REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 68955/18

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES:NO

REVISED

DATE: 12 FEBRUARY 2021

In the matter between:

V N[…] :H P **EXCIPIENT /DEFENDANT**

(IDENTITY NUMBER: …)

and

V N[…]: M **RESPONDENT/ PLAINTIFF**

(IDENTITY NUMBER: …)

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgement is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 12 February 2021.

JUDGMENT

COLLIS J

INTRODUCTION

[1] On 20 September 2018, the plaintiff (the respondent herein) instituted divorce proceedings against the defendant (the excipient herein).

[2] Pursuant to the summons being served on the defendant, he raised an exception, wherein he alleges that prayer 2 of the particulars of claim, wherein the plaintiff seeks a declaratory order, lacks the necessary averments to sustain a cause of action.

[3] "An exception is a legal objection to the opponent's pleading." It complains of a defect inherent in the pleading: admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admission the pleading does not disclose a cause of action or a defence, as the case may be.[1]

[4] In order to succeed an excipient has a duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear; no cause of action or defence is disclosed; failing this the exception ought not to be upheld.[2]

[5] The exception taken reads as follows:

"2.

(i) *The agreement allegedly concluded between the parties in terms of annexure "B" and whereupon the Plaintiff relies, is not alleged to have been concluded with the leave of the Court in terms of Section 21 of the Matrimonial Property Act, 88 of 1984, and was not* so *entered into.*

(ii) *In terms of the Law, parties are not able to post-nuptially amend an ante-nuptial contract without first having obtained the leave of the Court as is envisaged in Section 21(1) of the Matrimonial Property Act, 88 of 1984, whether such amendment is intended to have effect inter partes only or not.*

(iii) *The contract whereupon the Plaintiff relies for her claim in prayer 2 of the Plaintiff's particulars of claim, and pleaded in paragraph* 9 *thereof, and is contained in annexure "B" to the Plaintiff's particulars of claim, is void and of no effect.*

(iv) *Accordingly, the Plaintiff's particulars of claim is bad in law and the Plaintiff's particulars of claim do not disclose a cause of action in respect thereof.*

3.

(i) *Further, the Plaintiff on a proper construction of the Plaintiff's particulars of claim is seeking to acquire one-half of the Defendant's immovable property situated at [...].*

(ii) *The contract entered into between the parties, pleaded by the*

[1] Superior Court Practice , Erasmus B1-151 , Commentary on Rule 23
[2] Erasmus, Superior Court Practice , B1-152, commentary Rule 23

Plaintiff and is contained in annexure "B" to the particulars of claim, does not comply with the provisions of the Alienation of Land Act, 68 of 1981, and is invalid to that extent as it does not contain and description of the immovable property which the Plaintiff is seeking to claim a share of.

(iii) *In the premises, for that further reason, the claim in prayer 2 of the Plaintiff's particulars of claim is bad in law and not supported by a cause of action.*

4.

(i) Further, the agreement relied upon by the plaintiff in annexure "B" to the plaintiff's particulars of claim is an agreement which purports to regulate terms to come into effect if the parties were to divorce in future.

(ii) The agreement in annexure "B" is, ex facie the written contract, an agreement injurious to the institution of marriage, and would encourage divorce and is for that reason contra bonos mores, void and unenforceable."

[6] The application is opposed by the respondent.

BACKGROUND

[7] The parties were married to each other on 15 December 2006, out of community of property, with the exclusion of the accrual system.

[8] A day prior thereto and on the 14th December 2006, at Johannesburg, the parties entered into an Ante-nuptial contract. This contract is annexed to the summons as annexure "A".

[9] The material terms of the Ante-nuptial contract concluded between them, was that there would be no community of property between the parties; that there would be no community of profit and loss between them and that the accrual system specified in Chapter 1 of the Matrimonial Property Act, 88 of 1984 was specifically excluded.

[10] Some years later on or about 10 March 2016, at Kempton Park, the parties then concluded a purported agreement in writing, a copy of which is annexed to the particulars of claim as annexure "B".

