

the proposed amendment, despite the paucity of the information A contained in the affidavits filed in support of the application.

The last of the proposed amendments flows from the amendment of the defendant's plea to para 4bis of the particulars of claim as re-amended, which is not opposed. It will accordingly also be granted.

The plaintiff's opposition to the proposed amendments was partly B successful and in any event reasonable. The plaintiff is in my view entitled to the costs of the application to amend including the cost of its opposition to the application.

I make the following order. The proposed amendments are granted, save for the amendment sought in para 3 of the plea as amended which is C annexed to the defendant's notice of amendment in terms of Uniform Rule of Court 28. The defendant is ordered to pay the costs of the application to amend, including costs of the plaintiff's opposition to the application.

Applicant's (Defendant's) Attorneys: *Dr R Gemholtz & Co.* Respondent's (Plaintiff's) Attorneys: *Fairbridge, Arderne & Lawton.* D

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## LAGESSE v LAGESSE

DURBAN AND COAST LOCAL DIVISION

KRIEK J

1989 August 28 1990 March 12

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Husband and wife—Divorce—Proprietary rights—Redistribution order G

—Divorce Act 70 of 1979, s 7(3)—Marriage by foreigners  
—Antenuptial contract—Meaning of in s 7(3) and (5) of Act—Not restricted to notarially executed contract—Meaning any agreement regulating proprietary consequence of marriage entered into between parties before marriage—Marriage certificate containing marginal note incorporating provisions of Status of Married Women Ordinance of 1949 (Mauritius)—Intention of parties that marriage governed by provisions thereof—Amounting to antenuptial contract in terms of s 7(3) and (5) of Divorce Act—Ordinance expressly excluding matrimonial property regimes of community of property, community of profit and loss and any form of accrual—Court accordingly able in terms of provisions of s 7(3) of Act to order redistribution of assets. I

The following issues in a divorce action fell to be determined separately as ordered in terms of Rule 33(4) of the Uniform Rules of Court: (1) whether the parties were J

A married in or out of community of property, and (2) if they were married out of community of property, whether the plaintiff had any claim against the defendant under the provisions of s 7(5) of the Divorce Act 70 of 1979. The issue arose in this form because the Court had to determine the meaning of 'antenuptial contract' as used in s 7(3) and (5) of the Divorce Act read with s 36(b) of the Matrimonial Property Act 88 of 1984 in relation to a marriage entered into in Mauritius. The parties put up in terms of Rule 33(1) an agreed set of facts: the parties were married before the defendant was domiciled in Mauritius and the proprietary consequences of their marriage accordingly fell to be determined according to the law of Mauritius; their marriage to be governed by the provisions of the Status of Married Women Ordinance 1949 of Mauritius; the parties, however, had not concluded a formal antenuptial contract. The relevant provisions of the Divorce Act provide essentially that in the event of a marriage out of community of property the Court might on divorce on the application of one of the parties, and in the absence of any agreement between them regarding the division of their assets on divorce, order that the assets or part of the assets be transferred from the one to the other. It was the plaintiffs' contention that the reference to 'antenuptial contract' in the provisions of s 7(3) and (5) of the Divorce Act read with s 36(b) of the Matrimonial Property Act contemplated in addition to a notarially executed contract an informal agreement entered into between the parties before their marriage regulating the proprietary consequences of their marriage whether concluded in the Republic or not. The defendant contended that the antenuptial contract contemplated by the section was a notarially executed contract and, in any event, if the Court found otherwise, the contract entered into between the parties did not comply with the further provisions of the section in that it did not exclude community of property, profit and loss and any form of accrual.

E Held, that there were two possible meanings of the phrase 'antenuptial contract' namely: an informal agreement between parties which was binding only on them and their universal successors, or a formal contract duly registered under the provisions of the Deeds Registry Act.

Held, further, that there was nothing in the language of s 7(3) which indicated that the narrower meaning of the 'antenuptial contract' had been intended.

