

Citation	1947 (3) SA 678 (D)
Court	Durban and Coast Local Division
Judge	Milne AJ
Heard	July 29, 1947
Judgment	July 29, 1947
Annotations	Link to Case Annotations

Flynote: Sleutelwoorde

Husband and wife – Ante – and post-nuptial contracts – Registration of – When granted – Document executed in foreign country – Failure to register in South Africa – Applicant husband conversant with SA law – Duplicate original not found – Allegation that same may still be delivered – Evidence – Secondary evidence – When admitted – Lost document.

Headnote: Kopnota

First applicant, who was domiciled in South Africa, had, prior to his marriage to second applicant in America on 23rd June, 1940, executed a contract before an attorney in Kansas City under which community of property, profit and loss, and the marital power was excluded. He had taken this step as he was fully conversant with the law in South Africa governing the property rights of spouses. The attorney, however, took no steps to have the contract registered in any of the Deeds Registries in South Africa. A signed duplicate original was handed to the first applicant, who had placed it in a trunk together with the documents. This trunk instead of being sent to South Africa was despatched to Australia. Efforts were being made to trace it and the first applicant hoped that it would eventually reach him. Applicants first discovered that their marriage was not out of community when in May, 1947, the second applicant desired to make alterations to her will. In an application under section 88 of Act 47 of 1937 for an order authorising the registration of a contract having the effect of an ante-nuptial contract,

Held, that though the Court may act on the uncorroborated evidence of the spouses, it had to be satisfied that the terms of the contract sought to be registered were agreed to prior to marriage.

Held, further, that the lapse of 27 years did not operate to debar the Court from being so satisfied.

1947(3) SA p679

MILNE AJ

Held, further, that a document may properly be said to be lost when, although its existence is presumed, the precise place of its existence cannot be remembered by anyone who can reasonably be expected to have known it, and it cannot be found despite adequate search.

Held, however, that in view of the allegation that the trunk may eventually be delivered, secondary evidence of the document could not be admitted.

Held, further, that the Court was entitled to a more convincing explanation as to why the first applicant did not consider it necessary to register the contract which the parties aver had been executed in America.

Held, further that no order should be made on the application, but that the applicants be granted leave to renew it on the same papers supplemented by such information as was referred to in *Ex parte Jaffe et uxor* (1946 TPD 548).

Case Information

Application under sec. 88 of Act 47 of 1937 for an order authorising the registration of a contract having the effect of an ante-nuptial contract. The facts appear from the reasons for judgment.

K. H. Bullimore, for the applicants: The Court is entitled to grant the order upon the affidavits of the applicants. See *Ex parte Windwood* (1946 NPD 279); *Ex parte Hersh et Uxor*; *Ex parte Joffe et Uxor* (1946 TPD 548). The parties acted with due promptitude after being advised by their attorneys of their position. *Ex parte Pedder et Uxor* (1942, W.L.D. 92).

Judgment

MILNE, A.J.: This is an application by a husband and wife made under sec. 88 of Act 47 of 1937 for an order authorising the registration of a contract having the effect of an ante-nuptial contract. The application is based on an affidavit by the husband setting out the facts relied on, and a short corroboratory affidavit made by the wife. Para. 1 to 21 of the husband's affidavit are as follows:

1. *I was born in the year 1869 and came to South Africa in the year 1887 to join the firm of D. and D. H. Fraser owned by my uncles, which subsequently became Frasers, Limited, of Wepener, Orange Free State, who were then and are still carrying on extensive business operations in the Orange Free State, Transvaal, Basutoland and other parts of South Africa.*
2. *I eventually became a director and shareholder in Frasers, Limited, and had extensive business interests in the Orange Free State, Transvaal and Basutoland. Wepener was my permanent home.*
3. *In the year 1898 I married Susan Helen van Aardt, of Wepener, out of community of property and by virtue of a duly executed ante-nuptial contract which excluded community of property and the marital power.*

