

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case Number: 243/2019

In the matter between:

M[...] C[...]

Plaintiff

And

S[...] S[...] N[...]

Defendant

Coram: Reinders J

Heard: 13 September 2024

Delivered: This judgment was handed down in open court on 17 February 2025 and distributed to the parties via electronic mail communication.

Summary: Customary marriage – absolution from the instance

ORDER

1. The application for absolution from the instance is dismissed with costs on Scale B.

JUDGMENT

Reinders J

[1] The plaintiff instituted action for divorce proceedings against the defendant claiming a customary marriage to have been concluded between the parties, together with ancillary relief. The defendant disputes the existence of such a

marriage in accordance with the prevailing customs as required by s 3(1) of the Recognition of Customary Marriages Act¹ (the Act).

[2] It is common cause that the parties had at some stage (from 2014 to 2018 according to the defendant's plea) resided together and that a son was born from the relationship. To prove her case the plaintiff testified and called her mother (Mrs E[...] C[...]) as a witness.

[3] The plaintiff places reliance upon a letter annexed to her particulars of claim, dated 14 August 2018. For convenience of the court a typed translation was handed up into evidence. The heading of the letter reads: "Lobola Negotiations". The plaintiff testified comprehensively on how celebrations were conducted in order to prove that a customary marriage was concluded. Being vigorously cross-examined thereon it seemed that the nub of the defendant's case as put to her was that the ceremony to which she testified related to an introduction of the minor child to the ancestors, and was not in respect of compliance with the conclusion of a customary marriage as envisaged in the Act. Mrs C[...] testified, amongst others, on a meeting held between the C[...] and N[...] families.

[4] After the plaintiff closed her case, the defendant applied to be absolved from the instance.

[5] Counsel appearing for the parties supplied me with comprehensive heads of arguments for which I am much indebted, in particular the summary of the *viva voce* evidence of the plaintiff and her mother as captured by counsel for the defendant. In principle it would seem to be an accurate summary, bar a few aspects to which counsel for the plaintiff alluded.

[6] Included in the heads of arguments are case law applicable to the adjudication in respect of an application for absolution from the instance as it has crystallised over the years. I do not intend repeating all the cases referred to by the

¹ Act 120 of 1998.

parties herein, save to quote from the time-honoured test for absolution from the instance as formulated in *Claude Neon Lights (SA) Ltd v Daniel*² which held:

“...when absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.”³

Harms JA in *Gordon Lloyd Page and Associates v Riviera and Another*⁴ referred to this quotation with approval and amplified the test as follows:

“This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff... As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one...Having said this, absolution at the end of the plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interest of justice.”

It follows therefore that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff.

[7] As I understand the arguments of the defendant, it is in essence submitted that the plaintiff and her mother did not corroborate each other on what counsel for defendant deems to be crucial aspects relating to the conclusion of a customary marriage, and consequently (so the argument goes) no *prima facie* case was made

² *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A).

³ At 409 G-H.

⁴ *Gordon Lloyd Page & Associates V Riviera and Another* [2000] 4 ALL SA 241 (A).

out by the plaintiff. The plaintiff however submitted that on face value, and absent any evidence to the contrary, the letter should stand *prima facie* as a lobola negotiation letter. Furthermore, the evidence for the plaintiff established that certain celebrations took place, the families did meet and there were in fact negotiations that took place. It is trite that the credibility of the witnesses does not play a role at this stage when considering an application for absolution from the instance.

[8] I have carefully considered the evidence tendered thus far, submissions made by both counsel together with the applicable test at this stage as formulated in the case law to which I was referred, more in particular as enunciated in *Claude Neon Lights* and *Gordon Lloyd Page and Associates*. Having done so, I have not been satisfied to absolve the defendant from the instance. In my view the plaintiff has made out *prima facie* case that calls for an answer from the defendant. I shall furnish full reasons for my order below when handing down judgment at the conclusion of the trial. In respect of costs to be awarded it is trite that costs follow the event. Both counsel submitted Scale B of Uniform Rule 67 A to be warranted.

[9] I make the following order:

The application for absolution from the instance is dismissed with costs on Scale B.

C REINDERS, J

Appearances:

On behalf of the Plaintiff

Adv PC Ploos van Amstel

Instructed by:

McIntyre Van der Post

BLOEMFONTEIN

On behalf of the Defendant:

Adv S Ngombane

Instructed by:

Thebe Attorneys

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