F Held, further, that the term 'antenuptial contract' had not acquired such a specialised meaning that when it appeared in a statute one could safely assume that it referred to a registered notarially executed contract only.

Held, further, that the use of the term in the narrower sense in other provisions of the Act, in particular s 6(1), did not necessarily mean that it should be restricted to that meaning in all other instances in which it occurred in the Act.

G Held, further, that the Legislature could not have intended, given the objective of the Act to redress the position between spouses, to amend the matrimonial property law as the preamble to the Matrimonial Property Act said, that upon divorce a spouse married by a formal antenuptial contract should be in a more favourable position than a couple married with an informal agreement: the phrase when used in s 7(3) of the Divorce Act was intended to refer to all antenuptial contracts recognised by our law.

H Held, with regard to the alternative argument that before a Court could apply the provisions of s 7(3) in a particular case the spouse seeking to invoke the section was obliged to prove the existence of an antenuptial contract which expressly excluded community of property; community of profit and loss and accrual sharing in any form, that the intention of the parties had been to incorporate by reference the terms of the Status of Women Ordinance 50 of 1949 of Mauritius, which terms expressly excluded those matrimonial property regimes.

I Held, accordingly, that the plaintiff had a claim against the defendant in terms of s 7(3) of the Divorce Act 70 of 1979.

Stated case in terms of Rule 33(4) of the Uniform Rules of Court. The facts appear from the reasons for judgment.

A *I J Chadwick* for the plaintiff.

J *P C Combrinck SC* for the defendant.

*Cur ado vult.*

*Postea* (12 March 1990).

Kriek J: Plaintiff claims a decree of divorce and certain other relief. Prior to the commencement of the trial I ordered, in terms of Rule 33(4) of the Uniform Rules of Court, that the following issues be determined separately from the remaining issues between the parties: (1) whether the parties were married in or out of community of property, and (2) if they were married out of community of property, whether the plaintiff (the wife) in law has any claim against the defendant under the provisions of s 7(5) of the Divorce Act 70 of 1979.

C It is these two issues with which I am now concerned, and in relation to them the parties have, in terms of Rule 33(1), put up an agreed statement of facts. It is now common cause between the parties that they were married in Mauritius, out of community of property, and the first issue mentioned above therefore falls away. The background to the remaining issue, as it emerges from the stated case, may be summarised as follows:

1. When the parties were married the defendant was domiciled in Mauritius, and the proprietary consequences of their marriage consequently fall to be determined according to the law of Mauritius.

2. In that country there are three possible matrimonial regimes: E  
2.1 The parties may, when they marry, declare to the marriage officer that they wish to be governed by the provisions of the Status of Married Women Ordinance 50 of 1949. The relevant portion of s 2 of that ordinance reads: F

'(2) Where parties intending to marry shall declare to the Civil Status Officer at the time of the marriage that they wish to be governed by the provisions of this ordinance the Civil Status Officer shall make a marginal entry to that effect in the act of marriage and the provisions of this ordinance shall thereupon apply to such parties.

(2) Notwithstanding anything to the contrary in any enactment a married woman to whom the provisions of this ordinance shall apply shall retain her full capacity to deal with her property both movable and immovable and to act in all matters whatsoever as if she were not married.'

2.2 They may enter into an antenuptial contract before a notary, in which event the proprietary consequences of the marriage will be governed by the terms of that contract (which would normally exclude community of property and the husband's marital power). H

2.3 In the absence of a declaration in terms of Ord 50 of 1949 and of an antenuptial contract, the marriage will be in community of property.

3. In the present case the parties' marriage certificate bears the I following marginal note:

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'The parties declare that they wish to be governed by the provisions of the Status of Married Women Ordinance 1949.'

They did not conclude a formal antenuptial contract, whether before a notary or otherwise. J

## A 4. Section 7(3)(a) of Act 70 of 1979 reads:

(3) A Court granting a decree of divorce in respect of a marriage out of community of property—

(a) entered into before the commencement of the Matrimonial Property Act 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded: or

(b) . . . . .  
may, subject to the provisions of ss (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the Court may deem just be transferred to the first-mentioned party.