1947(3) SA p680

MILNE AJ

4. *In the year 1907 I resigned as a director of Frasers, Limited, and retired from active participation in the work of the Company, but retained my financial interest in this and other business concerns operating in South Africa. I still retain my interest in Frasers, Limited.*
5. *I then proceeded with my said wife on a trip to England, returning to South Africa in 1909. From that time until 1945 I proceeded overseas on a number of occasions and was away from South Africa for a considerable portion of the time, as will appear from subsequent paragraphs hereof, but always with the intention of returning to South Africa, which I regarded, and have always regarded since my arrival in 1887, as my permanent home and country of domicile.*
6. *In the year 1919 I divorced my said wife by order of the Supreme Court South Africa, Orange Free State Provincial Division.*
7. *In the year 1920, whilst on a visit to the United States of America, I married Muriel Awdrey Bernard, whose affidavit in support of this application is annexed hereto, and whose is hereinafter referred to as my wife.*
8. *During my long and extensive business experience in South Africa I had become fully conversant with the law in South Africa governing the property rights of spouses. Prior to the marriage, therefore, and being fully aware that by reason of my South African domicile community of property would attach to my marriage unless I executed a contract before marriage excluding the Common Law provisions of the Union of South Africa, I discussed the question of our respective property rights with my wife and we agreed to enter into a contract which would enable us respectively to have and possess our own separate estates and to administer them without control or hindrance from the other. To this end we proceeded to a firm of solicitors in Kansas City in the State of Missouri.*
9. *I am unable to recall the name of this firm of solicitors, but I remember that they were well conversant with the law prevailing in the Union of South Africa with regard to the property rights of spouses, and were aware that it would be necessary for me and my wife to execute a contract before marriage excluding community of property and the marital power, if these consequences were not to attach to our marriage.*
10. *Neither we nor the American firm of solicitors were, however, aware of the provisions of the Deeds Registries Act of 1918 requiring registration of such a contract in one of the Deeds Registries in the Union.*
11. *Accordingly my wife and I caused to be drawn up and executed in Kansas City a contract which declared that our marriage was to be free from community of property and of profit and loss and that the marital power which I would otherwise have over the property of my wife was to be excluded. I cannot recall the exact terms and conditions contained in this contract, but I am sure that it followed very closely the ordinary form of ante-nuptial contract in use in South Africa, and that it excluded community of property and the marital power.*
12. *Subsequent to the execution of this contract, and on the 23rd June, 1920, my wife and I were married at St. Paul's Church, Kansas City aforesaid, and a certificate of marriage, a copy of which is annexed hereto marked 'A' was issued and handed to us by the Rector of St. Paul's Church aforesaid.*

1947(3) SA p681

MILNE AJ

13. *No steps were taken by me, or as far as I am aware by the solicitors who prepared the contract, to have it registered in one of the Deeds Registries of the Union of South Africa, but a signed duplicate original was in my possession until the year 1945, when it was packed in a trunk with other documents and possessions belonging to me and despatched from England to my South African address by Messrs. Pickfords, of London. This trunk has never reached me, but as a result of enquiries made I have reason to believe that it arrived in*

Australia by mistake. My agents are persisting in their enquiries with a view to having this trunk traced, and it may eventually be delivered to me.

