



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 820/2021

In the matter between:

CICILIA SUSANNA BOTHA
(born Cornelius previously COMBRINCK)

Appellant

and

DAVID HERCULES BOTHA

Respondent

Neutral citation: *Botha v Botha* (Case no 820/2021) [2022] ZASCA 123 (22 September 2022)

Coram: VAN DER MERWE and MOLEMELA JJA and KGOELE, SALIE-HLOPHE and MASIPA AJJA

Heard: 17 August 2022

Delivered: 22 September 2022

Summary: Husband and wife – agreement for lifelong maintenance in event of death of husband or divorce – no variation of existing ante-nuptial contract – no divestation of discretion under s 7(2) of Divorce Act 70 of 1979 – agreement enforceable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Bam AJ and Collis J concurring) sitting as a full court:

- 1 The appeal is upheld with costs.
- 2 The order of the Gauteng Division of the High Court, Pretoria, is set aside and replaced with an order in the following terms:
'The appeal is dismissed with costs.'

JUDGMENT

Kgoele AJA (Van der Merwe and Molemela JJA and Salie-Hlophe and Masipa AJJA concurring)

[1] In anticipation of their marriage, the appellant, Mrs C S Botha, and the respondent, Mr D H Botha, concluded an ante-nuptial contract (ANC) which declared their marriage to be out of community of property with the exclusion of the accrual system. The ANC was duly registered in the Deeds Registry, Pretoria on 22 January 2015. The parties subsequently married each other on 19 May 2015. On 20 February 2015, however, after the registration of the ANC and before the solemnization of their marriage, the parties concluded a written agreement (the agreement). The central issue in the appeal is the enforceability of the agreement.

[2] The marriage eventually broke down and on 8 August 2018, the respondent instituted an action for divorce against the appellant in the regional court, Springs. In defending the action, the appellant filed a plea and a counter-claim. In the counter-claim, the appellant claimed the enforcement of the terms of the agreement. The respondent also filed a plea to the appellant's counter-claim, and admitted to having executed the agreement but denied that the terms of the agreement were enforceable.

[3] The matter came before the regional court which was requested by the parties, in terms of rule 29(4) of the Magistrates' Courts Act 32 of 1944, to separately adjudicate the issue of whether the agreement was enforceable and should be read together with the parties' ANC or not. The separated issue was pleaded as follows in the plea to the counter-claim:

'8.3 After signing the agreement the parties abandoned the terms thereof by entering into marriage and having the ante-nuptial contract as originally agreed upon registered as pleaded by the Plaintiff.

...

9.2 The Plaintiff denies that the terms are enforceable for the reasons as pleaded supra.'

The regional court recorded that 'it was agreed that the issue of whether the agreement was valid and enforceable *vis-a-vis* the ANC is what is to be argued.' The essence of the argument of the respondent was that the agreement contradicted the ANC and had the effect of impermissibly varying it.

[4] After hearing the argument from both parties, the regional court rejected the argument advanced by the respondent. It therefore declared the agreement enforceable, and that it should be read together with the ANC. It also ordered the respondent to pay the costs of the separated hearing.

[5] Aggrieved by this outcome, the respondent appealed to the Gauteng Division of the High Court, Pretoria (the court a quo). Apart from the aforesaid argument, 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 70 of 1979 (the Divorce Act) and deprived the divorce trial court of its discretion in terms of s 7(2) of the Divorce Act.¹

¹ The relevant sub-sections reads:

'7(1) A Court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

7(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one to the other, the Court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct insofar as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the Court should be taken into account, make an order which the Court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.'

The court a quo upheld the appeal with costs, set aside the order of the regional court, and replaced it with an order that the agreement is not enforceable. The appeal is with the special leave of this Court.

[6] The agreement reads:

'Having said that, on the date of signing hereof, the parties hereby declare that both are unmarried and intend to enter into marriage with each other on the 14th of March 2015 which the marriage will be out of community of property;

and having said that, the parties have already entered into a Prenuptial Agreement which will be registered with the Registrar of Deeds, the parties request that the following agreement be read together with the Prenuptial Agreement, and the parties mutually agree as follows:

At the dissolution of the intended marriage by the death of DAVID HERCULES BOTHA;

Or

through divorce: The said, DAVID HERCULES BOTHA, donates the following property to SUSANNA CICILIA COMBRINCK as her exclusive property:

1. **IMMOVABLE PROPERTY**

1.1 A residence to the value of R1 500 000-00 (one million five hundred thousand rand) which property will be designated by SUSANNA CICILIA COMBRINCK.

1.2 DAVID HERCULES BOTHA and or the estate of DAVID HERCULES BOTHA will oversee the transfer costs of the property in the name of SUSANNA CICILIA COMBRINCK.

2. **VEHICLE**

A vehicle to the value of R250 000-00 (Two hundred and fifty thousand rand) which vehicle will be designated by SUSANNA CICILIA COMBRINCK.

