

IN THE REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG DIVISION, PRETORIA

CASE NO: 54914/2014

In the matter between

M M G E

Plaintiff

and

G J E N.O.

Defendant

JUDGMENT

Fourie AJ

1. This matter came before the court **as a** stated case in terms of Rule 33(1) of the Uniform Rules of Court.

2. The defendant is the nominated executrix in the estate of her late father, [G J E] ("*the deceased*"). The deceased was married to the plaintiff, out of community of property subject to the accrual system as intended by section 3 of the Matrimonial Property Act, 88 of 1984 ("*the Act*"). The marriage was dissolved by the death of the deceased.

3. The plaintiff instituted action against the defendant wherein she claimed, *inter alia*, an order for the immediate division of the accrual "*concerned*" and an order that the defendant includes the plaintiff's accrual claim in the final liquidation and distribution account and makes payment of such accrual to which the plaintiff is entitled in terms of the Act. To this end, the plaintiff pleaded in paragraph 6 of the particulars of claim that:

"The accrual of the plaintiff's estate ~~s~~ smaller than the accrual of the deceased's estate and consequently, by virtue of the provisions of section 3 of the Act, the plaintiff is entitled to an amount equal to half of the difference between the accrual of the respective estates of the parties, which amount is to be calculated in the manner provided for in terms of the provisions of sections 4 and 5 of the Act."

4. In answer to this the defendant pleaded as follows in paragraph 4.2:

"4.2.1. the declared net value of the parties' respective estates as recorded in the (antenuptial contract) are incorrect;

4.2.2. *the defendant was not a party to the (antenuptial contract) and is not bound thereto; and*

4.2.3. *the calculation of any accrual, if it is found that the plaintiff has a claim in terms of section 3 of the Act, which is denied, should be determined having regard to the correct commencement values of the respective estates at the time of the conclusion of the marriage between the parties."*

5. The parties agreed that at the hearing of the matter, the Court would deal only with the legal principle raised by the defendant in paragraph 4.2 of her plea in regard to whether the executrix is bound by the *commencement* values set out in the antenuptial contract.
6. The parties further agreed to appoint experts to determine the accrual according to the method proposed by the plaintiff (being the declared values), as well as in accordance with the method proposed by the defendant (being the determined values). Such experts have been appointed, however, counsel informed me that they had not yet been able to make any determination. This has no bearing on the question I am required to consider.
7. Clause 5 of the antenuptial contract provides as follows:

"That for the purposes of proof of the nett value of their respective

estates at the commencement of the intended marriage the intended spouses declared the nett value of their respective estates to be as follows:

That of GJ E R 3 401 120.00

To be

Consisting of:

1 Sectional Scheme Unit		
Situating at Unit [E...] SS		
Dolphin 4, Marine Drive,		
Milnerton, Western Cape		
	R 450 000.00	
Less outstanding (Bond)	R 340 000.00	R 110 000.00
2 Sectional Scheme Unit		
Situating at Unit [1...] SS		
Sabuti, Simbithi, KwaZulu-		
Natal		
	R2 900 000.00	
	R 0.00	R 2 900 000.00
Less outstanding (Bond)		
3 Immovable property situated at		
[1...] Drennan Drive,		
Lonehi/1, Gauteng		
	R 390 000.00	
	R 0.00	R 390 000.00
Less outstanding (Bond)		
4 50% share in Immovable		
Property situated at Estate No.		
[1...], Helderfontein		
	R 2 240.00	R 1 120.00
TOTAL		
		R 3 401 120.00

That of [M M G C] To be R 1 120.00

Consisting of:

- 1 50% Share in Immovable Property situated at Estate No.

<i>[1...],</i>	<i>R 1 120.00</i>	<i>R 1 120.00</i>
<i>Helderfontein</i>		<i>R 1 120.00"</i>
<i>TOTAL</i>		

8. It is common cause that the value accorded to the Helderfontein property is incorrect and that the antenuptial contract should be rectified to reflect a total value of R 2 240 000.00.
9. Accordingly, the commencement values of the spouses' respective estates, as reflected in the antenuptial contract, and as rectified as aforesaid, should be the following:
 - 9.1. The deceased – R 4 520 000.00;
 - 9.2. The plaintiff – R 1 120 000.00.
10. These will be referred to as the rectified declared commencement values.
11. The parties have different views as to what the commencement values will amount to, should the defendant not be bound to the rectified declared values. These will be referred to as the factual commencement values. Suffice to say there is a significant difference but this will be resolved by the experts appointed for that purpose, if necessary.
12. The plaintiff seeks an order that the calculation of any accrual in terms of section 3 of the Act be determined having regard to the rectified declared commencement values of the respective estates.

13. The defendant seeks an order that the calculation of any accrual in terms of section 3 of the Act be determined having regard to the factual commencement values of the respective estates at the time of the conclusion of the marriage between the plaintiff and the deceased, such values to be agreed or determined.

