[zRPz]**HONEY v HONEY 1992 (3) SA 609 (W)** A

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| **Citation** | 1992 (3) SA 609 (W) |
| **Court** | Witwatersrand Local Division |
| **Judge** | Du Plessis J |
| **Heard** | January 30, 1991 |
| **Judgment** | January 30, 1991 |
| **Annotations** | [Link to Case Annotations](http://juta/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalr%7d&xhitlist_q=%5bfield%20folio-destination-name:'a923609'%5d&xhitlist_md=target-id=0-0-0-248223" \t "main) |

B

[zFNz]**Flynote : Sleutelwoorde**

Husband and wife - Proprietary rights - Variation of property regime in terms of postnuptial contract - Contract not entered into with leave of Court as provided for in s 21(1) of the Matrimonial Property Act 88 of 1984 - Repeal in s 22 of Act of prohibition against donations between C spouses not automatically abrogating common-law rule that parties may not by postnuptial agreement amend matrimonial property system, whether such amendments intended to have effect inter partes only or not - Contract void and unenforceable.

[zHNz]**Headnote : Kopnota**

D The proprietary rights of the parties to the instant divorce action were governed by an antenuptial contract, which specified that the marriage would be subject to the accrual system in terms of the provisions of chap 1 of the Matrimonial Property Act 88 of 1984 ('the Act'). Some three years after the marriage a further written agreement was concluded between the spouses, in terms of which the parties purported to cancel their antenuptial contract. This later contract was not registered in the deeds registry nor entered into with the leave of the Court as provided for in s E 21(1) of the Act. The plaintiff (the wife) sued the defendant for divorce and, relying on the postnuptial contract, *inter alia*, claimed an order declaring that she was entitled to retain as her property the assets listed therein as hers. An order was subsequently granted in terms of Rule 33(4) that the issues regarding the validity of the postnuptial contract be adjudicated separately from the other issues. At a pre-trial conference it was agreed that the only issue to be determined was whether the F postnuptial agreement was enforceable as between the parties *inter se* for the purpose of determining their proprietary rights in the action. It was contended on behalf of the plaintiff that the common-law rule that postnuptial amendments of the matrimonial property system were void had its *ratio* in the prohibition of donations between spouses. Section 22 of the Act however provided that 'no transaction effected before or after the commencement of this Act is void or voidable merely because it amounts to a donation between spouses', so that, so it was contended, the *ratio* for G the invalidity of postnuptial contracts varying the matrimonial property system no longer existed (at least as far as the parties *inter se* were concerned). Thus, according to the plaintiff, the present postnuptial contract was valid as far as the parties themselves were concerned. The defendant contended that the postnuptial contract was invalid.

*Held*, that s 2 of the Act made it clear in so many words that the accrual system could, when the parties were married out of community of property and with the exclusion of the community of profit and loss, only be H excluded by *ante*nuptial contract.

*Held*, further, that the provisions of s 2 governed both antenuptial contracts that were duly registered (and which were therefore valid *vis à vis* third parties) and those which were not (and were therefore valid only *inter partes*), so that the plaintiff's contention that s 2 did not affect contracts valid only *inter partes* (such as the present postnuptial contract) could not be upheld.

*Held*, further, with regard to the plaintiff's contention that s 22 of the I Act had abolished the *ratio* for the invalidity of postnuptial contracts which varied the matrimonial property system, that the common-law authorities regarded the rule that the matrimonial property system was immutable as a substantive rule with a separate existence and not as a mere application of the rule prohibiting donations between spouses.

*Held*, further, that the applicable case law also did not assist the plaintiff's case, providing no authority for the proposition that a postnuptial contract was effective *inter partes* provided that it did not J amount to a prohibited donation.

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A *Held*, further, that the repeal of the prohibition against donations between spouses accordingly did not automatically abrogate the rule that parties may not postnuptially amend an antenuptial contract, whether such amendment was intended to have effect *inter partes* only or not.

*Held*, accordingly, that the instant postnuptial contract was invalid and unenforceable as between the parties *inter se*. B

[zCIz]**Case Information**

Adjudication in terms of Rule 33(4) of the Uniform Rules of Court on the issue of the validity of a postnuptial contract. The facts appear from the reasons for judgment.

*R W Nugent* for the plaintiff.

*D A Smith* for the defendant. C

[zJDz]**Judgment**

Du Plessis J: The parties to this divorce action were married out of community of property on 27 September 1986. They concluded, prior to their marriage, an antenuptial contract which was duly registered in the deeds registry. This contract, entered into on 16 September 1986, provided, D apart from the normal clauses excluding community of property, that their marriage would be subject to the accrual system in terms of the provisions of chap I of the Matrimonial Property Act 88 of 1984 (hereinafter referred to as 'the Act').