3. **MEDICAL**

DAVID HERCULES BOTHA and or the estate of DAVID HERCULES BOTHA will pay for the premium of SUSANNA CICILIA COMBRINCK with regards to a medical aid (similar to the plan on which she is with the undersigning of this) for as long as she lives.

4. **MONTHLY ALLOWANCE**

DAVID HERCULES BOTHA and or the estate of DAVID HERCULES BOTHA will, before the 7th day of every month, pay the amount of R20 000-00 (Twenty thousand rand) to the mentioned SUSANNA CICILIA COMBRINCK into a bank account nominated by SUSANNA CICILIA COMBRINCK as lifelong maintenance between spouses.

5. **POLICY**

DAVID HERCULES BOTHA and or the estate of DAVID HERCULES BOTHA will oversee the payment of the Momentum Life Policy with number 211448146, for as long as the mentioned SUSANNA CICILIA COMBRINCK may live.'

[7] The appellant's case is simply this: there is no conflict between the terms of the ANC and the agreement; they co-exist and remain valid and enforceable as two distinct and separate legal instruments, each serving a different purpose which do not impinge upon each other; ss 7(1) and 7(2) of the Divorce Act are not applicable in this matter, the counter-claim is a contractual claim based on donations in her favour which were made by the respondent with the full knowledge of the contents of their ANC; in terms of *Odgers v De Gersigny*² (*Odgers*), the donation by the respondent in terms of which he undertook to pay the appellant lifelong maintenance is neither unusual nor impermissible and lastly; that the principle of *pacta sunt servanda* is applicable. For the reasons that follow, the court a quo should have upheld these contentions.

[8] It is instructive at the outset to consider first the definition and the purpose including the primary objective of these two legal instruments which form the matrix of this appeal. The primary objective of the ANC is not to create obligations, but to determine the matrimonial property system between spouses by excluding or varying the normal patrimonial consequences of marriage. Regarded in this light, the ANC is by no means a contract.³ Lawsa⁴ defines a donation as follows: 'an agreement which has been induced by pure (or disinterested) benevolence or sheer liberality whereby a person under no legal obligation undertakes to give something (this includes the gratuitous release or waiver of a right) to another person, called "the donee", with the intention of enriching the donee, in return for which the doner receives no consideration nor expects any future advantage'. It is trite that the prohibition on donations between spouses has been abolished.⁵ It is therefore no longer necessary for such donations to be made in an ANC.⁶

[9] The agreement does not purport to vary the ANC. In my view, the two legal instruments can co-exist because an ANC regulates the matrimonial regime of the parties *stante matrimonio* only, whereas the agreement has no bearing at all on the nature of their matrimonial regime and the respective estates of the parties. Their

² *Odgers v De Gersigny* [2006] ZASCA 125; 2007 (2) SA 305 (SCA).

³ Cronje and Heaton *South African Family Law* (1999) at 107-108.

⁴ 8 *Lawsa* 3 ed para 268.

⁵ Matrimonial Property Act 88 of 1984, s 22.

⁶ *Ibid* fn 4 at 115.

estates remain separate. Thus, the provisions of the ANC will remain intact and will be applicable upon their divorce despite the appellant's entitlement to enforce the terms of the agreement. The legal effect of this is that a portion of the patrimonial consequences upon divorce or death will flow from the agreement and not from the matrimonial regime. Neither party will have any claim against the other based either on the provisions of the Divorce Act or the Matrimonial Property Act 88 of 1984 (the Matrimonial Property Act). The finding by the court a quo to the effect that the agreement constitutes an impermissible attempt to vary the ANC or the parties' matrimonial regime contrary to s 21 of the Matrimonial Property Act, is therefore fundamentally flawed.

[10] In addition, the conclusion by the court a quo ignores the clear intention of the parties as espoused in the agreement. The preamble of the agreement is clear and unambiguous. It was carefully crafted and indicated that 'it is agreed that the parties will be married out of community of property' and that 'the ANC will be registered.' An analysis of the text and the factual context in which the agreement was concluded including the clear purpose of the agreement reveals that the parties never intended that the agreement should rectify or amend the ANC. The agreement records no reference to the changing of the matrimonial regime. It is important to note that the agreement in this matter was made by the parties fully alive to their matrimonial regime. Had there been any intention on the parties to alter, vary or amend the terms of the ANC by the conclusion of this agreement, the parties would have expressed themselves in clear terms in this regard.

[11] Section 7(1) of the Divorce Act is not applicable, nor is the matter of *HM v AM*,⁷ which was relied upon by the court a quo. The import of s 7(1) is to confer the power upon the divorce court to make a written settlement concluded by divorcing parties which relate to the payment of maintenance an order of court when a decree of divorce is granted. The appellant does not ask for a settlement agreement to be made an order of court under s 7(1). A proper scrutiny of the appellant's particulars of claim reveals that the appellant's counter-claim is clearly a contractual claim for specific performance. She specifically prays for the enforcement of the terms of an agreement

⁷ *HM v AM* [2019] ZASCA 12.

as they are couched in the agreement. The fact that the agreement refers to a lifelong monthly payment of 'maintenance' does not render it an attempt to settle a pending divorce action.

