

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
CASE NO: 69491/2014
DATE: 17 MARCH 2016
In the matter between:

[J.....] [L.....]

Plaintiff

And

[W.....] [T.....] [L.....]

Defendant

JUDGMENT

Baawa J

[1] The parties herein are currently litigants in a divorce action pending before this court. The parties have agreed to a separation of issues in terms of Rule 33 (4) of the Uniform Rules of Court and in terms of that agreement the current application for the rectification of the ante-nuptial contract between the parties has proceeded before me.

- [2] The parties were married to each other out of community of property with the inclusion of accrual on 11 October 2008.
- [3] The ante-nuptial contract was entered into between the parties at the offices of attorney Pieter Le Grange and it was registered at the Deeds office on 1 October 2008.
- [4] The applicant, [W.....] [T.....] [L.....], is the defendant in the divorce matter and the respondent is [J.....] [L.....] who is the plaintiff in the matter.
- [5] The defendant has called Mr Pieter Le Grange (Le Grange) to testify regarding the drafting and signature of the ante-nuptial contract.
- [6] Le Grange testified how both parties attended at his offices and had a consultation with him regarding the drafting of the ante-nuptial contract. He explained to them the difference between a marriage in and out of community of property and with or without accrual. He was then given a list of assets to be excluded by the plaintiff but was not given any list by the defendant.
- [7] The parties then waited while the contractual document was being prepared and after completion thereof he explained the contents and confirmed that they understood same and had no wish to amend anything in the typed contract document. They thereafter signed the document and departed.

- [8] He was referred to the ante-nuptial contract and with reference to clause 4 thereof he confirmed that the starting value for the plaintiff was the amount of R5 170 000.00 being the value of the list of assets given to him by the plaintiff, whereas the starting value for the defendant was reflected as zero. He testified that this was an oversight on his part as his instructions were to record a starting value of zero in respect of both parties.
- [9] Le Grange testified that this was due to the oversight, paragraph 4 of the antenuptial agreement had to be rectified to reflect zero starting values for both parties as that was the common intention of both parties.
- [10] He further testified that the contents of paragraph 5 correctly reflected the instructions that were given to him regarding the exclusion of the assets of the parties.
- [11] The defendant also gave evidence which was to the effect that they discussed the issue on the morning before they proceeded to Le Grange's offices. She had no preference for any marriage regime but she considered an ante-nuptial contract as a prerequisite for a marriage.
- [12] By and large she confirmed the testimony of Le Grange regarding what took place at his offices though she could not remember some aspects and she attributed that to effluxion of time.

- [13] Mrs [L.....] was subjected to a thorough and wide ranging cross examination which included reference to the pleadings in the divorce action. She was taxed regarding instruction which appeared to be different to different sets of attorneys. She attributed this to her insufficient knowledge of legal matters. She was however adamant that the starting values in paragraph 4 of the antenuptial contract ought to be amended to reflect a zero value for both parties.
- [14] Even though she had sought the inclusion of her assets namely, furniture and a Nissan motor vehicle in the ante-nuptial contract in one of the notices of amendment she had filed, she was no longer pursuing that relief.
- [15] The plaintiff also testified and his testimony regarding the events at Le Grange's offices was largely similar to that of the defendant. He however testified that the starting value of R5 170 000.00 in paragraph 4 of the ante-nuptial contract was as per his instructions and that that reflected the common intention of the parties. He specifically denied that the intention was to reflect a zero starting value for both of them.
- [16] A rather unusual aspect of this case was that even though Le Grange had been the plaintiffs attorney previously, he was subpoenaed by the Defendant.

Evaluation

- [17] Upon weighing Le Grange's evidence it did not appear to me that he sought to favour one party or the other in his testimony. He appeared to be honest and objective in giving his version of events. I found him to be a credible witness who gave his evidence in a professional and objective manner.

[18] The plaintiff testified that he had a discussion with the defendant regarding the different forms of the marital regimes and from a lay person's point of view also explained accrual and the possibility of excluding their current assets from the accrual arrangement. He further testified that from their date of marriage on 11 October 2008 they started with zero accrual value.