   It is common cause between the parties that, on 8 September 1989 (some E three years after the marriage), they concluded a further written agreement. This contract was notarially executed, not registered in the deeds registry and not entered into with the leave of the Court as provided for in s 21(1) of the Act. This latter agreement provides that the parties:

   1. . . . (H)ereby cancel the antenuptial contract dated 16 September 1986 entered into between them regulating the proprietary rights of the marriage.

    F 2. With effect from the date of the marriage community of property, community of profit and loss and the accrual system under the Matrimonial Property Act 88 of 1984 shall be excluded from the marriage between the parties.

   3. For the sake of clarity it is recorded that the respective assets of the parties are as follows: . . . .'

Then follows a list of the assets of each of the parties. (To this G contract I shall henceforth refer as the postnuptial contract.)

   The plaintiff (who is the wife) sued the defendant for a divorce and, relying on the postnuptial contract, *inter alia* claimed an order declaring that she is entitled to retain as her sole and absolute property the assets listed as hers in the postnuptial contract.

H    The defendant, in his plea, maintains that the postnuptial contract is void *ab initio* alternatively that it is voidable. In a counterclaim the defendant relies on the antenuptial contract and claims from the plaintiff relief based thereon.

   On 18 September 1990 De Klerk J granted an order, application having I been made in terms of the provisions of Rule 33(4) of the Rules of Court, that the issues regarding the voidness of the postnuptial contract be heard and decided separately from the other issues.

   At a pre-trial conference the parties agreed that 'the only issue to be determined is whether the said agreement is enforceable as between the parties *inter se* for the purpose of determining their proprietary rights J in the action'. It is only that issue which, in accordance with the order

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A referred to, now falls to be determined by this Court. The other issues have been stayed pending the determination of the present one.

   In terms of our common law, subject to an exception to which reference will be made later, parties to a marriage cannot by postnuptial agreement change their matrimonial property system. In *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 224 Innes CJ phrased the rule thus: B

   'Apart from statute, then, community once excluded cannot be introduced, and once introduced, cannot be excluded, nor can an antenuptial contract be varied by a postnuptial agreement between the spouses, even if confirmed by the death of one of them. The only exception to the rule is afforded by an underhand deed of separation either ratified, or entitled C at the time to ratification under a decree of judicial separation.'

(See also *Ex parte Smuts* 1914 CPD 1034 at 1037; *Ex parte Venter et Uxor*[1948 (2) SA 175 (O)](http://juta/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalr%7d&xhitlist_q=%5bfield%20folio-destination-name:'482175'%5d&xhitlist_md=target-id=0-0-0-248225" \t "main) at 179; *Ex parte Nathan Woolf et Uxor* 1944 OPD 266 at 269; *Edelstein v Edelstein NO and Others*[1952 (3) SA 1 (A)](http://juta/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalr%7d&xhitlist_q=%5bfield%20folio-destination-name:'5231'%5d&xhitlist_md=target-id=0-0-0-88783" \t "main) at 15G; *Ex parte Dunn et Uxor*[1989 (2) SA 429 (NC)](http://juta/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalr%7d&xhitlist_q=%5bfield%20folio-destination-name:'892429'%5d&xhitlist_md=target-id=0-0-0-248227" \t "main) at 431B-D.)

D    Counsel for both parties to the present action accepted the existence of the common-law rule as premise.

   On behalf of the plaintiff Mr *Nugent* submitted that the reason for the rule was to be found in the fact that, by common law, donations between spouses were prohibited: a postnuptial contract purporting to vary the E matrimonial property system of the parties invariably amounts to a donation in some form or another, so the argument went, and because donations were prohibited therefore a variation of the antenuptial contract would be void. Section 22 of the Act now, however, provides as follows:

   'Subject to the provisions of the Insolvency Act 24 of 1936, no transaction effected before or after the commencement of this Act is void F or voidable merely because it amounts to a donation between spouses.'

This being the position, the argument proceeded, the *ratio* for the voidness of a postnuptial contract varying the matrimonial property system has fallen away, at least as far as the parties *inter partes* are concerned. It therefore follows that the present postnuptial contract is valid and enforceable as far as the parties themselves are concerned, G although it might not be valid and enforceable as far as third parties are concerned.