C The issue between the parties with which I am concerned arises from the meaning to be attributed to the words 'antenuptial contract' in s 7(3). Plaintiff's contention is set out as follows in the stated case:

D 'The plaintiff contends that the reference to an antenuptial contract in s 7(3) and (5) of the Divorce Act 70 of 1979, read with s 36(b) of the Matrimonial Property Act 88 of 1984, contemplates in addition to a notarially executed antenuptial contract, an informal agreement concluded between the parties prior to the solemnisation of their marriage which regulates the proprietary consequences of their marriage and whether concluded within the Republic of South Africa or not.'

E Defendant's contentions are stated as follows:

'The defendant disputes that the said agreed facts constitute an antenuptial contract such as is contemplated in s 7(3) and (5) of Act 70 of 1979, read with the said s 36(b) of Act 88 of 1984 and contends that the antenuptial contract there referred to is an antenuptial contract notarially executed before a notary public within the Republic of South Africa.'

F The defendant further contends that should the Court find that the parties did enter into an informal antenuptial contract and that that agreement fell within the terms "antenuptial contract" in s 7(3), that the agreement did not comply with the further provisions of the section in that it did not have as its terms the exclusion of community of property, profit and loss and any form of accrual.'

G In *Ex parte Spinasse and Another NNO* 1985 (3) SA 650 (A) Corbett JA said at 658:

H 'It is clear that in terms of s 86 of the Act an antenuptial contract not registered in the manner and within the time mentioned in s 87 is of no force or effect against any person who is not a party thereto. Having regard, however, to the common law and legislative background to the Act (which I have sketched above), an antenuptial contract which has not been so registered is valid and effective as between the parties thereto. (See *Hahlo Law of Husband and Wife* 5th ed (1985) at 261-2.)

I Indeed, it seems likely (though it is not necessary to decide this point and though ss 86 and 87 deal with written antenuptial contracts—see the use of the word "executed" in the English text and "onderteken" in the Afrikaans (signed) text) that even a verbal antenuptial contract, if properly proved, would have such validity *inter partes*: see *Pollard and Pollard v Registrar of Deeds* 1903 TS 353 at 356-7; *Fisher v Malherbe and Rigg and Another* (*supra* at 19); *Ex parte Kloosman et Exor* 1947 (1) SA 342 (T) at 347; *Hahlo* (*op cit* at 261-2).'

(The reference to 'the Act' in the first sentence of this passage is to the A Deeds Registries Act 47 of 1937.)

In *Ex parte Minister of Native Affairs: In re Molefe v Molefe* 1946 AD 315 Watermeyer CJ said at 318:

B 'In the case of a legal marriage, where no question of domicile outside of the Union is involved, the proprietary rights of the spouses resulting therefrom, must be governed by the common law of South Africa except in so far as specific provisions have been introduced by statute, which alter the common law. At common law a husband and wife can, as between themselves, by an antenuptial agreement, regulate their proprietary rights after marriage. Such an agreement is binding between the spouses, but is of no effect so far as persons not party thereto are concerned, unless it is duly entered into and registered in accordance of the law governing antenuptial contracts. (See ss 86 and 87 of Act 47 of 1937.)'

C Dealing with the meaning of the term 'antenuptial contract' in this passage, Stegmann J said in *Mathabathe v Mathabathe* 1987 (3) SA 45 (W) at 51:

