THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 1317/17

In the matter between:

H M **APPELLANT**

and

A M **RESPONDENT**

Neutral citation: *H M v A M* (1317/17) [2019] ZASCA 12 (14 March 2019)

Coram Cachalia, Majiedt and Schippers JJA and Mokgohloa and Matojane AJJA

Heard: 15 February 2019

Delivered: 14 March 2019

Summary: Divorce – postnuptial agreement – whether concluded in contemplation of divorce.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mudau and Malungana JJ sitting as court of appeal):

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court a quo is set aside and replaced with the following:
'The appeal is dismissed with costs.'
3 The matter is remitted to the Regional Court for the Regional Division of Mpumalanga at Mbombela, to finalise maintenance for the respondent, Ms A M, and for any dependent child.

JUDGMENT

Majiedt JA (Cachalia and Schippers JJA and Mokgohloa and Matojane AJJA concurring):

[1] This is an appeal, with the special leave of this court, against an order of the Gauteng Division of the High Court, Pretoria (the high court), which made certain orders on a separated issue on appeal before it. The issue, separated from the relief sought in a divorce action, concerned the validity and enforceability of a written postnuptial agreement ('the agreement')

[2] The parties were married to each other out of community of property, with exclusion of the accrual system. The agreement was authored by the respondent, Ms A M, in April or May 2014 and presented to the appellant, Mr H M, for his signature some eight months prior to the commencement of divorce proceedings. It reads:

‘Hiermee bevestig ek, H M, ID nommer . . . dat ek my huwelikskontrak ter syde stel en dat A M, ID nommer . . . geregtig is op die volle helfte van my boedel.
Ek bevestig dat ek haar sal onderhou soos my finansies dit toelaat in dieselfde hoedanigheid as wat sy tans gewoond is en elke maand 50% van my netto inkomste/dividend en pensioen aan haar sal oorbetaal.’

[3] During April or May 2014 (the appellant was uncertain about the exact dates), the agreement was presented twice by the respondent to the appellant for his signature. On both occasions he refused to sign it and he told her that its content was ridiculous (‘belaglik’). No mention of divorce was made by any one of them at that time. The appellant was adamant in his evidence that divorce was not on his mind at all at that time, because he wanted to see his youngest child finish her schooling at the end of that year.

[4] On 10 November 2014 the appellant signed the agreement. No mention was made of a divorce by either party when he signed it. The respondent placed the agreement for safekeeping with friends and the parties continued as normal with their marital relationship. Matters, however, came to a head with a confrontation on 30 November 2014 which was precipitated by the respondent’s discovery of the appellant’s extramarital affair. This ultimately led to the breakdown of the marriage. The appellant issued summons on 15 January 2015. In her counterclaim, the respondent sought a declaratory order to the effect that the agreement was valid and binding on the parties. In the alternative, she claimed that the agreement was concluded by the parties in anticipation of the appellant issuing a summons for divorce and that the agreement was signed by the parties in settlement of all claims or disputes that might emanate from the divorce action and its patrimonial consequences. In the face of the peremptory provisions of s 21 of the Matrimonial Property Act 88 of 1984, which requires a court order to sanction a change in the parties’ matrimonial property regime, the respondent proceeded with her alternative ground only.

[5] The Mbombela Regional Court found that the agreement was invalid and unenforceable. The high court, however, overruled this finding. It held that the agreement was a binding settlement agreement entered into between the parties in

contemplation of a divorce. It, however, did not make the agreement an order of court, as provided for in s 7(1) of the Divorce Act 70 of 1979, but made declaratory orders instead.

[6] The high court, in crafting its order based on the wording of the agreement, attached its own interpretation to the wording. It made the following order:

'1. The appeal is upheld with costs;

2. The orders made on 27 July 2016 by the learned Magistrate, Mr N A Khumalo, are herewith set aside and substituted with the following:

"2.1 It is declared that the defendant is entitled to 50% (FIFTY PERCENT) of the nett asset value of the plaintiff's estate, calculated as at 10 November 2014, for the purpose of which:

2.1.1 The plaintiff is ordered to pay 50% (FIFTY PERCENT) of the value as agreed to between the parties, within 14 (FOURTEEN) calendar days of such agreement, into the nominated account of the defendant, alternatively, and failing agreement;

