THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 843/2018

In the matter between:

P V **APPELLANT**

and

E V **RESPONDENT**

Neutral citation: *P V v E V* (843/2018) ZASCA 76 (30 May 2019)

Coram: Tshiqi, Saldulker, Zondi and Molemela JJA and Davis AJA

Heard: 13 May 2019

Delivered: 30 May 2019

Summary: Rectification of an ante-nuptial contract – no common mistake or misunderstanding between the parties – rectification not competent – the clear unambiguous terms of the ante-nuptial contract cannot be ignored.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw, Maumela and Molopa-Sethosa JJ sitting as a court of appeal):

1 The appeal is upheld with costs.

2 The order of the Full Court, Gauteng Division of the High Court, Pretoria is set aside and substituted as follows:

'a. The appeal is upheld with costs including the costs of two counsel.

b. The order of the trial court is set aside and substituted as follows:

i. The counterclaim of the defendant relating to rectification is dismissed.

ii. The defendant must pay the plaintiff's costs relating to the dispute on rectification.'

JUDGMENT

Tshiqi JA (Saldulker, Zondie and Molemela JJA and Davis AJA concurring):

[1] This appeal concerns the terms of an ante-nuptial contract between the appellant, Mr P V, and the respondent, Mrs E V. On 7 January 2011, Mr and Mrs V signed a power of attorney authorising Mr Weyers, an attorney, to appear before a notary public to sign an ante-nuptial contract on their behalf. The marriage between the parties was scheduled to take place on 8 January 2011. At the time, the appellant was a professional rugby player, attached to a rugby club based in Pretoria, and the respondent was a business woman, running a Finishing and Modelling School for young

women with her mother. It is not in dispute that Mr Weyers was introduced by the appellant to the respondent and had before this date legally represented the appellant. Once the couple signed the power of attorney, Mr Weyers had a mandate to register the ante-nuptial contract on behalf of both parties.

[2] The power of attorney was signed in the afternoon, after the rehearsals for the wedding. The appellant arranged to meet with his fiancée along a gravel road close to the venue where the respondent, her family, bridesmaids and the rest of the bridal guests were booked. The appellant was in the company of Mr Weyers and his wife. The respondent was driven to the meeting by her brother. Upon arrival and before the power of attorney was signed, the respondent enquired from her fiancé about the nature of the document. According to her, she was not told that it was a power of attorney but that it was the ante-nuptial contract. Nothing turns on this, however, because she testified that during the discussion, it was revealed to her that the document would result in her marriage being out of community of property without accrual. She expressed her unwillingness to enter into that kind of matrimonial property regime and expressed her preference for a marriage out of community of property with accrual. During the discussion, she became emotional and so distressed that her brother went to fetch her mother, who later joined them. At some stage during this meeting the couple was left alone and they continued to discuss the matter. Their versions on what transpired during this later discussion differ. It is however common cause that they were later joined by the rest of the group and the power of attorney was signed.

[3] The appellant and the respondent both testified as to why they eventually signed the power of attorney. The respondent testified that they had discussed their matrimonial property regime earlier, before 7 January 2011, and that she had expressed her wish to marry with accrual whilst the appellant was disinclined to enter into such a regime. When she raised certain concerns during these discussions, the appellant was dismissive. On 7 January 2011, when she again raised her anxiety about the matrimonial property regime, the appellant apologised to her, said it was a mistake and that the mistake would be rectified after their honeymoon to reflect a matrimonial

property regime with accrual. She was also told by Mr Weyers that the ante-nuptial contract could not be changed then, that she needed to sign it so they could get married the next day and that Mr Weyers could approach the high court afterwards and bring an application to amend the ante-nuptial contract. After they came back from the honeymoon, she asked the appellant if the amendment had been effected and he assured her that it was done. She only discovered that this was not the case during the divorce process. Her version regarding the alleged assurance that the ante-nuptial contract would be amended was corroborated by her mother, but was denied by the appellant and Mr Weyers.

[4] The appellant confirmed that he had discussed the matrimonial property regime with his fiancée earlier but testified that they had agreed to marry out of community of property without accrual. He then instructed Mr Weyers to prepare the ante-nuptial contract. On 7 January 2011, the respondent informed him that she had discussed their matrimonial property regime with a friend and was no longer happy with the exclusion of the accrual. Her main concern about the exclusion of accrual was what she would get if they were to divorce. The appellant was concerned about this, and he asked her whether she was marrying him for his money. She told him she wanted to marry him for love. They then resolved this difference and signed the power of attorney which gave Mr Weyers the mandate to appear the following day before a notary public to sign the ante-nuptial contract on their behalf.

