

## Legal update 2 of 2022: Validity of postnuptial agreements

### Introduction

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This update deals with the validity of postnuptial agreements between married persons and whether any changes made to the antenuptial agreement should be enforceable. Below is a summary of and more detail on the case.

### Summary

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**Case:** A M V H M, Constitutional Court (Case no: CCT 95/19). Reported 2020.

- **The finding:** A postnuptial agreement is not valid and enforceable if at the time of concluding the agreement, the parties were not contemplating divorce.
- **Practical application:** A prenuptial agreement (known as a prenup) is a contract that a couple enters into before they get married that deals with the division of financial assets in the event of divorce. A postnup is simply a prenup entered into after the parties got married.

Married couples should ensure that when they enter into a postnup that both parties do so with the intention of reaching a binding settlement for purposes of divorce proceedings.

**Case:** A M V H M, Constitutional Court (Case no: CCT 95/19). Reported 2020.

The timeline of the events leading up to the case before the Constitutional Court was as follows:

- 28 August 1993: Ms A M and Mr H M were married to each other out of community of property with the exclusion of the accrual system. The antenuptial contract was duly registered in terms of the Matrimonial Property Act ('the Act').

- Ms A M drafted a postnuptial agreement that expressly stated that Mr H M would set aside the antenuptial agreement and pay her maintenance and that she would be entitled to half of the estate.
- Apr/May 2014: Ms A M presented the agreement twice to Mr H M for signing. However, he refused. At that stage there was no mention of a divorce.
- 10 November 2014: Mr H M signed the agreement. Once again, there was no mention of a divorce.
- After that, Ms A M gave the agreement to friends for safekeeping and the parties continued with their marriage as normal.
- 30 November 2014: Ms A M confronted her husband about his extramarital affair, which led to the breakdown of their marriage.
- 15 January 2015: Mr H M filed for divorce. In her counterclaim, Ms A M asked for the postnuptial agreement to be declared valid and binding on them. Alternatively, she claimed that they entered into the agreement because they were going to get divorced, and it was meant to deal with the claims relating to the termination of their marriage and the patrimonial consequences flowing from that.

### **The Regional Court's ruling**

The Regional Court found that the agreement was invalid and unenforceable. The fact that the parties entered into an agreement without contemplating divorce meant that it could not be made an order of court.

### **The High Court's ruling**

Ms A M appealed the Regional Court judgment in the High Court.

The High Court found that the nature of the contractual relationship between the parties was that they were spouses whose marriage had broken down irretrievably. They were contemplating a divorce and had entered into the agreement with the intention of reaching a binding settlement for their pending divorce action.

The Court ruled that the postnuptial agreement was valid and enforceable.

### **The Supreme Court of Appeal's ruling**

Mr H M appealed the High Court's judgement in the Supreme Court of Appeal (SCA).

The SCA found that while the parties complied with the requirements for the agreement to be valid, it could not be enforceable as Ms A M admitted that she and Mr H M only contemplated divorce on 30 November 2014 for the first time, whereas Mr H M signed the agreement more than two weeks earlier on 10 November 2014.

The SCA ruled that a postnuptial agreement may only be made an order of court if it was in relation to an actual legal dispute or preparation for litigation between the parties. Therefore, the parties must have contemplated divorce at the time of concluding their agreement for it to be enforceable.

### **The Constitutional Court's ruling**

Ms A M appealed the SCA's judgment to the Constitutional Court (CC), challenging the effect of the SCA's ruling that all agreements between spouses who are married out of community of property are against public policy, invalid and unenforceable, unless entered into in contemplation of a divorce. She also challenged the SCA's interpretation of section 21 of the Act, claiming that it did not allow for such agreements, which negatively impacts on married couples'

contractual freedom and infringing on their constitutional rights to freedom, dignity and non-discrimination.

The CC found that the SCA did not prohibit all agreements between spouses married out of community of property. It confirmed as follows: "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." The agreement did not relate to a legal issue between the parties and had no relation to litigation.

The CC dismissed the constitutional challenges because they were not raised in the High Court and SCA respectively and found that it was not in the interest of justice to grant leave to appeal.

The application was dismissed.

Hettie Joubert and Jonathan Tabane  
**Wealth & Retirement Fund Legal**

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