



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case number: **94084/2020**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

13 July 2021

SIGNATURE

DATE

PETER HERBERT MOTTÉE N.O.

First Applicant

LLOYD ROBERT BALL N.O.

Second Applicant

And

BONGEKILE CYNTHIA MKHWANAZI

First Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Second Respondent

JUDGMENT

1. This application, initially brought as an urgent application to be heard on 14 January 2020, consisting of relief in Parts A and B, was brought by the late Mr. Zolani Humphrey Mkhwanazi who deposed to the founding affidavit on 13 December 2019.

2. Mr. Mkhwanazi (hereinafter referred to as the deceased) however died on 4 January 2020 and the executors of his estate who substituted him are now only pursuing the relief as set out in Part A2:

“2. An order declaring that the unsigned ante-nuptial contract (hereinafter referred to as a “ANC”) entered into between the applicant (the deceased) and the first respondent in February 2016 are binding and enforceable *inter partes*.

BACKGROUND

3. The deceased and the first respondent were married to each other, on 18 February 2016 and it is common cause that the parties were married in community of property and that no ANC has been registered with the deed's office.

4. The deceased, in his founding affidavit stated that it was, from the outset the parties' intention to be married out of community of property, and attached an unsigned and undated typed document, presumably a letter, addressed to "Dear MaGxabashe" in support of his allegation.

5. The deceased also stated that the parties, in January 2016, signed a special power of attorney as well as a draft ANC in terms of which they intended for an attorney to appear before a Notary Public to have the ANC executed on their behalf.

6. Mr. Grant Williams, a notary public who was, according to his affidavit, instructed to draft and register the ANC, stated that he is in possession of the originally signed ANC, but only had a scanned copy of the signed power of attorney and the draft ANC when he duly notarised the ANC and entered it into his protocol as number 321/2016.

7. The copy obtained from Mr. Williams is an "Antenuptial Contract with the exclusion of the Accrual system in terms of the Matrimonial Property Act, 1984", with Protocol No. 32/2016, in terms whereof Wendy Noila Kapp, duly authorised by Special

Power of Attorney, signed by Xolani Humprey Mkhwanazi and Bongekile Cynthia Makhathini on 17 January 2016, appeared before him, being Grant Douglas Williams, on 17 February 2016, to declare that the marriage to be solemnised between the parties will be out of community of property and that the accrual system is expressly excluded. According to this duly signed document and attested to by witnesses, the Power of Attorney together with the original of this document was filed in Mr. Williams' Protocol.

8. Mr. Williams, according to his confirmatory affidavit was unable to locate the copy of the signed power of attorney but averred that he would not have notarised the ANC without having had sight of the signed power of attorney together with the draft ANC at the time. He also confirmed that he did not lodge the notarized ANC to be registered in the deed's office because he was waiting for the original power of attorney and attached ANC to be forwarded to him, but these documents were never received.

9. The first respondent conceded in her answering affidavit that she and the deceased,

“had spoken after the lobola was concluded of the possibility of signing an Ante Nuptial Contract (ANC). This was a mere discussion but the

deceased never went through with it. That was the first and the last time that the deceased and I ever discussed the possibility of an ANC.”

but denied that a draft ANC was prepared.

10. She also admitted that they consulted a lawyer, Grant Williams, since she was convinced that her future had to be protected, and that she requested Mr. Williams to draft a contract, but

“thereafter consultations with my husband who really saw no need in having such a stringent contract in our marriage which he was convinced its eternal and for the best, we then didn’t proceed with the ANC.”

11. The first respondent denied that she was contacted by Mr. Williams to prepare an ANC and specifically denied that she and the deceased concluded or signed any contract or that she signed any power of attorney. She also denied the correctness of the content of the letter referred in paragraph 4 above.

12. On consideration of the affidavits filed, it is evident that there is a dispute regarding the agreement between the parties to enter into an ANC prior to their marriage in February 2016.

MOTION PROCEDURES

13. It is trite law that motion proceedings are decided on the papers filed by the parties and in case there is a factual dispute which can only be resolved through oral evidence, it is appropriate that action proceedings should be used unless the factual dispute is not real and genuine.

14. In ***Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd***,¹ the court held that where there is a dispute of facts final relief should only be granted in motion proceedings if the facts as stated by the respondent together with the facts in the applicant's affidavit, justify an order.

15. In ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd***² Corber JA concluded:

‘It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or

¹ 1957(4) SA 234 (C) at 235 E- G

² 1984 (3) SA 623 (A) at 634H-635C

some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers . . .'

16. In ***National Director of Public Prosecutions v Zuma***³ Harms DP specifically found that that the general rule may not apply 'if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on

³ 2009 (2) SA 277 (SCA) para 26

the papers'. He also warned, that, the more serious the allegation or its consequences, the stronger must be the evidence before a court before it will find the allegation established.