D 'The expression "antenuptial contract" used in a broader sense included not only the antenuptial contracts in that narrower category, but, as indicated in the above-quoted passage of the judgment of Watermeyer CJ, also extended to informal contracts *not* complying with the formalities required by s 87 of the Deeds Registries Act 1937. The latter antenuptial contracts were of no concern to third parties. As far as third parties were concerned, a marriage between white persons domiciled in South Africa, regulated only by an informal or unregistered antenuptial contract, was no different from a marriage in community of property and of profit and loss and from which the marital power was not excluded. Third parties had to conduct their business with the spouses on that basis. Nevertheless, as between the parties, such an antenuptial contract was valid, effectual and enforceable to the extent that the rights of third parties were not affected. The fact that the contract was of no interest, concern, or relevance to third parties did not exclude it from the category of antenuptial contracts as more broadly defined. The existence of such informal antenuptial agreements is expressly recognised by the Legislature in s 88 of the Deeds Registries Act 1937. Its subject-matter is: "Postnuptial execution of antenuptial agreement." If an antenuptial agreement (in the broad sense) was arrived at between intending spouses, no matter how informally, the Court is empowered by the Legislature to authorise the postnuptial execution thereof before a notary, and its registration.'

G The first relevant consideration in interpreting s 7(3) is therefore that the term 'antenuptial contract' can either mean an informal agreement between the parties which is binding only on them and their universal successors, or it can mean a formal contract duly registered under the provisions of the Deeds Registries Act. What must be decided is which meaning is to be attributed to that term in s 7(3), and the approach ought, it seems to me, to be that it refers to all antenuptial contracts recognised by our law, unless there are indications in the Act itself that the Legislature intended it to refer only to formal registered contracts, or unless there are other considerations relevant to the interpretation of statutes which would justify limiting the meaning to be attributed to it. The following considerations are in my view relevant to this enquiry:

1. There is nothing in the language of s 7(3) which suggests that it was intended that 'antenuptial contracts' should bear the narrow meaning intended for by the defendant. The term 'antenuptial contract' has not, it seems to me, acquired such a specialised meaning in our law that

A when one sees it in a statute one can safely assume that it refers only to a registered notarially executed contract.

2. Mr *Combrinck*, who appeared for the defendants, referred me to s 6(1) of the Matrimonial Property Act 88 of 1984. It is clear that 'antenuptial contract' in that section means a registered notarially executed contract, and that it may well bear that meaning in the whole of chap 1 of that Act. It is also true that ss (3), (4), (5) and (6) of s 7 of the Divorce Act were introduced into that section by s 36 of the former Act, and against that background Mr *Combrinck* submitted that the meaning of 'antenuptial contract' in s 6(1) is relevant to the enquiry as to the meaning to be attributed to the same term in s 7(3). Dealing with a similar argument advanced in *Mathabathe v Mathabathe* (*supra*) Stegmann J said at 49-50:

'This argument loses much of its force when it is realised that s 36(b) of Act 88 of 1984 does not form part of the same legislative scheme as s 6(1). Section 6(1) is part of a legislative scheme contained in chap I of the Act, by which an accrual system was introduced in relation to certain marriages concluded on or after 1 November 1984. Section 36(b) has nothing to do with that. It introduced an amendment into the Divorce Act 1979. The amendment was not directly related to the introduction of the accrual system. It was designed to empower the Court to impose an equitable distribution of property on the dissolution of marriages concluded before 1 November 1984 and to which chap I of the Matrimonial Property Act has no application. (The fact that parties to a marriage entered into before that date may, in terms of s 21 in chap IV of the Matrimonial Property Act, cause the provisions of chapter I to be made applicable to their marriage, does not affect the argument.) The essential point is that "antenuptial contract" in s 6(1), in the narrow sense of a notarially executed antenuptial contract, is in no material sense an antecedent of that expression when introduced by s 36(b) into s 7 of the Divorce Act 1979. In my view the meaning of the expression in s 6(1) of Act 88 of 1984 cannot be regarded as a reliable guide to its meaning in s 7(3) of Act 70 of 1979.'