14. *Since our marriage we have assumed that each of us had the right to manage his or her own separate estate, and each of us has purported by last will and testament to dispose of his or her own separate estates as if the contract executed by us had been duly registered in accordance with the statutory requirements in the Union of South Africa.*
15. *At the end of May, 1947, my wife consulted Messrs. Garlicke and Bousfield, solicitors, of Durban, with a view to making alterations to her will, and these solicitors raised the question of her right to dispose of a separate estate by reason of her marriage, without an ante-nuptial contract, to a man domiciled in South Africa. Messrs. Garlicke and Bousfield were then made acquainted with the facts set out in this affidavit, and caused enquiries to be made from local firms of solicitors who had acted for me many years ago, with a view to ascertaining whether any steps had been taken to register the marriage contract executed by me in America, but they were unable to trace any such record.*
16. *I was further advised to communicate with one of my brothers who is in the United States of America, and to request him to endeavour to seek out the firm of solicitors at whose offices the marriage contract was executed, but I have since ascertained that my said brother, who is nearly seventy years of age, is very seriously ill and not expected to live.*
17. *My wife is a chronic asthmatic. She is sixty-one years of age and is in very poor health indeed. I am in good health at present, but having regard to my age and my wife's state of health, I hasten to make this application without waiting for the confirmation of what I have stated herein, which would be forthcoming if my lost trunk can be found or if I can succeed in tracing the records of my marriage contract in Kansas City, United States of America.*
18. *After my marriage in America in 1920 I travelled to Canada with my wife and we then proceeded to England and booked passages to South Africa. My father, however, died before we could leave, and my wife's mother urged us to make a lengthy stay in England. We accordingly cancelled our passages to South Africa.*
19. *My wife became ill during our stay in England and for many years was prevented from travelling to South Africa by reason of her ill-health. I therefore divided my time between South Africa and England, making frequent sea journeys between the two countries until in 1934 my wife was able to travel and we came out to South Africa. Almost immediately, however, she was compelled to return owing to her mother being severely ill, and I followed her some time later, and was in England at the outbreak*

1947(3) SA p682

MILNE AJ

of war in 1939. This prevented us from coming back to South Africa until 1945, when I purchased a property at Kloof, Natal, where my wife and I now live and where we intend to remain.

20. *I have at all times for the purposes of income tax payable to the Union Government been regarded as domiciled in South Africa.*
21. *Neither my wife nor I has any debts other than ordinary current household liabilities for food and clothing.'*

The wife's affidavit, after confirming her husband's affidavit from para. 6 onwards, continues as follows:

'In particular I confirm that my husband and I agreed before our marriage that it should be without community of property and of profit and loss, that each of us should have and retain our own separate estates, and that the marital power which my husband would otherwise have over my estate should be excluded. We executed a written contract, as stated in my husband's affidavit, setting out the terms of our agreement.

I concur in this application and I pray that this Honourable Court may be pleased to grant an order in terms of the order prayed hereunto annexed, or in such other terms as to this Honourable Court may seem meet.'

It seems to be quite clear that the Court may act on the uncorroborated affidavits of the two spouses in such cases (*Winwood's case* (1946 NPD 279); *Ex parte Hersch et Uxor, Ex parte Joffe et Uxor* (1946 TPD 548)). It is equally clear from these decisions that the Court is not bound to grant relief on such testimony, merely because interim creditors are always protected by the Court in making an order. Sec. 7 of Law 22 of 1863, which purports to deal only with marriages contracted in South Africa, makes provision for the registration of marriage contracts made postnuptially, but as far as I know there is no other law in this country permitting the registration of such contracts, and before the Court can grant relief under sec. 88 of Act 47 of 1937, it must, in each particular case, be satisfied that the terms of the contract sought to be registered were agreed upon prior to the marriage. On the other hand, mere lapse

of time, even, as in this case, a lapse of 27 years, does not operate to debar the Court from being so satisfied and, if the applicants' statements are to be accepted at their face value, it follows that they acted with due promptitude in making this application once they were told by their solicitors that it was necessary. *cf. Ex parte Pedder et Uxor* (1942, W.L.D. 92). I find myself, however, in a twofold difficulty in this case. The first part of it is that if the applicants' statements are to be taken at their face value, they establish the existence of a written antenuptial contract, the original of which is, they suggest, still with the records of the Kansas City firm of solicitors in whose office it

1947(3) SA p683

MILNE AJ

was prepared, and also the existence of a duplicate original in a trunk which, although it has been mislaid, is not stated to have been irretrievably lost. On the contrary the applicants appear to hold out some hope of recovering it. The fact that they have forgotten the name of the Kansas City firm is perhaps not to be wondered at, and I am bound to sympathise with them in the difficulty they will have in locating the original agreement if they do not succeed in recollecting the name of the firm. No doubt a document may properly be said to be lost when, although its existence is presumed, the precise place of its existence cannot be remembered by anyone who can reasonably be expected to have known it, and it cannot be found despite adequate search. The difficulty may, indeed, prove insuperable but, owing to the grave illness of the husband's elderly brother in the United States, no attempt has yet been made on behalf of the applicants to seek out the firm of solicitors in whose office the written contract was prepared. And as the missing trunk containing the duplicate original may, as the husband says, eventually be delivered to him, I do not see how I can say that the original has been lost. (See Taylor on *Evidence* (12th ed., paras. 429 and 435).) The applicants' attitude in bringing this application without waiting for more conclusive evidence is evidently partly due to the fact that the husband is now 78 years old and his wife in poor health, and no doubt partly due to the consideration that applicants must, in a case of this kind, show that they have acted with due promptitude in bringing the application. But these considerations cannot, it seems to me, make admissible, secondary evidence not otherwise receivable.

The second part of my difficulty is due to the fact that the husband, who was previously married out of community of property under a duly executed ante-nuptial contract, declares that at the time of his present marriage he was 'fully conversant with the law in South Africa governing the property rights of spouses'. He does not say that the ante-nuptial contract which he made prior to his former marriage was registered but, in the absence of any statement that it was not, it seems to me reasonable to think that it was, in view of the provisions of Law 7 of 1892 (O.F.S.), which appear to have remained in force up to the passing of the Deeds Registries Act of 1918. It is true that in para. 10 of his affidavit he says that he was not aware of the provisions of the Deeds Registries Act of 1918 requiring registration of ante-nuptial contracts, but that statement, if taken literally, is really inconsistent with

1947(3) SA p684

MILNE AJ

his claim that he had, prior to his second marriage, become fully conversant with the law in South Africa on the subject. That claim is obviously made by him in order to explain why he and his wife made an ante-nuptial contract. It is not a claim that I would care to make myself and I am prepared to regard it as being intended merely to convey that he was aware that, generally speaking, community of property prevails between spouses in South Africa in the absence of the execution of an ante-nuptial contract. But even so, when regard is had to the ante-nuptial contract he made before his former marriage, it seems to me that the Court is entitled to have a more convincing explanation from the husband as to why he did not consider it necessary to register the antenuptial contract which the parties say was executed in America.

I propose in these circumstances to adopt a course similar to the one taken by SCHREINER, J. in *Pedder's case (supra)*, namely to make no order on the application but to give the applicants leave to renew it on the same papers, supplemented by such further information as they may be able to put forward touching, for example, the fate of the originals of the contract said to have been made in America. I would draw the attention of the applicants to the fact that it has been held by a full bench of the Transvaal Provincial Division in *Joffe's case (supra)*, at p. 554, that, in order to put the Court in a proper position to judge whether an application under the section should be granted, the parties should produce, *inter alia*, evidence of their financial position, 'both at the time of the making of the alleged agreement, and at the time of moving the Court'. The reasons why they should do so are indicated in the judgment in that case, and are no less applicable to a case such as this where the need to have an antenuptial contract duly registered was only raised when the wife's right to dispose by will of a separate estate was questioned by the parties' solicitors. I would recommend, too, if the application is renewed, that the parties place on record what dealings, if any, the wife has had in immovable property (including mortgages) in South Africa, and the extent, if any, to which she has required her husband's assistance in operating any separate banking account or in entering into any other contractual relationships. I assume,

in the absence of any statement to the contrary, that the husband's domicile at the time of his present marriage was still the Orange Free State. If it was Natal, of course his marriage would be out of community of property, by virtue of the provisions of sec. 2 of Law 22 of 1863 (*Brown v Brown* (1921 AD 478)).

1947(3) SA p685

MILNE AJ

There will be no order on the application, but the applicants will have leave to move the Court on the same papers supplemented in such manner as they may think fit.

Applicants' Attorneys: *Garlicke & Bousfield*.