The law

[19] In a rectification claim the following facts must be alleged and proved:

19.1 An agreement between the parties which was reduced to writing.

19.2 Secondly, there must be evidence that the written document did not reflect the common intention of the parties correctly. The common continuing intention of the parties, as it existed when the agreement was reduced to writing, must be established. It may be deduced from an antecedent agreement, for instance.

See Meyer v Merchants Trust Ltd 1992 AD 244

City Council of the City of Durban v Rumdel Construction (Pty)

Ltd [1997] 2 All SA 20 (D)

19.3 Thirdly an applicant must prove an intention by both parties to reduce the agreement to writing.

Meyer v Kivner [1974] 4 All SA 201 (N), 1974 (4) SA 90 (N) p 103

19.4 Further, the applicant must prove a mistake in the drafting of the document.

See Vin Ziegler v Superior Furniture Manufacturers (Pty) Ltd [1982] 3 All SA 371 (T), 1962 (3)

SA 399 (T) p 411 Neuhoﬀ v York Timbers Ltd [1981] 4 All SA 675 (T), 1981 (4) SA 666 (T) p 674

See also Amler's Precedents of Pleadings (8th Edition) Harms pp 318 - 9

[20] In the case of *Brits v van Heerden* 2001 (3) SA 257 © at 282 Knoll J stated the position in this regard as follows:

“...I agree with Mr Murray that this judgment and other cases referred to indicate that it is necessary that there be a mistake of some sort. However, the mistake does not have to relate to the writing itself, but might relate to the consequences thereof. The mistake may be common to both parties; the mistake may be that of only one party; the mistake may be induced by misrepresentation or fraud. In my view, the crux of the matter is that the mistake, be it a misunderstanding of fact or law or be it an incorrect drafting of the document, must have the effect of the written memorial not correctly reflecting the parties' true agreement

[21] The evidence of both the defendant and Le Grange satisfies all the requirements I have referred to. In particular the evidence of Le Grange is quite specific regarding the error in the drafting of the document. Le Grange's evidence was not challenged under cross examination and as such its truthfulness and cogency in the weighing of the evidence also remains unchallenged. It can therefore not be validly argued as the plaintiff has tried to do in submissions by his counsel that the written memorial correctly reflects the parties' true agreement.

[22] The parties' true agreement is evident not only from the testimony of the plaintiff but also the evidence of the defendant and Le Grange who was the author of the document. The agreement was that accrual would begin with a zero value for both parties.

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[21] The evidence of both the defendant and Le Grange satisfies all the requirements I have referred to. In particular the evidence of Le Grange is quite specific regarding the error in the drafting of the document. Le Grange's evidence was not challenged under cross

examination and as such its truthfulness and cogency in the weighing of the evidence also remains unchallenged. It can therefore not be validly argued as the plaintiff has tried to do in submissions by his counsel that the written memorial correctly reflects the parties' true agreement.

[22] The parties' true agreement is evident not only from the testimony of the plaintiff but also the evidence of the defendant and Le Grange who was the author of the document. The agreement was that accrual would begin with a zero value for both parties.

[28] in the result I make the following orders:

28.1 Paragraph 4 of the ante-nuptial agreement of the parties is hereby rectified so that the starting value of the plaintiff, which currently reads "R5 170 000.00" is hereby deleted and substituted with the word "NUL" and the assets listed under plaintiffs starting value are deleted.

28.2 The remainder of the relief sought in this action is postponed sine die;

28.3 The plaintiff is ordered to pay the costs.

28.4 The draft order handed in as amended is marked "X" and made an order of court.

S. A. M. BAQWA

JUDGE OF THE SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Heard on: 17 March 2016

Delivered on: 17 March 2016

For the Plaintiff: Advocate J. Rasd

instructed by: JI van Niekerk Incorporated Attorneys

For the Defendant: Advocate I. Vermaak-Hay

Instructed by: Arthur Channon Attorneys