14. Section 6 of the Act is relevant:
 - 14.1. Ss 6(1) provides that *"(w)here a party to an intended marriage does not for the purpose of proof of the net value of his estate at the commencement of his marriage declare that value in the antenuptial contract concerned, he may for such purpose declare that value before the marriage is entered into or within six months thereafter in a statement, which shall be signed by the other party, and cause the statement to be attested by a notary and filed with the copy of the antenuptial contract of the parties in the protocol of the notary before whom the antenuptial contract was executed."*

 - 14.2. In terms of ss 6(3), *"(a)n antenuptial contract contemplated in ss (1) ... or a statement signed and attested in terms of ss (1) ... , shall serve as prima facie proof of the net value of the estate of the spouse concerned at the commencement of his marriage"*.

15. This subsection has not received much attention but has been considered in the judgments that I will refer to below.

16. The thrust of the argument of Mr Grabler, who appeared for the defendant, is that the defendant, as executor and heir, was not party to the conclusion of the antenuptial contract and that she is for purposes thereof, a third party. She is accordingly not bound to accept the rectified declared commencement values as correct. For this contention he relied on the following authorities.
17. In **Olivier v Olivier**, 1998 (1) SA 550 (D), the defendant contended in a divorce action that the declared commencement value of his estate only served as *prima facie* proof thereof and that he should be allowed to prove and use the correct value in the determination of the accrual.
 - 17.1. The first issue was whether ss 6(3) pertained to an antenuptial contract. The court concluded that the words "*contemplated in ss (1)*" with reference to the antenuptial contract, were inserted *per incuriam*. "*If a statement made in terms of ss (1) signed by the other party and attested to by a notary serves as prima facie proof of the nett value of the estate of a party, then so too should an antenuptial contract in which the value of the estates is set out, serve as such proof.*"
 - 17.2. The Court was however of the view that ss 6(3) only applies to a third party who wishes to challenge the commencement values, and does not apply to the spouses. Third parties with an interest in the initial value of the estates of the parties would be heirs and creditors at the dissolution of the marriage. Where the parties had contracted with

one another that the nett value of their respective estates would be nil, the written document is conclusive proof of the terms of their agreement and it can only be attacked on the recognised grounds of misrepresentation, duress etc; rectification could be sought if the contract did not correctly reflect the agreement due to common error.

- 17.3. The purpose of agreeing the nett asset value of the respective parties in an antenuptial contract is to have certainty when effect has to be given to the accrual system, and the Court questioned why the Legislature would wish to introduce uncertainty. In this regard the Court held that the common law was not altered by the provisions of the Act and the parties thereto are accordingly bound by the provisions of the antenuptial contract.
- 17.4. The defendant was accordingly held to be bound by the provisions of the antenuptial agreement that he had concluded.
18. In this Division, and in **Jones & Another v Beatty NO & Others**, 1998 (3) SA 1097 (T), the plaintiffs, who were heirs in a deceased estate, challenged the amount of the accrual in the deceased's estate, contending that the commencement value was incorrect.
 - 18.1. Although the learned judge was referred to the recent Olivier decision, he declined to follow it on the basis that ss 6(3) was not applicable as the parties had declared commencement values.

- 18.2. However, *"at common law the plaintiffs are entitled to challenge the computation of the account and the commencement value of the estate in the antenuptial contract. The parole evidence rule relating to extrinsic evidence, being irrelevant to challenge a written agreement, does not apply to strangers or third parties to the agreement."* See 11018-C. On that basis the plaintiffs – as heirs and not parties to the contract – were entitled to lead evidence to challenge the commencement values.
19. Shortly thereafter, having carefully considered both **Olivier** and **Jones**, the Court came to a different conclusion in **Thomas v Thomas**, [1999] 3 All SA 192 (NC).
- 19.1. Buys J convincingly motivates why ss 6(3) of the Act is applicable both to the nett values stipulated in the antenuptial contract, as well as in the ss 6(1) statement, and why the declared nett values in both these documents serve as *prima facie* proof only.
- 19.2. The Court rejected the argument that the spouses are bound to the declared values and can only challenge these values on the basis of recognised common law grounds, but that third parties are not. *"Ek het reeds probeer aantoon dat die bedoeling van die Wetgewer was om te bepaal dat die verklaarde netto waarde in die huweliksvoorwaarde kontrak sal dien as bewys van sodanige waarde wanneer die aanwas bereken word. Die Wetgewer tref geen*

onderskeid, vir die doeleindes van hierdie berekening, of dit geskied op aandrang van een van die gades – soos dit in die praktyk meestal sal gebeur – of op aandrang van derdes nie. Wanneer die Wet dan bepaal dat die verklaarde netto waardes slegs prima facie bewys is van sodanige waardes het dit volgens my oordeel betrekking op enige belanghebbende by die berekening van die aanwas: die gades sowel as derdes. As die Wetgewer dit nie so bedoe/ het nie, sou ek verwag het dat hy dit uitdruklik sou gese het."

