THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 952/12

In the matter between:

HARRY MARK DEON BATH **APPELLANT**

and

JUANITA BATH **RESPONDENT**

Neutral citation:	*Bath v Bath* (952/12) [2014] ZASCA 14 (24 March 2014)
Coram:	Lewis, Shongwe and Theron JJA and Swain and Mocumie AJJA
Heard:	**24 February 2014**
Delivered:	**24 March 2014**
Summary:	Terms of antenuptial contract inconsistent and incoherent: context did not clarify precisely what the parties intended to achieve: contract void for vagueness and marriage thus in community of property.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Louw J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Lewis JA (**Shongwe and Theron JJA and Swain and Mocumie AJJA concurring**):

[1] This appeal turns on the interpretation of an antenuptial contract signed by the parties, Mr Harry Bath, the appellant, and Mrs Juanita Bath, the respondent, the day before their marriage on 22 October 2005. Mr Bath instituted divorce proceedings against Mrs Bath first in March 2006. These were withdrawn. A year later he brought an action for divorce again, and withdrew that too. On 29 March 2007, for the third time, he sought a decree of divorce and ancillary relief, asserting that the marriage was out of community of property and subject to the accrual system. He set out the assets that he claimed as being excluded from the accrual and claimed his share of the accrual. And he claimed repayment of a loan that he had made to Mrs Bath.

[2] Mrs Bath counterclaimed for maintenance, amongst other things, and denied that the marriage was out of community of property, asserting variously that she had been induced to enter into the antenuptial contract by either duress or undue influence exerted on her by Mr Bath, and, in the alternative, that the contract did not effectively exclude community of profit and loss, and was void for vagueness, or, in the third alternative, that it should be rectified so as to reflect that the marriage was not out of community and that the accrual system did not operate.

[3] At the outset of the hearing, the North Gauteng High Court (Louw J) ruled in terms of Rule 33(4) of the Uniform Rules of Court, and at the instance of the parties, that the validity and effect of the antenuptial contract, should be determined first and the other claims and counterclaims be deferred to a later hearing. Louw J concluded that the antenuptial contract was void for vagueness and that the parties were married in community of property. Mr Bath appeals against that order with the leave of the high court, and Mrs Bath has noted a conditional cross appeal (leave having been sought and granted by the high court shortly before the hearing in this court) in the event of this court finding that the antenuptial contract is not void.

[4] The allegations of undue influence and duress are not persisted with on appeal and thus the only issue before us is the interpretation of the antenuptial contract. Because of its wording – which is on the face of it contradictory and incoherent– I shall set out the terms fairly fully.[1] The legal provisions governing marriages by antenuptial contract will then be briefly stated, and, thirdly, the context in which it was drawn and signed will be discussed.

The terms of the antenuptial contract

[5] The contract is between Harry Mark Deon Bath and Juanita Heydenreich, and states that they have agreed:

'1 That there shall be no community of property between them.

2 That there shall be no community of profit and loss between them.

3 That the marriage shall be subject to the accrual system in terms of the Matrimonial Property Act . . . 88 of 1984.

4 That for purposes of proof of the *net value* of their *separate estates at the commencement of the marriage*, the intended spouses declared that the *net value of their separate estates* to be the following: [my emphasis]

That of Harry . . .Bath

a) Sibanyoni Mining Industrial Close Corporation;
b) Ampy Investments Close Corporation;
c) Annuities;

[1] I shall set out only the wording and shall not reproduce the form.

d) Policies.

That of Juanita Heydenreich

a) Jewellery
b) Pension
c) Policies.'

Note that the reference to net values in the first part of the clause is not followed through: no values are stated in respect of any of the assets listed, nor are they properly identified. The contract continues:

'5 That the following assets of the parties or of any one of them listed below and the stated values, as well as all debts in relation thereto, or any other asset acquired by such party as a result of his/her possession or former possession of such asset, will not be taken into account as part of such party's estate at *either the beginning or the dissolution of the marriage.* [My emphasis.]

The assets of Harry . . . Bath to be excluded in this manner is [sic] as listed above and the assets of Juanita Heydenreich to be excluded in this manner is [sic] as listed above.

6 The parties record that they will execute a statement in terms of section 6(1) of the Act, reflecting the net values of their respective estates at the commencement of their intended marriage.'

[6] It is immediately apparent that the wording makes no sense on the face of it. The reference in clause 4 to net values is followed by a list of assets of each party without any values attached. Clause 5 then refers to 'the following assets' and says that they are as listed above – a reference, presumably, to the assets listed in clause 4. These are the assets to be excluded from the accrual. But what, then, does clause 5 mean when it states that those assets will not be taken into account as part of either party's estate 'at either the beginning or the dissolution of the marriage'? Therein lies the main problem.

[7] It is trite that in ascertaining the meaning of a contract a court must have regard first to its wording. It must also consider the context or factual matrix in which

it was concluded. That is so even where the words on the face of it are clear.[2] And where the words are ambiguous or lack clarity that is *a fortiori* so. But if the terms of a contract are so vague and incoherent as to be incapable of a sensible construction then the contract must be regarded as void for vagueness, as the high court in this case held.

The relevant provisions of the Matrimonial Property Act read with the terms of the antenuptial contract

[8] Before turning to the evidence as to the factual matrix it is important to consider the legislative framework which forms part of it. Section 2 of the Matrimonial Property Act 88 of 1984 provides that all marriages out of community of property in terms of an antenuptial contract are subject to the accrual system 'except in so far as that system is expressly excluded by the antenuptial contract'.