I also consider that the object of the Matrimonial Property Act, and of the amendment to s 7 of the Divorce Act which it effected, was to redress the position between spouses, 'to amend the matrimonial property law' as the preamble to the former Act says, and that there is no reason to suppose that the Legislature intended that upon divorce a spouse married by a formal antenuptial contract should be in a more favourable position than one married by an informal contract. (Creditors of either spouse cannot be affected by an order made in terms of s 7(3), because s 7(5) enjoins a Court making such an order to take into account 'the existing means and obligations of the parties'). In this regard Mr *Chadwick*, for the plaintiff, referred to the canon of construction to the effect that statutory provisions should, where possible, be interpreted so as to affect everyone equally, rather than to sanction inequality and partiality of treatment. (Cockram *Interpretation of Statutes* 2nd ed at 112.) As between spouses, it makes no difference to their proprietary rights whether their antenuptial contract was concluded formally or informally.

In my view there are no indications that it was intended that the term 'antenuptial contract' in s 7(3) should refer only to registered notarially executed contracts, and not to informal agreements between intending spouses.

I should perhaps add that, although I have quoted certain passages from the judgment of Stegmann J with approval, that does not mean that I agree with his conclusions with regard to the issue with which he was dealing. For reasons which appear to me to be persuasive, Coetzee DJP in *Milbourn v Milbourn* 1987 (3) SA 62 (W) disagrees with certain of those conclusions. The latter case does, however, not support the interpretation of s 7(3) B contended for by Mr *Combrinck*. In that case it was held that parties domiciled and married in England and who did not enter into any form of antenuptial contract before their marriage, could not rely on s 7(3) for a redistribution of their assets. In the present case the parties did in my view enter into an antenuptial contract and that brings me to Mr *Combrinck's* C alternative argument.

That argument was to the effect that, before a Court could apply the provisions of s 7(3) in a particular case, the spouse seeking to invoke these provisions was obliged to prove the existence of an antenuptial contract which expressly excluded: (a) community of property, (b) community of profit and loss, (c) accrual sharing in any form.

The agreement between plaintiff and defendant was, it is common cause, only that their marriage was to governed by the provisions of Ord 50 of 1949 (Mauritius); it contained no further express terms.

The effect of the agreement which the parties concluded was in my view to incorporate into their agreement, by reference, the relevant provisions E of the ordinance. There can be no other interpretation of their agreement.

One can, I think, assume that the parties knew what the effect was of the relevant provisions of the ordinance, but whether or not they knew is not in my view relevant to the efficacy of their agreement. It seems to me that a term incorporated into a contract by reference is as effectively a term F of the agreement as one expressly included in the contract.

In *Burger v Central South African Railways* 1902 TS 571 the appellant's agent had delivered goods to the respondent for carriage by rail. The agent signed a consignment note which stated on the face of it that it was issued subject to the goods traffic regulations in force on the railway. Those G regulations limited the liability of the respondent in the case of loss of the goods entrusted to it unless certain steps had been taken by the consignor, and such steps had not been taken. It was argued on behalf of the appellant that his agent had not read the consignment note before signing it and had in any event not known what the effect was of the regulations referred to in the consignment note, and that he was therefore not bound by the term H in question. At 578 Innes CJ said:

'Had the regulations alluded to in the consignment note been annexed to it or printed upon it, there could surely have been no doubt as to the signatory being bound. And the fact that though referred to in the contract, they were not actually printed as part of it, cannot alter the legal position of the consignor.'

This case dealt with a written contract. It can be said that the agreement between plaintiff and defendant in this case was also written, because the marriage certificate (annexure 'B' to the agreed statement of facts) which contains the marginal note I have quoted, was signed by them. It is not, however, in my view relevant to the efficacy of a term incorporated into an J

A agreement by reference, whether that agreement was oral or written. In either case it is as much a term of the agreement as if it had been expressly included in the agreement.

B In my view therefore the relevant provisions of the ordinance in question were terms of the agreement between the parties in this case. The effect of these provisions are stated as follows in para 5 of the agreed statement of facts:

C 'In terms of the law of Mauritius if the parties elect that their marriage shall be governed by the provisions of Ord 50 of 1949, the proprietary consequences are that community of property, community of profit and loss and accrual sharing in any form are excluded and each party to the marriage thereafter retains his or her separate estate as if never married.'

D That being so the prerequisites for invoking the provisions of s 7(3) have been met.

