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**THE REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: 2018/39527**

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED

\_\_\_\_\_  
DATE

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SIGNATURE

In the matter between:

**N[...] W[...] M[...]**

**PLAINTIFF**

and

**N[...] Q[...] M[...]**                      **FIRST DEFENDANT**

**THE REGISTRAR OF DEEDS, JOHANNESBURG**

**SECOND DEFENDANT**

**Delivered:** 16 August 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to *CaseLines* and

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by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 16 August 2023.

*Husband and wife — Community of property — Immovable property — Divorce — Practice — Pleading — Grounds for exception — No serious prejudice — Exception dismissed.*

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## JUDGMENT

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**PG LOUW, AJ**

- [1] The plaintiff filed an exception to the first defendant's plea on the ground that the plea does not disclose a defence.
- [2] The plaintiff and the first defendant were married to each other in community of property on 9 March 1995. They purchased an immovable property which forms the subject matter of the plaintiff's action (the property). The property was registered in both the names of the plaintiff and the first defendant on 31 July 2002.
- [3] On 6 June 2012 the marriage was dissolved in terms of a decree of divorce granted by the regional court for the regional division of Gauteng. The relevant part of the decree reads as follows:
- “2. Forfeiture of the benefits arising from the marriage in community of property in favour of the Plaintiff.”
- [4] The first defendant in this court was the plaintiff in the regional court. The plaintiff in this court was the defendant in the regional court.
- [5] At the time of the divorce the property was one of the assets in the joint estate. The joint estate consisted of a number of assets including furniture,

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pension benefits and motor vehicles. The joint estate also had a number of debts, including a bond registered against the property.

[6] On 28 June 2018, the Registrar of Deeds, Johannesburg (second defendant) acting in terms of the provisions of s 45*bis*(1) of the Deeds Registry's Act 47 of 1937 (the Act) made an endorsement on the Deed of Transfer in terms of which the plaintiff's right, title and interest in the property was transferred to the first defendant.

[7] These are the pertinent common cause facts of the matter.

[8] In essence, the plaintiff claims that the second defendant was only entitled to effect the endorsement if the first defendant lawfully acquired the share of the plaintiff and that the first defendant has never lawfully acquired the plaintiff's share in the property. As such, the plaintiff alleges that the second defendant was not entitled to endorse the Deed of Transfer as it did.

[9] The plaintiff claims that:

a) The second defendant is ordered to cancel the endorsement.

b) The joint ownership in the property is terminated.

c) The property is to be sold and the net proceeds of the sale is to be divided equally between the plaintiff and the first defendant.

[10] The first defendant has delivered a plea and conditional counterclaim. The defence raised in the plea is essentially that:

“5.5 The effect of the order was that the court granting the decree of divorce was satisfied on the facts before it that an equal division of the joint estate would result in the plaintiff receiving an undue benefit.

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The court accordingly granted an order the effect of which was that the plaintiff forfeited the whole of the benefit that he would receive from a division of the joint estate. Accordingly, the effect of the order was that there would be an unequal division of the estate, the plaintiff forfeiting his share of the joint estate and the first defendant receiving 100% of the joint estate.”

[11] The first defendant pleads further that -

“the endorsement made by the second defendant was lawful in that upon the unequal division of the joint estate whereby the plaintiff forfeited his entire share in the joint estate in favour of the first defendant, the first defendant became the sole owner of the immovable property.”<sup>1</sup>

[12] The first defendant also pleads that she has assumed responsibility for: (i) all bond repayments in respect of the property prior to and subsequent to the divorce; (ii) municipal rates and taxes in respect of the property before and subsequent to the divorce; and (iii) the maintenance and improvement of the property.<sup>2</sup>

[13] The plaintiff pleads that a division of the joint estate has never taken place.<sup>3</sup>

[14] The first defendant pleads that the parties’ joint ownership of the joint estate has terminated in accordance with the provisions of the decree of divorce and, in the alternative, pleads that should the court find that there was no division of the joint estate then an order in terms of the first defendant’s conditional counterclaim should be granted.<sup>4</sup>

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<sup>1</sup> Plea para 8.2.

<sup>2</sup> Plea para 9.

<sup>3</sup> Particulars of claim para 8.

<sup>4</sup> Plea para 10.

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[15] In the conditional counterclaim, the first defendant claims that, if there has not been a division of the joint estate, a receiver must be appointed with certain powers, essentially to cause a division of the joint estate.<sup>5</sup>

[16] Paragraph 4 of the exception reads as follows:

“It is respectfully submitted that an order for forfeiture, having regard to the admitted facts in this matter was nothing more than an order for a division of the joint estate. The forfeiture order was never an order that the plaintiff forfeited his undivided share in the joint estate (*Keyser v Keyser* 1974 (4) SA 12 TPD at 15). He retained the interest in the vehicle he used as well as in his pension interest.”

[17] Mr Bruwer, counsel for the plaintiff, also referred the court to *Smith v Smith*.<sup>6</sup>

[18] It bears mentioning that the plaintiff previously successfully excepted against the defendant's (previous) plea on the basis that it did not disclose a defence. Dlamini AJ upheld the previous exception in a judgment dated 5 September 2019.<sup>7</sup>

[19] From the judgment of Dlamini AJ it is clear that the previous exception was raised against the first defendant's plea that -

“... the Regional court made an order in terms of which the plaintiff forfeited his share in the joint estate in favour of the first defendant and that the issue of forfeiture is res judicata, and further that the first defendant became the lawful owner of the whole of the property and the endorsement made was lawful.”<sup>8</sup> [Underlining added.]