[11] In terms of the 'Bevestigingskontrak' contained in annexure "B", the parties ostensibly confirmed a prior written agreement concluded between them, in terms whereof the parties agreed that they were *inter partes* married in community of property, if they were to divorce in future.

[12] Clause A of the 'Bevestigingskontrak' provides as follows:

"A. NADEMAAL die partye ten tyde van huweliksluiting 'n skriftelike ooreenkoms inter partes aangegaan het in terme waarvan, afgesonder van die notariele huweliksvoorwaarde kontrak, die partye inter partes binne gemeenskap van goed getroud is. Met ander woorde, alle krediteure uitgesluit, en ook die afsterwe van een van die partye, indien die partye sou skei vir welke rede ook al, sal die vermoensgevolge van die huwelik behandel word tussen hulle asof hulle binne gemeenskap van goedere getroud is."

EXCIPIENT'S SUBMISSIONS

[13] As a general rule, all marriages concluded in terms of the Common Law create communal property and are in community of property, unless they are concluded in terms of an Ante-nuptial contract in terms of which community of property, and of profit and loss, is excluded. [3] In the present instance the parties as of date of marriage, were married out of community of property.

[14] To change a marital property regime, parties would have to apply to court as regulated by section 21 of the Matrimonial Property Act, 88 of 1984.[4] In the present instance, no such application was made to court.

[15] Any contract which undermines the institution of marriage is void. A contract that is described as attempting to distort the whole concept of marriage, includes those that threaten an existing marriage. In this category also fall some contracts between husband and wife relating to future separation.

[16] An agreement setting terms to come into operation in the event of a separation or divorce is not against public policy unless it is likely to encourage or facilitates separation or divorce. An agreement relating to a future divorce is not contrary to public policy if the marriage has irretrievable broken down.[5]

[17] The effect of the plaintiff's particulars of claim, is aimed to obtain a division

[3] Edelstein v Edelstein NO & Others 1952 (3) SA 1 (A) at 10.
[4] Clark (ED) Family Law Service B5
[5] Stembridge v Stembridge [1998] 2 All SA 5 (D) at 12d-15b

of the matrimonial home situated at […]. In her particulars of claim, the plaintiff does not allege that she is the co-owner of the immovable property referred to paragraph 9.5 and 9.5.1 of the particulars of claim.

[18] In seeking this relief, the plaintiff is placing reliance on the agreement contained in annexure "B" to claim a half share thereof. This annexure "B" however does not contain any reference to the said immovable property in question, nor does it contain a description thereof. As such counsel for the excipient contended, that this agreement cannot be used to circumvent the provisions of the Alienation of Land Act, Act 68 of 1981 and it also falls foul of the provisions of this Act.

[19] Furthermore, the purported contract referred to in annexure "B" was concluded on 10 March 2016, which purports to be a confirmation contract of a previous contract. On a simple reading thereof, if this contract were to be valid, then a divorce would have financial benefit for the plaintiff and for that reason the purported contract would encourage a divorce and is injurious to the state of marriage and thus *contra bonos mores.*

[20] It is for the above reasons that counsel had argued the particulars of claim, specifically prayer 2 thereof, is bad in law and therefore excipiable.

RESPONDENT'S SUBMISSIONS

[21] On behalf of the respondent it was submitted that when a court is called upon to consider the validity and enforceability of annexure "B" concluded between parties, the first point of consideration is whether the requirements for the conclusion of a contract has been met.

[22] Secondly, that since this court must accept that the excipient in the present, matter does not deny having appended his signature to annexure "B", the basic requirements for a valid agreement have been met.