   (In support of his argument Mr *Nugent*, *inter alia*, relied upon an unpublished article by Dr *K Davis*. A copy of this article has been made available to the Court and reference will be made to the article as 'the unpublished article'.) H

   The Act itself in my view provides the answer to Mr *Nugent's* argument. Section 2 of the Act provides as follows:

   'Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is I subject to the accrual system specified in this chapter, except insofar as that system is expressly excluded by the antenuptial contract.'

This section makes it clear in so many words that the accrual system can, when the parties are married out of community of property and with the exclusion of the community of profit and loss, only be excluded by J antenuptial contract.

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A    Mr *Nugent*, however, submitted that s 2 is no obstacle to his argument, his argument being that the present postnuptial contract is only valid *inter partes*: s 2 does not affect the present issue because that section only regulates the parties' matrimonial property system *vis-à-vis* third parties.

   The argument cannot, in my view, on an interpretation of s 2, be upheld. B It must be kept in mind that the term 'antenuptial contract' is not synonymous with the term 'duly registered antenuptial contract'. An antenuptial contract is valid between the parties and *inter partes* regulates their matrimonial property system even if it is not registered. (See *Ex parte Spinazze and Another NNO*[1985 (3) SA 650 (A)](http://juta/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalr%7d&xhitlist_q=%5bfield%20folio-destination-name:'853650'%5d&xhitlist_md=target-id=0-0-0-173221" \t "main) at 656D-658D; see also s 86 of the Deeds Registries Act 47 of 1937; Joubert 'Informele C en Ongeregistreerde Huweliksvoorwaardekontrakte' (1982) 16 *De Jure* (vol I) 70 at 74 and further.) A duly registered antenuptial contract on the other hand regulates the parties' matrimonial property system also as regards third parties. In s 2, the Legislature does not deal only with registered D antenuptial contracts but, with presumed knowledge of the status of an antenuptial contract, refers to 'an antenuptial contract' without qualification. If the intention in s 2 was to deal only with the parties' position *vis-à-vis* third parties, the reference would have been to a duly registered antenuptial contract.

   The answer to Mr *Nugent's* thorough argument may, however, not be as simple, and I deem it necessary also to deal with the argument relating to E the reason for the rule against postnuptial amendments to antenuptial contracts.

   The common-law authorities that I have consulted in most instances discuss the question whether parties may change the matrimonial property system from one in community of property to one out of community of F property separately from the other question whether parties can by postnuptial contract amend or cancel an antenuptial contract. As will be seen later in this judgment, the authorities relied upon by Mr *Nugent* invariably deal with instances where parties married in community of property endeavoured to change to out of community of property. I shall, however, assume that there in fact is only one rule, namely the rule as G formulated by Innes CJ in the *Larkan* case *supra*. (See also De Groot *Inleidinge* 2.12.5.) I might add that the passages quoted hereunder are, except for *De Groot*, those that deal with the ability postnuptially to amend or cancel an antenuptial contract.)

   With the possible exception of Van der Linden *Koopmanshandboek* 1.3.5, H the common-law authorities regard the rule that the matrimonial property system is immutable as a substantive rule with a separate existence and not as a mere application of the rule prohibiting donations between spouses. (See *Voet (Gane's* translation) 23.4.60; Groenewegen *De Leg Abr Ad C.* 4.29.11; Van Leeuwen *RHR* 4.24.12; Cos *Rechtsgeleerde Verhandelingen* I *over Huwelykze Voorwaarden* at 55 para III; Arntzenius *Inst* 2.4.10 (translation by *F P van den Heever* at 147-8).) Maasdorp JA in *Larkan's* case *supra* at 231 also deals with the question whether the rule referred to above is a mere application of the prohibition against donations between spouses in the following manner:

   'It is said by the writers that during marriage community of property cannot be altered by contract, because that would create a gift between J the spouses, but that

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    A does not place an extinction of community of property in the same position as a gift. There are, in law, special rules affecting community of property, and other rules affecting gifts.'

   It is true that most of the authorities quoted give the prohibition of donations between spouses as a reason for the rule, but most of them also give other, differing reasons as well. De Groot *Inleidinge* 2.12.5 states B the general rule only, and gives no reasons save that, once the marriage has been solemnised, the law of the land takes effect and the parties cannot change it *inter vivos*.