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<sup>5</sup> Counterclaim prayer 1.

<sup>6</sup> 1937 WLD 126 127-128.

<sup>7</sup> A copy of the judgment appears on Caselines at 076-10 onwards (Dlamini AJ judgment).

<sup>8</sup> Dlamini AJ judgment para 8.

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- [20] Dlamini AJ held that the *res judicata* plea is misplaced and upheld the exception.<sup>9</sup>
- [21] Reliance is placed in the (current) exception on the Dlamini AJ judgment.<sup>10</sup> The plaintiff contends that the first defendant did not appeal the judgment upholding the exception and that the plea does not disclose a defence.<sup>11</sup>
- [22] The first defendant's plea forming the subject matter of this exception does not place reliance on *res judicata*.
- [23] It is trite that an excipient is bound to the grounds of exception set out in his notice of exception and he will not be allowed to, at the hearing, rely on different grounds or different exceptions.<sup>12</sup>
- [24] Another judgment in this matter bears mentioning. The first defendant at first failed to amend her plea pursuant to the previous exception being upheld. The first defendant was placed under bar to file a plea and the plaintiff applied for default judgment. This triggered the first defendant to bring an application to uplift the bar.
- [25] The application to uplift the bar was heard by Karachi AJ. On 3 January 2022, Karachi AJ granted an order uplifting the bar.<sup>13</sup> A copy of the plea and conditional counterclaim was attached to the application to uplift the bar.<sup>14</sup>
- [26] Karachi AJ considered the plea and conditional counterclaim in determining whether good cause was shown in order for the bar to be uplifted.<sup>15</sup>

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<sup>9</sup> Dlamini AJ judgment para 15 and 16.

<sup>10</sup> Exception para 3.

<sup>11</sup> Exception para 5 and 6.

<sup>12</sup> *Jowell v Bramwell Jones* 1998 (1) SA 836 (W) 899A.

<sup>13</sup> A copy of the judgment appears on Caselines at 076-1 onwards (Karachi AJ judgment).

<sup>14</sup> Karachi AJ judgment para 12.

<sup>15</sup> Karachi AJ judgment para 12 to 15.

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- [27] Karachi AJ held that the first defendant has a *bona fide* defence which is not patently unfounded. It was also held that “*regard must be had to the importance of the issues raised in this case and that it is in the interests of justice that the trial court adjudicate the matter*”.<sup>16</sup> I agree.
- [28] It is trite that in determining an exception the pleading must be looked at as a whole.<sup>17</sup> The plea should to my mind be read together with the conditional counterclaim.
- [29] It is also so that an exception should be dealt with sensibly and not in an over-technical manner.<sup>18</sup> As such, the court looks benevolently instead of over-critically at a pleading.<sup>19</sup>
- [30] Mr Meyer, who appeared for the first defendant, submitted that the exception puts the cart before the horse in circumstances where, before any judicial finding is made pertaining to the degree to which the plaintiff should forfeit the benefits referred to in the decree of divorce, evidence needs to be led before the trial court whereafter, and if satisfied, the trial court may order that a receiver and liquidator be appointed to finalise the division of the joint estate.
- [31] Sight should not be lost of the fact that the second defendant may be called as a witness at the trial to explain the circumstances under which the endorsement was effected. It will be for the trial court to adjudicate upon the question as to whether the first defendant lawfully acquired the plaintiff's share in the property.
- [32] I cannot at this stage conclude that it is impossible for the first defendant's defence to succeed at trial, irrespective of the facts which may emerge at the trial. As such, the exception should not be upheld.<sup>20</sup>

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<sup>16</sup> Karachi AJ judgment para 16.

<sup>17</sup> *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) 149F.

<sup>18</sup> *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking and Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) 465H.

<sup>19</sup> *Merb (Pty) Ltd v Matthews* [2021] ZAGPJHC 693 (*Merb*) para 9.

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[33] Ultimately, the plaintiff must satisfy the court that he would be seriously prejudiced if the plea is allowed to stand.<sup>21</sup>

[34] I am not satisfied that the plaintiff will be seriously prejudiced if the exception fails.

[35] Mr Meyer submitted that if the exception is dismissed, no cost order should be made, alternatively that the plaintiff should pay the costs on the party and party scale. This submission was made on the back of the submission that the dispute between the plaintiff and the first defendant has been ongoing for a very long time and that it is in their interests that the matter be finalised.

[36] I have already held that I agree with Karachi AJ that it is in the interests of justice that the trial court adjudicate the matter. In the circumstances I do not intend to make any order as to costs.

*Order*

[37] In the premises the following order is granted:

1. The plaintiff's exception dated January 2020 is dismissed.

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**PG LOUW**  
**ACTING JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

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<sup>20</sup> *Tembani v President of the Republic of South Africa* 2023 (1) SA 432 (SCA) para 16.

<sup>21</sup> *Merb* para 10.



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Counsel for Plaintiff: Adv A P Bruwer  
Instructed by: Kitching Attorneys

Counsel for First Defendant: Adv G H Meyer  
Instructed by: J H Van Heerden & Cohen Attorneys

Date of hearing: 18 May 2023

Date of judgment: 16 August 2023