[12] The respondent focused on clause 4 of the agreement in terms of which the respondent undertook to pay the appellant an amount of R20 000.00 per month as maintenance. It appears that the court a quo was intrigued by the words 'lifelong maintenance' which led it to conclude that 'absent a settlement agreement envisaged in s 7(1) of the Divorce Act, the court still retains the statutory power to enquire into the reasonable needs of the spouse who requires maintenance and therefore the discretionary power vested in the court in terms of s 7(2) of the Divorce Act has been ousted by the regional court's order'. The court a quo's finding and reasoning in this regard are misplaced if regard is had to the correct legal position in our law. Unlike the duty of the high court as upper guardian of minor children to ensure that their best interests are served during divorce proceedings, it owes no such duty to the parties. The legal position regulating agreements between parties was set out by this Court in *Odgers* as follows:

'As previously indicated, the agreement in the instant case does not come within the purview of s 7(2). There is no bar to agreeing on the duration and extent of the payment of maintenance which is to be made, irrespective of any change in the parties' circumstances, the agreement is valid and purely contractual in nature. It falls to be governed by the rules applicable in that sphere.'⁸

[13] The correct approach was more than two decades ago succinctly summarised in *Hodges v Coubrough N O*.⁹ The following remarks quoted with approval in *Odgers* are apposite in this matter:

'The field of contract is very different from the one where the present case lies. Everybody may bind his estate, by contract no less firmly than by will, to pay maintenance after his death. And he may settle the maintenance on whomsoever he chooses, on his current wife, a former wife, a mistress, an employee or anyone else. Whether in a given instance that result has been produced, whether the liability which was incurred survives the death of the person who assumed it and passes to his estate, depends of course on the terms of the contract, or their

⁸ Footnote 2 para 8.

⁹ *Hodges v Coubrough NO* 1991 (3) SA 58 (D) at 66D; Hahlo *The South African Law of Husband and Wife* 5 ed at 553.

true meaning. And that goes too for the kind of contract in question, an agreement between spouses which is made an order of Court on their divorce. So, like the legislation whenever its meaning is sought, the agreement must be interpreted. By no means is the enquiry the same, however, since the objects of the exercise differ. The intention which has to be ascertained in the one case is that of Parliament, legislating in general terms and with general effect. In the other it is the intention of private individuals, minding their own business and dealing solely with that. They have no occasion to reckon with the common law. They have no reason to worry about issues of policy. Nor do they care a fig if the party who is maintained under their arrangements turns out to be better off than somebody else's widow. Then there is a further consideration, a rule governing contractual obligations which has no counterpart in the area of those generated statutorily. . . .'

[14] The Constitutional Court confirmed this legal position in *AM v HM*.¹⁰ In dismissing the application for leave to appeal the SCA decision of *HM v AM*, which has been heavily relied upon by the respondent in this matter, the Constitutional Court remarked:

'In my view, the applicant's attack on the judgment of the Supreme Court of Appeal is misplaced. A proper interpretation and analysis of the judgment reveal that the Supreme Court of Appeal did not prescribe a bar on all agreements between spouses out of the community of property. The finding only relates to this agreement, whose terms appeared to have the effect of changing the parties' matrimonial regime without being sanctioned by a court order. It did not affect the parties' capacity to contract in respect of other agreements.'¹¹

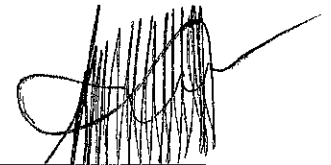
[15] Likewise, the agreement in this matter does not fall within the ambit of the provisions of s 7(2). The discretion under s 7(2) only arises when a claim is made under that section. There are a variety of reasons why such a claim may not be made in a particular matter, including that as a result of substantive donations there is no need for maintenance. The appellant does not claim maintenance under s 7(2) but simply requests the divorce court to enforce the terms of the agreement. As gathered from the authorities quoted above, the agreement is neither unusual nor impermissible. The invocation of the discretionary power conferred by s 7(2) by the court a quo was therefore uncalled for. Therefore, the agreement does not take away a discretion under s 7(2).

¹⁰ *AM v HM* [2020] ZACC 9; 2020 (8) BCLR 903.

¹¹ *Ibid* para 32.

[16] For these reasons, the following order is made:

- 1 The appeal is upheld with costs.
- 2 The order of the Gauteng Division of the High Court, Pretoria, is set aside and replaced with an order in the following terms:
'The appeal is dismissed with costs.'



A M KGOELE
ACTING JUDGE OF APPEAL

APPEARANCES:

For the appellant: H P West
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