealt with in judgment.

[36] In the result, I find no grounds for disturbing the findings of the Court a *quo* both on the merits and on costs. I consequently propose the following order:

" *The appeal is dismissed with costs"*.

JA Motepe

Acting Judge of the High Court

I agree

DS Molefe

Judge of the High Court

I agree and so it is ordered

DS Fourie

Judge of the High Court

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1 Stellenbosch Farmer's Winery Group Ltd and Another v Martell Cie and Others 2003 (1) SA 11 (SCA) at 141- 15D, paragraph 5

2 2002 (4) SA 408 (SCA) at 416F-G, paragraph 24