

IN THE HIGH COURT OF SOUTH
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER

318/2008

5 DATE

13 MARCH 2008

In the case between

ANTONIO MANUEL DA COSTA SILVA

PLAINTIFF

and

CHARLISE SILVA

DEFENDANT

10

J U D G M E N T

FOURIE J:

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The parties in this matter are embroiled in an opposed divorce. The main disputes between them centre on the proprietary consequences of the divorce and include Defendant's claim in terms of the accrual sharing system, as well as her claim for the implementation of certain provisions of the Antenuptial Contract.

At the commencement of the hearing, it appeared to be convenient to have two issues decided separately and at the request of the parties, I accordingly ordered, in terms of Rule

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33(4), that the following issues be heard separately: Firstly, whether Plaintiff's interest in the following legal entities should be taken into account for the determination of the accrual of his estate, namely (a) Nichols Investments CC; (b) 92 5 Malgrove (Pty) Ltd and (c) Euro Blitz 1154 CC. Secondly, whether Defendant is entitled to occupation of erf 4301, alternatively erf 12300, Knysna, from date of divorce, to the date that the minor child born of the marriage, is emancipated.

10 I also ordered that the remaining issues between the parties are to stand over for later determination, if necessary. As this judgment is given during the penultimate week of the civil circuit and other matters require my attention, I do not intend furnishing detailed reasons, but merely to provide a summary 15 of my findings on the issues presently before the Court.

Clause 3.4.6 of the parties' Antenuptial Contract, reads as follows:

20 "Notwithstanding anything to the contrary herein contained, in determining the accrual of each party's estate, any and all shares and/or members' interest and/or claims on loan account against any company, close corporation or other business by which a party is employed at any 25 time during the 12 month period preceding the

date of dissolution of the intended marriage,
shall be excluded from the accrual of the estate
of the party entitled thereto."

5 If Clause 3.4.6 of the Antenuptial Contract is read in the
context of the document as a whole, it is clear that what the
parties intended, is that a party's interest in any legal persona
should be taken into account in determining the accrual of
his/her estate, except if he/she is employed by the legal
10 person in which he/she holds such interest during a 12 month
period preceding the divorce.

The question to be answered is accordingly whether, as
averred by Plaintiff, he is employed by the three entities
15 concerned. In terms of the golden rule of interpretation, the
ordinary grammatical meaning of the word 'employed' should
be determined.

As pointed out by Miss Wasserman, for plaintiff, the Collins
20 English Dictionary defines the word 'employ' as meaning:

"To engage or make use of the services of a
person in return for money or the state of being
employed, especially in the phrase 'in
someone's employ'".

In the South African cases dealing with employment law, the so-called control test was traditionally used to determine whether an employment relationship, i.e. that of master and servant, exists between two persons. However, as stated by Van Heerden J, as she then was, in Stein v Rising Tide Productions CC 2002(5) (SA) 199 (C) at 206D, the problems experienced by our Courts in the application of the control test for determining a master/servant relationship, ultimately resulted in the Courts acknowledging that, although the control test is an important factor in the enquiry, the crucial test, particularly in marginal cases, is whether or not the dominant impression of the relationship is that of a contract of employment. See also Smit v Workmen's Compensation Commissioner 1979(1)(SA) 51 (A) at 62 D to 63 B.

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In the Stein case at 206 H to 207 B, Van Heerden J, listed the most important indicia in the application of the dominant impression test, thus:

"The application of the dominant impression test

20 thus requires a typological approach according to which the right of control is not an indispensable requirement of the contract of service, but one of a number of indicia, the combination of which may be decisive. Other
25 indicia which have been identified in the South

African case law are: the nature of the work; the existence or non-existence of the right of supervision on the part of the employer; the manner of payment (for example whether the employee is paid a fixed rate or by commission); the relative dependence of freedom of action of the employee in the performance of his/her duties; the employer's power of dismissal; whether the employee is precluded from working for another; whether the employee is required to devote a particular amount of time to his/her work; whether the employee is obliged to perform his/her duties personally; the ownership of the working facilities and whether the employee provides his/her own tools and equipment; the place of work; the length of time of the employment; the intention of the parties etc."

