REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **36080/2015**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

_____ _____

Date: **WHG VAN DER LINDE**

In the matter between:

R., J. Plaintiff

and

R., S. Defendant

JUDGMENT

Van der Linde, J:

[1] This is a divorce action in which the parties were commendably able to settle all but four issues. The first issue was whether their ante-nuptial contract ("ANC") should be rectified, the second what cash monthly amount the defendant husband should be contributing to his son's maintenance, the third whether or the defendant should pay half of the boy's future private as opposed to public school fees, and the last whether or not the defendant should pay half of his tertiary education.

[2] The plaintiff and the defendant are respectively 37 and 39 years old. They were married ten years ago, on 11 March 2007, in Stellenbosch. One child, a boy now two years old, was born of the marriage. They had met on a kontiki tour, after they had both landed up in London. The plaintiff was born and bred in Windhoek, Namibia, one of three siblings, of well-to-do parents. Her father is a leading attorney in Windhoek. After schooling there the plaintiff, whose father funded her studies, did first a BSc and then a MSc in food sciences. She then went to London to explore work opportunities there.

[3] The defendant's life path brought him from New South Wales in Australia via Japan, to London. He is a self-made man, who took himself to tertiary education in Japan, and in time, after the parties married, rounded off his education with an MBA from GIBS, locally.

[4] About a year and a half ago, the plaintiff and the defendant decided to end their marriage. He left, returning for Australia. She stayed her in Johannesburg, in Paulshof, in the house they had bought together, and where they had lived together. In their time together they acquired also a house in Nooigedagt Estate in Stellenbosch, which they were letting. Finally, to complete the introduction to Mr and Mrs R., there is a house in Australia, a residential property which the defendant bought as an investment long before parties met, and that the defendant was letting.

[5] Turning now to the remaining issues between the parties, the particulars of claim tell of an ANC that subjected their marriage to the accrual system, with both parties' assets' commencement value being reflected at nil. This contract was executed before a public notary at Stellenbosch, a Mr Feenstra. He had been recommended to the parties by the plaintiff's father. The plaintiff's claim therefore includes a claim for 50% of the nett value of the two parties assets.

[6] The problem was the defendant's Australian house. In the particulars counterclaim, he says that the parties' assets outside South Africa were meant to be excluded from the ANC, and so his Australian house was excluded. He says that was their common continuing intention, and that they had signed the ANC in the bona fide but mistaken belief that the ANC so provided. He consequently asks for an order declaring that all the parties' assets outside South Africa be excluded from the ANC. It should be noted that the defendant did not in his claim define the way in which the ANC should be rectified, nor did he claim that it be rectified by the insertion or deletion of an appropriate clause that would give effect to what he pleaded was the parties' true intention.

[7] There was a sharp conflict of fact on this issue. The defendant's evidence was that about a week before the signing of the ANC, there was a discussion between him and the plaintiff's father at the Strand. It was asocial occasion at which friends of the plaintiff's parents attended. His future father in law there said to him that no daughter of his would be marrying without an ANC. The defendant

expressed to him his concern for his Australian house, but was assuaged by the plaintiff's father that all assets outside of South Africa were as a matter of course, excluded from the ANC.

[8] The next event was when the two betrothed were to attend the offices of the notary public in Stellenbosch, for the purposes of executing the deed. This they did on 7 March 2007. Nothing of substance was said; there was certainly no advice given or, for that matter, asked. They executed the ANC in front of Mr Feenstra, the defendant comforted, he said, by the knowledge that his house was excluded.

[9] The defendant gave a very different version. She said that while they were in London, during a telephone conversation with her father, he suggested to her that it would be advisable to marry subject to an ANC; that was the done thing. It protected the other spouse should one engage on a business enterprise that went south. She discussed it with the defendant but he was not impressed. His attitude was that an ANC was something for rich people; where he came from, people did not marry by means of an ANC.

[10] Sometime later the plaintiff's father called the defendant, still in London. The plaintiff was in the flat when her father called, but she was not party to the conversation. She knew that it concerned the ANC however. After the conversation between the defendant and her father, she asked the defendant whether he was now satisfied about getting married in terms of an ANC. He said to her then that he was.

[11] She denies the discussion in the Strand, about a week before they signed the ANC, at all events to the extent that that version sought to make her a party to that conversation. She said that on the day at Mr Feenstra's office, they were shown an uncompleted ANC by the staff. Their identity numbers, and in the case of the defendant his passport number, had to be furnished; which they then did. Also, at clause 12, which provided for the commencement values of their respective estates, had not yet been completed.