[5] The appellant testified that in the evening he received a call from his fiancée saying she was still unhappy about the exclusion of accrual. She enquired if this could be changed. He informed her that he was not willing to enter into a matrimonial property regime which did not exclude the accrual system and was willing to call off the wedding if she was still unhappy. During the discussion, he promised that he would be loyal to the respondent and that he would look after her. Eventually she agreed that they could continue. He thereafter had discussions with Mr Weyers and his family and gave them an update about the discussions he had with the respondent.

[6] Mr Weyers confirmed that the appellant called him that evening to inform him that his fiancé was still unhappy about the proposed matrimonial property regime. He enquired from the appellant whether they wished to change their mandate because there was still time. The appellant undertook to revert. When no call came through thereafter, Mr Wyers proceeded, as arranged, and appeared before a notary public to register the ante-nuptial contract on behalf of the parties.

[7] It appears from the pleadings that the parties soon experienced marital problems. In October 2012, the appellant issued summons against his wife alleging that their marriage had broken down irretrievably. He only sought a decree of divorce and costs of opposition. A copy of the ante-nuptial contract was attached. The respondent filed a plea and a counterclaim. She admitted her signature on the ante-nuptial contract but denied that the parties had agreed to exclude accrual. She alleged that it was the common intention of the parties for the accrual system to be applicable to the marriage, with commencement values of the parties' respective estates at R0-00; that because of the appellant's intentional behaviour, alternatively as a result of a bona fide error, the intention of the parties was not reflected in the ante-nuptial contract. She then asked for rectification of the ante-nuptial contract to reflect that the accrual system was applicable to the marriage.

[8] The appellant filed a plea to the counterclaim. He denied the allegations pertaining to rectification, but pleaded that, in the event the court found that the accrual system was applicable, it would be reasonable, on several grounds, if his wife forfeited any right to share in the accrual of the estate. In the further alternative, he pleaded that, in the event the court refused to make a forfeiture order, the court should find that the commencement value of his estate as at the date of marriage was R100 854 as was reflected in his statement of assets and liabilities on 8 January 2011, and that the commencement value of his wife's estate should be held to be an amount of R522 000 as reflected in the further particulars supplied upon request from her.

[9] The trial was allocated to Tlhapi J. As the parties were in agreement that the marriage relationship had broken down irretrievably, they agreed that a decree of divorce should be granted. The respondent abandoned her claim for maintenance. The issues that remained for determination were the prayer for rectification of the ante-nuptial contract and, the prayer for forfeiture of the accrual in terms of s 9 of the Matrimonial Property Act 88 of 1984 (the Act). By agreement between the parties, Tlhapi J was requested to first adjudicate on the rectification of the ante-nuptial contract. The prayers for forfeiture and costs were postponed sine die. After the hearing, a decree of divorce was granted immediately and judgment relating to the ante-nuptial contract was to be handed down on a later date. Before judgment was handed down, and as an annexure to the heads of argument, the respondent filed a notice of amendment in terms of Rule 28(10) for:[1]

'(a) Deletion of references to the commencement value of the parties' estates being R0-00.

(b) Incorporation of the following claim as an alternative to rectification:

"2.2.5 Alternatively, if it is found that that it was the intention of the Plaintiff to exclude the accrual system:

. . . .

2.2.5.2 Defendant is therefore, in any event, entitled to an order declaring that the accrual system for which provision is made in Chapter 1 of the Matrimonial Property Act 88 of 1984, is applicable."

(c) By adding a new prayer:

"2(b) an order declaring the accrual system for which provision is made in Chapter 1 of the Matrimonial Property Act 88 of 1984 is applicable to the parties' marriage." '

[10] The notice of amendment was not opposed. The trial court made an order declaring that the accrual system as provided for in Chapter 1 of the Act was applicable to the marriage. The trial court reasoned as follows at para 16:

'What became very consistent and clear from the entire evidence is that both [Mr P V] and [Mrs E V] wanted a marriage out of community of property and that on the one hand [Mr P V] did not wish the accrual to be applicable while on the other hand [Mrs E V] wanted accrual to be

[1] As translated to English by the Full Court of the Gauteng Provincial Division of the High Court.

included. I can only conclude that a marriage out of community of property was concluded and that the agreement be rectified to this extent.'