It is common cause that Plaintiff is the sole shareholder and director, or sole member, of the three legal entities, which are utilized as vehicles to acquire properties and to let same out to tenants. As conceded by Plaintiff, the purpose of the acquisition of the properties and holding same by means of these entities, is to make a profit and to minimize tax

implications.

5 All the income earned by the letting of the different properties is paid into one bank account and is used as and when Plaintiff requires the money. At the end of the financial year, his auditor allocates such advances to remuneration earned by Plaintiff or as draws against his loan accounts in the said entities.

10 It is common cause that Plaintiff has no formal employment contract with any of the entities, nor has there been any form of agreement concluded between him and the entities, regarding any remuneration to be paid to Plaintiff by the entities. In fact, there is not a single document which Plaintiff produced, indicating the existence of an agreement of employment between Plaintiff and any of the three entities.

20 Plaintiff is also in sole control of the running of the day to day affairs of the entities and, if necessary, he appoints sub-contractors to perform certain work which may be required to be done. No other people are employed by the entities.

When the indicia referred to by Van Heerden J in the Stein judgment, are applied to the facts of the present case, it is, in my view, abundantly clear that the dominant impression test

(or even the traditional control test) yields only one result, namely that no relationship of employer/employee exists between Plaintiff and the three legal entities. In fact, all the indicia point the other way, i.e. that Plaintiff is in sole control of the entities and conducts the business of these entities for his own financial benefit. It follows, in my view, that Plaintiff is not employed by any of the said entities.

Clause 3.4.8 of the Antenuptial Contract reads as follows:

“Notwithstanding anything to the contrary herein contained in determining the accrual of each party’s estate, unless otherwise agreed by the parties in writing, if at the time of the dissolution of the intended marriage there are minor children born of such marriage, the custodian parent shall be entitled to remain in occupation of whatever residential property is registered in the name of either party until such time as the youngest of such minor children is emancipated.”

Plaintiff testified that by including this clause in the Antenuptial Contract, he, as the party who gave the instructions to the attorney who drafted same, intended it to provide his children to be born of the marriage, with a roof over their heads until their emancipation.

I should mention that there is one minor child born of this marriage, born on 26 March 2007. I should also mention that in terms of the minute of their pre-trial conference, the parties confirmed that it would be in the best interests of the child for her to be in the primary care of Defendant.

The question to be answered, is accordingly whether Defendant and the minor child are entitled to remain in occupation of whatever residential property is registered in Plaintiff's name. I should add that it is common cause that the parties have not agreed otherwise in writing as envisaged in Clause 3.4.8.

The grounds upon which Plaintiff relies in contending that Defendant is not entitled to occupy a residential property owned by him, are, firstly, that in terms of the new Children's Act, No. 38 of 2005, both parents are, in effect, custodian parents and neither is or will become the custodian parent as envisaged by Clause 3.4.8 of the Antenuptial Contract.

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Secondly, it is submitted that as Defendant is not in occupation of the relevant properties, she cannot, in terms of Clause 3.4.8, remain in occupation so as to enable her to qualify for this benefit in terms of the Antenuptial Contract.

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I am in agreement with the submission of Mr Jooste, for Defendant, that interpreting this clause of the Antenuptial Contract, the best interests of the minor child of the parties, should be paramount. Not only does Plaintiff confirm that the clause was intended to benefit their children, but Section 28(2) of our Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. That is also the theme to be found in the new Children's Act.

10 I further agree with Mr Jooste that the correct approach in the interpretation of Clause 3.4.8, is to accept that upon the divorce of parties, the right to remain in occupation of a property registered in the name of either party, vests in the child. In view of her tender age, the child of this marriage has
15 to be cared for on a permanent basis and as I have already indicated, the parties are agreed that Defendant as the mother of the child, is and should remain the primary caregiver.

This, in my view, means that on a proper construction of
20 Clause 3.4.8, Defendant and the minor child should, as from the date of the divorce, be entitled to remain in occupation of a residential property registered in Plaintiff's name, as there is no residential property registered in her name.

25 The interpretation contended for by Plaintiff, is, in my view,

not only highly technical, but also does not pay any regard to the best interests of the child. In fact, on Plaintiff's interpretation of the relevant clause, neither party would, on the wording of the Children's Act, be entitled to remain in occupation of whatever residential property is registered in the other's name.

