

## THE ANTENUPTIAL AND ADDED AGREEMENT: CAN THEY CO-EXIST?

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

*In a generous agreement entered into between would-be-spouses, after concluding an antenuptial agreement and before solemnising their marriage, the husband undertook, amongst other things to maintain his future wife for the rest of her life, also after divorce. When the marriage faltered, the wife sought to rely on the agreement. The husband argued to the contrary, saying that the agreement in effect changed the import of the antenuptial and was therefore invalid. Not so, said the Court, explaining that the aim and legal consequence of the two agreements in this matter were quite different, and that they should be read together. The summary below highlights the Court's sound reasoning.*

The Judgment can be viewed [here](#).

### FACTS

In anticipation of their marriage, Mrs C S and Mr D H concluded an ante-nuptial contract ("the ANC") which declared their intended marriage to be out of community of property with the exclusion of the accrual system. The ANC was duly registered in the Deeds Registry in January 2015 and the parties subsequently married each other in May 2015.

In February 2015, after the registration of the ANC and before the solemnization of their marriage, they concluded a written agreement ("the agreement"). The preamble recorded in the agreement read as follows:

*"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 ... 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 D H or through divorce:*

*The said D H B donates the following property to Mrs C S as her exclusive property ...".*

After this preamble, the agreement continued to list items donated, including a vehicle, immovable property and other assets. It also included a provision stating that on divorce, or on death of Mr C H, he or his estate shall pay a certain monthly maintenance amount to Mrs C S for as long as she lives.

The marriage broke down three years later and Mr D H instituted an action for divorce. In defending the action, Mrs C S filed a plea and a counter-claim. In the counter-claim, she sought enforcement of the terms of the agreement. Mr D H filed a plea to the counter-claim, admitting to having executed the agreement but denying that the terms thereof were enforceable.

The Springs Regional Court found in favour of Mrs C S, that the agreement was enforceable. Aggrieved by this outcome, Mr D H appealed to the Pretoria High Court ("the court *a quo*"), which Court set aside the order of the Regional Court.

Mrs C S thereafter appealed to the Supreme Court of Appeal. Here she argued that there was no conflict between the terms of the ANC and the agreement; they co-existed and remained valid and enforceable as two distinct and separate legal instruments, each serving a different purpose; and that sections 7(1) and (2) of the Divorce Act were not applicable in this matter as her claim was based on contract and not in terms of a maintenance agreement that was made an order of court in a divorce. She stated that the donations made by Mr D H to her in the agreement were made with the full knowledge of the contents of their ANC.

## HELD

### ***The agreement and the ANC: Different objectives***

- The primary objective of an ANC is not to create obligations, but to determine the matrimonial property system between spouses by excluding or varying the default patrimonial consequences of a civil law marriage (being that the marriage is one in community of property).
- The agreement between Mr D H and Mrs C S recorded various donations. In our law, a donation is defined as “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 donor receives no consideration nor expects any future advantage.” As pure donations between spouses are no longer prohibited in our law, there was no need for the donations to be recorded in the ANC.
- The agreement does not purport to vary the ANC. The two legal instruments can co-exist because an ANC regulates the matrimonial regime of the parties during the marriage only; the agreement, on the other hand, had no bearing at all on the nature of the spouses’ matrimonial regime and their respective estates. The spouses’ estates remained separate, the provisions of the ANC remained intact and would be applicable upon their divorce, despite Mrs C S’ entitlement to enforce the terms of the agreement.
- The finding by the Court *a quo* to the effect that the agreement constituted an impermissible attempt to vary the ANC or the parties’ matrimonial regime contrary to the Matrimonial Property Act was fundamentally flawed.
- In addition, the conclusion by the Court *a quo* ignored the clear intention of the parties as espoused in the agreement. The preamble of the agreement is unambiguous: It was carefully crafted and it 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 revealed 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. The agreement in this matter was made by the parties fully aware of 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.

### ***Is the agreement regulated under section 7(1) of the Divorce Act which speaks to maintenance agreements on divorce?***

- Section 7(1) of the Divorce Act was not applicable in the circumstances. This section confers the power upon a 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. Mrs C S did not ask in this matter for a settlement agreement to be made an order of court under s 7(1). Her claim was contractual, for specific performance, i.e. enforcement of the terms of an agreement. The fact that the agreement referred to a lifelong

monthly payment of 'maintenance' does not render it an attempt to settle a pending divorce action.

- It must be remembered that in contract law, anyone may bind his estate by contract to pay maintenance after his death. He may settle the maintenance on whomsoever he chooses, on his current wife, a former wife, a mistress, an employee or anyone else. A divorce order in terms of section 7 of the Divorce Act is also an agreement between spouses which is made an order of Court on their divorce. But, when a court has to ascertain the meaning of the words used in a section 7 maintenance agreement, the enquiry will be different since the objects of the exercise differ. In the latter instance, the Court will have to consider the intention of Parliament in this Act that applies generally when it interprets the wording of the section 7 maintenance agreement. On the other hand, in an agreement such as between Mr and Mrs in this matter, 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.
- Likewise, the agreement in this matter does did not fall within the ambit of the provisions of section 7(2) of the Divorce Act, which sets out the considerations that a court must take into account when considering the maintenance amount. The discretion under section 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. Mrs C S did not claim maintenance under section 7(2), but simply requested the divorce court to enforce the terms of the agreement. As gathered from the authorities quoted above, the agreement was neither unusual nor impermissible. The invocation of the discretionary power conferred by section 7(2) by the Court *a quo* was therefore uncalled for. Therefore, the agreement did not take away a discretion under section 7(2).

## CONCLUSION

The appeal was upheld with costs.