[11] The matter was taken on appeal to the Full Court of the Gauteng Division of the High Court, Pretoria, with leave having been granted by this Court. In its judgment the Full Court highlighted the failure by the trial court to make credibility findings but endorsed the conclusion by the trial court that there was no consensus between the parties regarding their matrimonial property regime. According to the Full Court, this conclusion was consistent with the evidence presented and could not be faulted. The Full Court concluded that the trial court was correct in its finding that the ante-nuptial contract should be rectified to provide that the accrual system was applicable. It then dismissed the appeal with costs. This appeal is with the special leave of this Court.

[12] Although, the respondent had filed an amendment, the trial court premised its declaratory order on a conclusion that the ante-nuptial contract had to be rectified. The Full Court went further and said that Clause 3 of the ante-nuptial contract which provides for the accrual system to be excluded was clearly severable from the rest of the ante-nuptial contract and could therefore be deleted. The dispute between the parties therefore centres on whether the respondent could invoke the remedy of rectification to escape the clear terms of Clause 3 of the ante-nuptial contract, on the basis that the appellant and Mr Weyers had promised that the ante-nuptial contract would be amended later. It is thus apposite to first consider whether on the evidence, rectification was available to the respondent.

Rectification

[13] Rectification of a written agreement is a remedy available in instances where the agreement, through a common mistake, does not reflect the true intention of the contracting parties or where it erroneously does not record the agreement between the parties. The predominant requirement for rectification is a common continuing intention of the parties, which is not reflected in the agreement. (See *B v B* [2014] ZASCA 14 para 20). To allow the words the parties actually used in the documents to override their

prior agreement or the common intention that they intended to record is to enforce what was not agreed, and so overthrow the basis on which contracts rest in our law. (See *Tesven CC v South African Bank of Athens* [1999] 4 All SA 396(A) at para 16). It is trite that the onus is on the party claiming rectification to show, on a balance of probabilities, that it should be granted. The major problem before us is that it cannot be said that the respondent discharged the onus in that the trial court did not make any findings on the credibility of any of the witnesses, did not weigh the probabilities and did not state which version it preferred. Its conclusion that there was no consensus between the parties on the matrimonial property regime they wished to conclude, seems to stem from an acceptance by the trial court of the versions of both parties. This court cannot, as a court of appeal, make any credibility findings and is thus unable to either accept or reject the evidence of any of the parties. Once the trial court concluded that there was no consensus between the parties, an order for rectification was not competent.

[14] In *Brits v Van Heerden* 2001 (3) SA 257 (C) at 282C, it was held that:

'The mistake may be one common to both parties; the mistake may be that of only one party; the mistake may be induced by misrepresentation or fraud. But there must be a mistake. In my view, the crux of the matter is that the mistake, be it 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.'

The court continued at 283B:

'[R]ectification may be granted where the written memorial of an agreement does not reflect the true consensus of the parties.'

[15] In the heads of argument the respondent's counsel contended that the reasoning of the court in *Brits v Van Heerden* is supportive of their case. This is not so. In this matter there was no mistake on the respondent's side when she signed the power of attorney, and there was no misunderstanding about the legal consequences of a marriage out of community of property without accrual. This is why she was anxious. I have no difficulty in accepting that when the respondent called the appellant later in the evening on 7 January 2011, to discuss their matrimonial property regime further, she had reservations about having signed the power of attorney earlier. The insurmountable

difficulty she faces is that the trial court did not reject the appellant's evidence that she eventually agreed to marry without accrual during that discussion. Thus on the evidence available to this Court, there was no prior agreement between the parties regarding accrual.

Alternative Plea

[16] This then takes me to the alternative plea which was pleaded through the further amendment annexed to the heads of argument. The essence of the plea is that if the court found that the appellant intended to exclude the accrual system, the respondent did not have the intention to do so, and there was no consensus between the parties. In the event the court made such a finding, then the respondent was entitled to an order declaring that the accrual system was applicable to the marriage.

