

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

CASE NO:37681/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

Date: 09/06/2023

In the matter between:

B[...] T[...] T[...]

Plaintiff

And

K[...] K[...] T[...]

Defendant

In re:

K[...] K[...] T[...]

Excipient

And

B[...] T[...] T[...]

Respondent

JUDGMENT

SETHUSHA-SHONGWE AJ

Introduction and background

[1] This is an opposed exception.

[2] For the purpose of this judgment I will refer to the Excipient as the Defendant and to the Respondent as the Plaintiff.

[3] The Defendant raises three complaints on which the exception is based.

[4] The grounds as set out in the Notice of Exception are set out hereunder.

[5] Let me pause and thank both Counsel for their submission of detailed and helpful Heads of Argument.

Grounds of Complaint

[6] The Defendant contends that the Particulars of Claim lacks a cause of action with specific reference to paragraphs 4.5 and 11. As such a Notice in terms of Rule 23(1) calling upon the Plaintiff to remove certain causes of complaint was served on the Plaintiff's previous attorneys of record on 8 September 2022, of which Plaintiff did not heed, hence the adjudication of this exception.

[7] In Paragraphs 4, 5 and 11 of the Particulars of Claim, the Plaintiff base her claim on the existence of a customary marriage concluded between Plaintiff and the Defendant. On the following premise:

"4 On 28 October 2018 the parties entered into a customary marriage at Pretoria in terms of which the Defendant paid part of the lobola and as

such marriage still subsists. A copy of the lobola is attached hereto as Annexure "A1"

5 *Subsequent to the payment of part of the lobola, the parties cohabited as husband and wife at the above place of residence of the Defendant."*

[8] The Defendant's bone of contention on paragraph 4 is that there was no customary union that was concluded. On the basis that there was part of the lobola outstanding as per annexure "A1" and signed by representatives of both the Plaintiff and the Defendant.

"DATE: 28 OCTOBE 2018

Total lobola price: R60, 000,00 (Sixty thousand rand only).

Part payment received R20, 000,00 (Twenty thousand rand only)

Outstanding lobola: R40,000.00 (Forty thousand rand only)."

[9] The Defendant submits further that the requirements of section 3(1)(b) of the Recognition of Customary Marriages Act¹ ("RCMA") where not met, and that the customary marriage was not registered.

[10] The Defendant further submits that:

*"[p]paragraph 4 of the particulars of claim is also expiable in that it is *inter alia*, pleaded that 'A copy of the lobola is attached hereto as Annexure "A1".*

Annexure "A1" is not a copy of lobola as pleaded, since it is subjectively and objectively impossible to annex copy of lobola".²

¹ Act 120 of 1998.

² Notice to Remove Cause of Complaint in terms of Rule 23{1}, p002-13, 1.8-1.9.

[11] The Defendant's further submission on that lobola is not a compulsory requirement to conclude a valid customary marriage, on the Particulars of Claim as they are, the Plaintiff did not state how the said marriage was negotiated, entered into and how it was celebrated.

[12] Further that the reaching of an agreement on lobola does not, on its own conclude customary union.

[13] As such it remains vague and a bald pleading that a customary marriage exists.

[14] Defendant's counsel made references to various cases including:

- *Mbungela & Another v Mkabi & Others*;³
- *Tsambo v Sengadi*;⁴
- *Modiko & Another v Sethabela & Others*⁵
- *Malufeke v The Minister of Home Affairs*⁶
- *Fanti v Boto & Others*;⁷
- *Mabuza v Mbatha*;⁸
- *Ndlovu v Mokoena & Others*;⁹ and
- *Southon v Moropane*¹⁰

All of these cases deal with the approach of the Court in determining whether a customary marriage exist. The Defendant submits further that the Plaintiffs particulars of claim under paragraph 11 relating to spousal maintenance is

³ 2020 (1) SA 41 (SCA); (820/2018) 2019 ZASCA 134 (30 September 2019) at paragraph 17.

⁴ (244/19) [2020] ZASCA 46 (30 April 2020).

⁵ 2017 JDR 1345 (FB); (4856/2016) [2017] ZAFSCH 123 (4 August 2017) at paragraphs 5 -10.

⁶ 2008 JDR 0426 (W) paragraphs 12 -15.

⁷ 2008 (5) SA 405 (C) at paragraphs 19 - 22.

⁸ 2003 (4) SA 218 (C) at 223.

⁹ 2009 (5) SA 400 (GNP) paragraph 11, page 404.

¹⁰ (14295/10) (2012] JHC 146 (18 July 2012) at paragraph 6

misplaced due to the non-existence of a valid marriage.