E I should, for the sake of completeness, add that the same result can probably be arrived at by adopting the reasoning of Stegmann J in *Mathabathe's* case *supra*. At 50 the learned Judge said:

F 'On behalf of the defendant, Mr Nel submitted that the reference in the new s 7(3) of the Divorce Act to a marriage

G "... in terms of an antenuptial contract by which community of property, community of profit and loss, and accrual sharing in any form are excluded ... must not be understood in a narrow sense as being confined to a formal antenuptial contract, executed before a notary public, expressly excluding the three institutions mentioned, and registered in the deeds registry. Indeed, if those are the requirements, the class of marriage that will qualify will be remarkably small. The institution of "accrual sharing" was virtually unknown in this country before 1984. The most usual forms of antenuptial contract expressly excluded community of property and of profit and loss and the marital power, and made no reference to "accrual sharing". Exclusion of "accrual sharing" by implication must be sufficient for the purposes of s 7(3). Therefore, implied exclusion of community of property and of profit and loss must also be sufficient.'

H Having regard to the wording of the marginal note I have quoted and to the provisions of the ordinance, it can therefore be said that the parties impliedly agreed that their marriage would exclude community of property, community of profit and loss and accrual sharing.

I My finding is therefore that the plaintiff has a claim in law against the defendant under the provisions of s 7(3) of Act 70 of 1979. The defendant is ordered to pay the plaintiff's costs incurred consequent upon the order which I made in terms of Rule 33(4).

J Plaintiff's Attorney: *Sanan & Watts*. Defendant's Attorneys: *Livingston, Doull & Winterton*.

## ZULU v MINISTER OF WORKS, KWAZULU, AND OTHERS

A **Spoilation—Mandament van spolie—Applicant seeking order compelling respondents to resume supply of water to his private dwelling—Water supplied to applicant in terms of special arrangement with KwaZulu Government—Claim not one for restoration of physical possession, but for restoration of incorporeal, non-servituital right—Mandament van spolie not concerned with protection or restoration of rights but restoration of factual possession, although possession of certain incorporeal rights such as servitudes also protected—To extend protection of mandament van spolie to rights such as right to performance of contractual obligation would be to extend remedy beyond its legitimate field of application and usefulness—Applicant's use of water did not constitute use of a servituital right—Furthermore, any right applicant might have had to have water supplied to him not constituting an incident of his possession or control of a corporeal thing (ie his dwelling)—Applicant accordingly not entitled to mandament van spolie—To hold otherwise would mean granting of order for specific performance of contractual obligation in proceedings where respondents precluded from adducing evidence disproving existence of such obligation—Application denied.**

B The applicant, a senior prince in the Zulu royal family, applied for an order setting aside the decision of the respondents to terminate the water supply to his home, and ordering the third respondent to reinstate said water supply. It appeared that the applicant had had a pipeline connected to the piping system which supplied the Zulu royal household, which was situated at some distance from the applicant's home. The water had been supplied for a number of years in pursuance of an arrangement with the KwaZulu Government under which the applicant was allowed to draw water surplus to the requirements of the royal household free of charge. The decision to terminate the supply of water to the applicant was made because the surplus was no longer available. It was submitted on behalf of the applicant that the termination of the water supply was an act of spoliation and that the respondents should *arise omnia*, and before the merits of the dispute could be entered into, be ordered to restore the applicant's water supply.

C **Held**, that what the applicant was seeking was in essence an order compelling the respondents to supply water to his house, and not one which ordered the respondents to restore the applicant's physical control over corporeal property to the extent that he had been deprived thereof (for example, by reconnecting his pipeline).

D **Held**, further, that the mandament van spolie was a possessory remedy, and that an applicant for a spoliation order had to prove that he had had possession.

E **Held**, further, since what the applicant was in effect asking for was an order directing the respondents to supply to the applicant something (water) which he (the applicant) had never had possession of and of which he had accordingly never been despoiled, that the applicant could not found his claim on loss of physical possession.