17. In ***Lohan Civils (Pty) Ltd v Tokologo Local Municipality***⁴ Opperman J discussed dispute of facts as follows:

“IV DISPUTE OF FACT

[19] A real dispute of fact can arise in one or other of the following ways:

1. Where the court is satisfied that the party who purports to raise the dispute has in his affidavit, seriously and unambiguously, addressed the facts said to be disputed;
2. The respondent may deny one or more of the material allegations made on the applicant's behalf and produce evidence to the contrary, or apply for the leading of oral evidence of witnesses who are not presently available or who, though averse to making an affidavit, would give evidence if subpoenaed;
3. The respondent may admit the applicant's affidavit evidence but allege other facts, which the applicant disputes;

⁴ Saflii (2676/2019) ZAFSHC 20 2020 (14 February 2020)

- give
4. The respondent, while conceding that he has no knowledge of one or more material facts stated by the applicant, may deny them and put the applicant to the proof, and himself giving or proposing to evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable, or that certain facts upon which the applicant relies to prove the main facts, are untrue. The absence of positive evidence directly contradicting an applicant's main allegations, does not render a case such as this free of a real dispute of fact. In other words, a respondent is entitled to seek a reference to oral evidence or to trial under circumstances where it is unable to produce affidavits containing positive allegations that prima facie establishes a defence. This requires of the deponent to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Importantly, the deponent must satisfy the court that there are reasonable grounds for believing that the defence would be established.
- is
5. If the respondent's version is farfetched and untenable there is not a dispute.
6. A bare denial is not a dispute."

THE FACTS AND DISPUTES *IN CASU*

18. On consideration of all the facts, the only undisputed fact is that the deceased and the first respondent consulted Mr. Williams, prior to their marriage, to discuss their marriage regime.

19. The consequences of their consultation and whether an agreement to be married out of community of property was reached, are in dispute. As indicated above, the first respondent agreed that they consulted Williams, but was definite in her denial of the agreement and the fact that she never signed a power of attorney and ANC.

20. On behalf of the applicants it is argued that the first respondent in paragraph 37 of her answering affidavit confirmed that Williams was consulted and that the contract was in fact drafted and signed, but paragraph 37 cannot be regarded as confirmation.

“I deny these allegations. At the time of consulting the lawyer, Grant Williams, I personally was adamant that I needed to protect my future as I was young and my husband’s erratic behaviour was of great concern to me. I asked if Grant could draft a contract and thereafter consultations with my husband who really saw no need in having such a stringent contract in our marriage which he was convinced its eternal and for the best, we then didn’t proceed with the ANC.”

21. The applicants' strongest argument that there was an agreement to enter into an ANC, is based on the evidence of Mr. Williams, who confirmed that he was instructed by both parties to prepare an ANC and that he drafted the ANC and a power of attorney to authorise one of his employees to execute the draft ANC before him. He further confirmed that he received a scanned copy of the signed power of attorney and draft ANC and that on strength of these scanned signed documents proceeded to notarise the ANC and entered it into his protocol, as number 321/2016.

22. Mr. Williams, unfortunately only has the originally signed ANC, which was signed in his presence by Kapp, his assigned employee according to the power of attorney, in his protocol and not the scanned signed power of attorney and signed draft ANC. He stated that he did not lodge the notarised ANC to be registered in the deed's office, because he was waiting for the original power of attorney and attached ANC to be sent to him, but he did not receive these documents.

23. I accept Mr. Williams' statement that he would never have notarized the ANC without having had sight of the signed power of attorney together with the attached draft ANC, but without the signed documents, and in view of the first respondent's denial that she signed these documents, I cannot find that it was the first respondent's signature on these documents.

24. The fact that Mr. Williams was on his own version only prepared to notarise the ANC on strength of the scanned signed documents, but not to register it in the deed's office, confirms the importance of the originally signed documents and at this stage I do not even have a scanned copy of the signed documents to confirm the parties' signatures.

25. On behalf of the applicants it was furthermore argued that the fact that there was a previous application by the deceased and first respondent to change their marriage regime, confirmed the fact that they intended to be married out of community of property. However, Ms. Calaca, the attorney who held the instruction to move the previous application, did not confirm that she was instructed by both the deceased and the first respondent. She only confirmed that the deceased instructed her to draft an application. He apparently told her that it was with the agreement of the first respondent, but the first respondent never instructed her or agreed to her personally to the bringing of the application.

26. The first respondent's denial of the existence of an agreement to be married out of community of property and her denial that she signed the power of attorney and draft ANC, cannot, in view of her version about the consultation with Williams and subsequent discussions with the deceased be regarded as only a bare denial.

27. I am not persuaded that the first respondent's version is unattainable or false and can be rejected on the papers. The parties' version about the agreement to enter into an ANC is material and cannot be resolved on the papers.

28. I therefore grant the following order:

The application is dismissed with costs.



**ACTING JUDGE JF BARNARDT
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 13 July 2021.

APPEARANCES

For the applicants: Adv. BD Stevens
Instructed by: Kotze and Roux Attorneys Inc.

For the respondent: Adv K Mvubu
Instructed by: Ningiza Horner Attorneys

Date of hearing: 9 March 2021

Date of Judgment: 13 July 2021