



Consequences of 'Void for Vagueness' Antenuptial Contract

In terms of Section 2 the Matrimonial Property Act of 1984, all marriages entered into after the commencement of this Act, which is out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss is excluded, is automatically subject to the accrual system. However, it is possible for the marriage to not be subject to the accrual system by expressly excluding the parties' intention to do so in the antenuptial contract. At the dissolution of the marriage, either by way of divorce or death of one or both of the spouses, "the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, acquires a claim against the other spouse for an amount equal to half of the difference between the accrual of the respective estates of the spouses". The amount by which the net value of the respective party's estate at the dissolution of the marriage exceeds the net value of that party's estate at the commencement of the marriage is the amount by which that party's estate has accrued.

The antenuptial contract, which excludes community of property and community of profit and loss, subject to the accrual system, has two distinguishing features and is consequently set out in two separate clauses. The first being, namely, that the net value of both of the respective party's estate at the commencement of the marriage must be determined and expressly stipulated in the antenuptial contract. The value which is provided will be subject to the accrual system. The second being, namely, that the party's assets which they intend to exclude from the accrual system at the commencement and dissolution of the marriage and/or any other asset acquired by virtue of his/her possession or former possession must be specifically listed and described in detail in the antenuptial contract. These assets will not be taken into account as part of such party's estate (will not form part of the accrual of such party's estate).

The problem herein occurs when the description of the two abovementioned clauses contradict each other materially and irreconcilably, i.e. the assets cannot at the same time be included in the net value and excluded from the accrual of each party's separate estates. Should this occur, the antenuptial

contract will be declared void for vagueness and the result will be that the parties will be found to be married in community of property.

In the Supreme Court of Appeal in *Bath v Bath* [2014] ZASCA 14 (24 March 2014), as well as in the later judgment of *RM v BM* 2017 (2) SA 538 (ECG), similar circumstances occurred, which accurately describes this scenario, in that, when providing one party's respective net value in the first clause, the antenuptial contract specified a list of assets to be taken into account when dealing with the accrual and totalling the respective net value, but similarly described the same assets in the second clause which were not to be taken into account in determining the accrual value.

The court in *Bath v Bath* (para 19), referred to hereinabove, stated that, in such a circumstance, the clauses "are so contradictory and incoherent that in my view they vitiate the contract as a whole. No certainty has been achieved 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". The court further stated that the court cannot make a contract for the parties and determine whether the parties intended to exclude certain assets from the accrual or not. If the parties are able to prove that they have a common continuing intention as to what they wished to do at the time of concluding the antenuptial contract, rectification of the antenuptial contract is the only solution. Failure to prove such a common continuing intention, however, will result in the antenuptial contract being declared void for vagueness, and in consequences the parties will be found to be married in community of property.

Article by Myrna Heunis (Candidate Attorney at Malan Lourens Viljoen Inc).