2.1.2 The parties are ordered to a debatement of the nett asset value of the plaintiff's estate, and for the plaintiff to pay 50% (FIFTY PERCENT) of the nett asset value of the plaintiff's estate, within 14 (FOURTEEN) days from final debatement of the estate as aforesaid;

2.2 The plaintiff is a member of the KPMG Retirement Annuity Fund with number M00251518, for the purpose of which it is ordered that:

2.2.1 The defendant is entitled to 50% (FIFTY PERCENT) of the value of the aforementioned fund, as at 10 November 2014;

2.2.2 In terms of section 7(8) of the Divorce Act, Act 70 of 1979, and Section 37D(1)(e) of the Pension Fund Amendment Act:

2.2.2.1 Payment of 50% (FIFTY PERCENT) of the plaintiff's interest in the aforementioned fund must be paid to the defendant, within 45 (FORTY FIVE) days following the date upon which the defendant has exercised her selection referred to *infra;*

2.2.2.2 The fund must within 45 (FORTY FIVE) days after the submission of this order by the defendant to the Fund, request the appellant in writing to exercise her selection with reference to payment of 50% (FIFTY PERCENT) of the plaintiff's interest in the Fund to the defendant directly, alternatively transfer the 50% (FIFTY PERCENT) of the plaintiff's interest to a fund as nominated by the defendant.

2.3 If the parties are unable to come to a resolution of the quantum of the amount payable by the plaintiff to the defendant pursuant to the debatement anticipated above, the aggrieved party is granted leave to approach this court on application for appropriate relief.

2.4 It is declared that the plaintiff is liable to make monthly maintenance payments to the defendant in the amount calculated as 50% (FIFTY PERCENT) of his nett monthly income as from the date of their divorce.
3. The plaintiff is ordered to pay the costs of the action.'

[7] The high court evidently interpreted the words 'volle helfte van my boedel' to mean the nett asset value of the appellant's estate. It added to the words '50%. . . . pensioen sal oorbetaal' to mean that the appellant had to pay to the respondent 50 per cent of the value of the KPMG Retirement Annuity Fund as at 10 November 2014. And it interpreted the words 'en elke maand 50% van my netto inkomste / dividend aan haar sal oorbetaal' to mean that the appellant had to pay half of his nett monthly income to the respondent, from the date of divorce.

[8] In arriving at its conclusion that the agreement was valid and enforceable as a settlement agreement, the high court reasoned as follows:
(a) When one considers the wording of the agreement read within context, it must be borne in mind that the nature of the contractual relationship between the parties was that of a married couple whose marriage had irretrievably broken down and who were contemplating a divorce.
(b) Reduced to its bare essentials, the parties' rights and obligations in terms of their agreement was that the appellant, who wanted a divorce, gave half of his estate to the respondent.
(c) The wording clearly conveys that the appellant not only intended the respondent to be entitled to half of his estate, but also that he would maintain her.
(d) Any doubt in this regard was removed by the appellant's commitment to pay to the respondent half of his nett income / dividend and pension every month according to the standard of living she was used to.

[9] Counsel for the appellant's first line of attack was whether the agreement could be said to be an agreement at all. While the language at first blush appears to support the contention that it was not an agreement, but rather a unilateral act of waiver or abandonment of matrimonial property rights by the appellant, it is, in the view that I take of the matter, not necessary to decide this point. For present

purposes I am prepared to accept that the agreement was entered into between the parties. The central question is whether it was made in contemplation of a divorce.

[10] It is settled law that a court may only make an agreement between parties an order of court if it is competent and proper to do so. First and foremost, the agreement must, either directly or indirectly, relate to a legal issue or lis between the parties. It must bear some relation to litigation. (*Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 25). This means that, while it is not necessary for divorce proceedings to have been instituted at the time of the signing of the agreement (ie 10 November 2014), a divorce must have been contemplated by the parties at that time. The respondent who, as stated, counterclaimed on the agreement, bore the onus of proving this fact on a preponderance of probabilities. For the reasons that follow, I am of the view that the respondent failed to discharge this onus. As I shall demonstrate, the respondent's own evidence failed to establish that divorce was in the parties' contemplation when the agreement was concluded.