[17] Generally contracts entered into between adults of full contractual capacity are enforced to the letter. This court has consistently said that courts should refrain from creating contracts for the parties. The approach to the interpretation of contracts is trite. In *Novartis v Maphil* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) this court traversed several cases and summed up the proper approach as follows in para 25:

'First, the integration (or parole evidence) rule remains part of our law. . . . If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning… Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses..: Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent... Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible"… '

[18] The legal principles concerning matrimonial property are also well established. Parties are allowed to choose their own matrimonial property regime. Community of property is the first choice at common law and it applies unless expressly excluded by the parties. A party who asserts that the marriage is subject to a certain matrimonial property regime must prove it. (*Edelstein v Edelstein*, 1952 (3) SA 1 at 9H-10A). Section

2 of the Act provides that every marriage out of community of property in terms of an ante-nuptial contract by which community of property and profit and loss are excluded, is subject to the accrual system except in so far as that system is expressly excluded by the ante-nuptial contract.

[19] In this matter, clause 3 of the ante-nuptial contract expressly provides that the accrual system is excluded. Unless it is deleted, on the basis of a legally competent ground, the marriage is without accrual. The trial court thought that it could delete the clause by simply finding that there was no consensus. In this regard it erred, Clause 3 can only be deleted if both parties had the intention that accrual should apply. The appellant's evidence that he would not have married without the exclusion of the accrual was accepted by the trial court, hence; finding that 'he did not wish the accrual to be applicable'. Contrary to this firm finding by the trial court, the Full Court seems to have preferred the respondent's version that the appellant made an undertaking that the ante-nuptial contract would be amended after the honeymoon. On this basis it then concluded that the alleged undertaking was a term of the ante-nuptial contract. In this regard the Full Court misdirected itself.

[20] However, a more fundamental problem with the conclusion of the Full Court is that s 2 of the Act does not require consensus to exclude the accrual system but stipulates that the accrual system must be expressly excluded in the ante-nuptial contract itself. Clause 3 expressly did so. If Clause 3 of the ante-nuptial contract were to be simply deleted on the basis that there was no real consensus between the parties, or the mere say so of one of the parties, then the provisions of s 2 of the Act would be rendered obsolete, because the clear and unambiguous terms of an ante-nuptial contract would be ignored.

[21] Another significant difficulty for the respondent is that a written ante-nuptial contract is proof of the terms of the agreement between the parties. Once it is registered, it cannot be amended by the parties between themselves because the effect

of registration is to give notice to the world of its existence and binds other persons who are not parties to its terms, including the creditors. Section 88 of the Deeds Registries Act 47 of 1937 provides for authorisation by a court for a post-nuptial execution of a notarial contract having the effect of an ante-nuptial contract, if the terms of the contract were agreed upon between the parties before the marriage. There was no such agreement between the parties in this matter.

[22] Another problem for the respondent is that s 4 of the Act provides that the accrual of the estate of a spouse is the amount by which the net value of the estate at the dissolution of the marriage exceeds the net value of the estate at the commencement of the marriage. The net values of the parties' respective estates are not reflected in the ante-nuptial contract. The declaratory order made by the trial court does not address this issue and if it is upheld, it would result in the absurdity that the ante-nuptial contract would still not be in compliance with the Act.

Conclusion

[23] The only ground pleaded in order to attack Clause 3 of the ante-nuptial contract was rectification. The amendment in terms of Rule 28(10) simply alleged that the respondent was entitled to the declaratory order, in the event it was found that the appellant did not intend to exclude accrual. During argument counsel for the respondent was unable to assist the court on how it could get around the clear terms of Clause 3. The finding that rectification is not competent in these circumstances must also mean that the contract stands.

[24] For all the above reasons the appeal must succeed. I make the following order:

1 The appeal is upheld with costs.

2 The order of the Full Court, Gauteng Division of the High Court, Pretoria is set aside and substituted as follows:

‘a. The appeal is upheld with costs including the costs of two counsel.

b. The order of the trial court is set aside and substituted as follows:

i. The counterclaim of the defendant relating to rectification is dismissed

ii. The defendant must pay the plaintiff’s costs relating to the dispute on rectification.’

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Z L L Tshiqi

Judge of Appeal

APPEARANCES:

For Appellant:	JG Bergenthuin SC
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	Rosendorff Reitz Barry, Bloemfontein
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