[9] Section 4 of the Act sets out the manner in which the accrual of an estate is to be determined and s 5 excludes certain assets from the joint estate of the parties as a matter of law. Section 4(1)*(b)*(ii) provides that 'an asset which has been excluded from the accrual system in terms of the antenuptial contract of the spouses, as well as any other asset which he acquired by virtue of his possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage'.

[10] As counsel for Mrs Bath contended, if a specific asset is excluded in the agreement its value is irrelevant in the determination of the accrual. The reference in clause 4 of the antenuptial contract in question to assets may have been intended to reflect that. But then the clause refers to value: 'for purposes of proof of the net value of their separate estates', it stated, the assets were those listed.

[11] Section 6(1) of the Act provides that where a party to an intended marriage does not, for the purpose of proof of the value of his or her estate at the time of the commencement of the marriage, declare the value in the contract, then he or she may do so within six months of the marriage in a statement attested to by a notary. Section 6(4)*(b)* provides that the net value of the estate of a spouse at the

[2] See *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) para 39 and the cases cited in that paragraph, and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

commencement of the marriage is deemed to be nil if the value was not declared in the contract itself or in a statement subsequently executed in terms of s 6(1).

[12] Clause 6 of the antenuptial contract, set out above, states that the parties will execute a statement in terms of s 6 of the Act, thus indicating that the values were not determined at the outset but would be provided later. This was apparently what the parties intended, and what the notary reflected when she recorded clause 6 of the antenuptial contract. But no such statement was ever made by either of the parties. The consequence of that, if the contract were proved to be valid, would be that s 6(4)*(b)* of the Act would become the default position, namely that the net value of the estate would be deemed to be nil unless the contrary were proved.

The context

[13] Does the context in which the antenuptial contract was concluded show that the parties intended to exclude particular assets from the accrual, or to declare the value of their respective assets to be excluded from the determination of the value of the accrual on dissolution of the marriage? The contract itself does not tell us, given its contradictions. The question that arises, then, is what the objective facts were preceding the conclusion of the contract. These may throw light on its construction.

[14] A great deal of evidence was led in respect of the context for both parties. Most of Mrs Bath's evidence, however, centered on her claim that she had signed the contract under duress or the undue influence of Mr Bath. She had never intended, she claimed, to marry subject to an antenuptial contract excluding community of profit and loss. Such a marriage, she kept saying, was contrary to her Christian principles: it anticipated divorce. I shall not traverse this evidence since on appeal it is conceded that no such duress or undue influence were proved. Mr Bath too conceded that they had not initially intended to marry out of community of property but that he had been advised, shortly before the wedding, that it was preferable to do so in order to protect assets in the joint estate from creditors' claims. (The correctness of that advice is not in issue.)

[15] Mrs Bath testified that she had been forced to sign the antenuptial contract the day before her wedding, not ever having consulted with an attorney beforehand, and without knowing its contents. The contract had been read to her, she said, but

her understanding of what it achieved differed materially from that of Mr Bath and of the notary who drafted it, Mrs Nunes. Nothing turns on this, however, since evidence of the parties' respective understandings of what the contract meant is not relevant. Moreover, it is impossible to comprehend what each of them meant having regard to their testimony as a whole.

[16] What is clear, however, is that Mrs Bath was not forced to sign the contract the day before the wedding. She and Mr Bath had consulted Mrs Nunes earlier in the week of the wedding, and she had explained how the accrual system operated and what their options were. They had indicated which assets they wished to exclude from the accrual, and she had made a note of these. Mrs Nunes and staff in the attorneys' firm in which she worked confirmed the earlier consultation, and the staff had witnessed the signing of the contract on a later occasion.

[17] Mrs Nunes' evidence also threw no light on the meaning of the contract. She could not explain what it meant. The only evidence of any value that she proffered was that after the wedding she had written to Mr Bath on a number of occasions reminding him that he and Mrs Bath should execute a statement in terms of s 6 of the Act. He had not done so, however, and responded that Mrs Bath refused to co-operate with him.

[18] Although in his particulars of claim Mr Bath asserted that the assets he had excluded from the accrual had a particular value, no evidence was led in this regard. In effect, then, even if the contract were valid, it was effectively one in community of property since nothing was excluded from the accrual. It is not necessary to make any finding on this issue in view of the conclusion to which I come.

What did the contract mean?

[19] It is clear to me that the parties did intend to exclude community of property and profit and loss and to adopt the system of accrual: but it is far from clear *how* they intended to do that. If the contract had included only the first three clauses they would effectively have achieved a contract out of community of property, subject to the accrual system regulated by the Act. But the clauses that followed are so contradictory and incoherent that in my view they vitiate the contract as a whole. No certainty has been achieved as to what the contract meant – what the parties

intended to achieve. The contract does not embody terms that enable this court to give effect to what their intention might have been.[3]

[20] And it is trite that a court cannot make a contract for the parties. This court cannot determine whether the parties intended to exclude certain assets from the accrual, or stated values of assets from the value of the accrued estate. Nor can it ascertain what was meant by clause 5 where it stated that particular assets (without any certainty as to what they were) would not be taken into account at the beginning or the dissolution of the marriage. And since they did not have a common continuing intention as to what they wished to do, rectification (one of the alternative claims by Mrs Bath) is also not possible.

[21] Accordingly the high court correctly concluded that the antenuptial contract between the parties was void for vagueness and the appeal must be dismissed with costs.

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C H Lewis

Judge of Appeal

[3] See *Namibian Minerals Corporation v Benguela Concessions Ltd* 1997 (2) SA 548 (A); S W J van der Merwe, L F van Huyssteen, M F B Reinecke and G F Lubbe *Contract: General Principles* 4 ed (2012) at 193.

APPEARANCES:

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