[11] As stated, the parties resumed a normal marital relationship after 10 November 2014 until 30 November 2014. This was common cause at the trial. The respondent testified that during this period their marriage relationship was normal, which included the exercise of conjugal rights. This is destructive of the notion of a breakdown in the marriage, let alone irretrievably so. On the respondent's version, the agreement was an 'insurance policy', to allay her fears of insecurity in the event of a divorce. In this regard it is significant that she had left the agreement for safekeeping with friends after it was signed on 10 November 2014. The respondent regarded the agreement as an 'undertaking' by the appellant to address her financial needs in the event of a divorce.

[12] During the evening of 29 November 2014, the respondent gained access to the appellant's mobile phone, and she discovered photographs suggesting that the appellant's extramarital relationship was continuing. These put paid to the falsehood peddled at that time by the appellant that his extramarital affair was a thing of the past. An even more devastating discovery on the appellant's mobile phone emanated from an e-mail sent to him by his attorneys. The e-mail's content

concerned a possible divorce and attached thereto was a draft settlement agreement, presumably for the appellant's consideration as a basis for settling a potential divorce action.

[13] As stated, at that time there were no divorce proceedings pending; the summons was only issued on 15 January 2015. This discovery led to the confrontation of 30 November 2014. When pressed by the respondent to explain the draft settlement agreement, the appellant indicated that he wanted a divorce and that he preferred it to be done as 'neatly' as possible. When asked in cross-examination if that was the first time that either one of them had mentioned a divorce, the respondent replied in the affirmative. I deem it necessary to repeat this important passage verbatim, as it, in my view, conclusively destroys the basis for the counterclaim:

'Goed en wat het die eiser toe vir u gesê? Het hy vir u toe nou gesê maar ek gaan jou nou dagvaar vir 'n egskeiding of ek soek my vryheid, hoe het hy hierdie skikking dokument verduidelik? --- Hy het vir my gesê hy het 'n egskeidings dokument laat optrek by Heilet, hy wil graag van my, hy wil van my skei op 'n mooi manier en hy wil dit met my bespreek. Hy wil nie meer aangaan met die huwelik nie en daar is sekere maniere hoe 'n mens 'n egskeiding doen, die maklikste manier is om 'n skikking te bereik voordat jy 'n dagvaarding uitreik en as ek die dokument sal teken dan sal hy dit na Heilet toe vat en dan sal, dan kan ons dit afteken en gaan indien en ek het vir hom gesê ek wil eers 'n regsopinie kry, ek weet nie hoe werk dit nie, ek weet nie wat hier aangaan nie en ek weet nie wat hier is nie maar hierdie dokument lyk glad nie in lyn met die dokument wat hy geteken het die 10de November nie.
So dit is die eerste keer volgens u getuienis wat hy vir u gesê het hy wil van u skei --- Dis reg.'

[14] On the respondent's version it must be accepted therefore that it was only on 30 November 2014 that the divorce was contemplated for the very first time by the parties. The respondent's testimony and the objective facts lead ineluctably to the conclusion that the agreement did not embody the settlement of any lis, more particularly a divorce action. No divorce was contemplated when the agreement was signed on 10 November 2014. In the premises, the high court erred when it upheld the appeal and concluded that the agreement was a valid and enforceable settlement agreement. We were informed from the bar that the parties' marriage had in the meantime been dissolved by order of the Mbombela Regional Court, in

December 2016. All that remains is the issue of maintenance for the respondent and any child who may still be dependent (both children have by now reached the age of majority, but may still be dependent on their parents, for example as fulltime students). For that purpose the matter must be remitted to the Mbombela Regional Court.

[15] The following order issues:

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court a quo is set aside and replaced with the following:
'The appeal is dismissed with costs.'
3 The matter is remitted to the Regional Court for the Regional Division of Mpumalanga
at Mbombela, to finalise maintenance for the respondent, Ms A M, and for any dependent child.

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S A Majiedt
Judge of Appeal

APPEARANCES:

For Appellant:	M C Erasmus SC, with I Vermaak
Instructed by:	Swanepoel & Partners Inc, Pretoria
	Symington de Kok Attorneys, Bloemfontein
For Respondent:	A C Ferreira SC, with S G Gouws
Instructed by:	Schoeman & Associates, Pretoria
	McIntyre van der Post Attorneys, Bloemfontein