



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 22 September 2022

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Botha v Botha (820/2021) [2022] ZASCA 123 (22 September 2022)

Today the Supreme Court of Appeal (SCA) upheld an appeal from the Gauteng Division of the High Court, Pretoria (high court) and replaced the high court's order with one dismissing the appeal.

The issue in this appeal is whether an agreement which confers a lifelong maintenance executed by the respondent in favour of the appellant, after the registration of the ANC, is enforceable and can be read together with the ANC.

The appellant and respondent were married to each other out of community of property with the exclusion of the accrual system. They furthermore concluded an additional agreement in terms of which the respondent donated certain movable and immovable property to the appellant, as well as some allowances to her benefit.

When their marriage eventually broke down, the respondent instituted a divorce action in the regional court. In defending the action, the appellant claimed as a counter-claim, enforcement of the aforementioned agreement. The issue of the enforceability of the agreement was heard separately by the regional court and the bone of contention was the clause which related to the maintenance of the respondent. The regional court rejected the arguments advanced by the respondent to the effect that the agreement varies the terms of the ANC and that the agreement cannot be enforced as it cannot co-exist alongside the ANC. It declared the agreement enforceable.

Aggrieved by this outcome, the respondent appealed to the court a quo. In addition to setting aside the order of the regional court, the court a quo upheld new arguments on appeal. These were that the agreement was not enforceable under s 7(1) of the Divorce Act and that it deprived the divorce trial court of its discretion in terms of s 7(2) of the same Act.

The SCA considered the definition and the purpose of the two legal instruments and found that the agreement does not vary the terms of the ANC; the two can co-exist. The first regulates the matrimonial property regime and the respective estates of the parties whereas the other relates to donations between the parties which are governed by the law of contract. As such, the SCA found, that enforcement of the agreement will not oust the discretion of the divorce trial court envisaged by s 7(2) and reliance on s 7(2) by the court a quo was misplaced. The SCA also found that the finding by the court a quo intruded on the express intentions of the parties, as evidenced by the wording of the agreement.

As the result, the SCA upheld the appeal and replaced the high court's order with one dismissing the appeal.

-----ends-----