[23] Counsel went on to submit, that the conclusion of annexure "B" is an agreement *inter partes,* without having the intention of amending or cancelling their duly registered ante-nuptial agreement. In this regard, counsel had placed reliance on the Constitutional Court decision of Barkhuizen [6] read together with the earlier decision of Honey [7] where the following was held:

[6] 2007 (5) SA 323 CC at [57]
[7] 1992 (3) SA 609 (W) at 612B-D

"it must be kept in mind that the term 'ante-nuptial contract' is not synonymous with the term 'duly registered ante-nuptial contract.' An ante-nuptial contract is valid between the parties and inter partes regulates their matrimonial property system even if it is not registered.....A duly registered ante-nuptial contract regulates the parties' matrimonial property system as regards to third parties." As such counsel had argued that there was no need to have complied with the provisions of section 21(1) of the Matrimonial Property Act as this agreement remained *inter partes* and of no force and effect against third parties and to prevent parties to contract would amount to an infringement of their constitutional rights of freedom and dignity.

[24] Furthermore, section 7(1) of the Divorce Act, Act 70 of 1979 specifically regulates that a Court granting a decree of divorce may in accordance with a written agreement between parties make an order with regard to the division of the assets of the parties, or the payment of maintenance by one party to the other and as such parties can agree to any terms regarding the patrimonial consequences of their estates in the event of divorce.

[25] In as far as the exception raised by the excipient that annexure "B" does not comply with the Alienation of Land Act, counsel had submitted that this ground of the exception is unfounded and bad in law. This is so, as the respondent does not seek to become half-share owner in the existing immovable property, nor does she require to be registered as such.

[26] Only in that event, would she be required to have complied with the provisions of the Alienation of Land Act; but what she rather seeks as part of her relief, is merely for the estate to be divided between her and the excipient upon dissolution of their marriage relationship.

[27] The third ground of exception raised by the excipient is that the agreement is injurious to the institution of marriage, would encourage divorce and is contra bones mores.

[28] In this regard, counsel had argued that an agreement of this nature as concluded by the parties, is not contrary to public policy, if the marriage has already irretrievably broken down.[8]

[29] In order for this court to make an assessment as to the state of the marriage at the time when annexure "B" was concluded, the parties would have

to give *viva voce* evidence. On this basis it was therefore, submitted that this ground of exception is therefore unfounded.

ANALYSIS

[30] In order to sustain a cause of action for the dissolution of a marriage the following *facta probanda* needed to be pleaded:

(a) The jurisdiction of the court;

(b) An allegation that the parties are domiciled within the court's jurisdiction;

(c) That a valid marriage was concluded between the parties; when and where such marriage was concluded and the marital regime applicable at the time of the marriage;

(d) That the marriage still subsists;

(e) The plaintiff must allege whether any children were born from the marriage;

(f) An allegation that the marriage relationship between the parties has broken down irretrievably. [9]

[31] In *casu,* the plaintiff makes the allegation that when they entered into their union, that they got married out of community of property with the exclusion of the accrual system and in anticipation of such marriage, they concluded and registered a written Ante-nuptial contract on 14 December 2006. The said Ante-nuptial contract is annexed to the particulars of claim and marked as annexure "**A**".[10]

[32] Some years later around 2016, they concluded a written agreement (annexure "B"), which was proposed and drafted by the excipient wherein they agreed that in the event of divorce how the distribution of their assets should take place, i.e. as if they were married in communityof property.[11]

[33] The plaintiff, in her particulars of claim alleges that this agreement so concluded merely regulated their matrimonial property system *inter partes* as at date of signature, but fails to allege that his agreement would not affect any rights of any third party. If this indeed was alleged, it would have

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[8] See again Stembridge v Stembridge mentioned supra .
[9] Amler's Precedents of Pleadings Eight Ed p 170
[10] Particulars of Claim para 9.1 Index 0002-10
[11] Particulars of Claim para 9.3.1 Index 0002-10

circumvented the requirement for compliance with the provisions of section 21(1) of the Matrimonial Property Act.

[34] Section 21(1) of the Matrimonial Property Act reads as follows:

Change of Marital Property System

"21(1) A husband and wife, whether married before or after the commencement of the Act, may jointly apply to a court for leave to change the marital property system, including the marital power, which applies to their marriage, and the court may, if satisfied that-

(a) there are sound reasons for the proposed change;

(b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and

(c) no other person will be prejudiced by the proposed change; order that such matrimonial property system shall no longer apply to their marriage and authorise them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit."