   The rule being a substantive rule for which different reasons are given cannot be regarded as having been abrogated by the repeal of one of the C reasons given by the authorities for its existence. *Davis* (in the unpublished article) analyses the common-law authorities, categorises the reasons furnished by them for the rule and then argues that, but for the protection of creditors, all the other reasons for the rule are either of historic interest, are not of application to marriages out of community of D property or had been repealed or became obsolete. The argument has much to commend itself in logic, but the mere fact that there are authors who give reasons that are not dealt with by *Davis* illustrates the danger of such logic. (See *De Groot (loc cit*); *Arntzenius (loc cit)*; H D J Bodenstein 'The Validity of Pacts between Husband and Wife' (1917) 34 *SALJ* 11 at 16-28.) E

   Mr *Nugent* also relied on various decisions of our Courts as authority for the proposition that the prohibition against donations between spouses is in fact the only reason for the immutability of spouses' matrimonial property system.

F    In *Union Government (Minister of Finance) v Larkan (supra* at 220) Innes CJ does refer to the prohibition against donations between spouses as a reason for the rule, and says that therefore the rule

   'was *largely* affected in the Netherlands by the further question whether the law regulating the transaction absolutely prohibited donations between spouses'.

(My italicising.) I do not read the learned Chief Justice at all as G suggesting that the rule can be regarded as a mere application of the rule against donations between spouses. (See in this regard also the passage from the judgment of Maasdorp JA quoted above.)

   In his formulation of the rule (the one quoted above) Innes CJ refers to an exception to the general rule that the matrimonial property system cannot be changed by postnuptial contract - if the parties were entitled H at the time of the agreement to a decree of judicial separation, they could *inter partes* divide the common estate. (See in this regard also *Voet* 24.2.19 and *De Groot* 3.21.11. See also *Scheltinga se dictata oor De Groot* as edited by De Vos and Visagie and published by *Lex Patria* publishers in 1986 at 425.)

   Mr *Nugent* relied on *Ziedeman v Ziedeman* (1838) 1 Menzies 238 as I authority for the proposition that a postnuptial contract is effective *inter partes* provided it does not amount to a prohibited donation. *Ziedeman's* case, however, is no more than an application of the exception referred to by Innes CJ and does not assist the plaintiff in the present case.

*Pugh v Pugh* 1910 TPD 792 also dealt with a notarial deed of separation J and similarly does not assist the plaintiff.

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A    Mr *Nugent* further relied on the case of *Coulthard v Coulthard* 1922 WLD 13 where the learned Judge said the following at 16-17:

   'The law laid down in *Ziedeman v Ziedeman* . . . is as follows: All contracts which spouses may lawfully and effectually enter into with each other *before marriage* may lawfully and effectually be entered into by them *stante matrimonio* insofar as regards and concerns themselves provided B always that such contract be not of a nature as to constitute, either directly or indirectly, a deed of donation from one spouse to the other. From which follows the corollary: A contract entered into between spouses whereby the one only receives from the other what that other was legally bound to grant and no more is a valid contract between the parties.'

What was said in *Ziedeman's* case is clearly *obiter* as that case dealt with the exception to the general rule that I have referred to. In any event, C as far as the statement relates to a postnuptial contract purporting to amend the parties' matrimonial property system, it is not in accordance with the authorities quoted above. *Coulthard's* case itself was decided on two principles: the contract in question did not contain a provision for separation *a mensa et thoro* and therefore did not fall under the exception D referred to above. The second principle upon which *Coulthard's* case was decided was purely that the contract under consideration in fact amounted to a donation between spouses and was therefore void. The case is not authority for the general proposition that as long as it does not contain a prohibited donation, the parties can validly by postnuptial contract E change the matrimonial property system.

   In *Ex parte Marx et Uxor (2)* 1936 CPD 499 the Court had to decide whether parties could postnuptially alter their marriage from one in community of property to one out of community of property. Jones J (with F whom Davis J concurred) does refer to *Larkan's* case *supra* and said that in that case it was decided that parties who are married in community of property cannot by postnuptial agreement change to a marriage out of community of property 'for the very simple reason that according to our law a change from a communal marriage to a marriage out of community amounts to a donation between the spouses'. The Court, however, does not go into the question whether the contract then under consideration in fact G did amount to a donation or not, and simply found that the contract is void. This case too does not afford authority for the proposition advanced by Mr *Nugent*.

   It is therefore concluded that the mere repeal of the prohibition against donations between spouses did not automatically abrogate the rule H that parties may not postnuptially amend an antenuptial contract whether such amendment is intended to have effect *inter partes* only or not.

   The following order is therefore made:

   The contract between the parties dated 8 September 1989 and purporting to vary their antenuptial contract is void and unenforceable as between the parties *inter se*. The plaintiff is ordered to pay the costs of the I argument in respect of the question of law and fact decided in terms of Rule 33(4).

   Plaintiff's Attorneys: *Feinsteins Inc*. Defendant's Attorneys: *Shapiro &* J *Orelowitz*.