



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

Case number:35413 /2020

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

J. Barnardt

SIGNATURE

27 October 2021

DATE

In the matter between:

M[....] R[....] R[....]

Plaintiff

And

L[....] G[....] M[....]

Defendant

JUDGMENT

1. The defendant raised several exceptions against the plaintiff's particulars of claim in which she prayed for a declaratory order that there was no customary union or marriage between the plaintiff and defendant and alternatively, that the defendant forfeits all patrimonial benefits of the marriage with the plaintiff.

FACTUAL BACKGROUND

2. The summons *in casu* was issued and served on the defendant on 20 August 2020 and the defendant served his notice of intention to oppose the action on 2 September 2020.

3. A notice of bar was served on 7 October 2020 and on the same date the defendant served a notice of irregular step on the plaintiff, due to her failure to annex Annexure "MRR1" to the particulars claim.

4. In reply to the defendant's notice of irregular step, the plaintiff wrote a letter, dated 16 October 2020 acknowledging her omission, stating *inter alia* that her claim was not based on annexure "MMR1". She did however, on 20 October 2020 provide the defendant with a complete summons with Annexure "MMR1".

5. Even though the plaintiff provided the defendant with Annexure "MRR1", he raised several exceptions to her particulars of claim.

LAW

6. Erasmus, Superior Court Practice.”¹ discussed exceptions as follows:

“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 either a cause of action or a defence, as the case may be. It follows that where an exception is taken, the court must look at the pleading excepted to as it stands: no facts outside those stated in the pleading can be brought into issue – except in the case of inconsistency – and no reference may be made to any other document. ... In order to succeed an excipient has the 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.”

7. Exceptions are regulated by Rule 23 of the Uniform Rules of Court and there are generally two forms of exceptions:

¹ Erasmus, Superior Court Practice Volume 2 D1-293-294 (Service 13, 2020)

7.1 The pleading is vague and embarrassing, and

7.2 The pleading lacks the averments to sustain a cause of action or a defence.

8. The nature and extent of exceptions was considered by McCreath J in the decision of ***Trope v South African Reserve Bank and Two Other Cases***², which was cited with approval by Heher J in the decision of ***Jowell v Bramwell Jones and Others***³, where the court laid out the following general principles regarding exceptions:

- "(a) minor blemishes are irrelevant;
- (b) pleadings must be read as a whole; no paragraph can be read in isolation;
- (c) a distinction must be drawn between the facta probanda, or primary factual allegations which every plaintiff must make, and the facta probantia, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence;
- (d) only facts need be pleaded; conclusions of law need not be pleaded;

² 1992 (3) SA 208 (T) at 211

³ 1 Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W)

(e) bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them. implied allegations and the pleading must be so read: cf *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 37 1 (D) at 377, 3798. 3790- -H."

EXCEPTIONS

9 The first exception raised referred to the plaintiff's failure to attach Annexure "MRR1" to the particulars of claim, and although this might be regarded as fatal, I am of the view that the plaintiff acknowledged her oversight and provided the defendant with the annexure.

10. The defendant was already in possession of the annexure when he raised his exceptions, which according to me, rendered this exception unnecessary and frivolous.

11. The second exception raised was that the particulars of claim do not disclose a cause of action on the ground that it lacked the necessary averments regarding the allegations that the customary marriage is invalid.

10. The plaintiff in paragraph 8 of the particulars of claim alleged that

"The parties however did not proceed with the rest of the customary rituals that would create a binding customary union."

But according to the defendant

“The plaintiff failed to allege and prove how the customary marriage does not meet the prescribed validity requirements of customary marriages contemplated in section 3 of the Act”.

11. He argued that the plaintiff failed to allege which of the requirements for a binding customary union were not met and concluded that the conclusion of customary rituals were not requirements of a valid customary union.

12. I agree with the defendant that the plaintiff did not allege which customary rituals were not proceeded with and therefore the allegation in this regard is vague and embarrassing.

13. According to the third exception raised, the plaintiff did not disclose a cause of claim due to the lack of any averments that a customary marriage came into existence, that it still subsists and that the marriage has irretrievably broken down as well as the applicable matrimonial property system.

14. It is evident from paragraph 10 of the particulars of claim that the plaintiff tried to allege, in the alternative, if it is found that a valid customary marriage subsists, that the defendant should forfeit the benefits of the marriage.

15. I agree with the defendant that the plaintiff failed to make the necessary averments regarding the existence of the customary marriage and therefore this exception is also upheld.

16. The fourth exception deals with the plaintiff's failure to pray for the necessary relief, being a decree of divorce and the dissolution of the joint estate.

17. I agree that the plaintiff did not pray, in the alternative to the prayer for a declaration, for a decree of divorce. However, I find that a prayer for the dissolution of joint estate was not necessary in the light of the plaintiff's prayer that the defendant should forfeit all patrimonial benefits of the marriage.

CONCLUSION

18. On due consideration of all relevant factors and averments made in the particulars of claim, I find that the second, third and partially fourth exceptions raised were valid and that the particulars of claim are vague and embarrassing.

19. I accordingly make the following order:

- i. The second, third and partially fourth exceptions are upheld.

- ii. The plaintiff is given leave to amend the particulars of claim by notice of amendment within 15 days of the date of this order.

- iii. The plaintiff is ordered to pay the costs of the exception, limited to one day for appearance.

JF Barnardt

**ACTING JUDGE JF BARNARDT
JUDGE OF THE HIGH
COURT**

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 October 2021.

APPEARANCES

For the excipient/ defendant:	Mr. Gilford Malatji
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For the plaintiff:	Ms L Mbanjwa
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Date heard: 8 October 2021

Date of judgment: 27 October 2021