19.3. The Court concluded that the legislator had expressly altered the common law in this respect and he said, for good reason - there may be grounds upon which the declared commencement values may be challenged, where the common law remedies are of no assistance and rectification does not apply. The learned judge also referred to the situation arising where one spouse dies and the other spouse and third parties are heirs. The third parties would be able to challenge the commencement values, but the surviving spouse not. This result is unfair and could not have been intended by the legislator.

19.4. Accordingly the Court held that the spouses, as well as third parties, are free to challenge the declared commencement values by tendering evidence of the actual values.

20. I must align myself with the reasoning of Buys J in **Thomas**. It does not, with

respect, appear that the matters were properly ventilated in **Jones**, and the learned judge did not have the benefit of the comprehensive judgment of Buys J. For this reason I am of the view that the stated commencement values in an antenuptial contract may be challenged, and that they may be challenged by both the other spouse, as well as third parties. See also **The law of divorce and dissolution of life partnerships in South Africa**, Heaton, page 64.

21. I now turn to consider the plaintiff's arguments.
22. In his heads of argument, Mr Hitchings, who appeared for the plaintiff, contended that the defendant, as executor in the deceased estate, is not a third party. In this regard he relied on **Ex parte Spinazze & Another NNO**, 1985 (3) SA 650 (A) at 666: *"Where one of the parties to the (antenuptial) contract has died, then obviously the contract would be operative as between the estate of the deceased party and the surviving party or parties. It would determine, inter partes. their property rights."*
23. On this basis he argued that the executrix is not a third party to the antenuptial agreement and has simply stepped into the shoes of the deceased. Furthermore, Chapter 1 of the Act makes it clear that a claim for accrual in a marriage terminated by death lies against the estate. and the estate is represented by the executrix. The purpose of the Act would be stultified should the executrix be free to ignore the declared values.

24. It may be so that the executor assumes certain obligations incurred by the deceased in his lifetime. The intention or knowledge of the deceased when concluding the agreement, cannot, however, be attributed to the executor. The executor and the deceased are separate *personae*. The whole estate, consisting of an aggregate of assets and obligations, vests in the executor and she is required to administer and distribute it according to the law. **SA General Electric Co. (Pty) Ltd v Sharfman & Others NNO**, 1981 (1) SA 592 (YV) at 597-598, **Van den Bergh v Coetzee**, 2001 (4) SA 93 {T}. In the latter case, the Court held that the wrong-doings of the deceased cannot by operation of law be imputed to the executor. Where it appeared that the deceased had knowledge of latent defects in his property, which was sold by the executor after his death, that knowledge cannot by law be imputed to the executor who was unaware of the defects. An executor does not succeed the person of the deceased. Even if she does, for the reasons I have explained, in my view both the surviving spouse and third parties may challenge the stated commencement values provided they have reason to do so.
25. The references made to third parties in the heads of argument do not take the matter any further. In the context of the authorities referred to by Mr Hitchings the third parties had established rights as against the estate of one or other of the spouses. They are not the party disputing the validity or correctness of the antenuptial contract, but are parties may potentially be affected by the result of such a dispute. In this case, it is the third party that is disputing the content of the contract.

pleaded that she is not bound to the declared commencement values as she is a third party. She did not say that the declared commencement values are wrong. This is not correct. The defendant pleaded in the first instance that the declared net value of the parties' respective estates as recorded in the antenuptial contract are incorrect and in the second instance, that she was not a party to the antenuptial contract and is not bound thereto.

27. It may be that the allegations lack detail, but on the other hand, the plaintiff did not replicate in order to refute the allegation that the declared values were incorrect.

28. I therefore find that the defendant is entitled to challenge the rectified commencement values, and that on the pleadings, she has made out a case for doing so.

29. The following order is made:

29.1. The calculation of any accrual in terms of section 3 of the Matrimonial Property Act, 88 of 1984, is to be determined having regard to the factual commencement values of the respective estates at the time of the conclusion of the marriage between the plaintiff and the deceased, Garth Joseph Erasmus, such values to be agreed or determined.

- 29.2. The balance of the issues between the parties are separated in terms of rule 33(4) of the Uniform Rules of Court and postponed *sine die*;
- 29.3. The plaintiff is ordered to pay the costs of the action to date of this order.

H R FOURIE
ACTING JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF

ADVOCATE: BD HITCHINGS

ATTORNEYS: VAN WYK VAN DEVENTER INC, SANDTON

FOR THE DEFENDANT

ADVOCATE: JF GROBLER

ATTORNEYS: VAN DER HOF INC, PRETORIA