As such the Defendant submits that Plaintiffs pleading does not disclose cause of action.

[15] On the contrary, the Plaintiff submits that she is married to the Defendant in terms of custom and that the marriage is in accordance with the RCMA.¹¹

[16] Plaintiffs counsel further submits that the Defendant filed an exception as a dilatory tool to avoid a determination of the totality of facts involved in the matter. It is for the Trial Court to establish whether there is a valid and binding customary marriage between the Plaintiff and the Defendant.

[17] Plaintiffs Counsel submitted further that the Defendant's grounds of exception are argumentative and as such cannot be determined by way of an exception.

[18] Further the Plaintiff is not required to plead evidence in Particulars of Claim. The Plaintiff is only required to plead material facts upon which the claim is based which is exactly what the Plaintiff did in the particulars of claim.

[19] Plaintiffs Counsel submitted further that Plaintiffs claim as contained in the Particulars of Claim meet the threshold and criteria as required in the Uniform Rule 18 and as such it enables the Defendant to reply, he can either deny, admit or avoid. The rest will be for the factual evidence and making arguments on points of law. There's no need to be academic and technical in order to avoid pleading. Therefore, the Court should dismiss the exception.

Issue

¹¹ *Idem* fn 1,

[20] The crisp issue for determination in this matter is whether the Particulars of Claims lack particularity to the extent that it is vague and that vagueness causes embarrassment of such a nature that Defendant is prejudice and unable to plead in his defence.

The Law

[21] Rule 23(3) of the Uniform Rules of Court provides that where an exception is taken to any pleading the grounds upon which the exception is founded shall clearly and concisely be stated.

[22] An exception should be dealt with sensibly and not in an over technical manner. See in this regard *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority*.¹²

[23] Section 3 of the RCMA provides the following requirements for a valid customary marriage:

"3 Requirements for validity of customary marriages

(1) For a customary marriage entered into after the commencement of this Act to be valid-

(a) the prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

¹² 2006 (1) SA 461 (SCA) at 464H.

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law."

[25] Section 4(9) of the RCMA provides for the registration of customary marriages the relevant parts of this section reads as follow:

"Failure to register a customary marriage does not affect the validity of that marriage."

[26] Section 8(4)(e) of the RCMA provides that a Court granting a decree for the dissolution of a customary marriage:

"may when making an order for the payment of maintenance, take into account any provision or arrangement in accordance with customary."

Discussion

[27] In my view the Particulars of Claim, as they stand are precise and concise and set out the cause of action. The Defendant should therefore be able to set his defence by either admission, denial or avoidance.

[28] The defence based on the existence or non existence of the marriage as per paragraphs 4, 5 and 11 of the Particulars of Claim is a matter of evidence to be led, before the Trial Court based on factual findings and dependent on the culture and tradition of the parties. The Court having made factual findings, the cases referred to by the Defendant's counsel will then become relevant for legal determination in the matter.

[29] The issue of maintenance is a factor to be determined by the trial court after

there is a determination of a valid marriage or not. Therefore, maintenance is a consequential relief to be ventilated after primary relief is granted by the trial court.

[30] In my view, in Plaintiffs pleadings there is material facts up on which the claim is based. I found that Plaintiffs pleadings complies with rule 18 of the uniform rules¹³.

[31] When factual disputes arise relief should only be granted if the facts stated by respondent, together with admitted facts in the applicant's affidavit justify such order. See *Plascon Evans v Van Riebeeck Paints (Pty) Ltd*¹⁴: The rule calls for real genuine dispute of fact to be present in the matter. Then the matter must be referred for oral evidence as it cannot be resolved by papers.

[31] I am therefore fully persuaded that the exception should fail, it is proper to defer the matter to the Trial Court to allow the Plaintiff to testify, call witnesses if she so wish, in order to define paragraphs 4, 5 and 11 to enable the Trial Court to make a determination on the existence of the marriage and then followed by a spousal maintenance determination.

[32] Having considered all factors presented as well as the presence of material factual dispute raised, I arrive at the following order.

Order

[33] The exception is dismissed with costs.

N.C. SETHUSHA-SHONGWE
Acting Judge of the High Court

¹³ Uniform rule 18, erusmus superior court practice, volume 2 dl, 221-228.

¹⁴ 1984 (3) SA 623 (A),

Appearances:

Counsel for the Excipient: Adv. Mokutu SC & Adv. M. Feinstein

Instructed by: Di Siena Attorneys

Counsel for the Respondent: Adv. M.R Maphutha & Adv. A. Seshoka

Instructed by: Forbay Attorneys INC.

Date of the hearing: 03 May 2023

Date of judgment: 09 June 2023

Judgment transmitted electronically