[12] On this issue Mr Feenstra said to them that they could either list the value of the assets that they wished to be excluded from the growth in their respective estates, or that could simply enter a nil value, in which event all of their existing and future assets effectively became shared between them.

[13] The plaintiff said to the defendant, in response to this advice, that she was going to put in nil value; what was he, the defendant, going to do? He replied, saying that he too was going to put in a

nil value. Each of them then wrote in the word "nil" next to his/her name. The ANC agreement was then completed in typed form, and executed.

[14] In the view that I take of the matter, it is not necessary to resolve this conflict between the parties, because it seems to me that on the defendant's own version, the rectification has not been shown. It is relevant to remind oneself that the plaintiff's case is not that of justus error; that he had made a unilateral mistake that should, in all the circumstances of the case, be excused. If that were his case, he would have to seek avoidance of the agreement, and that would leave him having been married in community of property.

[15]Rather, his case is squarely a rectification. The tried and tested requirements for the successful invocation of rectification of written instruments are: the common continuing prior agreement or intention that the parties' agreement will contain a certain specified provision; the common continuing prior agreement or intention that such provision will be included within the written instrument; the signing by both parties of the written instrument on the common bona fide but mistaken belief that the written instrument in fact contained the provision concerned when in truth it did not; and a prayer for rectification of the written instrument by the insertion, at the appropriate place, of the provision concerned, which should then be properly circumscribed.

[16] The defendant's case for rectification fails at the first hurdle. No common continuing intention has been shown. Whatever transpired between the defendant and the plaintiff's father cannot without more be ascribed to the plaintiff. The defendant appears to have assumed that whatever he discussed with her father, would also automatically incorporate the plaintiff; and that whatever her father told the defendant, he (her father) would report to the plaintiff.

[17] Even if this were a natural assumption to have made, it was not a safe assumption. Her father was not her agent, and the defendant should have checked with the plaintiff whether the two of them at least, were on the same page. Absent the involvement of the father as an agent for the plaintiff, from a legal point of view, the defendant has not on his own evidence shown that he and she shared, as a fact, the same mental attitude to the meaning and effect of the ANC when they signed it.

[18] That really is the end of the rectification claim. But one may add that in another respect there are problems for the rectification claim. It is this. There is no circumscription of the clause that it is said should have been included in the written instrument, nor any claim for a rectification in those terms.

[19] Finally on this score, if it were necessary to have made a factual finding on the issue, i have to say that I would have preferred the evidence of the plaintiff, for these reasons. First, the letter written by her father to Mr Feenstra does not suggest that her father held himself out as an expert on the topic. Rather, he left it over to Mr Feenstra to advise the two. And Mr Feenstra was in attendance; it would have been entirely natural for the defendant to have asked him to confirm the impression that the defendant was labour under as regards the inclusion or exclusion of the foreign assets.

[20] Second, the plaintiff gave detailed evidence of the events in Mr Feenstra's office. That evidence fits the objective facts, such as the necessity to complete the draft ANC. On this score, it is of particular significance that clause 12 had not been completed. That implied that something had to be done about it; and the plaintiff's evidence of the exchange between Mr Feenstra and the two of them, and between the two of them only, neatly and convincingly fits the completion of that last step.

[21] Third, the plaintiff's understanding throughout her cross-examination of why an ANC was the preferred route to go, was clear an unequivocal. It reflected a proper grasp of what was involved in executing the ANC. This grasp is reflected too in her evidence concerning the contents of Mr Feenstra's advice: that of nil values were inserted, it effectively imply a complete sharing of everything the parties them had, and would acquire in the future. In short, she was, I think, more attentive on this issue than was the defendant.

[22] The claim for rectification should thus be refused. I do believe, as the defendant submitted concerning the cost of the boy Liam's schooling, that it is premature at this stage to determine that he should attend a private school. When the time comes, the parents will no doubt discuss and agree the best school; and the defendant is obliged to pay half of those fees.

[23] Similarly, I agree with the defendant that it is far too early now already to make an order concerning Liam's cost of tertiary education. Similarly, when the time comes, the parents will no doubt discuss and agree the appropriate tertiary institution; and the defendant will be obliged to pay half of those fees. Finally, the cash amount claimed by the plaintiff for Liam's maintenance, R6500 pm, is reasonable.

[24] In the result I make the following order:

WHG van der Linde
Judge, High Court
Johannesburg

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Dates trial: 25 – 26 May, 2017
Date judgment: