

## Court case on the accrual and a post nuptial contract

The plaintiff (L) and the first defendant (C) were married out of community of property with inclusion of the accrual in 1997. C excluded his sole proprietorship from the operation of the accrual, and the parties agreed not to apply the consumer price index to calculate L's commencement value.

Shortly after the marriage the C Trust was formed of which the two spouses and their children were to be beneficiaries. The trust was formed to by an immovable property for C's business. A few years later L sold her interest in a partnership (a restaurant). The couple had two children, a daughter born in 1997 and a son in 2002. In 2000 L was diagnosed with cancer for which she received treatment and she recovered fully. C developed his business and later conducted it in the form of a company.

In 2003, on C's insistence, the parties obtained a court order giving them permission to enter into a post nuptial contract. The contract excluded any business interest C had at the time as well as any future business interests and immovable property acquired by C from the accrual. L's business interests, present and future, immovable property and interest in insurance policies were excluded and the CPI was included to calculate her commencement value at R50 000. The marriage came under stress and divorce proceedings started in 2013, and was moved to the High Court in July 2014 because L was seeking relief also w.r.t. to the trust.

L testified that she was financially vulnerable while C was substantially increasing his wealth, that she was afraid in 2003 that she would be left destitute if she did not sign the post nuptial agreement and that C had had several extra-marital affairs over the years, including a long-term affair with one of his employees.

L attacked the validity of the post nuptial agreement on the basis that she was unduly and improperly influenced by C to sign the agreement. She also averred that C sold his sole proprietorship to the company and did not merely convert the business into a company. This allegation was supported by the fact that an amount of goodwill was included in the value of the business at the time. L also averred that the C Trust was C's alter ego and that he treated the trust property as his own. Consequently L claimed that the value of the trust assets must be included in the value of C's assets for purposes of a just and equitable division of the estates.

The court (Salie-Hlophe J) held that the post nuptial contract was invalid for two reasons:

- 1) that L was indeed unduly influenced to the extent that there was no true consensus about the contents of the agreement, and

2) that the contract did not have the effect of changing the matrimonial property regime as envisaged by section 21 of the Matrimonial Property Act, 88 of 1984. As to the second point, the court held the view that the contract eroded the accrual, but did not change the matrimonial property regime to exclude the accrual. The court therefore held that the accrual applied as envisaged in the ante nuptial contract.

The court also held that the trust was C's alter ego. In this regard the court relied on the fact that the trust was called the C Trust, that C changed the way maintenance for the children was funded by the company extending loans to the trust which the trust used to pay the children's maintenance, and that C did not consult the independent trustee on any of these decisions. The trust property was therefore taken into consideration in the division of assets forming part of the divorce order.