[35] The section therefore requires, that where any change in marital regime is intended that an application should be made to court by both spouses and that such change can only be effected with the leave of the court.

[36] If the parties intended that upon divorce for their marriage to dissolve as a marriage in community of property and thus contrary to the marital regime applicable to their marriage, it follows that compliance with the provisions of section 21(1) of the Matrimonial Property Act, should have been pleaded and the present instance, this was not done.

[37] In addition, it is worth mentioning that annexure "B" concluded *inter partes,* also carry legal consequences. These legal consequences not only attract to them as the contracting parties, but also attract to the outside world who still labours under the impression that they have separate estates.

[38] It is for the above reason that I conclude, that the failure to have alleged compliance with the provisions of section 21(1) of the Matrimonial Property Act, is part of the *facta probanda* to sustain her cause of action, and consequently, the exception is upheld.

[39] The respondent further places reliance on the terms agreed upon

between the parties in annexure "B", for claiming a half share of the immovable property, situated at number […]. The said annexure "B" makes no reference to this immovable property wherein, she claims a half share, or any other immovable property. It is simply silent. This being so, I therefore conclude that there had also been non-compliance with the provisions of the Alienation of Land Act and consequently, the exception is furtherupheld on this ground.

[40] As to the third ground of exception raised, I agree that this ground cannot be assess without *viva voce* evidence being tendered and in the absence thereof, I conclude that this ground can succeed.

RESERVED COSTS FOR 26 AUGUST 2019

[41] In this regard on behalf of the respondent it was submitted, that the respondent should be awarded the costs for the proceedings which was reserved on 26 August 2019 .

[42] This is so, as the respondent in contemplation of the judgment to be handed down by the Constitutional Court under case CCT 95/ 19, [12] had informed the excipient that the enrolment of his exception should be removed in order to avoid unnecessary costs, but despite of this request the parties still had to appear in court on the day of hearing. On this day, the matter was ultimately postponed by agreement between the parties pending the outcome of the Constitutional Court decision, with the costs reserved. As such it was argued, that had the excipient acceded to the request for a postponement that the costs incurred for the 26 August 2019, could have been curtailed.

[43] In response to the above argument, counsel for the excipient had argued, that the decision to postpone the exception on the 26 August 2019, was by agreement between the parties as both parties, were desirous to obtain the outcome of the Constitutional Court decision. As such, counsel had argued that there would be unfairness in ordering the excipient to pay the costs occasioned by the removal.

[44] Having regard to the correspondence [13]exchanged between the parties

[12] CCT 95/19 delivered 26 May 2020.
[13]Respondent's Supplementary Affidavit Index 0003-9

in contemplation for the hearing date for the 26 August 2019, it is apparent that costs could have been curtailed as what the respondent requested *via* such correspondence prior to the hearing, is ultimately what the outcome of the proceedings were. Consequently, I am of the opinion that the respondent should be awarded the costs for this day.

COSTS OF THE EXCEPTION

[45] As to the costs to be awarded in as far as this application is concerned, the excipient is substantially successful and as such, the costs should follow the result.

ORDER

[46] Consequently, the following order is made:

46.1 The exception is upheld with costs.

46.2 The plaintiff is granted leave to amend her particulars of claim,within 15 court days of date of this order.

46.3 The respondent is awarded the costs reserved on 26 August2019.

C.J. COLLIS
JUDGE OF THE HIGH COURT

Appearances

For the Excipient	: Adv . M.L. Haskins SC
Attorney for the Excipient	: Steve Merchak Attorneys
For the Respondent	: Adv. LC Haupt SC
Attorney for the Sixth Respondent	: Adams & Adams
Date of Hearing	: 25 August 2020

Date of Judgment : 12 February 2021

Judgment transmitted electronically.