This would mean that neither party would, upon divorce, be entitled to rely on Clause 3.4.8 to safeguard the interests of the child. Surely, this would not have been the intention of the parties in instructing the attorney to draft Clause 3.4.8 in the manner that it appears in the Antenuptial Contract.

In my view a purposive interpretation of the nature referred to hereinbefore, is necessary to give effect to the object the parties intended to achieve by incorporating Clause 3.4.8 in the Antenuptial Contract.

Even if a purposive construction of this nature is not followed, I am of the opinion that, at the very least, the clause is ambiguous and should in any event be interpreted against the prevailing background circumstances and in such a manner as to avoid an absurdity. The construction contended for by Plaintiff ignores the most important background circumstance, namely, the intended protection of the child's rights upon

divorce of the parties.

It also leads to an absurdity, as already explained, namely that the child may be left without a roof over her head, as neither party will be regarded as the custodian parent and accordingly not be entitled to occupy the residential property of the other after the divorce.

Finally, as a last resort, to resolve the ambiguity, the clause should be interpreted *contra proferens*, i.e. against Plaintiff.

It follows, in my view, that from the date of the parties' divorce, Defendant and the minor child is entitled to occupy either of the two residential properties registered in Plaintiff's name.

Mr Pama, the attorney for Plaintiff, has today, with the consent of Mr Pretorius, the Defendant's attorney, placed the following information before me, namely, that Defendant does not intend occupying either of the two residential properties owned by Plaintiff.

Mr Pretorius informed the Court that he agreed to this being divulged to the Court, as it has no relevance to the issues now before the Court. In my view, this information, which I accept

as part of the body of evidence, does not assist Plaintiff. Firstly, this intimation by Defendant does not constitute a written agreement by the parties as envisaged in Clause 3.4.8 of the Antenuptial Contract and does accordingly not constitute
5 a waiver of Defendant's rights.

More importantly, however, is my finding that the said clause creates a right which vests in the child, which right cannot be abandoned by Defendant. Even if Defendant decides to
10 reside elsewhere after the divorce, it does not necessarily mean that she has abandoned her right, nor, as I have indicated, does she have the right to abandon the rights created for the child by Clause 3.4.8.

15 During the course of the evidence, it transpired that Plaintiff has in fact sold the property known as erf 4301 Knysna, to a third party and that his attorneys were in the process of transferring same to the third party. He estimated that the transfer would probably be registered within a period of
20 approximately one month.

Defendant accordingly sought a temporary order interdicting Plaintiff from transferring this property, pending the final determination of the divorce action.

Plaintiff opposed the application but I granted same for the following reasons:

I was satisfied that Defendant had established the necessary
5 clear right in the subject matter of this litigation. In particular, she has a clear right to a judgment on the issue of accrual sharing, at least insofar as the right created in her and the child's favour in Clause 3.4.8 of the Antenuptial Contract, is concerned.

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The transfer of erf 4301 Knysna will result in her right to occupy this property being rendered worthless, as the divorce herein will in all probability not be finalized before the transfer of the property is concluded.

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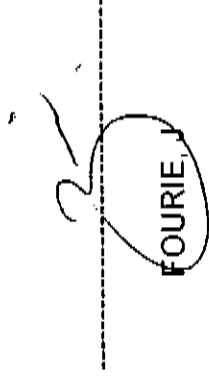
I was also satisfied that the balance of convenience favoured the granting of the order, as a refusal of the application would leave her and the child without a remedy to enforce her and the child's rights in terms of Clause 3.4.8 of the Antenuptial
20 Contract, while the granting of the order will not cause Plaintiff similar irreparable harm.

I also concluded that in these circumstances Defendant has no satisfactory alternative remedy at her disposal.

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Returning to the relief sought in these proceedings, the following orders are made:

1. It is declared that Plaintiff's interest in the following legal entities is to be taken into account for the determination of the accrual of his estate,
 - (a) Nichols Investments CC
 - (b) 92 Malgrove (Pty) Ltd
 - (c) Euro Blitz 1154 CC.
2. It is declared that Defendant and the minor child born of the parties' marriage, are entitled to the occupation of erf 4301 Knysna, alternatively erf 12300 Knysna, from date of divorce to the date the minor child is emancipated.
3. Plaintiff is to pay the costs occasioned by the adjudication of the two issues decided in terms of Rule 33(4), as well as the costs occasioned by Defendant's application for an interim interdict.



 FOURIE, F.